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### International Law: Practical Authority, Global Justice

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## VISIONS OF INTERNATIONAL LAW: INSIGHT FROM NORMATIVE THEORY

This panel was convened at 2:45 pm, Friday, March 27, by its moderator, Dianne Otto of University of Melbourne School of Law, who introduced the panelists: Brian Lepard of the University of Nebraska College of Law; John Linarelli of the University of La Verne College of Law; Mary Ellen O'Connell of the University of Notre Dame Law School; and Andrew Strauss of Widener University School of Law.

### TOWARDS A NORMATIVE THEORY OF CUSTOMARY INTERNATIONAL LAW AS LAW

*By Brian D. Lepard\**

Our panel has been asked to focus on various visions of international law articulated by normative theories. I would like to address the status of customary international law and sketch out a new normative theory concerning its authority. My views are elaborated in a forthcoming book.<sup>1</sup>

#### THE DEBATE ON THE LEGAL STATUS OF CUSTOMARY INTERNATIONAL LAW

All international lawyers are acutely conscious that outside the legal academy there are pervasive doubts that international law is really law. These doubts are especially severe in the case of customary international law both because it is often unwritten and because there is no centrally-organized regime of sanctions for violators. Indeed, in light of these lacunae, many political scientists believe that customary international law is merely a series of "regimes"—pragmatic patterns of cooperation that can serve the self-interests of states, but lacking any authority.

Some great legal philosophers have joined the doubters' chorus. In his celebrated book, *The Concept of Law*, H.L.A. Hart maintained that customary international law does not constitute a full-bodied legal system because it has no general "rule of recognition."<sup>2</sup> Even some international lawyers, such as Jack Goldsmith and Eric Posner, have lodged the skeptical allegation that customary norms do not exercise any "exogenous influence on state behavior" and thereby called into question their legal status.<sup>3</sup>

#### INSIGHTS FROM THEORIES ABOUT THE NATURE OF AND JUSTIFICATIONS FOR AUTHORITY

How can we evaluate these challenges to the legal character of customary international law? I suggest, first, that we need to probe the very concept of legal authority. What does it mean to claim that a customary norm has authority over states? According to legal philosopher Joseph Raz, actors, including states, typically make decisions to act based on the "balance" of "first-order" reasons for performing, or not performing, an action. However, an authoritative norm *preempts* the independent decision-making of states and affects their

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<sup>1</sup> See BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* (2010).

<sup>2</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 226-31 (1961).

<sup>3</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 42-43 (2005).

“balancing” of these reasons by excluding some of them. This is what it means to accept an “obligation.”<sup>4</sup> An authority claim furthermore relates to a particular “domain,” such as a legal rather than a moral or political one.

It is also possible to distinguish among three forms of authority. *Claimed authority* is the authority claimed by an actor, such as a state or the U.N., on behalf of a norm. *Empirical authority* involves the actual acceptance of the authority of a norm by a state. And *normative authority* is the authority of a norm that ought to be recognized by a state according to some posited value system. These concepts help us differentiate authority from persuasion. Persuasion does not have preemptive effect. A persuasive argument instead changes a state’s perception of the balance of first-order reasons. This is a completely voluntary process. At the other extreme, authority is also distinct from coercion. A coercive threat by itself does not claim to preempt an actor’s balancing of reasons, but is rather intended to be an additional reason to take the action demanded.<sup>5</sup>

Despite these differences, persuasion does play a role in acceptance of authority. A state must be persuaded, for certain reasons, to accept the claimed authority of a norm—that is, to obey it. This acceptance is still a voluntary act, which creates what might be called a “paradox” of authority. At the same time, authority claims, including on behalf of international law, are often linked with a threat of sanctions.<sup>6</sup> This may be a precondition for a state accepting an authority claim. But that acceptance is still ultimately voluntary.

Normative theories make it their business to explain just what reasons states *should* accept for recognizing the claimed authority of international law norms. I will review just a few of these reasons here.

One reason advanced by certain theories is compliance of an authoritative norm with secondary rules—or, to use Hart’s phrase, “rules of recognition.” These are rules about how primary rules of law are formulated. They can include the traditional criteria for identifying customary international law—*opinio juris* and consistent state practice. Another reason is to facilitate collective action among states—for example, to solve coordination problems or to resolve a prisoner’s dilemma. The availability of an effective sanctions regime to ensure that violators are punished is a further reason for obedience put forward by some theories. Others advocate membership of states in a global community of states that can establish rules for that community as a reason to accept the authority of those rules.

Traditional positivist theory, of course, allows that the only reason for states to obey a norm is that they have given their direct or indirect consent to it. Some theories maintain that international norms are legally authoritative if they constitute mutual promises, which morally must be honored. Others focus on the moral principle that expectations reasonably created by a state’s behavior should not be disappointed. And a final set of theories maintain that international rules deserve obedience only if they promote substantive norms of ethics, such as peace or human rights.

#### FUNDAMENTAL ETHICAL PRINCIPLES AND A NEW NORMATIVE THEORY OF CUSTOMARY INTERNATIONAL LAW

To develop a normative theory of customary international law, we must be able to weigh and judge these potential reasons for accepting its authority. To do this, we need an ethical

<sup>4</sup> See, e.g., J. Raz, *Authority and Justification*, in *AUTHORITY* 115, 124 (Joseph Raz ed., 1990).

<sup>5</sup> See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 83 (1990).

<sup>6</sup> See, e.g., MARY ELLEN O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* (2008).

framework. I suggest that we look to international legal documents themselves, and an important ethical principle latent in them, to develop this framework. That principle is “unity in diversity.” In short, it maintains that all individuals form part of a global human family that, ideally, should act in unity while treasuring human diversity. And it asserts as a corollary that individuals have the right to associate with one another in communities, and that states therefore have a degree of ethical legitimacy. It recognizes, in turn, the existence of a global community of states that has a moral obligation to serve the welfare of all members of the human family.

We find these ideas implicit in such documents as the Universal Declaration of Human Rights, which affirms “the equal and inalienable rights of all members of the *human family*.”<sup>7</sup> At the same time, the U.N. Charter envisions a world-embracing community of states that morally should cooperate with one another. I suggest that a panoply of ethical principles, which I refer to as “fundamental ethical principles,” can be identified based on two criteria: (1) they are logically related to the principle of unity in diversity, and (2) they are recognized by the community of states in contemporary international resolutions and treaties. They could be seen, in John Linarelli’s terminology, as principles of justice “internal to international law itself.”

#### CUSTOMARY INTERNATIONAL LAW AS LAW UNDER A NEW NORMATIVE THEORY

The ethical principle of unity in diversity implies, first and foremost, that membership of states in a globe-spanning community of states is the most important reason to recognize the authority of customary international law. Moreover, that community has developed secondary rules for creating norms to govern it, and among them are rules for identifying customary international law.

However, other reasons propounded by various normative theories also have a role to play. For example, customary norms can often facilitate coordination and the resolution of prisoner’s dilemmas that impede states’ ability to maximize realization of their own self-interests. And in some cases, sanctions may be a proper condition for recognizing the authority of putative customary norms—for example, where states reasonably perceive that they confront a prisoner’s dilemma in which each state has an incentive to “cheat.” In addition, customary law rules may be justified in certain cases based on promises, reasonable expectations, or the moral content of these rules as measured by fundamental ethical principles. But, according to this theory, explicit consent is less important as a reason to accept the authority of customary law.

The literature I have reviewed on the nature of authority also sheds light on the contentious problem of whether customary international law is really law. Above all, it indicates that even the traditional doctrine of customary law *claims* that rules of customary law have legal authority over all states, except persistent objectors. And this claim, in turn, is accepted by all states, none of which alleges that customary international law has no normative force.

Moreover, the claimed authority of customary international law is definitely legal—not just moral or political. Violations can be adjudicated by courts or arbitration panels. Of course, as I have just argued, its authority may well be supported by ethical principles. But states, and courts, properly draw a line between norms of customary law and purely moral norms.

<sup>7</sup> Universal Declaration of Human Rights, GA Res. 217A, at preamble, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (emphasis added).

The reasons I have outlined that support the authority of customary international law as law are also reasons that customary international law does not merely reflect pragmatic conventions. The reasons supporting its authority are many, and they include ethical principles. Those scholars who treat customary norms as mere regularities of behavior based on self-interest may be overlooking the fact that *all* authority relations—as opposed to coercive ones—incorporate voluntary persuasion. It is not easy to observe the internal reasoning process by which a state voluntarily decides to allow a customary norm to preempt its decision-making, which may account for some skeptical views of state motivations.

Furthermore, instances of noncompliance do not imply that *normatively* customary law should not be treated as law. Indeed, if we view states as members of a global community, one of whose primary responsibilities is to protect the well-being of all members of the human family, it follows that our task as international lawyers is to strengthen the status of customary international law as law, including by instituting the kinds of implementation systems that Mary Ellen O'Connell aptly describes in her book.

### INTERNATIONAL LAW: PRACTICAL AUTHORITY, GLOBAL JUSTICE

*By John Linarelli\**

The annual meeting theme this year is among the best we have had in recent memory for philosophy. In philosophy, we ask questions about law as law. We should be using well-settled ideas in practical philosophy to explore ways to understand international law no differently from the way we use those ideas to explore ways to understand municipal law. To this end, the field divides into two related sets of questions, one having to do with the formal and logical features of international law and the other with the values that international law should reflect. To be clear, the questions do not always neatly separate.

Philosophers use conceptual analysis to understand the formal and logical features of a legal system. Two connected concepts, normativity and validity, fall here, though normativity at least also connects to value.

Normativity is about the idea of obligation in international law. It is about the claim to obedience that international law makes on states and persons. Another way of describing the task of understanding normativity is to account for why international law has practical authority—as providing authoritative reasons to act according to its demands.

A claim to obedience is to be distinguished from the fact of obedience. When we ask whether we should obey a particular legal standard, we are asking a normative question. The question is whether the law or some particular legal rule makes a claim of obedience on me. California criminal statutes prohibiting murder make a claim of obedience on all persons within the state. It is an entirely different question to ask whether people in California actually obey the law prohibiting murder. Regrettably, some do not. That is a naturalistic question. But they should obey the law. That is a normative question.

Some law and economics scholars draw a false inference from instances of failures of states to comply with international law to argue that international law makes no claim of obedience on states. One does not follow from the other. A better question for a social scientist to ask is: *if* international law makes a claim of obedience on states and their rulers, and *if* states are not obeying international law, then why not? I do not know if any law and economics scholars have tried to answer that question.

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Validity is about what comprises a legal system. Analytical jurisprudence is the most influential school of thought dealing with such questions. H.L.A. Hart's famous chapter X has not been thoroughly challenged. The principal strategy to defeat the positivist challenge has been to avoid legal positivism altogether and to seek answers from natural law to the question of what makes international law. This is the so-called "natural law turn in international law."<sup>1</sup>

But there is hope for a positivist account of international law. The main worry about positivism is its reliance on the state for secondary rule officials. The traditional notion of positivism is as an account of state dominated, municipal, territorial, legal systems, which I classify as the political conception of positivism. A transnational conception of positivism is possible. While I cannot provide a detailed account here,<sup>2</sup> a transnational conception of legal positivism, one removing the state as an enabling condition for a legal system, would seem to require that five conditions be met: (1) acceptance by the participants in the legal system of the rules of the system as valid, binding, and authoritative; (2) systemic qualities of normative consequence within the putative legal system that make the normative order that the system represents intelligible or comprehensible to the participants; (3) secondary rules and secondary rule officials, though they can be distributed across different state and non-state hierarchies; (4) shared agency between secondary rule officials demonstrating sufficient mutual responsiveness and joint commitment to a legal system; and (5) primary rules dealing with issues that legal systems usually deal with, such as property, contract, and dispute resolution.

As for the question of value, international law may be subjected to moral appraisal just like municipal law. Justice is the most important value a legal system can have. In his Storrs Lecture, Thomas Nagel argues, "the need for workable ideas about the global or international case presents political theory with its most important current task, and even perhaps with the opportunity to make a practical contribution in the long run, though perhaps only the very long run."<sup>3</sup> To meet these challenges, Nagel's call must be taken to international law. To do that, theories of global justice must be institutionally sensitive; they must inform us on the structure of institutions and be able to appraise the actions and public justifications of states, international organizations, multinational enterprises ("MNEs"), and other international actors. In addition, they should account for responsibility because talk of rights without talk of who is responsible for fulfilling them is an incomplete discussion.

We can dispense with claims by the so-called realists about how morality makes no claims on states.<sup>4</sup> It is a kind of Nietzschean skepticism about moral demands as a disaster for the actor bound by them. To a realist, complying with moral demands can be disastrous for states and the populations they represent. In a world in which such skepticism prevails, a moral framework for thinking about international law simply cannot get off the ground. If the skeptics are right, then international law is indeed simply ideology and politics. These claims are easy to reject because I doubt that many citizens of states and their government officials are moral skeptics. Marshall Cohen got it right when he said that "these are not

<sup>1</sup> MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* (2008).

<sup>2</sup> For my recent attempt to use these conditions to conceptualize a transnational commercial law order, see John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, available at: <<http://ssrn.com/abstract=1331928>>, now published at 114 PENN ST. L. REV., 119 (2009). In that article, I used the phrase "cosmopolitan conception." I am grateful for Gunther Teubner's comments on the article, in which he suggested the better phrase to be "transnational conception."

<sup>3</sup> Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFFAIRS 1 (2005).

<sup>4</sup> The realism to which I refer is realism in international relations, not meta-ethics.

the terms a responsible constituency can be understood to have exacted from those who conduct its affairs.”<sup>5</sup>

At least five theories of global justice are in play:<sup>6</sup>

- (1) Human rights approaches locate the source of global justice in human rights. The human rights community has been very successful. Human rights theories meet my criterion of institutional sensitivity. The movement to a large extent is the product of lawyers, with its main source of inspiration in legal change. I have two worries about human rights accounts of global justice. First, at its core, human rights law imposes obligations on states to respect the rights of their own citizens; except for the most basic human rights, it has had a hard time extending human rights beyond state borders. Second, some rights don't clearly match to an agent with an obligation to furnish the right. This is Onora O'Neill's problem with manifesto rights or imperfect obligations.<sup>7</sup>
- (2) Duties or obligations based approaches locate the source of global justice in duties we owe to each other. They align with moves in international law towards more clarity in specifying responsibilities of states and international organizations, such as the responsibility to protect (“R2P”) movement.
- (3) Utilitarian approaches locate the source of global justice in the consequences of an act or a rule and seek to maximize good in the world. Peter Singer is perhaps the most famous advocate for global utilitarianism. Some have concerns about utilitarianism. For our purposes, utilitarianism as it has been extended globally is not yet institutionally sensitive, despite its historical connection to law reform.<sup>8</sup>
- (4) Capabilities approaches locate the source of global justice in things people need to achieve positive or substantive freedom. It is a theory about institutions meeting the needs of people to lead a good life in an ethical sense. Its main proponents are Martha Nussbaum and Amartya Sen. It has had some institutional success. It forms the basis for the UN Human Development Index, a measure going beyond GNP growth or GDP per capita. I'm not sure how a capabilities account makes demands on states and institutions to provide capabilities.
- (5) Justice-based approaches locate the source of global justice directly in concepts of justice. I realize that may sound circular. Justice combines notions of both rights and duties. These approaches tend to be contractualist.

Cohen's idea of a “responsible constituency” has a certain appeal, in the sense that it could be made to refer to a reasonable constituency of persons represented by a state. The idea here is contractualist in the sense of T.M. Scanlon's version of contractualism, which is that the form of moral argument is principles no one can reasonably reject.<sup>9</sup> The basic notion Scanlon works from is “put yourself in my shoes, and I'll put myself in yours.” Moral principles are formed on the notion of justification to others. What gets valued locates in reasonableness, not rationality. My approach is to take contractualist accounts of global justice and make them more institutionally sensitive, or, one might say, more responsive to facts, data, and history. As a lawyer, I find frustrating that moral theory has not undergone the intellectual revolution that economics underwent with new institutional economics.

<sup>5</sup> Marshall Cohen, *Moral Skepticism and International Relations*, 13 PHIL. & PUB. AFFAIRS 299 (1984).

<sup>6</sup> See KOK-CHOR TAN, JUSTICE WITHOUT BORDERS 40-55 (2004) (similar taxonomy).

<sup>7</sup> *Id.* at 50-51.

<sup>8</sup> See William Easterly, *Affluence and Ethics*, WALL ST. J., Mar. 5, 2009, available at <http://online.wsj.com/article/SB123621201818134757.html> (last viewed May 6, 2009) (reviewing Peter Singer's *The Life You Save*).

<sup>9</sup> T. M. SCANLON, What We Owe to Each Other (1998).

The skeptics might claim that international law has nothing to do with morality because international law in their scheme reduces to sovereignty, which is not a moral but a political concept.<sup>10</sup> The objection is based on the Hobbesian notion that any rules about agreement come not from irreducible principles of right, such as those based on justification to others, but from bargaining and the self-interest of states. The notion of sovereignty is easily handled within the notion of reasonable rejection. There will be cases in which it is reasonable for sovereignty to be respected, and unreasonable for it to be respected. And it just might be true that contractalist justification does not describe every norm in international law, but that does not stop us from moral appraisal of these norms.

International law needs to be put under scrutiny using these theories. If we cede the territory to law and economics, I fear, to borrow loosely from Anthony Kronman, that the lawyers we educate in our law schools will be lost from an ethical point of view. The age of the lost international lawyer will persist, an age in which we will continue to witness moral failure by lawyers who cannot properly reason about values, whose memos authorize torture on the basis of the cruel precision of cost-benefit analysis. The theories that we discuss today have immediate practical relevance to the way international law will be practiced in this century.

### INTERNATIONAL LAW'S NATURAL NORMATIVITY\*

*By Mary Ellen O'Connell*<sup>†</sup>

Of the many debatable points Jack Goldsmith and Eric Posner make in their 2005 book, *The Limits of International Law*, one of the most debatable is their view that compliance with international law is not even virtuous, let alone obligatory.<sup>1</sup> They seem to believe that international law can be explained by positivism alone, and that positivism is an amoral theory of law. Benedict Kingsbury and others have contested whether positivism is, in fact, an amoral theory. That may or may not be. My point here is that international law is not adequately explained by positivism alone. Understanding international law also requires knowledge of natural law and process theory. Both of these theories infuse international law with plenty of moral content, regardless of the morality or amorality of positivism.

John Gardner provides a useful perspective on the amorality of positivism: [L]egal positivism admittedly does not distinguish law from a game, which is also made up of posited norms. To distinguish law from a game one must add, among other things, that law, unlike a game, purports to bind us morally. That has implications, no doubt, for what counts as successful law, and hence for what one might think of as law's central case. But this does not detract from the truth or the importance of [legal positivism], which is not a thesis about law's central case but about the validity-conditions for all legal norms, be they central (morally successful) or peripheral (morally failed) examples.<sup>2</sup>

The tendency of international law scholars has been to search in positivism for a basis of authority for international law generally, not just for a thesis of rule-validity. The positive act of consent by states to the system has been used as the defining characteristic of both treaties and custom and of international law as law. This is done in domestic law, too, in

<sup>10</sup> David Luban, *Just War and Human Rights*, 9 PHIL. & PUB AFFAIRS 160 (1981).

\* Adapted from MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW, INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* (2008).

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<sup>1</sup> JACK GOLDSMITH AND ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 197-99 (2005).

<sup>2</sup> John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 227 (2001).



social contract theory in which citizens are deemed to have given consent, expressly or impliedly, to the legal system. Social contract is a problematic theory for the authority of law—first, it is not true. We do not give our consent to be bound by law. But even if we did, or if somehow just supposing that we did was sufficient, we could just as easily withdraw our consent.

The weakness of consent-based authority for law is apparently more obvious to theorists when it comes to international than to domestic law. The international community includes sovereign states, subjects of the law that might more plausibly withdraw consent than the mere citizens of those states. And states have institutions with the apparent ability to lock citizens into the system or to give them an avenue to express consent, such as through voting. Thus, consent is dismissed as a basis of legal authority more readily for international law than domestic law, but ultimately it is inadequate to both. Kelsen recognized this and left behind his early proposition that it is consent (*pacta sunt servanda*) that serves as the basis of legal authority. He replaced it with his idea of the *Grundnorm*, namely that law is acknowledged to bind.

For Kelsen, the *Grundnorm* is the basis of international and domestic law. He understood there to be only one, unified or monist legal system. Most theorists today divide the systems. This may also help to keep the extra-consensual basis of domestic law disguised. The recognition that international law has a basis in something other than the positive acts of states—consent—is likely part of the explanation of why it came to be doubted as real law, at least, in the United States. Indeed, international law plainly has other extra-positivist elements. It includes among its sources general principles that are not derived from the positive acts of states. International law also recognizes *jus cogens* (peremptory) norms.

There is bound to be some discomfort with this explanation of the basis of legal authority. Natural law theories have been the subject of severe criticism as unscientific, irrational, unknowable, or wholly subjective. None of these criticisms apply, however, to the proposition that we believe law has authority. They apply rather to the attempt to find more specific rules using natural law theory. International law, however, like domestic law, has, generally, a positivist explanation of the sources of international law. Treaties and customary rules are created through the positive acts of states and organizations. General principles and *jus cogens* norms do not emanate directly from positive acts, though positive acts provide the evidence of their existence. Courts and other deliberative bodies make the decisions as to whether they exist.

The great attraction of consent over extra-consensual bases is that consent is an objective indicator of the recognized rules. The old problem of natural law—that it is derived from revelation and/or reason—lies in reaching consensus as to what the law is, once the authority of the priest or pope was lost for this general determination. In fact, however, positive law needs interpreting just as much as natural law. Courts and other deliberative bodies play an essential role in the international legal system with regard to both rules emanating from positive sources as well as extra-positive sources—general principles and rules of *jus cogens*. International law shares with domestic law fundamental characteristics. Both categories are best understood as a blend of positivism and naturalism.

The real difference in the systems does not lie in their nature, but in the problems they attempt to solve. International law is used to resolve the challenges facing the international community—armed conflict, global environmental degradation, the most serious forms of human rights violations, and global poverty. A better response to these challenges requires

improving international law, and that improvement requires ever-more sophisticated processes—in particular courts and tribunals.

Globalization has resulted in more international law and more legal institutions. With new courts, tribunals, and other decision-making bodies, the same problem of restraining subjectivity that has been the concern of domestic law scholars for decades is becoming an important issue for international law. International legal process scholars teach that decision-makers must start in international law with treaties, customary international law, and general principles. To the extent the law is ambiguous or needs updating, the decision-maker should look first to the purposes of the relevant law. Decision-makers must also bear in mind the purpose of law generally and the values of international society. The purpose of international law, like all law, is the peaceful settlement of disputes. It can be argued that the values of international society are reflected in its most important legal agreements and principles: human rights, peace, prosperity, and the protection of the environment dominate any search for the important values of the international community.

Looking to history and to our best ideas about law, plainly courts and tribunals are emerging as the key institutions to support the flourishing of these values. Judges and arbitrators can fill gaps in the law, resolve ambiguities, or even in limited ways make new law where needed: Scholars of legal process argue that if judges decide consistently with a community's values, the risk of simply applying personal preferences is avoided. Judicial reasoning must start with the accepted sources of international law—treaties, custom and general principles—and explain what values justify further development of the law in a particular case. This approach to judging incorporates elements of classical formalism to avoid subjectivity but without failing to provide appropriate answers to pressing issues or ignoring fundamental normative principles.

The needs of the international community cannot be met in our rapidly changing world solely through classic treaty or customary law-making. Nor is the identification of general principles or *jus cogens* norms best left to states or international organizations. Habermas now stresses process as the essence of democracy: not indisputable answers but methods of participation to reach consensus answers.

Wider, deeper, and more meaningful participation in international law should be a goal. Aiming for this seems to be a more constructive use of time and resources than aiming for a world parliament, as Andrew Strauss advocates. Perhaps a world parliament is achievable and would foster participation, but world parliamentarians may confuse voting with participation in law-making.

Currently, international law involves more direct participation of the governed than perhaps any other legal system. Much of international law is directed at states, and states all have the right to participate directly in law-making. With the rise of international communications, participation far beyond states is now also a common feature of international law. In 2009, we are increasingly seeing the limitations of elections—weak and corrupt political parties that hardly represent people's interests as well as subject matter expert NGOs. Finally, a world parliament is a step toward world government that gives many grave concerns. Better to have the check and balance system of multiple governments than one government that could be dominated by tyrants. Better also to work on improving the functioning of the United Nations General Assembly than to start from scratch developing a new institution.

Without doubt, international law has deficits—including a democratic deficit—yet it persists as the single, generally accepted means to solve the world's problems. It is not religion or ideology that the world has in common, but international law. Through international law,

diverse cultures can reach consensus about the moral norms by which we will commonly live. As a result, international law is uniquely suited to mitigate the problems of armed conflict, terrorism, human rights abuse, poverty, disease and the destruction of the natural environment.

## INTERNATIONAL LAW AS DEMOCRATIC LAW

*By Andrew Strauss\**

Normative political theorists have traditionally seen democracy as limited to domestic governance. When Plato and Aristotle attempted to envisage superior forms of government, they assumed that the realm relevant to their consideration was the domestic. Likewise, when James Madison conceived of the American republican/democratic constitution, he assumed that it was to bring about a *more perfect* internal union. Throughout the twentieth and now twenty-first century, however, power has continued to evolve to the international system. Today, we not only have international law, but we have rapidly proliferating and increasingly empowered international organizations that have institutionalized global governance.

Given these developments, theorists in both international law and international relations are increasingly noting the anomaly of a normative perspective that holds that democracy is the *sin qua non* of legitimate domestic governance but disregards its importance in the international system. Despite this attention paid to the global democratic deficit, however, precisely in what way the international system fails to be democratic remains under-theorized. This is troubling because it is only with a clear conceptual framework for thinking about the problem that we can understand its dimensions and evaluate various responses to it.

Therefore, I wish to start with the proposition that provision for the formal political equality of citizens is among the basic criteria—not the only—but among the basic criteria a social order must meet to be considered democratic. As Robert Post has succinctly put it in the *Annals of the American Academy of Political and Social Sciences*, “Democracy requires that persons be treated equally insofar as they are autonomous agents participating in the process of self-government. This form of equality is foundational to democracy, because it follows from the very definition of democracy.”<sup>1</sup>

To what extent then does the structure of the international system allow for such political equality? Drawing, by way of comparison, on Robert Dahl’s notions of interest group pluralism,<sup>2</sup> we can usefully summarize that within modern representative democracies, this equality is institutionalized in the granting of every citizen a theoretically equal opportunity to influence political outcomes. The ultimate arbiters of governmental policy are representatives selected by citizens who each have an equal vote, or say, in that selection. After this selection, citizens continue to influence representatives by way of interest groups, which all citizens have a formally equal opportunity to participate in forming. Such interest group formation is dynamic in that citizens can freely shift their allegiances among interest groups and the causes they represent. While this formal equality of opportunity to influence political outcomes is for a variety of reasons only imperfectly realized in even the most successful national democracies, these democracies are nevertheless structured so as to approximate the ideal.

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<sup>1</sup> Robert Post, *Democracy and Equality*, 603 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI., 24, 28 (2006).

<sup>2</sup> See, e.g., ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* (1989).

The international system, on the other hand, is structured so as to preclude the ideal of political equality. Citizens do not have a formally equal opportunity to select representatives to be the ultimate arbiters of policy in the international system. Rather, vastly unequal states themselves perform this role, and in the terms of our discussion of interests groups, all of the citizens of a certain nationality and/or within a certain geographical area are part of a permanent political coalition frozen into the institutional mold of the state. If citizens disagree with a political position their state is taking in the international system, they cannot freely shift their support to other more like-minded states as they would interest groups within a domestic democratic arena. Rather, their state's command over their economic resources (through taxes and their contributions to the state's economy) and often human resources (through conscription) as well as enforced conformity with the state's legal edicts all result in their having no choice but to contribute to the state's position.

This has significant implications for democratic equality. Citizens do not enjoy theoretical equality of opportunity to influence political outcomes in the international system. The influence of citizens from powerful states who prevail internally in getting their states to promote their external policy preferences is magnified by the power of the state, while those who do not prevail are given no official voice in the state centric process of making global policy.

As problematic as this might be, citizens of strong states that are internally democratic at least have a theoretical equality of opportunity to prevail in getting their states to promote their external policy preferences. Citizens of weak states, on the other hand, are restricted in their ability to influence global decision-making even when they prevail internally because their states themselves are so restricted. The bottom line is that fairly small numbers of citizens from powerful countries who represent far less than a global consensus can leverage their position so as to allow them to prevail in global decision-making.

This is not merely an abstract problem. All that I am doing this afternoon through theory is offering an analytical framework for understanding what millions of people around the world (and I'm sure many colleagues in this room) already know. One has only to travel to global civil society conferences or read relevant public opinion polls and even the headlines of daily newspapers to understand that there is a profound feeling among many people that they are not being fairly represented in global decision-making.

The good news is that this mass dissatisfaction can provide the raw fuel necessary—if properly channeled—to energize institutional innovation. After all, how long can the world continue to democratize and to globalize without the two coming together? Interpreting the normative in the title of our panel as meaning prescriptive, let me then *prescribe* what I see as the only serious way to overcome the global lack of political equality—and that is democracy. Specifically, I wish to suggest the initiation of what has come to be regarded in democracies as the core democratic institution: a parliament.

Richard Falk and I have explored elsewhere strategies for creating a popularly elected global parliament modeled on the European Parliament, and a discussion of such strategies is beyond the subject of this talk. But suffice to say that the path to a parliament may not be as difficult as many people assume, particularly if the parliament starts as an advisory body with less than universal membership.<sup>3</sup>

The central question my fellow panelists are grappling with is how to identify a solid theoretical basis for international law as law. A great deal is at stake in the endeavor, not only

<sup>3</sup> See, e.g., Richard Falk & Andrew Strauss, *Toward Global Parliament*, 80 FOREIGN AFF. 212 (2001).

normatively, but practically. To the extent such a basis gains widespread acknowledgement, international law becomes more legitimate and hence more effective. My contribution then is to introduce into the discussion an additional basis for international (or perhaps now *transnational*) law—democracy.

Rather than trying to just make states subject to their own collective law, I am suggesting that for certain purposes we transcend states to rest global authority upon *the consent of the governed*. This well-established democratic principle would ground global law in the same basis of authority as domestic democratic law. And over time, global democracy would hold out at least the possibility of creating similarly effective global institutions.

Certainly, there are many questions regarding how a global parliament would function and its relationship to other institutions of global governance, but a discussion of those must necessarily be left for another time.<sup>4</sup> It is, however, also relevant to question whether an institutional innovation as significant as a global parliament is necessary to introduce the ideal of political equality to the global system. Let me then conclude by briefly critiquing what I see as the three major non-parliamentary alternatives that are being offered for making the global system more democratic.

The first suggested by commentators, such as Jeffrey Laurenti, is to promote democratization at the national level.<sup>5</sup> Arguably, if freely elected national leaders are capable of democratically representing their constituents domestically, then shouldn't they likewise also be capable of representing them internationally? I have shown, however, that the global system distorts this representation. States, as vastly unequal "representatives," are not the same as similarly situated parliamentarians whose constituents all have a theoretically equal say in their selection. Likewise, states in their role as "frozen" interest groups do not give all citizens a theoretically equal opportunity to influence political outcomes. Domestic democratization without more, therefore, will not allow for all citizens to have formal equality of political opportunity within the international system.

The second alternative, suggested by many commentators, is to expand the ability of interest groups to participate as members of *transnational epistemic networks*.<sup>6</sup> These commentators variously suggest that interest groups more often be granted observer status in international organizations, and that they be more liberally allowed to submit amicus briefs to international tribunals and policy recommendations to treaty bodies. There is no doubt that citizens can bypass their states to play some role in directly affecting decision-making in international fora. Ultimately, however the decision-makers are not democratic representatives operating in a fundamentally pluralist system, but they are states operating on a vastly unequal playing field where non-state actors have no structural role and their influence is destined to be at the margins.

The final alternative, suggested by Joseph Nye<sup>7</sup> among many others, is to provide for greater accountability and transparency of international organizations. Institutional reforms that help overcome the lack of democratic transparency and accountability within the global system are no doubt valuable. They do not, however, address the lack of equality of opportunity for citizens to influence global outcomes.

<sup>4</sup> See *id.*

<sup>5</sup> See, Jeffrey Laurenti, *An Idea Whose Time Has Not Come*, in *A READER IN SECOND ASSEMBLY & PARLIAMENTARY PROPOSALS* 119, 128-29 (Saul H. Mendlovitz and Barbara Walker eds., 2003).

<sup>6</sup> See, e.g., essays in *GLOBAL CITIZEN ACTION* (Michael Edwards & John Gaventa eds., 2001).

<sup>7</sup> Joseph S. Nye, *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, *FOREIGN AFF.* (July/Aug. 2001).

Thus, I do not think that present global institutions can be tinkered with to achieve political equality. I believe we need to consider fundamental reform. The structural unfairness of the global system is I believe the great hidden civil rights challenge of our time. But for the analytical blinders that direct our view of global politics exclusively to the interplay between sovereign states, it would be clear to everyone that the global system does not measure up to generally professed democratic values. Faced with great dissatisfaction and the resulting political discord, for the powerful to choose coercion over reform (as has often been the case) is to betray democratic values and diminish the hope of a global system that can be sustained through legitimacy rather than force. As with our own American civil rights history, this is a time that offers a choice between inviting people in and forcibly keeping people out.

