

12-1-2007

Principles and Paradoxes of International Law

Phillip E. Devine

Providence College, pdevine@providence.edu

Follow this and additional works at: http://digitalcommons.providence.edu/philosophy_fac

Devine, Phillip E., "Principles and Paradoxes of International Law" (2007). *Philosophy Department Faculty Publications*. Paper 3.
http://digitalcommons.providence.edu/philosophy_fac/3

This Article is brought to you for free and open access by the Philosophy at DigitalCommons@Providence. It has been accepted for inclusion in Philosophy Department Faculty Publications by an authorized administrator of DigitalCommons@Providence. For more information, please contact mcaprio1@providence.edu.

PRINCIPLES AND PARADOXES OF INTERNATIONAL LAW

(Delivered at a Conference on the Dialogue of Cultures, Center for Ethics and Culture,
Notre Dame, December 2007)

On paper, contemporary international law forms an impressive corpus. States habitually invoke the law of nations against one another even as they themselves violate its requirements.¹ Citizens criticizing their own state's policies often invoke international law. The law of nations even includes a doctrine of *jus cogens*, sometimes held to be superior even to the United Nations Charter, according to which treaties and diplomatic practices can be held 'unconstitutional.'² In practice, however, the international community's lack both of an enforcement authority and of a stable customary morality renders international law erratic at best. (I do not here distinguish communities and societies – no one holds that the international community or the United States is a community in the way a well-functioning family is.)

Two issues arise, one conceptual and one normative, linked by the fact that *law* is a 'pro-word'; in less positivistic terms, it carries authority.

1. Is international law, insofar it purports to control the behavior of States, law?
2. Why should we care about what a skeptic is likely to call 'legal niceties' when they interfere with our collective purposes?

AMERICA AND THE INTERNATIONAL COMMUNITY

Condolezza Rice, now Secretary of State, wrote in 2000, "foreign policy in a Republican Administration ... will ... proceed from the firm ground of the national

interest, not from the interest of an illusory international community.”³ And, going beyond traditional ‘realists’ such as Hans Morgenthau,⁴ she added, “American values are universal; people want to say what they think, worship as they wish, and elect those who govern them; the triumph of these values is assuredly easier when the balance of power favors those who believe in them.”⁵ The same arguments could have been made on behalf of the Athenians at Melos.

Rice’s views are inconsistent with the presuppositions of international law, which requires a society, whose law it is. All forms of human society are imagined (which is not to say, imaginary) communities, and the human race as a whole is no worse off in this respect than the United States. And *if* there is an international community, the maxim, *ubi societas, ibi jus*, guarantees the existence of some sort of law. For we are creatures who need to work out the rules of our association, and who spontaneously recognize one another as potential friends as well as potential enemies. .

The interdependence and internal fragmentation of states undermine the assumption that states are the only significant actors in world politics, each guided by something coherent called the ‘national interest.’⁶ But such globalizing trends run parallel with the increasing difficulty in securing the co-operation our situation requires, both among and within nation-states. In a baffling world, the greater ease of dealing only with one’s own kind makes xenophobia perpetually attractive.⁷

Even if the international community lacks a common good, it has a common bad. International law rests on a doomsday scenario: the destruction of civilization through uncontrolled conflict. The current version is breakdown into an array of armed bands struggling for diminishing resources to meet to their increasing needs, stoking their

mutual hostility with atavistic myths; and, sooner or later, employing weapons of mass destruction. All (or nearly all) international actors have an interest in avoiding such results. Hence international actors have built a 'morality of accommodation,' to make it possible for peoples to live together.⁸ Nearly all such actors, including the United States, sometimes exempt themselves from the resulting standards and take a free ride on the observance of others.

PARADOXES

Both the international morality of the accommodation and the law it supports are subject to a number of debilitating paradoxes.

Human Rights

The concept of crimes against humanity has formed the foundation of a new departure in international law. The first prosecutor at the Hague Tribunal, Antonio Cassese, points out, "in the notion of 'crimes against humanity', 'humanity' did not mean 'mankind' or 'human race' but the 'quality' or 'concept' of man."⁹ British jurist Geoffrey Robertson gives a different explanation: such crimes "were committed against humanity in general because the very fact a person can order them diminishes the human race."¹⁰ Both formulations imply all human beings have an interest in maintaining our shared status, whether infringed in the victim or the perpetrator, and this shared interest creates the rudiments of a human, and hence also of an international, community. Thus Lung Chu-Chen, a Taiwanese international lawyer now teaching in the United States, has said, "the individual... acting both alone and as a group representative, is the ultimate

participant [in international law], performing in functions relevant to making and applying law.”¹¹

Every significant political actor now pays lip service to the notion of universal human rights. But violation of even the most elementary rights is now a daily occurrence. And there is no agreement upon either the reason we have such rights or the principles for resolving disputes about their content. Unusually for an international document, the American Convention on Human Rights (or Pact of San José) (1978), like many such documents is signed but not ratified by the United States, attempts to answer the fundamental question. “For the purposes of this Convention, ‘person’ means every human being” (Art. 1 § 2). It further specifies, “the right [to life] shall be protected by law and, in general, from the moment of conception” (Art. 4 § 1). We need not inquire further why this document has been neglected.

But the emphasis on human rights stands in stark contrast with the working assumptions of diplomatic practice, which only tentatively recognizes non-State actors as participants, and even then prefers potential States such as peoples demanding self-determination. Even more radical innovations, such as the rights asserted on behalf of indigenous peoples and the claims made on transnational corporations, prefer fictional to real persons. When international law speaks the language of human rights, moreover, it is oriented toward the control of *ethnic*, i.e., group, conflicts. Torture, for example, is defined in international law as the intentional infliction of severe pain and suffering, whether physical or mental, *by or with the consent of a public official* – in other words, as an offense against political outsiders rather than as a manifestation of individual

depravity.¹² Rape likewise is treated as an assault by one ethnic group on another through its women members – in other words political rather than a sexual offense.¹³

International Economic Justice

Michael Walzer points out that in a decentralized international regime, “the forces that oppose equality will never have to face the massed power of the globally dispossessed, for there won’t be one global arena where this power can be massed.”¹⁴ Likewise, in the absence of a common framework of social justice expressed in law, there are no principles available for assessing the claims of the dispossessed, and demands for international distributive justice invite a free-for-all.

An international context presses on a weak point in liberal theories of social justice. Rawls had argued in *A Theory of Justice* that a system of natural liberty unjust on the ground that, “it permits distributive shares to be improperly influenced by ... factors ... arbitrary from a moral point of view.”¹⁵ Charles Beitz applies Rawls’ argument to international affairs. “If evidence of global economic and political interdependence shows the existence of a global scheme of social cooperation, we should not view national boundaries as having fundamental moral significance.”¹⁶ As Libertarians¹⁷ and Communitarians¹⁸ have both pointed out, however, it does not follow, from the premise, that I do not deserve my talents and the social circumstances (such as being born in a rich country) that enable me to develop them, that any other human being or group can claim my talents either.

The later Rawls rejects any deduction of principles of justice from universal and necessary premises, while attempting to apply the notion of reasonable pluralism to a

wider variety of outlooks. When Rawls defines the original position from which he derives the law of peoples, he assumes that the parties are “citizens of some liberal democratic society, though not the same one” and “know that reasonably favorable conditions obtain that make constitutional democracy possible.”¹⁹ His theory is, like the World Trade Organization and the International Monetary Fund, a vehicle by which rich countries impose terms on poor ones – perhaps acceptable as a *modus vivendi*, but hardly an imperious requirement of justice.

Rawls’ critics ‘from the left’ argue that what he describes as failure to provide aid is in fact harming.²⁰ In evaluating this claim, everything depends on our background picture of politics outside a particular civil society. If we view human history as largely one of predation, and moments of generosity and concern for injustices done others as exceptional, we will reach different understandings of present practice than if we regard the West as violating a paradise inhabited by noble savages. Moreover, any of the people who claim compensation for past injuries would not exist, as cultural and biological entities, but for these injuries; hence questions of transgenerational justice raises difficult metaphysical issues. Finally, the dangers of imperialism latent in demands for economic justice are serious in a world in which people in poor countries desire to maintain their independence while reaping the benefits of modernity. Martha Nussbaum has made it clear in many writings that she is prepared to subject the familial and communal life of men and women everywhere to invasive principles of abstract justice.²¹

Diversity

Religion and secular ideology are divisive even domestically. In the international arena, they are more varied in character, and the constraining institutions are weaker. Hence the culture wars are now international. Many human rights advocates have a hard time seeing that, for pro-life people, opposition to abortion is a human rights cause quite as much as opposition to arbitrary imprisonment.²² The fact of human diversity includes, not only such ground-level moral controversies, but also competing understandings of the nature of law and its social role.²³

Different institutions are appropriate to peoples with different circumstances and histories, and peoples whose ways of life have been destroyed succumb to *anomie*, a condition that can be recognized as bad from a number of different normative perspectives. Moreover, non-Western ways of life might realize goods that consumer capitalism neglects. Imposing even good institutions on an alien society may fail in practice and in any case entail serious costs.²⁴ Nonetheless, just as there are individual decisions we regard as criminal, there are ways of life that are outside the pale. How we are to judge which these are is, however, a difficult issue. For these reasons, there is little language in which the common problems of humanity can be discussed.

The Core Paradox

International law rests on State practice, though it also stands in judgment over such practice. States persistently escape, one way or another, apparent international legal obligations that infringe their 'vital' interests, however implausible to external observers some of these claims of vital interest might be.²⁵ Hence we get either

restatements of State practice, which is then legal by definition, or ideals that in theory stand in judgment on State practice, but in practice can be manipulated to support whatever some government wants to do.

Finnish jurist Martti Koskenniemi explains the result for the principles of self-determination and territorial integrity.

Neither of the conflicting principles can be preferred because they are ultimately the same. When a people call for territorial integrity, they call for respect for their identity as a self-determining entity and vice-versa. In order to solve the conflict, one should need an external principle about which types of human association entail this respect and which do not.²⁶

To ask “whether to grant or reject or demand for self-determination ... would move the situation closer to goal values of human dignity” (as Chen puts it with Taiwan in mind)²⁷ is to ask whether it is a good thing, on the whole, that an internationally ambiguous entity should gain recognition as a State.

In short, international law is subject to three sources of paradox: first, it takes fictional more seriously than natural persons; second, it attempts to derive norms from the anarchic practice of such artificial persons; third, when, despite its bias in favor of States, it affirms the dignity and inviolability of natural persons, it lacks resources for defending the claim that we have such dignity or finding out what it implies. The root of these paradoxes lies in the fact that – even when it talks individual rights and responsibilities or recognizes entities other than traditional States – international law is concerned group rather than individual conflict – in terms of crime with genocide rather than murder.²⁸

NATURAL LAW AND REALISM

International law cannot rest on agreement alone. For treaties, including the UN Charter, require on a prior norm requiring their observance. The foundation of international law consists in two elements unequally yoked together – one linked to the sovereignty of the nation-state and one founded on the supra-conventional principle that States at least should be held to the standards they invoke against others.

Realists hold that moral discourse is out of place in international politics: arbitration is possible when both parties have the capacity to do one another serious damage; when they are unequal, the weak must accept whatever terms the strong might impose. There is now no way of limiting realism to international contexts. Most of us cannot live with a doctrine according to which the only thing wrong with Hitler's regime is that he lost. And the intuitions that oppose realism have a realistic basis. For power relations are unstable, and asymmetric conflicts sometimes end with the victory of the weaker party. And, whoever wins at the end of the day, weaker parties can inflict enough damage to require the stronger party to take them seriously. Even the most powerful members of the world's most powerful society can be at the World Trade Center on 11 September 2001.

The claims of common humanity, and the need for co-operation across national borders, are urgent. Cassese suggests a hopeful middle way (though one that needs to be updated) when he argues that, for a norm to bind a State in the absence of its explicit consent, the most important and representative States of the various blocs agree to it.²⁹ The following principles of practical reasonableness – *Seek peace and keep it, Keep your*

promises, Recognize other human beings as human, Recognize their right to be choose what we would not, Practice what you preach, See yourself as others see you, and Accept imperfect solutions – form a sound though incomplete morality.

Terrorism is a radical refusal to recognize the humanity of people who are somehow other and hence a grave violation of international law and morality. Terrorists, however, like Allied terror bombers during the Second World War, can always plead ‘supreme emergency,’ and the West is hard pressed to repudiate the premise,³⁰ especially when such emergency is now invoked to defend torture.³¹

Still, we dare not repudiate secular justice or human law, however inadequate they may be. Appeals to self-interest can only support hypocrisy, as the tribute vice pays to virtue, and a life of consistent hypocrisy, as Plato urged long ago, dooms a person to perpetual sickness of soul.

International law, like all law, serves as a moral educator. But, unlike Mother Teresa, the law must deal with open, persistent violators of its precepts or lose its authority. Law is a compromise between justice and power:³² its point is to introduce some elements of justice, however limited, into a system of power relations that without it would be intolerable. Respecting the finitude of human justice is itself a requirement of justice.³³ Any system of law requires some authority capable of making the required judgments of prudence; at present what have is an ill defined something called ‘international public opinion.’

In the absence of politically legitimate appeals to a divine legislator, international law is a postulate in Kant’s sense, as is the human community that is its source. The same is true of the sovereign state and its laws. If people are prepared limitlessly to

indulge in injustice and hypocrisy for the sake of fleshy satisfactions, or press the claims of justice, as they understand it, until they destroy any possible society, practical argument comes to an end.³⁴

NOTES

¹ The United States, for example, has invoked international law against Iran, but exempted itself from its requirements with respect to Nicaragua.

² See the Vienna Convention on the Law of Treaties (1969), arts. 53, 64, and 66,

³ Rice, “Promoting the National Interest,” *Foreign Affairs* 79, no. 1 (January/February 2000): 62. This statement provoked protests when she was granted an honorary degree at Jesuit sponsored Boston College, on the grounds that it was contrary to the Catholic doctrine of the unity of the human family. “Condoleezza Rice Does Not Deserve a Boston College Honorary Degree,” 4 May 2006, <http://michaelmoore.com/mustread/index.php?id=641>; accessed 22 June 2006.

⁴ Morgenthau was in part motivated by fears of moral imperialism. See his *In Defense of the National Interest* (New York: Knopf, 1952) and *Politics Among Nations: The Struggle for Power and Peace*, 6th edition (New York: Knopf, 1985)

⁵ Rice, “National Interest,” p. 49.

⁶ On this development, see Chris Brown, “International Affairs,” in Robert E. Goodin and Philip Pettit, eds., *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell, 1993), chap. 27. For a compendium of the sorts of interactions that undermine the state-centered model, see Joseph S. Nye, “Transnational and Transgovernmental Relations,” in Geoffrey Goodwin and Andrew Linklater, eds., *New Dimensions in World Politics* (New York: Wiley, 1975), chap. 2.

⁷ Norman Podhoretz has written of the “incandescent moral clarity” and “lovely condition of the spirit” attained by demands for unconditional surrender, in other words by denying

outsiders any standing in the forum of justice. “In Praise of the Bush Doctrine,” *Commentary* (September 2002); and “Syria Yes, Israel, No?” *Weekly Standard* (19 November 2001). Both quotations were found in Andrew J. Bacevich, *The New American Militarism* (Oxford: Oxford University Press, 2005), p. 95. Podhoretz’ son John drops the other shoe: “Wasn’t the survival of Sunni men between the ages of 15 and 35 the reason why there was an insurgency [in Iraq] and the basic cause of the sectarian violence now?” John Podhoretz, “Too Nice to Win? Israel’s Dilemma,” *New York Post On-line*, 25 July 2006.

⁸ See Terry Nardin, *Law, Morality, and the Relations of States* (Princeton: Princeton University Press, 1983), chap. 9, esp. pp. 224-232.

⁹ Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), p. 291.

¹⁰ Geoffrey Robertson, QC, *Crimes Against Humanity*, rev. ed. (New York: New Press, 2002), p. 326.

¹¹ Chen, *An Introduction to Contemporary International Law*, 2nd edition (New Haven: Yale University Press, 2000), p. xii.

¹² Declaration Against Torture (1975) and Torture Convention (1984), as cited in Robertson, *Crimes*, pp. 247-48.

¹³ On one occasion, “a trial chamber [of the Hague Tribunal for former Yugoslavia] seemed to argue that every rape of a woman (although, curiously, not of a man) was by definition torture, irrespective of motive” (Ibid., p. 326, citing *The Celbići Case* (*Prosecutor v. Zejnal Delačić and others*) (16 November 1996), ¶ 476.) This otherwise

bizarre judgment makes sense if we regard rape not as a crime against the individual woman, but as an attack on a community through its women.

¹⁴ Walzer, *Arguing About War* (New Haven: Yale University Press, 2004), p. 190.

¹⁵ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1972), p. 72 .

¹⁶Beitz, *Political Theory and International Relations*, rev. ed. (Princeton, N.J.: Princeton University Press, 1999), p 152.

¹⁷ See Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, n.d.), pp. 213ff.

¹⁸ Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), pp. 96-103.

¹⁹Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), pp. 32n1 and 33.

²⁰ See for example, Thomas Pogge, “A Cosmopolitan Perspective on the Global Economic Order,” in Gillian Brock and Harry Brighouse, eds., *The Political Philosophy of Cosmopolitanism* (Cambridge: Cambridge University Press, 2005).

²¹ Nussbaum, “Beyond the Social Contract,” *ibid.*, , chap. 13; “Love, Care and Women’s Dignity,” in Philip Alperson, ed., *Diversity and Community* (Malden, Mass.: Blackwell, 2002).

²² See the remarks on Lech Walesa in Robertson, *Crimes*, p. 523.

²³ See, for example, P. S. Atiyah and R S. Summers, *Form and Substance in Anglo-American Law* (Oxford: Clarendon, 2002), discussing two legal systems that are in some respects similar.

²⁴ See Bilihari Kaukisan, “Asian versus ‘Universal’ Human Rights,” and Aryeh Neier, “Asia’s Unacceptable Standard,” *Responsive Community* 7 no. 3 (summer 1997): 9-30, for an illuminating discussion of the resulting issues.

²⁵ Sir Adrian Roberts, “Just Peace: A Cause Worth Fighting For,” in Pierre Allan and Alexis Keller, eds., *What is a Just Peace?* (Oxford: Oxford University Press, 2006), p. 83, lists China, India, and Russia, as well as the USA as rejecting important parts of the international legal order

²⁶ Koshennimi, “The Politics of International Law,” *European Journal of International Law* 1 (1990), reprinted in Keith C. Culver, ed., *Readings in the Philosophy of Law* (Ontario, CANADA: Broadview, 1999), pp. 519-20.

²⁷ Chen, *Introduction*, p. 35.

²⁸ Because Pol Pot killed mainly fellow Khmer, the international community did not unite in regarding him as guilty of genocide. See Lori Fischler Damroch, “Genocide and Ethnic Conflict,” in David Wippman, ed., *International Law and Ethnic Conflict* (Ithaca, N.Y.: Cornell University Press, 1998), chap. 10.

²⁹ Cassese, *International Law*, p. 179.

³⁰ For a defense of Allied terror bombing, see Walzer, *Just and Unjust Wars* (New York: Basic, 1977), chap. 16, reiterated in his *Arguing*, chap. 3. “Supreme emergency,” Walzer maintains, “... rests on the existence of a collective entity – religious, political, or cultural – that the individuals compose and from which they derive some portion of their character, practices, and beliefs” (ibid., p. 42, citing Burke at pp. 42-43). Muslims employing terror tactics could make exactly this argument.

³¹ On the current debate see, Karen J. Greenberg, ed., *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006), and in Sanford Levinson, ed., *Torture: A Collection* (Oxford: Oxford University Press, 2004).

³² This is not a definition of *law* but a description, consistent with any definition (for example that of St. Thomas Aquinas) that acknowledges positivistic, natural law, and realistic elements.

³³ This sentence is directed against “Operation Infinite Justice,” the official name of the American invasion of Afghanistan before Islamic – for some reason not Jewish or Christian – objections intervened. For a selection of perspectives, see “Infinite Justice, out – Enduring Freedom, in,” *BBC News* (25 September 2001); Matt Bivens, “Pentagon PR in Search of Perfect Name,” *The Moscow Times.Com* (24 September 2001); Arundhati Roy, “The Algebra of Infinite Justice,” *Guardian Unlimited* (29 September 2001).

³⁴ Thanks to Josef Velazquez, and to the participants in a Philosophy Department seminar held at Providence College in November 2006, especially Michael O’Neill and Matthew Cuddeback, for their discussion of the issues considered in this essay; and to Vance Morgan for arranging this seminar. Thanks as well to the audience at my presentation at Notre Dame.