



ASIL STUDIES IN INTERNATIONAL LEGAL THEORY

Parochialism, Cosmopolitanism, and the Foundations of International Law

Edited by M. N. S. Sellers

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Parochialism, Cosmopolitanism, and the Foundations of International Law

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University of Baltimore Center for International and Comparative Law



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PAROCHIALISM, COSMOPOLITANISM, AND THE FOUNDATIONS OF INTERNATIONAL LAW

This book examines the boundary between parochial and cosmopolitan justice. To what extent should international law recognize or support the political, historical, cultural, and economic differences among nations? Ten lawyers and philosophers from five continents consider whether certain states or persons deserve special treatment, exemptions, or heightened duties under international law. This volume draws the line between international law, national jurisdiction, and the private autonomy of persons.

M. N. S. Sellers is Regents Professor of the University System of Maryland and Director of the University of Baltimore Center for International and Comparative Law. He received his A.B. and J.D. degrees at Harvard University and was a Rhodes Scholar, Frank Knox Fellow, and T. H. Green Scholar at University and Wolfson Colleges, Oxford, where he completed his B.C.L. and doctorate. Professor Sellers has served as a visiting scholar at Georgetown University Law Center, the Lauterpacht Centre for International Law at Cambridge University, Erasmus University Rotterdam, the Hague Academy of International Law, and Bryn Mawr College. He is coeditor, with Elizabeth Andersen, of the Cambridge University Press book series ASIL Studies in International Legal Theory.

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The purpose of the ASIL Studies in International Legal Theory is to clarify and improve the theoretical foundations of international law. Too often the progressive development and implementation of international law have foundered on confusion about first principles. This series will raise the level of public and scholarly discussion about the structure and purposes of the world legal order and how best to achieve global justice through law.

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*To Therese Sellers
first companion
December 29, 2010,
with love and admiration*

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Preface

This book inaugurates the ASIL Studies in International Legal Theory, a book series dedicated to clarifying and improving the theoretical foundations of international law. Too often the progressive development and effective implementation of international law have foundered on confusion about first principles. This series seeks to raise the level of public and scholarly discussion about the structure and purposes of the world legal order and how best to achieve global justice through law.

The idea for this series grows out of the International Legal Theory Project of the American Society of International Law. Every year for the past decade, the ASIL has devoted special attention to a different aspect of international law, inviting scholars and practitioners to discuss the theoretical basis of such topics as customary international law, humanitarian law, and universal human rights. The society has published a special issue of the journal *International Legal Theory* each year, presenting the results of these conversations. The book series ASIL Studies in International Legal Theory replaces this annual publication with a series of monographs and edited volumes considering fundamental questions in the theory, justification, and progressive improvement of the doctrine, substance, and institutions of international law.

This series does not seek to settle all disputed questions in international law, but rather to improve the quality of the discussion. The field of international law has experienced a constant growth in importance over the past century, supported by vast public enthusiasm, with a strengthening influence over governments and international affairs. At the same time, the law has outrun its theoretical basis, which has led to confusion and rising frustration. This series responds to increasing public demand for greater justice, coherence, and theoretical sophistication in international affairs.

This first volume addresses the foundational question of parochialism in international law. Law by its very nature requires rules of general application,

making the rule of law necessarily “cosmopolitan” when applied to international affairs. Yet circumstances differ vastly among the many peoples of the world. How then can there be a transcendent “international” law? This recurring question of generality and specificity in all human associations must reconcile liberty with law, independence with community, and the expression of treasured individuality with the realization of our common humanity.

The chapters collected in this volume grew out of a series of discussions held at Tillar House, the headquarters of the American Society of International Law, in Washington, D.C., under the auspices of the International Legal Theory Interest Group of the American Society of International Law. Leaders in this effort include Elizabeth Andersen and Charlotte Ku, present and past executive directors of the American Society of International Law; Lucy Reed, José Alvarez, James Carter, and Anne-Marie Slaughter, present and former presidents of the American Society of International Law; and present and past chairs of the International Legal Theory Interest Group of the American Society of International Law, Brian D. Lepard, Bryan Macpherson, Fernando Tesón, Onuma Yasuaki, Nicholas Onuf, and Joaquín Tacsan. Francesco Parisi deserves special thanks as founding editor of the ASIL publication *International Legal Theory*.

I would like to thank Laurie Schnitzer, Terican Gross, Netta Yochay, and Ian Foss for their work on this manuscript; Sheila Ward for her coordination of the meetings at Tillar House; and Finola O’Sullivan and John Berger for making Cambridge University Press the leading publisher in the field of international law. This book and this series would not exist without their encouragement. The American Society of International Law, the University of Baltimore Center for International and Comparative Law, the Lauterpacht Centre of Cambridge University, and Georgetown University Law Center gave me the practical and moral support that made this project possible. As always and for everything, I thank my wife Frances Stead Sellers and my daughter Cora Mary Stead Sellers, without whose comfort and inspiration my life and work would have no meaning.

Stanton Manor
December 29, 2010

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1 Introduction

Mortimer Sellers

People are parochial in their commitments and beliefs, and rightly so. We live, for the most part, among our neighbors, in our own home places, with local landscapes, customs, climates, and conventions. Much that is sweetest in life is built among human societies, according to the happenstance of provincial circumstances. This social nature of humanity pulls us together, but it also draws us apart, as we construct vastly different cultural superstructures on the foundations of our shared human nature. For most of history, humanity has lived in small and tightly knit bands of at most two hundred persons. We are profoundly adapted to find community, justice, and altruism within these narrow social units, while viewing outsiders with suspicion and self-righteousness.¹ Peace, justice, and prosperity have advanced in the world as people have learned to expand their sense of sorority and fraternity to broader ranges of humanity, beyond their most immediate social affiliations.

When people view the whole world as one community, they become “cosmopolitans” or “citizens of the world” (as the word is usually translated), which might seem unreservedly desirable, were it not for the implication that citizenship is exclusive and that citizens of the world do not fully participate in the local societies to which they should belong. “Cosmopolitan” has often become a term of abuse in the hands of regional political leaders such as Joseph Stalin, who criticized “rootless cosmopolitans” as a threat to the integrity of the State.² More recent critics of globalization have attacked “cosmopolitan”

¹ For the implications of human evolution on international relations, see Bradley A. Thayer, *Darwin and International Relations: On the Evolutionary Origins of War and Ethnic Conflict* (Lexington, Kentucky, 2004); William R. Thompson, ed. *Evolutionary Interpretations of World Politics* (New York, 2001); Patrick James and David Goetze, eds. *Evolutionary Theory and Ethnic Conflict* (Santa Barbara, California, 2001).

² See, e.g., Erik van Ree, *The Political Thought of Joseph Stalin: A Study in Twentieth-Century Revolutionary Patriotism* (New York, 2002).

international law as a tool through which hegemonic powers exploit the weakness of less privileged regions and cultures.³ Viewing the whole world as one community may not seem so desirable when political control of that community falls into the hands of a universal despot, ruling without regard to local circumstances or justice.⁴

The concept of justice not just within but also between states or peoples or other political communities is as old as humanity. Before proceeding to war, the Roman *fetiales* would slaughter a pig with the sacred flint, invoking Jupiter to strike them down unless their cause was just.⁵ What distinguishes modern international law from its earlier counterparts is not the commitment to universal justice, which every nation shares, but its abstraction from any particular religious or cultural tradition. Hugo Grotius inaugurated a new era of international justice when he insisted that the fundamental principles of international law arise from human nature and would remain the same even if we were to concede (*etiamsi daremus*) that “which cannot be conceded without the utmost wickedness” – that there is no God.⁶ The first comprehensive description of the fundamental requirements of international law began with the concept of a universal society of every human being,⁷ resting on human nature, rather than any specific appeal to divine or other external authority.

The standard definition of international law as “those rules of conduct which reason deduces, as consonant to justice and common good, from the nature of the society existing among independent nations”⁸ assumes both a universal standard (“reason”) and the continued existence of parochial communities (“nations”). The question has always been how best to reconcile the two. Emer de Vattel advanced the accepted solution, which grounds the political independence (“sovereignty”) of states on their existence as corporate “persons,” deriving their legal rights from the individuals who associate to create them.⁹

³ See, e.g., Richard Falk, Jacqueline Stevens, and Balakrishnan Rajagopal, eds. *International Law and the Third World: Reshaping Justice* (New York, 2008).

⁴ See Immanuel Kant, *Perpetual Peace*, in *Kant's Political Writings*, ed. Hans Reiss; trans. H. B. Nisbet (Cambridge, 1970) at 113 on the dangers of universal monarchy and soulless despotism.

⁵ Titus Livius, *Ab urbe condita*, I.24.8.

⁶ Hugo Grotius, *De Iure Belli ac Pacis libri tres In quibus Ius Naturae et Gentium item juris publici praecipua explicantur* (new edition, Amsterdam, 1646) at Prolegomena p. 5 (§11).

⁷ *Ibid.* at §6 – Cf. Marcus Tullius Cicero, *De legibus*, I.vii.23.

⁸ See James Madison, *An Examination of the British Doctrine which subjects to capture a Neutral Trade not open in a Time of Peace* (London, 1806), p. 41; Henry Wheaton, *Elements of International Law*, 8th ed. R. H. Dana (Boston, 1866), chapter I §14 (p. 20).

⁹ Emer de Vattel, *Le Droit des Gens ou principes de la loi Naturelle Appliqués à la conduite et aux affaires des Nations et des Souverains* (London, 1758), préface at pp. xiii–xiv, quoting Christian Wolff, *Jus Gentium Methodo scientifica pertractatum, in quo Jus Gentium naturale ab eo quod voluntarii, pactitū et consuetudinarii distinguuntur* (Frankfurt and Leipzig, 1749).

This does not in itself settle the borders between the jurisdictions of international law, national law, and ordinary individual autonomy or self-direction,¹⁰ which depend on the duties and rights of actual human beings.¹¹

The challenge of reconciling parochialism with cosmopolitanism is thus inherent in the basic structure of international law. International law is universal and cosmopolitan with respect to those questions properly subject to its primary jurisdiction, but also exists in part to support the separate jurisdictions (the “freedom” and “independence”) of individual citizens and states.¹² International law arises from the natural society of all humanity¹³ – the “société universelle du Genre-humain”¹⁴ – and specifically from our “cosmopolitan” obligations to this universal community,¹⁵ yet as Vattel recognized at the dawn of the international modernity, the natural society of nations requires that the rights and independence of every state and separate community be taken into account.¹⁶ This means, in many cases, tolerating injustice within states to maintain greater justice between them.¹⁷ Just as every individual deserves a zone of privacy within which to make her or his own choices (and mistakes), so too every state deserves an area of self-determination, within which to construct its national identity.

The problem of parochialism in international law is similar in many ways to familiar questions of federalism, legal hierarchy, and subsidiarity in other national and transnational regimes.¹⁸ At one extreme, strong nationalists deny that international law has any authority.¹⁹ At the other extreme, some internationalists resist the possibility that local institutions should ever legislate or rule.²⁰ The first step in establishing any coherent theory of international law will be to determine the province of international jurisdiction, how this

¹⁰ See *ibid.* at pp. xvii–xviii.

¹¹ *Ibid.*, préliminaires §5, pp. 2–3.

¹² “Les Nations étant composées d’hommes naturellement libres et indépendans... les Nations, ou les États souverains, doivent être considérés comme autant de personnes libres.” *Ibid.* at §4, p. 2.

¹³ In addition to the references to the foregoing Cicero and Grotius, see Vattel, *Droit des Gens*, préliminaires §10, p. 6.

¹⁴ *Ibid.* §11, p. 7.

¹⁵ *Ibid.* §12, p. 8.

¹⁶ *Ibid.* §15, p. 9.

¹⁷ *Ibid.* §21, p. 12.

¹⁸ The relationship of states within the United States of America to the federal government under the 10th Amendment to the U.S. Constitution or between member states of the European Union and the law of the Union itself, under Article 5(2) of the Treaty on European Union have both given rise to vast bibliographies.

¹⁹ See, e.g., Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford, 2005).

²⁰ See, e.g., *The International Post-War Settlement: Report by the National Executive Committee of the Labour Party to be presented at the annual conference to be held in London from May 29th to June 2nd, 1944* (London, 1944).

jurisdiction arises, and when, if ever, it trumps the rival jurisdiction of national or subnational institutions.

John Tasioulas initiates the discussion (Chapter 2) by raising the question of “legitimacy” in international law. Legitimacy in this context signifies the normative fact of being “justified” (rather than the empirical fact of being thought of as justified). International law and international institutions are “legitimate” (on this view) only to the extent that they actually enjoy a “right” to rule that “binds” their subjects with a duty of obedience. Put another way (in the vocabulary of Joseph Raz), legitimate directives impose content-independent and exclusionary reasons for action. Tasioulas observes that international law, like all law, claims to be legitimate in precisely this sense and then asks what would be needed to substantiate such assertions. Following Raz, Tasioulas suggests that international law enjoys legitimate authority when its subjects will better conform to reasons that apply to them by respecting the law’s directives (and will conform less effectively when they do not). Legitimacy follows from general accuracy in conforming with applicable reasons. This “service” conception of legitimate authority concerns objectively valid goals. To be legitimate, international law must strengthen its subjects’ conformity with reason, the ultimate purpose of all legitimate legal systems anywhere.

When legitimacy is understood in this way, it becomes clear that international law could be legitimate in some domains but not others. The test to be applied is whether *in fact* international law enhances conformity with the applicable objective reasons (or not). To be applicable at the international level, such reasons would have to obtain independently of individual or societal preferences and beliefs when these do not conform to objectively *true* judgments. Tasioulas understands the legitimate jurisdiction of international law to extend only so far as its grasp of applicable reasons transcends the abilities of more parochial authorities. Skeptics might challenge this assertion by denying that “true” ethical reasons ever apply to international affairs. Tasioulas responds that such an attitude of general skepticism would make it impossible to question *any* social practices, no matter how wicked. In fact, most seeming skeptics (to their credit) do hope for global justice and better societies. Their rhetoric contradicts their actual commitments.

The argument against the legitimacy of international law cannot, then be that *no* legal or social arrangements are more legitimate than others but that international law in fact lacks the legitimacy that other systems possess. Tasioulas suggests that an “ethical pluralist” might salvage a quasi-skeptical position by embracing the positive value of maintaining rival and

incommensurable legal or ethical regimes, but even then these separate societies, cultures, or states will need some overarching (cosmopolitan) perspective from which to adjudicate their disagreements. The argument must shift from attacking international law *as such* to challenging the scope of its jurisdiction by pushing for a more restricted or “minimalist” international legal system or by broadening the range of arguments through which the existing international rule of law is justified, to embrace the varied values that have resonance in the parallel but “incommensurable” ethical systems of rival societies. Tasioulas dismisses the facile dogma of value skepticism to support the softer benefits of “pluralism,” constrained by a few ultimately cosmopolitan judgments about what is fundamentally right (or wrong) in international affairs.

Armin von Bogdandy and Sergio Dellavalle (Chapter 3) suggest that there are both “particularist” and “universalist” paradigms in international law. The universalist paradigm (which they ultimately prefer) seeks a “truly public” international order, encouraging societies to solve their conflicts by peaceful means through methods that advance their common interests. The particularist paradigm would confine public order (in this sense) within the borders of homogenous political communities. Dellavalle and von Bogdandy make explicit the unexamined “universalist” and “particularist” assumptions at the heart of international law that arose with modernity itself in the scholarship of European universities and insist on the necessary coherence and consistency that scholarly commentary brings to the practice of international law. Without a reasonable theory to support it, law loses its capacity to govern the behavior of citizens or states.

The incapacity of undertheorized law to govern human behavior becomes particularly apparent when (as in the case of the international legal system) the coercive mechanisms of public order are weak. Dellavalle and von Bogdandy praise the role of legal scholars on the International Law Commission and other public bodies in maintaining an overall account of the purpose and function of international law. Legitimacy and legality are both vitally important to a functioning public order, and neither is possible without the other. Legitimacy has natural-law connotations, but there will also be “positivist” elements in any lasting international order of peace. International law contains an increasing number of norms that bind states irrespective of their consent. These “public” laws need a strong theoretical basis to justify their transnational validity. Dellavalle and von Bogdandy identify the traditional European understanding of the nation-state as resting in part on a particularist paradigm, promoting the cultural solidarity of (separate) “peoples” and assuming that most human activity will be bounded by the nation-state’s borders.

This separation between homogenous peoples has become much more difficult to maintain in the era of easy travel and communication. Globalization has undermined the particularist paradigm of international law.

The increasing autonomy of international law and international organizations from the political preferences of individual nations may be the natural consequence of globalization, but it threatens the self-determination of states. This can be seen either as a valuable control on the unreasonable decisions of the national political classes or the unjustified imposition of international norms onto local societies. How one views international law as a universal public order will depend to a large extent on whether the law makes local institutions more just. Dellavalle and von Bogdandy see it as the task of contemporary scholarship to contribute to the creation of a more just international order, supporting greater justice within as well as between states. The particularist paradigm tends to view states as necessarily in competition and therefore at odds with each other. Dellavalle and von Bogdandy prefer to seek an inclusive order founded on transcendental principles of human interaction and elaborated through dialogue between cultures.

The universalist paradigm of international law assumes that certain rights and values are (or ought to be) shared by all individuals and all peoples. These values include concern for other human beings (sociability) and respect for reason (reasonableness), as applied to the problems of social cooperation. Dellavalle and von Bogdandy identify these as two separate strands of the universalist paradigm: respect for our common humanity on the one hand and the application of our individual reason on the other. This idea of international law as the common law of a naturally sociable humanity implies an "international community" of all human beings. The great challenge to this conception of law is the evident fact that not all human beings actually accept their connection with humanity as a whole. Contract theory offers one very popular response to this dilemma by grounding law and ethics on the self-interest of individuals rather than the common interests of the community. In the end, however, these two viewpoints are difficult to keep separate. The real question is not how the community arises, but how far it should extend: Can we accept a society expanded to embrace all human beings? If not, international law loses legitimacy to control the activities of states.

Dellavalle and von Bogdandy cite the "cosmopolitan law" (*jus cosmopoliticum*) of Immanuel Kant as having first recognized not just (as others had) the *civitas maxima* of international community but also the specific rights of individuals in the international order. Global constitutionalism is the latest instantiation of this search for global community through common values and the common good. The international community views the state

as justified by its service to the human beings for whom it is responsible, and every state has a duty to provide specific services for the benefit of its citizens. Dellavalle and von Bogdandy cite Christian Tomuschat as a leading contemporary advocate of understanding international law in this way as ultimately an “individual-centered” (rather than a state-centered) system. At the same time (as Tomuschat understood), there can be no genuinely sustainable international legal order if national systems of government disintegrate. The international community collectively recognizes certain obligations as *erga omnes* and *jus cogens*. Dellavalle and von Bogdandy condition the legitimacy of states on respecting and implementing these fundamental obligations. The international order complements national legal orders as a further step in the process of civilization.

In an interdependent world, many decisions made by authorities in one polity substantially affect individuals living abroad. Dellavalle and von Bogdandy identify international law as a significant restraint on this often-negative consequence of globalization. Rather than advancing the hegemony of large and powerful states, international law may offer the most significant control over the self-interested impositions of some states onto others. Thus, a cosmopolitan or universalist conception of international law may be the best protection available for the parochial and particularist values so essential to human happiness. Cosmopolitanism supplies the necessary foundations for international law, but parochialism explains many of its most important purposes. Dellavalle and von Bogdandy reconcile universalism with particularism by understanding both in the light of global principles, applicable to all human beings. They propose that the next step should be a strengthening and deepening of international institutions to support a more just and equitable international public order, taking local interests more fully into account.

Ileana Porras (Chapter 4) examines the wide and often divergent set of meanings attributed to “cosmopolitanism” by students of international law and sets out to clarify the central and most useful senses of the term. Cosmopolitans begin by assuming a universal community of humanity in which each human being owes a duty of care to all the rest. This makes every other (smaller) human community contingent on respecting this basic duty to humanity as a whole. Local obligations can never fully displace the global community and the requirements it imposes on every human being. Porras does not suggest that states are morally irrelevant but that they cannot (for cosmopolitans) be politically absolute. Cosmopolitanism implies an attitude of engaged curiosity and tolerance in the face of cultural difference. For cosmopolitans, cultural differences are merely variations on the theme of humanity and should not be allowed further to separate us. Porras evaluates cosmopolitan conceptions