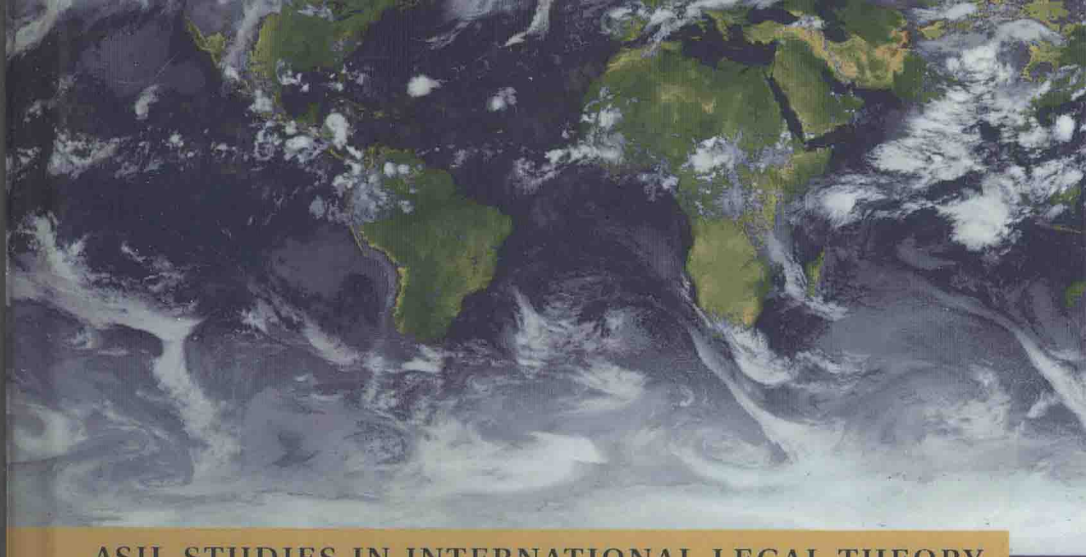

ASIL STUDIES IN INTERNATIONAL LEGAL THEORY

The Role of Ethics in International Law

Edited by Donald Earl Childress III

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THE ROLE OF ETHICS IN INTERNATIONAL LAW

The purpose of this volume is to explore what role ethical discourse plays in public and private international law. The volume seeks first to delineate the role of ethical investigation in creating, sustaining, challenging, and changing international law and second to open up a conversation between two related disciplines – public and private international law – that frequently labor in different intellectual vineyards. By examining the role of ethical discourse in international law's public and private dimensions, this volume will, it is hoped, open new avenues for cross-disciplinary exchange in these important fields and related disciplines.

Donald Earl Childress III is an Associate Professor of Law at the Pepperdine University School of Law. Professor Childress is a member of the American Society of International Law and serves as the Vice-Chair of the ASIL International Legal Theory Interest Group. His articles have appeared in various academic journals, including the *Duke Law Journal*, the *Northwestern University Law Review*, the *Georgetown Law Journal*, and the *U.C. Davis Law Review*.

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Contents

Introduction

Donald Earl Childress III

In recent years, much has been written about public and private international law, albeit largely from either a public law or a private law perspective and not often enough from an integrative perspective. Drawing upon various strands of domestic, comparative, and international legal materials, international lawyers have created a field of specialization (international law) with two subspecialties (public and private international law) that arguably constitutes its own tradition and subtraditions with a specialized language for resolving legal disputes that cross national borders or implicate various sovereignties. According to Daniel Philpott, this theoretical and doctrinal development of the "international law tradition is dedicated to extending to the entire globe a set of commitments to which states give their active assent."[1] Thus, "a planetary ethic is the very point of the tradition."[2] These commitments are borne out in the legal argumentation undertaken by international lawyers. Put in a slightly different way, when we theorize about international law, we draw on ethical discourse to create an ethic of international law, both public and private, that seeks to resolve transnational legal problems.

This realization will certainly come as a surprise to many international lawyers given that international legal theory is largely free of explicit claims that international law and ethics are intertwined. In fact, international legal theory is more often susceptible to claims that law and ethics should be separated in international legal discourse. Few public and private international law scholars forthrightly argue for an engagement of the ethical dimension in international law because modern international law still largely exists under a

[1] Daniel Philpott, "Global Ethics and the International Law Tradition," in William M. Sullivan and Will Kymlicka (eds.), *The Globalization of Ethics* (Cambridge: Cambridge, 2007), 17.
[2] Ibid.

spell of positivism,[3] although there have been challenges to this orthodoxy in recent years.[4]

Even if scholars do not make the question of ethics explicit in their analyses, it is nonetheless implicit in what the scholarship seeks to do – namely to negotiate conflicts between states, fora, peoples, and normative communities in such a way so as to determine what rule of law (a normative commitment itself) should govern a given dispute. In making this choice, the international lawyer engages in ethical reasoning by evaluating in a comparative fashion which laws or rules should guide the international legal community and choosing among competing possibilities to effectuate the international good. The question of what role international law and international legal theory plays in an international community cannot be made in isolation from a very basic question that joins law and ethics inextricably: What is the best way to effectuate the international good through law? In any statement of law, therefore, there cannot be a view from "nowhere;"[5] it is always a view from "somewhere," and that somewhere implicates ethics and ethical discourse.

The purpose of this volume is to explore what role ethical discourse plays in international law. In so doing, the following chapters uniquely explore the role of ethics in both public and private international law. This volume seeks (1) to delineate the role of ethical investigation in creating, sustaining, challenging, and changing international law and (2) to open up a conversation between two related disciplines – public and private international law – that frequently labor in different intellectual vineyards. By examining the role of ethical discourse in international law's public and private dimensions, it is hoped that this volume will open up new avenues for cross-disciplinary exchange in these important fields and related disciplines.

It should be said up front that this volume consciously avoids defining the precise contours of ethical inquiry, or, indeed, the very term "ethics" itself. This choice has been made in order to give the contributing authors the freedom to develop their own views of the ways in which ethics, ethical discourse, and ethical judgment play out in international legal theory. In the chapters that follow, therefore, the engagement of the ethical in international law occurs, among other areas, in the interstices of law and policy, as a gap filler to be

[3] See, e.g., Terry Nardin, "Legal Positivism as a Theory of International Society," in David R. Mapel and Terry Nardin (eds.), *International Society: Diverse Ethical Perspectives* (Princeton, NJ: Princeton, 1998).

[4] See, e.g., Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford, 2004); Mervyn Frost, *Global Ethics: Anarchy, Freedom, and International Relations* (London: Routledge, 2009).

[5] See Thomas Nagle, *The View From Nowhere* (Oxford: Oxford, 1989).

employed by courts and commentators in developing international law. To define ethics up front before seeking to uncover what role ethical reasoning plays in the development of international law would serve to needlessly cut off the possibility that ethical reasoning encapsulates more than was previously thought and, indeed, might mean something different in the years to come. It is hoped that the reader will not see this failure to define the key term of this volume as an artful dodge[6] but rather as a genuine attempt to create an open field for discourse, as that is how it is intended.

The topic of this volume is, however, not without some controversy. To be sure, much of the modern framework of international law is based on a skepticism of the relationship between law and ethics. This skepticism is grounded in the fear that appeals to ethics in international legal discourse are designed to conceal self-interested action and that the invocation of such terms might be used "by privileged groups in order to justify and maintain their dominant position."[7] As Martti Koskenniemi has provocatively argued, "the turn to ethics [in international law] is a politics. In the case of international law's obsession about military crises, war and humanitarianism, it is a politics by those who have the means to strengthen control on everyone else."[8]

This is, of course, not the only way to view the question, as the authors in this volume elegantly demonstrate. Ethics may at time be "a politics," but what this means is subject to a contestable vision of the right and the good that draws within its ambit the very question to be considered. Furthermore, ethics is surely more than politics, and exploring ethics in these areas is certainly fruitful as international law scholars and theorists go about grappling with resolving legal problems. The chapters that follow show that there is a way to engage the ethical dimension of international law without seeking to use ethics as a "Trojan horse" to sublimate what is at the end of the day raw politics and the will to power.

That is not to say, however, that ethical discussion, even open ethical discussion, does not run the risk of forcing out other versions of the right and the good as it goes about creating a normative vision for international law. The question becomes how to transport a socially imbedded practice such as ethics to an international community (assuming one can exist) without stamping out other competing social practices through the nomenclature of law. As one

[6] Cf. Charles Dickens, Oliver Twist (1838; describing the character the Artful Dodger as a character who is good at avoiding responsibility for his or her actions).

[7] Edward Hallett Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (New York: HarperCollins, 1964), 80.

[8] Martti Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," *The Modern Law Review* 65 (2002): 173.

commentator has explained, "[n]avigating difference doesn't require either assimilation or separation; it requires negotiation."[9] One might add to this important observation that it also requires constructive conversation. In the pages that follow, we will see that the language of law alone cannot answer the question of negotiating differences between legal orders and that some consideration must be given to other discursive tools, such as ethics, if there is a hope for some version of an international legal order. Recognizing this, to the extent that international law seeks to create a system of law above and beyond the state then such a system must itself be self-critical and seek to evaluate the ethical ground from which it springs.

To this end, the chapters are organized in three parts. The first part explores the role of ethics in public international law. The second part explores the role of ethics in private international law. The third part examines normative and theoretical perspectives on the role of ethics in international law generally, with a view toward encouraging a more integrated view of public and private international legal theory.

The section on the role of ethics in public international law begins with a provocative chapter by Roger Alford and James Tierney suggesting that a thicker description of public international law requires some consideration of a state governmental actor's recourse to ethical reasoning. In developing this "moral reasoning" theory of international law, Alford and Tierney draw on the writings of Lawrence Kohlberg to explore the cognitive process that governmental actors use to choose between inconsistent interests, values, claims, and norms in the process of complying with international law. Carefully avoiding articulating any one "right" version of the way in which a state's moral agents engage in moral reasoning in international law, they propose that scholars accept that states, like the human agents who act for states, employ different types of moral reasoning to resolve moral dilemmas in international law. After examining a series of case studies about contemporary moral dilemmas in international law, Alford and Tierney conclude that a law and psychology perspective of compliance with international law presents an opportunity to understand a state actor's reasoning in complying with international law.

Taking a slightly different approach, Oona Hathaway argues that the role of ethics in public international law is situated between "power and principle." It is, in her view, possible to glimpse the ethical decision making of actors in

[9] Paul Schiff Berman, "Towards a Jurisprudence of Hybridity," *Utah Law Review* 2010(1) (2010): 11.

international law as a mediating principle between positive law ("power") and normative theory ("principle"). In this vein, she offers an explanation of why states commit to treaties that constrain their behavior and how treaties, in turn, influence or fail to influence the behavior of states. By drawing on both political science and legal scholarship, she argues that if international law is truly law at all, then states abide by it not only because of a sense of positive, legal obligation but out of a sense of moral obligation. For Hathaway, this is where ethics and the study of compliance with international law directly connect and where the study of ethics might help international lawyers understand the binding legal nature of international law. Indeed, she argues that states that do not comply with international law are not only subject to legal sanctions and enforcement but also to moral approbation and its consequences. By adopting a nuanced understanding of when and how international law can shape what states do, Hathaway explains that international lawyers can find ways to use international law more effectively to bring order to a world that desperately needs it.

Mary Ellen O'Connell's chapter presents the international legal category that is indisputably concerned with ethical or moral norms, namely *jus cogens*, also known as peremptory or higher norms. In her view, the existence of *jus cogens* challenges those who separate law from morality, but the category suffers from the fact that international legal theory has for so long focused solely on positive law, seeking to exclude moral, ethical, and other considerations. She argues that international legal theorists, even those involved in human rights, have had little to say about the nature of *jus cogens* beyond acknowledging the category exists. O'Connell, a participant in the revival of natural law theory, seeks to offer a fuller explanation of *jus cogens* and to begin a discussion of the legal process appropriate to identifying *jus cogens* norms and applying them in practice. She starts with an overview of the evidence that *jus cogens* norms exist and for the type of norms that belong in the category. She then discusses the current theorization respecting *jus cogens*, and she points to the problems this is causing. She concludes by offering her own findings with respect to definitions and a proposal to improve the operation of international law's higher ethical norms.

The next section of the book shifts focus to investigate the role of ethics in private international legal discourse. Lea Brilmayer's chapter seeks to uncover and situate the proper place for ethical reasoning in private international law. After reviewing the problems of situating private international law in either a vested rights or governmental interest approach, which, in her view, exhibit an ethical commitment on the part of the advocate, she endeavors to construct

a common law model of private international law. In so doing, she hopes to encourage courts to consider not only the legal but ethical claims that lie at the heart of the private law process. Responding to her chapter, Michael Steven Green seeks to identify the obstacles that such a position must overcome.

Perry Dane's chapter builds on Brilmayer's subtle argument of the nascent importance of ethics in private international law by posing a thought experiment. His thought experiment posits a jurisdiction supremely confident that its own municipal law – down to the details of tort law, contract law, and family law – rests on natural law. If such a natural law forum existed, Dane asks this: Why would such a jurisdiction be willing to apply the substantive law of another place in a case involving foreign elements? Why should it give up its own law in favor of a foreign law that in its view is inconsistent with natural law? These questions lead Dane to consider the relationship of natural law theory to private international law. For him, this relationship creates a space for private international law to be accommodative of difference yet respectful of the profound underlying normative commitments of communities. In a turn that will come as a surprise for private international legal theorists, Dane proposes that the relationship between religious communities and the "other" as well as the ethic of love may have something to tell us about accommodating legal pluralism.

Trey Childress's chapter focuses on the role of ethics in United States private international law. His approach is both historical and theoretical. To begin with, he explores the common law ethos of judicial decision making that grounds the U.S. experience with law generally. The resolution of legal disputes in the United States is a part of an ongoing legal and ethical conversation within a community's law. When courts are asked, however, to examine private international law cases, Childress argues that the conversation is at risk of breaking down, either because cases stand outside the Anglo-American tradition or because of unique facts that stretch positive and common law decision making beyond the bounds previously encountered in case law. He shows that courts have looked to the conflict-of-law tradition for answers. Childress's review of various conflict-of-law theories illustrates that behind each of these theories lies certain ethical commitments that ought to be more forthrightly engaged. For him, the common law notion that courts are exercising discretion through judgment for a community is taxed to its limits in transnational cases, for there is not one community for which a court is to exercise judgment. A court is, at best, only constrained by principles drawn from domestic analogues and these principles are subject to manipulation in order to reach a "proper" result in the case at hand considering the transnational aspects of

the case. In light of the foregoing, he proposes that a focus of future private international law scholarship should be to (a) define or refine the criteria for assessing ethical judgment in the multistate transnational context and (b) define the circumstances under which ethics and ethical reasoning can tip the scale in transnational cases, if at all.

The final section of the book is dedicated to understanding the theoretical relationships between ethics, public international law, and private international law. Samantha Besson's chapter raises the question whether human rights are ethical, political, or legal. She argues that by not paying sufficient attention to the legal nature of human rights and by conflating the law of human rights too quickly with their politics or practice, current human rights theories miss a central component of the normative practice of human rights, thus impoverishing their moral account of human rights. Furthermore, they deprive themselves from essential theoretical insights about the nature of normative practices and hence of resources in their efforts to bridge the gap between human rights qua critical moral standards and the political practice of human rights. The point of her chapter is to show how legal theory can provide a useful resource in the light of which many of our current discussions in human rights theory could be more fruitfully held.

Patrick Glenn's chapter seeks to use the process of genealogy to explore whether there is an underlying "ethic" of international law, both public and private, that can be glimpsed throughout its history. For him, the underlying ethic of international law is thus found primarily in the normative claim that justice, at the international level, is best defined in terms of the relations of states and not in terms of the relations of individual human beings. Notwithstanding this realization, Glenn argues that international law, accompanied by its underlying ethic, is capable of engagement with novel or different normative claims. International law, even seen as positive law, would not constitute a bar or obstacle to recognition of such claims as law, because its underlying ethic would provide a normative repository for engagement with them.

* * *

When read together, these chapters confirm that there remains much important scholarly work to be done in examining the role of ethics in international law and how the ethic of international law continues to develop in both its public and private forms. Indeed, when viewed broadly, a self-critical reflection on the role of ethics in international law may do much to push international lawyers to recognize inherent assumptions in their lines of argumentation that call for further scrutiny, especially as international lawyers go about making

sense of varying ideas of the right and the good, and indeed of law, that exist throughout the world. Remembering that international law is both norm generative as well as a form of argumentation, the international lawyer must seek to uncover semantic moves in the very practice of international law. It is that realization that makes the study of the role of ethics in international law not only fruitful and interesting but necessary and proper.