1 Introduction

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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 or 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 jus 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] Emmer. de Vattel, *Le Droit des Gens ou principes de la Loi Naturelle Appliqués á 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, pactitii et consuetudinarii distinguitur* (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 humanity[13] – 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 Etats souverains, doivent être considerés 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

of international law in the light of the liberal, pacifist, and commercial ideals with which they are so often associated.

Immanuel Kant has had a vast influence in advancing understanding of these related ideas, which Porras suggests have been imbedded in international law from the beginning. The contemporary turn to cosmopolitanism is in fact a return to origins, and the more intolerant forms of parochialism have always been somewhat at odds with the basic structure of international law. Classic liberal political theory developed in large part to justify the coercive capacity of the state, reconciling individual autonomy with collective decision making through the application of right reason to civil society. States exist (on this account) to serve the interests of *all* their citizens. Transposed to the international arena, this makes international law the servant of *all* states, and all the people who inhabit them. The sovereign state makes sense only in the company of other sovereign states, in the same way that the rights of the individual require the presence of other individuals to make sense. Both depend on finding an ordering principle that could serve to justify collective constraint, beyond mere force. For Kant, the ultimate goal of the international system is true or perpetual peace, which would enable the full (or at least a greater) development of human capacities.

Porras understands Kant's cosmopolitanism as offering his solution to the liberal problem of reconciling individual autonomy with collective decision making. The preexisting, permanent, and irreplaceable global community arises from the simple fact of coexistence. Humans desire the possibility of nonhostile encounters between strangers. International law is therefore a necessary aspiration of the human race. For Porras, as for Kant, cosmopolitan right is the end point toward which universal history must tend, for only through cosmopolitan right can humanity hope to create the required conditions for human flourishing. This cosmopolitan attitude makes peace possible and opens the door to commerce, which brings separated humanity back into relations of friendship. Because Earth is a finite space, human beings cannot disperse over an infinite area but must necessarily tolerate one another's company. Porras shows this doctrine of Vitoria, Grotius, and Kant to be at the basis of international legality. The duty of mutual hospitality leads to reciprocity and cross-cultural exchange.

New cosmopolitanists extend the theories of the early publicists by deepening the reach of international law. Commerce has vastly expanded the common interests of disparate peoples (as Grotius and Kant predicted it would), which makes the necessity and necessary scope of global justice much broader than it was before. Porras notes, however, that international law beyond the borders of republican liberal states raises all the problems of accountability,

legitimacy, and enforcement that the nation-state first arose to address. The cosmopolitan assertion of a preexisting worldwide moral community seeks to solve this problem of legitimacy but seems to require the creation of stronger and more intrusive institutions of global governance. Porras worries that these may in turn weaken the present flawed but effective system of state-based rights. Liberal cosmopolitanism may undermine cosmopolitan liberalism if it saps the vitality of existing nation-states.

Most people think of human rights as being among the most cosmopolitan areas of law. James Griffin (Chapter 5) examines the basis of this assumption. If human rights are rights that we have simply by virtue of being human, then they share an essential element of the cosmopolitan perspective in their universality. That still leaves open the possibility of disagreement over the requisite sense of "human," or which aspects of humanity have relevance for understanding the nature of our rights. Griffin proposes that the best substantive explanation for the existence of human rights arises from the human capacity to imagine and define the possibility of a good life. This capacity allows for our "normative agency" or "personhood." Personhood in this sense must be protected not only through the principled recognition of its importance but also in the practical structure of society. So there are two grounds for human rights: personhood and practicalities. The existence of a right can be confirmed by showing, first, that it protects an essential feature of personhood, and, second, that its determinate content results from practical consideration of the nature of human society.

Personhood involves human interests that are not particular to any person or society, but also considerations of policy concerning how best to protect these interests in practice. This opens the door to culture, ethnicity, or other parochial considerations. Griffin suggests that many seeming differences between the ethical perceptions of different societies arise in reality from their different material conditions. Universal rights may apply differently in different circumstances. Autonomy, as protected by rights, and solidarity, which advances community, need not conflict and are both desirable. Human interests (a prudential value) imply human rights (a moral standard), but there may be a conventional element in applying this insight to particular societies. Griffin argues that the transition from prudence to morality progresses because a reasonable person who respects the prudential value (for example) of autonomy will also recognize the respect that is its due. This respect could take different forms in different circumstances. Such variations between societies do not reveal differences in the framework of basic evaluations but merely a highly constrained exercise in arational opting.

Griffin suggests that the primarily Western development of modern conceptions of international law and justice poses problems for the validity (for

example) of universal human rights only to the extent that these Western-elaborated ideas are false or harmful or incomplete. Nothing prevents people in different societies from recognizing truths first comprehensively articulated by others. All societies mix the local with the global in varying degrees, with the global elements now often expanding because of the massive increase in global communication and commerce. The idea that an intersociety pluralism of conceptions of justice and the good is an ineradicable feature of international life makes little sense in the world as it exists today (if it ever did). The argument cannot be that deep-seated cultural differences are an inescapable element of international society but that they *ought* to be. If the local particularities of cultural tradition are desirable, then human rights and other cosmopolitan values might be better advanced by seeking out local counterparts for universal values and recognizing their importance. Griffin warns, however, that in doing so, we must not lose touch with the real and necessary structure of the universal rights themselves. Often it will be more effective to promote a universal vocabulary to support universal values.

Maxwell Chibundu (Chapter 6) examines the importance of parochial values in international law, both in the positive sense that they deserve respect and in the negative sense that more powerful nations may impose their own parochial conceptions of the law on other states through false claims of universality. Chibundu offers human rights as an example of an area of law in which the United States and other Western powers have imposed parochial viewpoints on the world, confusing local European traditions with the requirements of international justice. Yet the world continues to be divided into substantially self-regulating nation-states. Chibundu examines the particularism inherent in the liberal international order and suggests that modern cosmopolitan liberalism contains at its heart a fundamental contradiction between international human rights and the collective power of the state. The growing emphasis on universal human rights in international law has tended to delegitimize the state, whereas the valorization of the state as protector of its citizens (particularly after the World Trade Center attacks) has tended to minimize the equal application of supposedly universal rights.

Chibundu distinguishes "philosophical" from "legal" understandings of rights. Philosophers begin by examining human nature to see what it requires, whereas lawyers look for the "sources" of law. Lawyers (on this theory of the rule of law) should concentrate on the validity of claims that are redressable through governmental power. Legal discourse is less a statement of normativity than a description of existing human institutions. The *concept* of human rights as explained by philosophers may have a wide variety of practical *conceptions*