Institute for Law and Philosophy
Foundations of International Law Conference
April 23 – April 24, 2010

Abstracts

Professor Mark Drumbl
"Always Innocent? Child Soldiers, Justice, and the International legal Imagination"

International law unduly minimizes the autonomy, control, and agency of child soldiers in contexts of atrocity. International legal interventions – including international criminal law – underestimate dispositional factors while overestimating situational factors in explaining why children end up in fighting forces and why some among them serially commit acts of atrocity. Accordingly, exploring international law's approach to child soldiers also illuminates deep-seated philosophical and jurisprudential questions regarding how international law should respond to mass atrocity generally. Advancing such a reflective process is one of this book's central goals. The conversation thereby extends from the child soldier to much broader spaces and places.

Professor Claire Finkelstein
"Rational Contractarianism and International Law"

It is a common theme that international law cannot be considered a true legal system as it lacks any means and method of enforcement. Detractors therefore suggest that both with respect to customary law and with respect to treaty obligations, all constraint is only self-imposed, and consequently useless as a basis for establishing a true international rule of law. In support of this claim, one might cite the fact that nations continue to display considerable strife and competition, even in situations in which their interests would be greatly advanced by cooperation. Nevertheless, there is arguably a contrary trend, according to which we observe a convergence of interests among states and an enhanced ability to cooperate. This is arguably the emergence of the butterfly from the chrysalis: Nation states may be slowly abandoning the natural state of war, under precisely the terms of cooperation Hobbes would have predicted for rational beings in a state of nature. This process of an emerging legal order, however, must be understood as occurring in terms that are quite different from those of domestic law: in the international context, the legal order is emerging from a gradual process of mutual self-limitation, rather than as a result of external enforcement. This paper seeks to provide a model of how self-constraint on the part of nations can generate law in this sense.

Professor George Fletcher
"The Misuse of Customary International Law in International Criminal Courts"

I will explore the misuse of customary international law in the current decisions of the international courts and in the literature. The problem arises largely because in public international law it is acceptable and indeed necessary to have resort to customary international law to bind non-

signatory states. But in criminal law it is totally inappropriate. Customary law is taboo as a source of binding obligations in criminal law and even worse, it has no place in the development of the theory of justification and excuse, where it often appears in the standard literature. The point of the paper is to bring international criminal law in line with the general principles governing criminal law.

Professor Oona Hathaway and Professor Scott Shapiro
"Is International Law *Law*? The Question of Coercion"

In this paper, we consider the objection that international law is not a coercive normative system. We argue that this objection is actually multiply ambiguous and will attempt to distinguish several different versions. Having disambiguated this objection, we will attempt to meet various versions of the objection by showing that international law does contain those very institutions and rules that its detractors deny it has. Furthermore, we will argue that international law contains the very same institutions and rules regarding sanctioning and enforcement that domestic law possesses. International law will turn out to be much more similar to domestic law than the critics of international law have realized.

Professor Benedict Kingsbury
"State of Nature versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International
Political and Legal Thought of Grotius, Hobbes, and Pufendorf"

Three foundational approaches to international order and law beyond the state were framed in early- to mid-seventeenth century Europe, by Hugo Grotius (1583-1645), Thomas Hobbes (1588-1679) and Samuel Pufendorf (1632-94), at the same time as the recognizable modern idea of the state was itself being framed. Grotius, Hobbes and Pufendorf each took distinctive approaches to the problems of whether and how there could be any legal or moral norms between these states in their emerging forms. They differed in their views of obligation in the state of nature (where *ex hypothesi* there was no state), in the extent to which they regarded these sovereign states as analogous to individuals in the state of nature, and in the effects they attributed to commerce as a driver of sociability and of norm-structured interactions not dependent on an overarching state. The core argument of this chapter is that the differences between them on these issues are of enduring importance. To situate them in what we regard as a key element of their intellectual context, that is the Greco-Roman lineage of ideas on law and on order and justice beyond the state, we outline in section I the Carneadean debate and argue for the importance of Roman law and of Greco-Roman political ideas in 16th century writings of Vitoria, Vasquez, Soto, Gentili, and others whose works influenced the 17th century writers.

Professor Mattias Kumm
"Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State"

The distinction between domestic and international law is conventionally believed to be deep and significant. Whereas international law has traditionally been plagued by ontological skepticism (is it really law properly so called?) and remains mired in empirical debates about compliance and normative debates about its legitimacy, constitutional law as the supreme national law has in the last decades primarily been discussed in terms of competing normative theories relating either to the constitution as a whole or specific elements of it. This article argues that the imagined divide between international and national law is the result of a misguided statist cognitive

frame that is used to construct the legal and political world and suggests a cosmopolitan constitutionalist cognitive frame for an integrative critical reconstruction of both national and international legal practice.

Professor Matthew Lister
"The Legitimating Role of Consent in International Law"

According to many traditional accounts, one important difference between international and domestic law is that international law depends on the consent of the relevant parties (states) in a way that domestic law does not. In recent years this traditional account has been attacked both by philosophers such as Allen Buchanan and by lawyers and legal scholars working on international law. It is now safe to say that the view that consent plays an important foundational role in international law is a contested one, perhaps even a minority position, among lawyers and philosophers. In this paper I defend a limited but important role for actual consent in legitimating international law. While actual consent is not necessary for justifying the enforcement of *jus cogens* norms, at least when they are narrowly understood, this leaves much of international law unaccounted for. I show how, given the ways that international cooperation is different from cooperation in the domestic sphere, actual consent is both a possible and an appropriate legitimating device for much of international law.

Professor Craig Martin
"Taking War Seriously: The Case for Constitutional Implementation of *Jus ad Bellum*"

The constitutional implementation of the principles the *jus ad bellum* regime would reduce the incidence of illegitimate armed conflict. The causes of war exist at the level of the decision-maker, the structure of the state, and the structure of the international system. Yet since the early twentieth century there has been little focus on domestic causes, and almost exclusive reliance upon international law to constrain the use of force.

The domestic implementation of *jus ad bellum* principles would be consistent with modern theories of international law compliance. Employment of domestic legal mechanisms will be increasingly important as the *jus ad bellum* regime likely evolves. Domestic implementation of *jus ad bellum* would not only strengthen constraints on the international causes of war, but it would engage the domestic causes of war in important ways, and strengthen the factors that lead to the democratic peace.

The proposed model would require that decision-makers sufficiently consider whether a contemplated use of force is consistent with the principles of jus ad bellum. It is thus a process based provision. It is part of a broader model which that would include a requirement for legislative approval and provision for limited judicial review of the decision-making process. The proposal engages recent debates in several countries over the need for greater constraint on decisions to use force, and over the future of the *jus ad bellum* regime.

Professor Larry May
"*Jus Cogens* and Procedural Rights in International Law"

In this paper I will defend a conception of *jus cogens* norms as universal moral norms that play an especially important role in an international rule of law. *Jus cogens* norms are rights or rules that can not be derogated even by treaty. In the list that is often given, *jus cogens* norms include norms against aggression, apartheid, slavery, and genocide. All of the members of this list are substantive rights. I argue that some procedural rights such as habeas corpus and nonrefoulement should also have the status of *jus cogens* norms.

Professor Jeff McMahan
"Individual Responsibility and the Law of *Jus ad Bellum*"

If we're to prevent unjust wars and to protect the rights of the innocent, we must try to eliminate the conditions that at present tend to excuse unjust combatants for the killing of innocent people. These excusing conditions facilitate participation in unjust wars. We must, in particular, greatly reduce the epistemic constraints within which combatants must act. We need to devise ways of enabling combatants to have knowledge of the moral character of their action. We must (1) increase our own understanding of *jus ad bellum* and then (2) make that enhanced understanding accessible to ordinary combatants. If we can achieve a deeper and more rigorous understanding of *jus ad bellum*, and if we can translate it into law, we'll then need an impartial court to interpret and give authoritative decisions on the application of that law. This could be a new court, or we could expand the role of an existing court such as the ICC. This court would be empowered to make legally authoritative judgments about matters of *jus ad bellum*, on the basis of a rich and detailed law of *jus ad bellum* informed by rigorous philosophical thought about the morality of war.

Professor Darrel Moellendorf
"Human Dignity, Equality, and Global Justice"

My argument proceeds as follows: I discuss some normative implications of the view that the inherent dignity of persons demands respect. Next I defend the view that duties of social justice based upon the norm of equal respect for human dignity are presumptively egalitarian in content. I then provide an account of when the demands of social justice apply to persons, employing the principle of associational justice and apply the previous considerations to the global economy, arguing that it is an independent source of egalitarian duties of justice. I then make the interpretive argument that the economic aspects of a complex association generate a norm of reciprocity. Finally, I conclude with a pro tanto argument that inequalities in the global economy are serious injustices.

Professor Jens Ohlin
"Nash Equilibrium and International Law"

Game theory has been a mainstay in the international relations literature for several decades, but its appearance in the international law literature is of a far more recent vintage. While game theory simply offered theorists of international relations a model for explaining their accounts of state relations, the methodology has had a far more explosive effect among international lawyers. Recent accounts have harnessed alleged lessons learned from game theory in service of a new brand of "realism" about international law. These skeptical accounts conclude that international law loses its normative force because states that "follow" international law are simply participants in a Prisoner's Dilemma seeking to achieve self-interested outcomes. Such claims are not just vastly exaggerated; they represent a profound misunderstanding about the significance of game theory. Properly conceived, the best way to understand international law is as a Nash Equilibrium – a focal point that states gravitate towards as they make rational decisions regarding strategy in light of strategy selected by other states. In domains where international law has the greatest purchase, the strategy is reciprocal compliance with international norms. This picture is entirely consistent with international law's normativity. Simply put, the Prisoner's Dilemma also provides a model to explain morality itself (self-interested actors who accept reciprocal moral constraints on action as a social contract), and this cannot be taken as a reason to deny morality's normativity, on pain of a *reductio ad absurdum* to complete moral skepticism. The paper concludes by briefly rejecting other

alleged reasons why states need not follow international law, including the supposed inability of collective entities to bear moral or legal duties.

Professor Mark Osiel
"Rethinking the Law of War: Collateral Damage in Targeting Terrorists"

This paper contends that the frequent departures of war crimes law from the apparent requirements of justice – as seen through the abstract lens of ideal-theory – can be better ascribed to cognitive shortfalls than to constraints of *realpolitik*. What does the law of war crimes assume about how much of what kind of information, technical and ethical, fighters at all levels know or can be expected to acquire? When, and on what empirical basis, are these assumptions warranted? For instance, the law requires commanders to employ no more force than "necessary" to achieve a given military aim. But how much do they really know about the measure of force required to achieve a given tactical goal before undertaking it? The limits of their understanding here explains the apparent lenience of courts when judging them. The law further demands that "incidental" damage to civilian life and property not become excessive "in relation to the concrete and direct overall military advantage anticipated." On what kinds of learning do soldiers rely when weighing the competing values in balance here? To say that these values – innocent life versus military success -- are incommensurable (as philosophers often do) is simply a more technical way of saying that we know of no acceptable means for measuring them along a single scale? Several other examples of prima facie injustice within the law of war crimes are also explained and justified by such epistemic or informational deficiencies in what is known about cause-effect relations in war.

Professor Thomas Pogge
"The Role of International Law in Reproducing Massive Poverty"
Each day, some 50,000 human beings —mostly children, mostly female and mostly people of colour —die from starvation, diarrhea, pneumonia, tuberculosis, malaria, measles, perinatal conditions, and other poverty-related causes. Most of this death toll and the much larger poverty problem it epitomizes are avoidable through minor modifications in the global order that would entail only slight reductions in the incomes of the affluent. Such reforms have been blocked by the governments of the affluent countries which, advancing their own interests and those of their corporations and citizens, are designing and imposing a global institutional order that, continually and foreseeably, produces vast excesses of severe poverty and premature poverty-related deaths. There are three main strategies for denying this charge. One can deny that variations in the design of the global order have any significant impact on the evolution of severe poverty worldwide. Failing this, one can claim that the present global order is close to optimal in terms of poverty avoidance. Should this strategy fail as well, one can still contend that the present global order is not causing severe poverty but merely failing to alleviate such poverty as much as it could. I discuss these three strategies in order.

Professor Alexander Somek
"Monism: A Tale of the Undead"

As is often the case in intellectual history, when prior debates are almost forgotten the reformulation of older ideas comes dressed up in new vocabulary. What has emerged from the constitutional context of European Union Law and begun to reach out into general international law are (relatively) new kids on the block, namely, "pluralism" and "cosmopolitanism". Adorned with constitutional pathos they are advanced as alternatives to the trite dualist and the long abandoned monist paradigm. The article argues, first, that pluralism and cosmopolitanism do not really offer any alternatives. Making sense of the relevant positions requires translating them into the

conceptual world of the received debate. If defensible, pluralism, either in simple or cosmopolitan form, formulates a new version of monism; if not, it amounts to a travesty of constitutional ideas, which assimilates legality to the mindset of administrative action. Moreover, it is argued—in a spirit somewhat reminiscent of Kelsen—that choosing one construction over the other is a question of political philosophy. Monism commends itself not least owing to its superb constitutionalist credentials.

Professor Ruti Teitel
"Global Transitions, New Perspectives on Legality and Judicial Review"

This paper explores the entanglement of international law jurisprudence with transitional rule of law and explores the role of new judicial institutions in guiding the emergent global order. My claim is that there are forces of change relating to the global transition that help illuminate the role of law, particularly at time where political authority is itself fragmented and often weak. Hence, a look at contemporary international jurisprudence regarding state practice may well inform the question of meaning of legal norms. One might also ask about the role of the expanded international judiciary in the legitimation of international law, through interpretation based on human-centered interests and values – with implications for constitutionalism as well. Judicial interpretation is proving well suited to making sense of diverse normative sources, under conditions of political conflict and moral disagreement. Courts are inherently in dialogue with other courts and institutions that also play interpretive roles, and their decisions in individual cases give meaning to law without purporting to give "closure" to normative controversy in politics and morals.

Professor Fernando Tesón
"International Law and the Doctrine of Double Effect"

The laws of war reflect a version of the doctrine of double effect. A major defect of the Geneva Conventions, however, is that they sever the *ius in bello* from the *ius ad bellum*. I attempt to fix the problem and restate the doctrine in order to allow it (sometimes) to justify the collateral deaths in an otherwise justified war. In order to do this, the DDE must require, not only that the agent should have the right intention, but also that the cause for which he fights should be compelling *enough*. More specifically, the DDE has three proportionality components: conduciveness (the act of war must be conducive to the realization of the cause), quantitative proportionality (the material destruction must be proportionate to the material benefits), and qualitative proportionality (the cause must be compelling enough to justify the collateral deaths.)

Professor Carl Wellman
"National and International Law"

Although many jurists are skeptical about the existence of moral human rights, very few of them deny the existence of international human rights. Human rights are explicitly recognized in international treaties and a few are established in international customs. Because treaties and customary practices are the two primary sources of international law, one cannot deny that human rights exist under international law. However one can and some do deny that these are real legal rights because so-called international law is not real law. There is no international legislature and what few international courts there are have very limited jurisdiction and almost no power to enforce their decisions. How, then, can international law be real law? And does it have institutions capable of conferring real legal rights?

No one doubts that municipal legal systems can and do recognize and enforce real rights. Although there are important differences between constitutional, statutory and common law rights, all are clearly rights in the strictest sense. Therefore, let us begin by asking how a municipal legal

system can confer rights upon its subjects? Presumably an adequate account of municipal law would explain, among other things, how legal systems impose legal duties and confer legal rights. Furthermore, it would provide one basis for deciding whether international law is similar enough in the relevant respects also to establish real human rights. A promising account of municipal and international law would conceive of them as social practices of creating and applying authoritative texts.