International Legal Theory

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International Legal Theory: Setting the Stage

This inaugural issue of *International Legal Theory* is the product of the hard work and generous efforts of the founding members of the ASIL Interest Group on the Theory of International Law. This publication wishes to provide a forum for those who conduct research on the theory of international law. The focus of the journal renders the input of scholars from related disciplines most welcome. The informal protocol of this publication hopes to encourage experimentation of new ideas among scholars of international law.

The group's Chair will indicate a general theme for discussion and circulate drafts of solicited articles to the members of the group. As a matter of coordination, submissions can be sent directly to the Editor, at George Mason University Law School, Arlington, Virginia, or to the group's Chair at the Arias Foundation, San Jose, Costa Rica. Responses and comments will be published together with the lead articles, subject to reasonable space constraints. These contributions will set the stage for an open forum on current issues of international law and theory. The growth of this journal will be left primarily to a process of 'organic' evolution, with its format adjusting to the changing needs and inputs of the contributors. Those of you who share my trust in spontaneous evolution will also share my hopes for the bright future of *International Legal Theory.*

The Editor

Letter from the Chair: Joaquin Tacsan

I am pleased to present this first issue of *International Legal Theory*, a newsletter of the recently established Interest Group on the Theory of International Law, This initiative arises from the premise that legal theory must play an increasingly relevant role in the study of world issues. The Group also responds to a shortcoming in the realm of international law: the need for greater theoretical investigation and exploration of the role of international law in global affairs.

In a heterogeneous international community, the rule of law has the capability to act as a unifying criterion for international behavior be it between States, NGOs, international organizations, or even individuals. International law must assume a greater role as a guiding tool that can influence decision making among international actors. This Interest Group offers the opportunity to exchange ideas about what part international law can and should play in today's world. As members, we each have the opportunity to enhance the role of international law and make our work more relevant to today's ever-changing world.

Throughout the Cold War, theoretical work in the held of International Law was scarce and fragmented. There are, of course, exceptions, the most obvious being the transcendental

work of Myres McDougal and Michael Reisman of the New Haven School. Others who have made significant contributions to the field of international legal theory include Richard Falk, Thomas Frank, Louis Henkin, Terry Nardin, and Oscar Schachter, among others. Despite the relative lack of theoretical exploration in the realm of international legal theory during the Cold War, recent years have witnessed a rebirth of studies in international law. The intention of this Newsletter is to publish contributions from recognized scholars, as well as papers by new students of international law, in order to encourage discussion and debate on issues of international legal theory. Member commentaries and reflections on these articles will also be published.

In this first issue, I am pleased to present Professor Nicholas Onuf's review, International Legal Theory: Where We Stand, which offers a picture of different theories on the nature and relevance of international law in global relations. Recognizing the thought put into Professor Onuf's quality work, I would like to point out what I feel is an important addition: the work of Professor Richard Falk. In his article, *A New Paradigm for International Legal Studies: Prospects and Proposals* (R. Falk et. al., *International Law: A Contemporary Perspective*, 1985, at 651) Professor Falk presents a concise version of his perspective for defining international relations in the new world order. In a world of constant transition, it can be difficult to determine where we are heading, or in what direction we wish to move, if we do not know where we are starting from. A very important component of Professor Falk's analysis perhaps then lies in his contribution to defining where it is that we currently find ourselves. Falk's insight recognizes that the role of the State in international relations is decreasing, and that any reform in global relations will likely arise from non-governmental actors. Indeed, he attests that change will likely occur in opposition to current economic and political power centers. Falk offers a means of looking at the world in a way that will help us formulate "a world order ideology appropriate to human needs and aspirations." Professor Onuf recognizes many contributions to international legal theory, but I feel Professor Falk's work cannot be overlooked. For this reason, I have asked Professor Falk to contribute to our next Newsletter.

In the Groups' initial meeting last April, it was agreed that communication and the interchange of ideas and opinions among members was of the utmost importance for our nascent group. To date, there has been some exchange among members, but I would like to encourage each of you to fully involve yourselves in the Group. Only through a constant interchange of information and communication can we fully take advantage of the resources and talents available to us through this network of legal scholars and practitioners. Communication among group members should be dynamic and generate reflection, discussion and debate. The use of electronic mail is of course the most convenient for those members who have access to it. But I encourage each of you to write a letter, send a fax, make a phone call, to discuss with your colleagues your ideas--or debate theirs. Only by generating discussion and debate will we be able to move our field forward and develop new ideas to increase the relevance of international law in global relations.

Finally, I would like to extend my most sincere thanks to each of the 50 current members of the Group for their participation and interest. I welcome you to this inaugural issue of our Newsletter, and I hope you enjoy it.

International Legal Theory: Where We Stand

These remarks are adapted from Professor Nicholas Onuf's discussion at the Inaugural Meeting of the ASIL International Legal Theory IG, held in Washington, D.C, April 8,1994.

Few students of international law overtly concern themselves with matters of theory. In view of the recent revival of interest in social theory and its philosophical foundations, this is at least mildly perplexing. After all, when the social sciences last went through an intense period of theoretical development (this was at mid-century, in the name of "science"), Myres McDougal,

Harold Lasswell and their associates at Yale Law School proposed a comprehensive theoretical system that no one (at least in the English-speaking world of international law) could ignore for long. Shifting inflections in the field's discourse suggest the gradual absorption of the message from New Haven without the encumbrance of the school's aggressively inaccessible conceptual vocabulary.

The current boom in social theory is deeply critical in spirit. Much of its energy is directed against the pretensions of science and the positivist temper of the modern world. The Critical Legal Studies Movement exemplifies the latest theoretical turn. Yet despite the appearance of two important books (David Kennedy's *International Legal Structures*, 1987, and Martti Kostenniemi's *From Apology to Utopia*, 1989), today's critical theorists have simply not had the same impact as yesterday's policy scientists; no one speaks of the Harvard school as they still do of the New Haven school.

By definition, of course, the critical movement is normatively driven. So too was the New Haven School, and openly so. The difference is that the latter's normative thrust well suited policy elites, not to mention most practicing lawyers, in the United States, while the latter's normative critique is dearly directed against those same groups in the United States and Europe. People tend to reject wholesale criticism out of hand. If the recent, postpositivist turn in social theory demands such criticism, then they will reject a renewed discussion of theory as well. Supporting this tendency is the strong vocational orientation of international law, and looming behind it is the massive edifice of legal positivism. This is of course a theory of international law - one that is closely linked to the prevailing positivist temper of modernity and so well developed that it has become unimpeachable doctrine for the vast majority of us.

As doctrine, legal positivism rests on three pillars: (1) international law has fixed sources (rules for making rules), (2) subjects (rightful participants in the system of rules) and (3) sanctions (rules for securing compliance with rules). Recent decades have seen efforts to undermine each pillar. In my opinion these efforts failed. To be more precise, they have engendered strikingly successful rescue efforts, with the overall effect of substantially reinforcing the entire edifice. As for sources, efforts to get beyond the modalities of state consent (custom and treaties) to other sources of normative inspiration has produced more elastic, and more useful conceptions of the same old state-dominated sources. As for subjects, the insistent claim that individuals have rights not conferred by states might be seen as supporting a naturalist theory of law against positivism. Some students of the subject are comfortable with this result, but most are not for the practical methodological reasons that enabled positivism to prevail over naturalism in the first place. Instead, they see rights not conferred by states as nevertheless conferred directly by international law as - what else? a system of positive law marked by fixed sources, subjects and sanctions. Those subjects include individuals for limited purposes (lawmaking not among them), as has always been the case. Finally, as for sanctions, the issue has been largely a question of how to use prescribed sources to open up the narrow compass of the UN Charter without going through the impractical expedient of ignoring or revising the Charter itself.

These developments within positivism picked up momentum in the mid-60s and ran their course in about two decades. They are not just or even chiefly matters of theory. In the first instance they appeared as questions of practice that state agents were obliged to consider in terms of (the limits of positive) law. From a practical point of view, state agents treated law as more pliable or porous than positivist theory tolerates, and theorists responded by striving to maintain the hard-edged integrity of their theoretical system. To the extent that theorists failed to do so - to the extent that they had to admit the importance of "soft law" in many domains of practice- the effect was to broaden the edifice of positivism and make it more supple in the face of rapidly changing circumstances. This is the reason we have seen so little theoretical activity within the confines of positivism over the last several years. After twenty years of accommodating change, little is needed. Shoring up positivist doctrine has been a great practical success. Nevertheless, as a theoretical system, positivism is considerably less tidy than it once was, and its boundaries have progressively blurred. This is the deep issue with "soft law," which is less a

problem for practicing lawyers (law being what they make it) than for any positivist (and not just legal positivists) for whom reality is either/ or: things are either in one category or another, either it's law or it's not.

Insofar as the current wave of social theory is postpositivist it repudiates the positivist premise that, objectively speaking, things must be one way or the other. Here we have a warrant for the critical evaluation of positivist doctrine. Such an evaluation would be less overtly normative than the critical school's but fully as radical (sharing, for example, that school's suspicion of any firm distinction between facts and values), and it would acknowledge the possibility that the world has "really" changed in the last few years. If the several hundred old system of ordered relations among states is in the process of undergoing a transformation that makes the very idea of state (either it's sovereign or it's not) unintelligible, positivists could not see it. They could only see further complications requiring more doctrinal tinkering, only now with less and less evidence of success.

I am not claiming that any such transformation is indeed taking place. I am only suggesting that we could recognize and respond to it most successfully by following up on a variety of postpositivist initiatives in social theory. There have already been some attempts to bring postpositivist theory to bear on the subject of international law. I mention three without implying that others may not turn out to be even more suggestive. First is Friedrich Kratochwil's effort to understand legal argument as a mode of practical reason (*Rules, Norms, and Decisions*, 1989). This perspective shifts the emphasis from rules (where either/or considerations prevail) to the discursive strategies through which normative material guides decision-making. Second is my own work (*World of Our Making*, 1989). It keeps the positivist emphasis on rules but sees them as linguistic phenomena at the center of continuous social construction. Recourse to rules makes their users and their social circumstances what they are, and in the process changes the rules as well. Both Kratochwil's work and my own cast doubt on the positivist presumption that law is something we can speak objectively about. The third initiative is feminist theory, to which Hilary Charlesworth, Christine Chinkin and Shelley Wright provide an admirable introduction (85 AJIL 1991). Feminist theory and the critical school draw on many of the same sources of conceptual inspiration. At least for many of us, the feminists' normative edge is just as sharp and cuts closer to home. Unlike the critical school, feminist theory has a practical agenda and evident staying power. For our purposes, feminist theory's most striking contribution is the assault on the positivist faith in either/ or categories (he/she, for example, or North/ South) as normatively neutral.

One need not be convinced that the state is becoming obsolete and the system of lawful state relations an illusion, not to mention a mockery of social justice, to gain from social theory, because not all contemporary social theory is adamantly postpositivist. Here I offer two of many possible examples. First, AnneMarie Burley's recent review of international relations theory (87 AJIL 1993) points up the importance of international regimes. Note that international relations theorists appropriated this concept from international law and developed it extensively (although, in my opinion, with better results had more international legal scholars been involved). Second, students of international law wishing to promote democratic governance (e. g., Thomas Franck, 86 AJIL 1992) could profit from an extremely active ongoing discussion of democratic theory, the spectacular rise of interest in civil society and the noisy debates between liberals and communitarians.

Many see the resurgence of social theory as evidence of some deep and perhaps terminal change in the modern world. It is useful to treat all such claims skeptically, for we all lack enough perspective on the trajectory of modernity to substantiate them. The main problem, of course, is that we are too close to events (and when we finally get some perspective on them it won't matter so much). It would help, however, if we knew more about modernity where it came from, how its (positivist) depiction of the way things are came to seem so plausible and even necessary, and why its has endured so long and with such profound effect on the life of the planet. Students of international law can play an important, even essential role in the project of

understanding where modernity came from, in order to understand better where it may be going. My conviction on this score underlies my current work on 18th century international thought (see 88 AJIL 1994). The history of international legal thought has languished (holding aside the attention Grotius received in 1983 on the 400th anniversary of his birth) almost as much as has international legal theory. There are signs of a revival, just as there has been a considerable revival of interest in the history of international thought among international relations theorists. I should also note that a vigorous community of Japanese scholars has devoted itself to the early modern history of international law for some time, though little of this work is available in English (but see Yasuaki Onuma, *A Normative Approach to War*, 1993).

I believe that the study of international legal history and the development of international legal theory, positivist and postpositivist, can and should be mutually enhancing projects. Both projects deserve the attention of this Interest Group, just as this group deserves the respect and support of all students of international law. Theory, like the past, informs everything we do. All of us, even our most practical -minded, can only benefit from the attention we pay to our theoretical assumptions and their provenience.

Nicholas Onuf

International Legal Theory: Positivist, Naturalist, and Much More

Theorists have long debated the philosophical basis of law as either positivist or naturalist and, in many areas of law, these alternatives adequately fuel scholarly discourse. Rules and judgment are evident in law, reflecting intrinsic competing needs for objectivity/ predictability and flexibility/ fairness. A rule-based, largely binary procedure defines relevant evidence and governs decision, while a highly subjective process selects a remedy that fits the entire situation. Positivism contributes the rules while a naturalist perspective lends judgment to inject circumstance into selection of a remedy. Various legal scholars have propounded arguments supporting positivism or naturalism as the basis for all law and these arguments are often plausible, until they are applied to international law.

The sources of international law are characterized by contrasting elements of objectivity and subjectivity that preclude application of any theory that adheres too closely to either positivism or naturalism. Treaty, alone, stands solidly within the realm of positivism, although persuasive arguments could be deployed for inclusion of some unwritten sources that might qualify as objective, e.g., custom and jus cogens. At the other extreme, sources such as equity and natural law, offer a normative view and exhibit the lack of uniformity that accompanies subjectivity. International law also embodies sources that are dynamic and assume many philosophical directions. The writings of publicists and the decisions of national courts vary with time and circumstance and this variety assures substantial inconsistency among these elements. This incoherence obstructs the positivist's search for tangible rules and frustrates the naturalist's desire for a broad consensus based upon unwritten principles.

Thus, both positivist and naturalist theories are wanting as means of explaining the origins and force of international law. Positivism does not address the intangible sources that are inevitable in a system of law that aspires to govern equal sovereigns: naturalism lacks the visibility and uniformity necessary to define what the law really is, especially across highly diverse cultures and national legal systems. A hybrid theory has been proposed, combining rules with flexible interpretation and application. This compromise is motivated by the inability of either positivism or naturalism to treat the entire domain of international law. Consolidation attempts to force a union of genuine opposites and has little to recommend it beyond the claim that it yields one perspective to apply to all sources of international law. As such, it reflects the weaknesses of each and offers too little synergy to overcome them. If a legal theory of international law is to be developed, an alternative to this limited traditional menu is needed.

One difficulty in choosing a conceptual framework for international law is that many scholars are already wedded to a philosophy. An observer with one perspective sees everything through the power and distortion of a single viewpoint. The popular "law of the instrument" analogy is a child with only a hammer; through that child's eyes, everything needs to be hammered. But perspectives are merely means of illuminating a subject, be it law, politics, behavior, or religion, to gain insight. Each has strengths and weaknesses, just as a telescope reveals the moon's craters but may obscure an overall likeness of the moon's face to Mickey Mouse. Law is neither positivist nor naturalist: it has these qualities and many more. It is vital to distinguish the assumptions of the analytic tool from the "reality" of the subject. Microscopes do not make objects larger and positivism does not establish rules as the basis of law. The application of multiple perspectives confers significant benefits by revealing different attributes and facets of an object, and this is a common analytic technique in the policy analysis and behavioral fields. The appropriate question is not "Positivism or Naturalism," but "How can all of the available perspectives be applied to reveal the essence and teach the workings of international law?'

Viewed as a voluntary commitment, international law may be analyzed as a contract between nations. Treaties are actual contracts and consistent behavior can be regarded as performance exchanged for reciprocal behavior by other nations. Jus cogens, the most unusual source of international law, might be analogized to quasi-contract. A contractual perspective aids understanding of behavior by emphasizing notions of reciprocity of obligation, the existence of specific conditions, and a cost exchanged for a benefit. The analogy is good but not perfect, particularly with respect to highly diverse sources, such as the writings of publicists, decisions of national courts, and natural law (which varies among different cultures). Contract analogy is a useful way of examining international law and it yields insight on issues related to mutuality.

Efficiency is a broader perspective that can be usefully applied to inquiry on why international law exists and how it performs its function. Treaties enable nations to increase their economic efficiency by entering agreements that make the behavior of signatories predictable and economically exploitable. Customary law and other unwritten forms of international law also serve the same function, although with less certainty. If efficiency is used as a conceptual framework for international law, it is able to explain and predict a significant amount of national behavior, such as when nations will abide by the various forms of international law and when they will forsake their commitments. The indifference of an efficiency perspective to the form of international law is an advantage not available in a positivist-naturalist construction wherein some sources of international law are conspicuously mismatched with one of these perspectives. The economic framework allows each nation to assess the effects of international law and to structure its behavior in ways that maximize benefits and minimize costs. The incentive to resort to strategic behavior during the development of an international law is discounted by the ability of each nation to assess other participants' incentives and concerns and form an independent estimate of the potential rewards and costs involved in compliance with the law, whatever its form. Efficiency, however, does not provide significant insight into moral, political, or cultural considerations.

In summary, the inclination to move away from a simple choice of positivist or naturalist views of international law derives from the inability of either to accommodate the diversity within this body of law. Intuitively, a hybrid positivist/ naturalist perspective that captures the advantages of both has attractive qualities but also imposes a need to specify when which qualities apply to a given situation. The difficulty inherent in achieving a balance of objective and subjective features within a single legal theory is obvious.

A contractarian perspective offers insight into why some forms of international law arise and are respected or violated but this view has weaknesses, specifically for vague forms such as writings, equity, and natural law. An economic conceptual framework may prove to be the most practical analytic tool for international law. Its usefulness is independent of the form of law and it

can inform estimates of future behavior with considerable force. It goes beyond obligation and engages behavior at the very fundamental level of reward and punishment. An economic perspective can gauge intensity or the absence of motivation and allows nations to predict the effect of changes in the environment on compliance.

Many other analytic templates are available; rationality, property rights, symbolism, power, politics, and bureaucracy are but a few. No single perspective captures the breadth of international law: there is too much uniqueness in its sources. But the use of multiple views is a powerful, synergistic tool that offers insight and promotes understanding of the origins and operation of the diverse components that comprise this area of law.

Stan Gontarek

Subjective Intent and Soft Law: A Domestic Parallel

In his article International Legal Theory: Where We Stand, Professor Nicholas Onuf discusses the evolution and role of legal theory in the field of international law. One particular aspect of the article focuses on, inter alia, the theoretical ambiguity and confusion that accompanied the evolution of the positivist approach to international law, as its proponents sought to adapt it to inconsistent State agent application and changing world circumstances. Implicit in his discussion is the assertion that the positivist approach to international law has seen its demise. Professor Onuf asserts that there is a significant body of work, including his own, that seeks to "cast doubt on the positivist presumption that law is something we can speak objectively about," while endorsing the need for a greater articulation of social theory in the "postpositivist era." While moral and social considerations are extremely important, the necessity of objectivity and definiteness in any body of law, whether it be municipal or international, cannot be underscored enough.

In my opinion, this conflict between positivist and postpositivist approaches to international law closely parallels the friction between the objective and subjective theory of municipal contracts law. The positivist approach to international law focuses on the objective nature of law: who made the rule, who enacted it, the fixed sources of international law, subjects, and sanctions. Similarly, in contracts, the objective theory strives to enforce the validity of the contract and whatever stipulations it may contain. Both strive for definitiveness and objectivity in their respective fields of law. Alternatively, the subjective theory of contracts diminishes the importance of the written, objective document and strives to enforce what the parties actually intended. It is less concerned with the quality of concreteness and more concerned with vague notions of fairness. Similarly, in the postpositivist world, the written documents, rules, etc., appear to be mere clay, molded and shaped to fit the "continuous social construction." These approaches place priority upon subjective, social values and downplay the importance of objectivity and definitiveness.

While enforcing and perpetuating justice and notions of morality should be a goal of any legal system, that search for fairness should be based upon a definitive set of rules and laws. The positivist approach, like the objective theory of contracts, reduces the possibility of inaccurate determination of subjectivity, potential unfairness, and economic inefficiency that often result from soft law.

In a municipal setting, determination of the subjective intent of contracting parties is not a simple task. An accurate determination of subjective intent is vulnerable to the self-interests of the involved parties, often resulting in unintended biases or deliberate misrepresentation. Even for those parties attempting to honestly describe the situation, the passage of time often erodes intellectual accuracy in recalling particular intentions and understandings during the time of contract formation. The objective theory of contracts, instead, focuses on the written body of the

contract. This serves a highly useful evidentiary function as to the parties' express understandings and obligations, and reduces the need for possibly inaccurate and biased testimony.

In the international arena, the problem of determining the applicability and meaning of soft law is susceptible to many of the same difficulties. Nation states are separated by such a vast array of ideological, political, social, and cultural beliefs, that attempting to give a common meaning to vague and ambiguous rules of international law could prove to be a tremendous, and quite conceivably, impossible undertaking. If instead, the focus is on an objective, positivist approach to international law, the difficulty inherent in determining ill-defined rules and values is greatly reduced.

The positivist, objective approach has been attacked for its lack of a moral element. But it is the objectivity and definitiveness that ' it's law or it's not" that perhaps provides the greatest basis for fairness. Striving for greater objectivity in international law, as in contracts, serves two important functions: first, it protects the parties reasonable expectations in relying on a rule of law and second, it encourages the stability of the legal system.

In a municipal contractual setting, courts do not wish to enforce the subjective intent of a party when it was not reasonable to do so, or in other words, when the other party did not have a reasonable foundation upon which to base his behavior. The same principle applies to the international setting. If the law is effectively understood and defined, States are provided with a fair and reliable foundation upon which to base their behavior. If instead, the law is more ambiguous, soft law for example, States may suffer from fundamentally unfair consequences if they have incorrectly interpreted a rule of law or whether a rule of law even exists.

Additionally, these notions of morality and soft law disrupt the vitality of the international legal system. In the article *Towards Relative Normativity in International Law*, 77 AJIL 413 (1983), Professor Weil discusses the explosion of soft law, "whose substance is so vague, so uncompelling" that are eroding the international legal system. As with the objective theory of contracts, the greater and greater emphasis upon subjective notions of intent diminishes the importance of the written document and the stability of contracts, in general. Though the rule of law may not satisfy all States morally, the nature of the system permits them to abstain from following the rule or contract around it. As long as the law is explicit, States in the international setting are given the fairest basis for their actions.

Finally, a positivist, objective approach minimizes the economic inefficiencies that often accompanies these notions of morality and soft law.

In a contractual setting, attempting to enforce the subjective intent of parties incurs high ex post transaction costs. The enforcement of the objective contract serves a highly useful evidentiary function and also minimizes the ex post costs involved in the dispute. By referring to the written agreement, the court can more quickly and easily determine the understandings and obligations of the contracting parties. Objectivity in contracts also reduces the formative costs of the agreement. By enforcing the parties reasonable expectations in relying on a contractual promise and the stability of contracts, the objective theory reduces the need for such costs as extensive negotiations to insure against the idiosyncratic bargainer and monitoring.

Professor Onuf asserts that the evolution of legal theory has seen the diminished role of positivism as an approach to the study and practice of international law and the ever-increasing popularity and acceptance of postpositivist theories that focus on social norms and soft law. Though this may be true, I wonder whether the importance of objectivity in any legal setting can be so quickly dismissed. My analogue with the domestic setting suggests that it can not.

Quart Luong

Sovereignty and Jus Cogens: Plus Ca Change, Plus C'Est la Wine Chose?

Professor Onuf observes that the system of ordered relations among states maybe undergoing a significant transformation, making the positivist idea of "state" unintelligible. The recent reemergence of the dismissed notion of natural law reflects dissatisfaction, at least since World War 11, with the traditional positivist concept of "sovereignty" (a dissatisfaction shared by many postpositivists), and a resultant tendency to revisit the belief that there are principles which require a legal system to look beyond rules. An expression of this tendency is found in the notion of jus cogens. As Janis points out, the emergence of jus cogens in modern international law is partly the result of a retreat from positivism following the Nazi experience during World War 11 (3 Conn. J. Int'l L. 1988). An international legal order could no longer be based solely on expediency and states as the sole source of law; rather, as articulated by Mr. Pal, the Indian representative of the International Law Commission in 1963, there must be "a higher allegiance to the principle of justice." (1 Y.B. Int'l L. Commn 1963) The Vienna Convention's recognition of the concept of jus cogens indicates the shared awareness that some principles are irreducible components of the international legal system. Regardless of whether one accepts jus cogens as rooted in natural law, and despite its apparent lack of concreteness, its very existence necessarily impacts on the positivist notion of sovereignty, which is based on the theories of consent and of states as the only subjects of international law. By imposing restrictions on states without their consent, jus cogens perforce limits their sovereignty. In an earlier writing, Professor Onuf himself submitted that "the relative lack of concern for the content of peremptory norms indicates that their existence as a category, however devoid of content, is itself a substantial change in the structure of the international legal order." (Onuf and Birnev, 4 Den. J. Int'l L. & Pol 1974) When the members of the international community of states do not possess unfettered discretion in the observance of peremptory norms of international law, the system of ordered relations among states is necessarily transformed. As Turpel and Sands observe, "the 'general will' of the international community of states, and other actors, will take precedence over the individual wills of states to order their relations." (3 Conn. J. Int'l L. 1988) Although Professor Onuf is correct in asserting that we are too close to the events to gain a meaningful perspective on what changes may be occurring in the system of ordered relations between states, his approach appears unduly cautious. The emergence of jus cogens in modern international law constitutes clear evidence that sovereignty no longer entails "business as usual." Further, although both positivism and postpositivism undoubtedly have much to contribute to the development of international legal theory, there is no valid reason to deny the possibility that natural law - however one cares to define it may once again be influencing international law. For better or for worse, history tends to repeat itself.

Ian G. Corey

For a Unified Approach: Economic Analysis of International Law

Prof. Onuf describes the current wave of international legal and social theory as postpositivist. This concept seems to be a merger or coexistence of the traditional "hard law" of positivism with less normative, more pliable, “soft law." Onuf sees postpositivist theory as a reaction to, and triumph over, attacks on positivism by competing groups of international law theorists. The practical weakness of the positivist theory, according to Onuf, is its insistence on an either/or reality: "either it's law or it's not." Such a bright line dichotomy leaves the positivist with little room for emerging law that may develop in response to changing circumstances. Onuf notes that positivists cannot recognize the possibility that the idea of "state" itself may be undergoing transformation.

Apparently Onuf's postpositivist theory encompasses a multidisciplinary approach, using insights from social theories such as practical reason, linguistics, and feminism. These supply postpositivism with normative structures adaptable to changing circumstances but less

susceptible to the circularity and "bootstrapping" criticisms of natural law theorists (see James D. Boyle, *Ideals and Things: International Legal Scholarship and the Prisonhouse of Language*, 26 HILJ 327, 336-39 (1985). However, these social theories may be inherently subjective, are unlikely to produce consensus about rules, and are not conducive to empirical confirmation.

Traditional positivism has at least in its favor that its rules are empirically confirmable- one can observe whether or not states behave in accordance with a purported rule of international law. Confirmability is also a strength of economic analysis of law (although a major criticism of economic analysis is that it is not falsifiable in the scientific sense – see Richard A. Posner, *Problems of I Jurisprudence* 363-65 (1990)).

As in positivist theory, observation of the actual behavior of parties is a basis of formulating and confirming economic principles. Application of economic analysis to international law requires that one attribute rationality to the sovereign (not an unreasonable assumption) and substitute the state for the individual in the economic equation.

One useful application of economic analysis to international positivism might be a contractarian analysis of informal constraints on contracting parties. (See Allen & Lueck, *Back Forty On A Handshake: Specific Assets, Reputation, and The Structure of Farmland Contracts* (1992); Gilson & Mnookin, *Disputing Through Agents: Cooperation and Conflicts Between Lawyers In Litigation* (1994)). The concepts - expectation of repeat dealings, reputation within the community, and the availability of accurate information about the other party and the subject of the contract - provide an economic explanation of why states may feel obligated to follow customary international law even in the absence of express consent or formal enforcement mechanisms. Concepts similar to Goldberg's are important in game theory, as exemplified in Robert Axelrod's The Evolution of Cooperation (1984).

Applying Coasian theory to international law may avoid the bootstrapping problem of positivism's justification of the sovereign's normative authority (see Boyle at 384). In Coasian analysis the source of state authority is not necessarily important because the emphasis is on the rule itself, not its source. The general rule derived from the behavior of states will be contracted around - not be binding - whenever the rule is not optimal and the transactions costs are less than the costs of keeping the suboptimal (default) rule. The Coasian theory of contracting around the default rule also works to explain specific or regional customs - they arise when states seeking a concession / special rule offer sufficient value to other states to induce them to forgo their presumptive right to enforce the general rule.

The economic concept of preference curves may be profitably applied to international law. Certainly the practices of states are indicative of their preference curves - what provisions a state is willing to give up, for example, in a treaty negotiation, in order to gain other provisions, will mirror their preference curves regarding said provisions. Continuing compliance with, or persistent objection to, a rule may indicate a stable set of state preference curves, while subsequent objection to a previous agreement could be explainable as a shift in the set or in a particular curve.

A particular appeal of a law and economics approach to international law may be economic theory's cross-cultural capacity. Unlike other social theories, economics has no necessary cultural normative context beyond a few basic assumptions such as the rational actor, wealth-maximization, and the existence of market forces. Economic theory assumes that each state has its own unique definition of what constitutes wealth. Thus religious differences between states, or the fact that one state places a high value on individualism while another prefers conformism, is not an obstacle to an economist. In contrast, cultural preferences like individualism vs. conformism, or religious differences, can cause great difficulties in human rights and feminist theory (cf. Anna Jenefsky, Egypt's Reservations to the Convention on the Elimination of Discrimination Against Women, 15 MJIL 199 (1991); Charlesworth, Chinkin & Wright, Feminist Approaches to International Law, 85 AJIL 613 (1991)).

Because law and economics theory respects and encompasses individual states' preferences, yet provides consistent, reasonably clear explanations and predictions of state behavior, it is perhaps uniquely well-suited to international law. Law and economics theory has the potential to serve as a unifying base theory of international law that avoids the blurred boundaries of Onuf's post-positivism.

Barb L. Bettenhausen

The Rational Actor Paradigm of States and the Expansion of Democracy

Professor Onuf s article, International Legal Theory: Where We Stand, sets forth several postpositivist authors who offer normative challenges to contemporary international law. One such challenge comes from Thomas Franck's article, The Emerging Right to Democratic Governance. In this article, Franck argues that international law should actively promote democracy and should eventually guarantee a "democratic entitlement" for all peoples. He maintains that the principal force behind the recent growth of the democratic entitlement has been governments' craving for validation. He explains that, because regimes desire legitimacy, they are willing to cede some power to their citizens through democracy in exchange for validation by the international community. Franck therefore concludes that international law should develop rules and procedures of validation, and thereby actively promote and eventually guarantee the democratic entitlement. In this commentary, I suggest that, (1) it is not the role of international law to guarantee a democratic entitlement; and (2) the spread of democracy does not require the intervention of international law.

First, the proper role of international law is not to guarantee all the world's citizens a democratic entitlement, but simply to regulate relations among states according to the rules to which the states consent to be bound, either through custom or treaty. In contrast, under post-positivist theory, this "rational actor" paradigm gives way to a system of international law that addresses the interests of the individuals that make up states, while deemphasizing the states themselves. This approach is consistent with public choice concerns on the role of states as agents for their people. The implication is that international law should concern itself with sanctioning or rewarding countries according to how they treat their citizenry.

However, these post-positivist notions depart from the fundamental dogma of international law that states are sovereign, and that short of egregious violations of human rights, such as slavery or genocide, it is not the role of international law to intervene in domestic political issues. The democratic entitlement is no exception and should not be forced upon sovereign states as an international legal obligation.

Second, an expansion of the democratic entitlement does not require the intervention of international law. Democracy will continue to spread and flourish as states adjust to the new realities of a competitive global economy. Increasing competitive pressures do not forgive the inefficiencies brought about by totalitarian regimes. Russia did not reject communism as a result of the influence of international law. It rejected communism because the massive inefficiencies of central planning had finally brought the Soviet economy to the brink of collapse. Likewise, Mexico has not started to embrace democracy because of a desire for validation from international law, but because of more compelling economic pressure.

The implicit assumption of this analysis is that states are autonomous and self-motivated rational actors. It is true that this paradigm downplays the principal-agent problems of public choice theory that affect political decisions in the international arena. However, the same logic that reveals the shortcomings of the "rational actor" paradigm also exposes the fallacies of most interventionist approaches. For these reasons, I believe that the interventionist argument for

international law is weakened, and positivist theory of the state as a rational actor is further strengthened.

Michael Alexander

ASIL Annual Meeting

Members of the IG on the Theory of International Law will meet on Saturday, April 8, 1995 from 8:00 to 9:15 p.m. at the 1995 ASIL Annual Conference in New York City.

GMU Conference: The Economic Analysis of International Law

The George Mason University School of Law and its Law & Economics Center are sponsoring a Conference on the Economic Analysis of International Law, to be held on Friday, May 5 and Saturday, May 6,1995 at the Omni Sheraton Hotel in Washington, D.C. Panelists include Honorable Gregory Carmen and Douglas Ginsburg, and Professors Jagdeep Bhandari, Frank Buckley, Robert Cooter, Alan Deardorff, Eleanor Fox, Jonathan Macey, Geoffrey Miller, Warren Schwartz, Duncan Snidal, Alan Sykes, and Michael Trebilcock. For further information, please contact John P. Giacomini, GMUSL, 3401 North Fairfax Drive, Arlington, VA 22201. Telephone (703) 9938040; Facsimile (703) 993-8088.