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## **The Purpose of International Law Is to Advance Justice -- and International Law Has No Value Unless It Does So**

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## THE VALUE AND PURPOSE OF INTERNATIONAL LAW

This panel was convened at 9:00 a.m., Saturday, April 15, 2017, by its moderator, Marie Jacobsson of the Swedish Ministry of Foreign Affairs, who introduced the panelists: Mortimer Sellers of the University of Baltimore School of Law; Maxwell Chibundu of the Francis King Carey School of Law, University of Maryland, Baltimore; and Cecilia Bailliet of the University of Oslo Faculty of Law.\*

### THE PURPOSE OF INTERNATIONAL LAW IS TO ADVANCE JUSTICE—AND INTERNATIONAL LAW HAS NO VALUE UNLESS IT DOES SO

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*By Mortimer N.S. Sellers<sup>†</sup>*

The central topic of this year's annual meeting of the American Society of International Law has been "What International Law Values," restated more forcefully in the title of this panel, "The Value and Purpose of International Law." Notice the underlying assumption: that international law has value and serves some useful purpose. This premise is important because it supplies the basis on which international law seeks to secure our obedience and respect. We have no reason to obey or respect international law unless international law has some value or serves some useful purpose. This leads us to consider what this value and purpose might be. Which values and what purpose does international law exist to serve? Or, more important, which values and purpose would international law *have* to serve or advance if it were to deserve our obedience or respect? The answer can be given in one word: justice. Justice is the value that justifies or could justify international law, and justice is the purpose that international law properly seeks to serve and protect.

### JUSTICE

Embracing justice as the justifying value and underlying purpose of international law should not be controversial, as justice has been understood for centuries to be the proper purpose and justifying value of all law, everywhere.<sup>1</sup> Rival values that are sometimes advanced in place of justice, such as "order" or "peace," stand revealed on examination to be the attributes or products of justice, and therefore subsidiary. Peace and order are corollaries of justice. Justice creates peace and order, but (pretended) peace and order without justice are simple oppression. As Calgacus said of the Romans, "solitudinem faciunt, pacem appellant"—"they have made a wasteland and they call it peace." The motto of the American Society of International Law is "Inter Gentes Ius et Pax"—"Justice and Peace Among Nations." The second depends upon the first.

\* Ms. Jacobsson did not contribute remarks for the *Proceedings*.

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<sup>1</sup> M. Tullius Cicero, *De legibus*, I.vii.23.

The ASIL's commitment to justice is relevant here because of the setting in which we discuss it, but also because of the attitude it reveals at the heart of the enterprise. The constitution of the American Society of International Law declares as its purpose "the establishment and maintenance of international relations on the basis of law and justice." This is also the purpose of international law—to establish justice across the globe.<sup>2</sup> And this claim of justice is also the foundational claim of every other legal system. Implicitly and often explicitly every legal system claims to deserve obedience because it establishes justice.<sup>3</sup> The nontruthfulness of many such claims does not diminish their importance. Legal systems claim to establish justice in order to be viewed as legitimate and therefore worthy of obedience and respect.

Justice is the attribute that makes legal systems legitimate. Legitimacy in this context is the status of being justified, according to the standard of legitimacy that applies to the practice in question. Legal systems are legitimate when they establish or at least advance justice, but otherwise are not. If they fail to establish or at least advance justice, then legal systems are not legitimate according to the standards of legitimacy that justify laws and legal systems.<sup>4</sup> And if they are not legitimate, then they do not deserve our obedience or respect. This claim of legitimacy through service to justice is particularly significant in the case of international law, which has no well-developed methods of enforcement. States respect and obey international law—when they do so—either because they wish to behave justly or because they wish to be believed to behave justly. The claim of justice is not only what makes international law legitimate in theory, it is also what makes the law effective in fact.

#### THE NATURE OF INTERNATIONAL LAW

Modern international law arises from the perception of Hugo Grotius that any law that seeks to transcend culture must also transcend religion. Put simply, international law must rest on the basis of reason and universal reality rather than religious authority. Grotius sought a law that would still be valid even if we were to concede ("*etiamsi daremus*") that there is no God.<sup>5</sup> As elaborated by Christian Wolff<sup>6</sup> and Emer de Vattel,<sup>7</sup> this meant that jurists discovered and developed the fundamental principles of international law by applying the universal requirements of justice to the conduct and affairs of nations. Henry Wheaton gave the standard definition of international law its canonical form when he wrote that "international law as understood among civilized ... nations may be defined as consisting in those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations."<sup>8</sup>

It is in the nature of international law that it claims to be just, but that does not assure that the law achieves justice in practice. Deducing the rules that justice requires in a society of independent states may not be as easy as it sounds and indeed there are and frequently have been sincere disagreements on difficult points of law. Wheaton proposed several techniques for clarifying the law

<sup>2</sup> See JAMES MADISON, AN EXAMINATION OF THE BRITISH DOCTRINE WHICH SUBJECTS TO CAPTURE A NEUTRAL TRADE 41 (1806) on the "very definition" of "the law of nations," which he identifies 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." This is also the best source for the meaning of the "law of nations" as the term is used in the United States Constitution.

<sup>3</sup> See, e.g., U.S. CONST. pmbl.

<sup>4</sup> LAW, REASON, AND EMOTION (M.N.S. Sellers ed., 2017).

<sup>5</sup> HUGO GROTIUS, DE IURE BELLI AC PACIS 11 (1625).

<sup>6</sup> CHRISTIAN WOLFF, IUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (1749).

<sup>7</sup> EMER DE VATTEL, DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉS A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (1758).

<sup>8</sup> HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 46 (1836). Cf. JAMES MADISON, *supra* note 2.

in such circumstances—specifically by considering international custom as evidence of a general practice accepted as law, by considering general principles of law accepted by civilized nations, by considering judicial decisions and the teachings of the most highly qualified publicists, and by considering international treaties, whether general or particular, establishing rules expressly recognized by the contesting states.<sup>9</sup>

These techniques of clarifying the requirements of international law, first applied by Grotius, Vattel, and Wheaton, remain the methods applied today by statesmen and international tribunals, such as the International Court of Justice (ICJ), when they seek to resolve disputes in accordance with international law.<sup>10</sup> By discovering what justice requires in international relations, courts and statesmen seek also to understand what the law requires in the international community of states. The essential nature of international law is that it claims to establish justice, and international law has value only if it establishes justice in fact.

### THE VALUE OF INTERNATIONAL LAW

This conference as a whole has asked us to consider “what international law values”—to which the answer is “justice.” This panel in particular has asked us to identify the “value and purpose of international law.” Here again, the answer is “justice.” Yet this simple point has significant implications for the identification, creation, enforcement, and legitimacy of international law. All these and many other aspects of international law depend ultimately on justice as the fundamental value that supports the rest. Those who seek to identify international law must do so with an eye to what is just. Those who seek to create international law must do so with an eye to what is just. Those who seek to enforce international law must do so with an eye to what is just. If they do not, they forfeit the legitimacy of the enterprise.

Speaking or writing of justice as the fundamental value of international law requires a definition of justice. The usual definition, implicit and sometimes explicit in Grotius, Vattel, Wheaton, and the other great publicists of international law, has been that global “justice” signifies that global social and political order in which all persons are taken into account and none are disregarded. The just world would be a world constructed for the common good, where worthwhile and fulfilling lives are available to all. Achieving such justice is the proper purpose of law. But the value and purpose of law are distinct from the law itself. Law itself is a system of requirements that determine what must be done or not done in particular circumstances<sup>11</sup>—what must be done if we are to establish a world order that is actually just, in reality.

Set out in this way, in the context of the history of international law, the value and purpose of the enterprise are remarkably easy to identify. Justice is claimed as the value and purpose of every legal system the world has ever known, and indeed this claim is inherent in the very concept of “law.”<sup>12</sup> All legal systems claim to be legitimate and this claim can only be vindicated if they establish or at least advance justice in fact. This understanding is implicit and often explicit in every discussion that has ever taken place about the value and purpose of international law. The difficult question is not how to identify the law's nature and purpose, but rather how to identify what international law actually requires of its subjects in any particular circumstance or eventuality.

<sup>9</sup> WHEATON, *supra* note 8, at 48–50.

<sup>10</sup> Statute of the International Court of Justice, Art. 38.

<sup>11</sup> M. Tullius Cicero, *De legibus*, I.vi.18, I.xii.33.

<sup>12</sup> See M.N.S. SELLERS, *THE NATURE AND PURPOSE OF LAW* (forthcoming 2018).

## SPECIFYING THE LAW

Discussing the value and purpose of international law quickly reveals that the law rests on certain fundamental principles, the nature and content of which are remarkably easy to identify. Grotius, Vattel, Wheaton, and many others stated, restated, and developed these principles with a striking degree of consensus. Problems only arise in applying these comparatively uncontroversial principles to actual cases and controversies. Deciding real cases requires techniques and institutions to clarify and specify the law. International law has no strong legislature to determine the law, no strong judiciary to interpret the law, and no strong executive to administer and enforce the law. These all exist in a limited and nascent form, but with very little direct influence or authority in practice.

The absence or weakness of most legal institutions in global society makes the direct recourse and reference to justice much more necessary and prevalent in international law than it is in more highly developed legal systems. Grotius, Vattel, Wheaton, and most of the great authorities on international law derived their authority from their ability to state clearly and convincingly what reason deduces, as consonant to justice, from the nature of the society existing among independent nations. Contemporary self-styled authorities on international law, such as speakers at the annual meeting at the American Society of International Law, judges on the International Court of Justice, members of the United Nations General Assembly, the president of the United States, and other supposed authorities, are more or less authoritative as they prove themselves more or less accurate in identifying what reason requires as consonant to justice from the nature of the society existing among independent states.

It would be highly desirable were the world to develop formal legal institutions that could identify and specify the requirements of international law with greater justice, accuracy, and authority than the publicists of the past. That is not yet the case. So we look to international custom, to the general principles of law accepted by civilized nations, to judicial decisions, to the teachings of the most highly qualified publicists, and to treaties, when they establish rules expressly recognized by the contesting states. All these are useful and persuasive evidence of the actual requirements of justice, and therefore of international law.

## THE JUSTICE OF INTERNATIONAL LAW

Justice establishes the foundations of international law because it is justice alone that can justify the enterprise. International law has authority and legitimacy only to the extent that it is just. Thus, state consent is useful and interesting because in some circumstances it is good evidence of what justice requires. International custom influences our understanding of the law because it is useful evidence of what justice requires. Legal principles recognized by civilized nations do not have authority because civilized nations have recognized them, but because they are just. Nations are considered to be civilized or not according to the principles that they actually embrace.

Principles deduced by reason from the nature of the society existing among independent states will require constant adjustment as the nature of the society existing among independent states develops and changes. This makes our role as scholars and judges and lawyers and interpreters and authorities on international law all the more important. Judicial decisions and the teachings of the most highly qualified publicists do not have authority and legitimacy because of our inherent virtue. Scholars and judges have authority because we have carefully and thoroughly studied what reason requires as consonant to justice from the nature of the society existing among independent nations.

Our task as scholars and judges, as lawyers and interpreters of international law, is always to remember justice. Remember always that the value—and the purpose—of international law is

justice. We should aspire to create better international institutions, a better international legislature, better international courts, and better enforcement mechanisms for international law. But in doing so, we must make sure that these are effective in establishing international justice, because if they are not, then international law will have no legitimacy at all, and will not deserve our obedience or anyone's respect.

## CONCLUSION

My argument, in brief, has been that the purpose of international law is to advance and maintain justice and that international law has value only to the extent that it actually does advance and maintain justice in fact. Justice here signifies the establishment of a world order for the common good of all persons, in which all persons are taken into account and none are dominated or oppressed. To establish justice in international society or in any other social order requires that all persons have the opportunity to live worthwhile and fulfilling lives. This will not happen soon. It will never happen in full. But it is the aspiration that justifies the enterprise. International law claims to bring this just world closer to reality. International law *must* claim to do so in order to be effective. And if international law does not do so, then it is a nullity, and has no claim to our obedience or any other status or deference at all.

## REMARKS BY MAXWELL CHIBUNDU\*

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Good morning and my welcome to the audience. I would like to thank our panel chair, Dr. Jacobson, my co-panelists, and especially the panel's organizer, Professor Mortimer Sellers, who has been a terrific friend and colleague for over a quarter century. He exemplifies all that is commendable about modern cosmopolitans. It is a genuine pleasure to be back as an ASIL Annual Meeting participant, and I congratulate the meeting organizers for a very good conference.

If the title of the panel ("The Value and Purpose of International Law") is intended to suggest that the task at hand is the uncovering of a singular value or of some overarching purpose (however fundamental), for the international project—to which I am sure we are all committed—then such a quest would be ill conceived and misguided. We do not ordinarily ask the same questions of national legal systems, and to ask them of international law today is to raise issues that international law should by now have transcended—whether it be confused attempts at meeting the skepticism of H. L. A. Hart (for whom I have the deepest admiration) as to whether there is such a thing as international law, or a strident subscription to Hans Kelsen's logical certainty as to the primacy of international law. My approach to understanding international law is that it must be viewed as a species of the encompassing genre that is law. International law must have the essential characteristics of any and all legal systems, while possessing elements that render it a specific and distinguishable legal order. At core, and as an essential minimum, law must be a set of instructions that demands compliance from those to whom it is addressed without regard to the ad hoc preference of the addressee. But international law cannot simply be a substitute for failed national legal systems. A central charge of international law then is to determine those areas for which its competences are most suitable, whether these concern areas of regulation, persons from whom compliance is sought, or methods of enforcement. Yet, all international law, in application, is necessarily nationalized; the relationships of the two are necessarily intertwined, and thus, at a basic level, their

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values and purposes are shared. Nonetheless, I do not think that it is to such mundane generalities, however true, that I have been invited to speak to. I shall therefore focus on those features of international law that might be said to be expressive or distinctive of the purpose or value of the international society or the international system of which international law is an element or attribute.

International law, like any legal order, functions primarily to address specific problems that arise within a community. Such problems vary with time and space, and the answers that are provided must take account of the particulars of the environment—political, economic, social, and cultural, as well as the technology of the means that are available for deployment in the society. Thus, given the variety of these considerations, it should be expected that all legal systems necessarily implicate the realization of multiple values and serve several purposes that cannot and should not be reduced to an overly simplified formulation. I shall illustrate this proposition in what follows by exploring contemporary international law through four lenses: those of text, history, structure, and normativity.

### TEXT

Much contemporary international law resides in international agreements. These agreements cut across the entire swath of human interests and desires. The textual articulation of those interests almost always identify the purpose or purposes of the agreement as well as the values that underpin the agreement, or that the agreement is intended to further. The specific textual articulation of the values and purposes of a particular regime of international law deserves credence and respect from international lawyers. The Charter of the United Nations Organization, the primary and constitutive international law document of our age, is illustrative. The Charter, in its Preamble and its first two articles, specifies no fewer than seven objectives, values or purposes: (1) “to save humanity from the scourge of war” (i.e., the maintenance of peace); (2) respect for and affirmation of “fundamental human rights” and the dignity of the person; (3) belief in and subscription to the equality of all persons, at least in matters affecting race, gender, and religion (and perhaps we might now add, as elementary derivations, wealth, disability, and sexual orientation); (4) a similar belief in and subscription to the equal sovereignty of all states, big and small alike; (5) “to establish conditions under which justice and respect for international law can be maintained”; (6) “to promote social progress and better standards of life in larger freedom”; and (7) to realize these objectives through a process of interstate collaboration that concurrently obligates each member state (and indeed the international system itself, subject to a limited exception) to respect the territorial integrity and political independence of other member states by refraining from the use or threat of the use of force in their relations with each other. These texts have given rise to further elaborations of objectives and purposes, including: collective security, resistance to aggression, peaceful resolution of disputes, equality of rights, self-determination, international cooperation in the resolution of conflicts, as well as in the undertaking of social, economic, scientific, and cultural research.

Textual exegesis alone, of course, will almost never suffice in identifying the dominant value or purpose embedded in a legal rule. This might seem especially true when the text of the rule or doctrine comes in varied formulations, as is typically the case with “Customary International Law” or “General Principles of Law.” But even in these situations, the texts, however loosely formulated, will always provide a starting—but rarely conclusive—articulation of the value and purpose that are sought to be realized by the legal rule that is in play.

### HISTORY

Text alone does not of course supply value or purpose. The interpretation of text necessarily occurs within a value system, whether expressly articulated or otherwise. History is essential to

understanding the value system, and indeed to its formation. For example, we cannot make sense of the text of the Charter of the United Nations without reflecting on the forces that gave rise to the Charter: a globally destructive war that had been brought about in no small measure by the failure of the antecedent experiment of consensus-based collective security under the aegis of the League of Nations. In this setting, history functions both to supply context for text and to explain necessary deviations from text. Thus, the objectives of peace, justice, equality, and freedom prescribed in the text of the Charter cannot be viewed by international lawyers as abstract propositions, but must be given meaning as practical constructs generated in response to particular historical facts. But those responses are not frozen in time. They must be read and fashioned to respond to new historical facts. And so the interpretation and prioritization of values, purposes, and objectives of international law will be shaped as much by historical facts as by linguistic text.

### STRUCTURE

The supposition that we can identify or attribute some overriding value or purpose to or for international law originates in two additional influences of the interpretive process: namely, those of structure and of normativity. While these prisms are relevant for situating international law within its proper sphere, I do not think they yield any more conclusive statements of value or purpose than do text and history. We are of course familiar with the long-running debate over whether international law's primary purpose is to regulate the behavior of states vis-à-vis each other, or of states toward the individual, especially their citizens. The issue is framed and reframed in all kinds of formulations: "National security or human rights?" "State sovereignty or freedom of the individual?" "Law of nations or law of peoples?" The reality, of course, is that international law seeks to address both sets of concerns, and the priority of one over the other at any given time is dictated as much by text and history as by any purported structural or normative preference.

It is thus hardly accidental that although the preamble of the United Nations Charter begins with the familiar clarion call of "we the people . . .," what follows directly addresses not the rights, privileges, responsibilities, or obligations of individual persons, but the commitments and rights of "state members" of the United Nations. Put another way, whatever may be the values and objectives of the Charter, its framers recognized that, as a practical matter, the state was instrumental to its realization. Cooperation among states, rather than dictatorial assertions of power—even of victors over the vanquished—was a necessary element of international law. Indeed, in the first four decades of the Charter's existence, the primacy of the state reigned supreme. The "sovereignty" of the state, protection from interference by others of its "political independence and territorial integrity," and even the "self-determination of state" (rather than of individuals or subgroups within the state)—were advanced as the *raison d'être* of the international system. It took a substantial shift in normative thinking brought about by shifts in power relationships among states for "we the people" to assert itself as a focal point of contemporary international law. Increasingly, the focus of current international law gets directed as much to the rights-based claims of individuals, remedies for wrongs done them, and individualized punishment for wrongful behavior, as to the rights and obligations of nation-states. This shift of focus has also resulted in a structural shift in institutional competences. Alongside the statesman, diplomat, international civil servant, bureaucrat, and technocrat, adjudicatory tribunals—domestic and international—have become much more significant players in creating and construing international law doctrines; and, we might therefore assume, in giving value and purpose to those doctrines. This structural change in the enforcement of international law has surely altered the balance of values and purposes that might be said to exist in international law.



## NORMATIVITY

That one's preference ought to be the law is an all-too-common human conceit. This certainty of the correctness of one's own preferred values as universal norms has become particularly pronounced over the last quarter century as "natural law" has mounted an increasingly successful challenge to positivism in the domain of international law. If classical liberalism preached toleration of national difference by enshrining positivism as its lodestar, neoliberalism has challenged that ethos of "moral relativism," identifying in its place some purportedly bedrock universal norms. The idea that only a particularistic form of "democracy" or of "human rights," or of market-driven capitalism, not to speak of "the rule of law," exemplifies this pull toward some familiar uniformity in the description and attribution of value and purpose to international law. Recent developments in the West, notably the rise of so-called populism, remind us that the preferences of elites alone, however sincerely held, have never been sufficient to create a universal standard for all. If one norm supersedes all others, it is that difference will always govern, because it is the only genuine response to the variations and diversities of human experiences. To search for some overriding purpose or value is thus a misguided search for uniformity in an environment of constant change and differentiated necessities.

**PEACE IS THE FUNDAMENTAL VALUE THAT INTERNATIONAL LAW EXISTS TO SERVE**

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*By Cecilia M. Bailliet\**

Hersch Lauterpacht set forth that international law should be functionally oriented toward both the establishment of peace between nations and the protection of fundamental human rights.<sup>1</sup> This perspective was followed by Hans Kelsen, who authored *Peace Through Law*, reminding us that the pursuit of peace requires patience and commitment to international norms and legal institutions, such as international criminal tribunals, stating, "He who wishes to approach the aim of world peace in a realistic way must take this problem quite soberly, as one of a slow and steady perfection of the international order."<sup>2</sup> Later on the work of Grenville Clark and Lois B. Sohn spanned three decades, pursuing "World Peace Through World Law" through which they envisioned the creation of a World Conciliation Board, a World Equity Tribunal, compulsory jurisdiction for the ICJ, transfer of primary responsibility for the maintenance of peace from the Security Council to the General Assembly, and world disarmament enforced by regional courts.<sup>3</sup> Several of these topics are under renewed discussion at present, including reform of the Security Council, the value of conciliation in international law, and the new Treaty on the Prohibition of Nuclear Weapons. Some suggest that the fragmentation of international law into specialized sub-fields, such as trade law, human rights, etc. resulted in a dissipation of attention to broader, common aims such as peace, instead promoting specialized technical expertise within each realm. To the extent that contemporary international law engaged with peace, it focused on the subject of peace treaties and the role of relevant institutions, such as the United Nations and regional entities.

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<sup>1</sup> Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 Brit. Y.B. Int'l Law 1, 51 (1946).

<sup>2</sup> HANS KELSEN, *PEACE THROUGH LAW* (1944); see also Mary Ellen O'Connell, *Peace and War*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 272 (Bruno Fassbender & Anne Peters eds., 2012).

<sup>3</sup> GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (1958).