**Symposium: International Law and Political Morality**

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It is well-rehearsed that contemporary international law has its intellectual origins almost wholly within Europe and that it operated, for a considerable portion of history, as a tool of both capitalism and empire.[[3]](#footnote-3) It has presided, in particular, over some of the worst travesties in human history, including the horrors of colonialism and the transatlantic slave trade.[[4]](#footnote-4) Even post-1945, the international legal order is hardly free from structural injustice; with global inequality entrenched within institutions such as the United Nations Security Council,[[5]](#footnote-5) and norms of statehood infamously excluding many Indigenous and nomadic peoples, who for various reasons do not satisfy prevailing (and historically European) conceptions of the state.[[6]](#footnote-6) Indeed, the connection between law and imperial domination appears so tight that it often seems odd to speak of international law and political morality as linked in any kind of thoroughgoing manner. Nonetheless, this kind of connection – between international law and political morality – is precisely what the symposium presented within this issue of *Transnational Legal Theory* seeks to explore.

Although ‘political morality’ is a contested term, and each of our contributing authors no doubt maintains their own views on what it contains and implies, all their papers nonetheless conceptualise it along similar lines. Rather than taking political morality to be a fixed body of ‘natural laws’,[[7]](#footnote-7) the discussion within this symposium understands it to be the complete set of ‘genuine normative reasons’ that govern how we should interact with each other at the macro-social level, whatever those reasons might in fact disclose.[[8]](#footnote-8) The morality of politics, so to speak, is the question of how we should live together, under what kinds of structures and in what sorts of groups. How we should regulate those spaces and what role, if any, law has to play in their delineation.

Attention to the detail of public international law from the perspective of political morality, understood in this manner, has two principal benefits. First, as is most evident from the papers of Professors Thomas Bustamante and Frédéric Mégret, such a perspective gives scholars distinctive ground upon which to stand when analysing and critiquing international law. Analysing *de lege lata* with *de lege ferenda* explicitly at the forefront of our minds sparks scholarly imagination and unlocks new legal possibilities.[[9]](#footnote-9) Second, as exhibited with the paper of Professor Başak Çalı and Dr Alain Zysset on the one hand, and of Dr Alex Green on the other, reflection upon the normative reasons latent within international law itself can sharpen our understanding of its prescriptive content.

This second benefit echoes a discrete tradition of scholarship, which situates legal analysis within the values that ground the law, over and above its constitutive principles or rules. That tradition has a long intellectual history at the international level. In 1946, Hersch Lauterpacht advanced his account of the ‘Grotian tradition’ of international law, alluding to a ‘workable synthesis of natural law and State practice’,[[10]](#footnote-10) which mirrors many of the analyses adopted here. Naturally, not all of our contributing authors would identify as Grotian. Nonetheless, as recent work by Professor Çalı and others attests,[[11]](#footnote-11) a vibrant contemporary school of ‘legal interpretivism’ now exists, drawing and expanding upon the domestic jurisprudence of Ronald Dworkin.[[12]](#footnote-12) Such interpretivism shares Lauterpacht’s commitment to understanding and interpreting international law through reference and appeal to political morality. It is the question of how this tradition can progress our thinking about international law, that more than one paper within this symposium explores.

The discussions that follow started life as a speculative email exchange during the Covid-19 pandemic, which led swiftly to an online conference (hosted by Leeds Beckett University) before finally yielding the four papers presented here. Various themes are covered within these texts, including normative authority, authoritarianism, political action, and war. Each paper engages with discrete elements of international legal doctrine, including the principle of sovereign equality, the idea of jurisdictional subsidiarity, and the relationship between human rights and international humanitarian law. Notwithstanding this diversity, all four remain united in their reflection upon international law as an argumentative and regulatory space within which political morality looms large.

First, Professor Thomas Bustamante uses Ronald Dworkin’s posthumously published work as a lens through which to analyse the possibility (and dangers) of ‘authoritarian’ international law, arguing against dominant positivist approaches and in favour of a monistic understanding of international law’s relationship with domestic legal orders. Second, Professor Başak Çalı and Dr Alain Zysset critically reflect upon the normative basis of procedural subsidiarity within the European Convention of Human Rights system, arguing that democracy and the rule of law operate as foundational values for both substantive and procedural subsidiarity. Third, Dr Alex Green advances a novel reconstruction of the equality of states as it is recognised and protected under contemporary international law, in an analysis that has implications not only for the status of established states but also for our understandings of colonialism, ‘developing’ statehood, and the status of Indigenous peoples. Fourth, Professor Frédéric Mégret takes a bold step into the international legal imaginary. Asking what the *jus in bello* might have looked like today, had a concern with protecting fundamental human rights been at its core from the outset, Mégret re-envisions the law of human rights itself as a tool for critiquing other aspects of the international legal order.

Ultimately, although all of these papers break new ground in exciting and thought-provoking ways, they each reflect a long-standing view within international legal theory, which has, in our view, wrongly fallen somewhat out of fashion in recent years. That view, whether we call it ‘Grotian’ or ‘interpretivist’ is perhaps best summarised by J.L. Brierly, who reminds us that:

We are too often tempted to forget that the link between law and morals is much more fundamental than the difference between them and that the ultimate basis of the obligation to obey the law can only be a moral one.[[13]](#footnote-13)

Perhaps international law really is just imperialist dogma; but if it *isn’t*,the papers included within this symposium exemplify the approach that is uniquely placed to discover the value it may truly hold.

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3. Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (CUP 2020), in particular Chapter 2. [↑](#footnote-ref-3)
4. See generally: Anghie Antony, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005). [↑](#footnote-ref-4)
5. Tamsin Paige, ‘Mission Impossible? Reforming the UN Charter to Limit the Veto’ (2022) 25 J International Peacekeeping 187: 191-192. [↑](#footnote-ref-5)
6. See generally: Jennifer Hendry, ‘A Legally Pluralist Approach to the Bakassi Peninsula Case’ in Damian Gonzalez-Salzberg and Loveday Hodson (eds), *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2020); Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge 2015). [↑](#footnote-ref-6)
7. Compare, for example: Hugo Grotius, *De iure belli ac pacis libri tres*, (Buon 1625) I.1.10.1. [↑](#footnote-ref-7)
8. Derek Parfit, *On What Matters: Volume One* (OUP 2011) 31; Ronald Dworkin, *Justice for Hedgehogs* (Harvard UP 2010), in particular Part 5. [↑](#footnote-ref-8)
9. Alex Green, Mitchell Travis, and Kieran Tranter, ‘Jurisprudence of the Future’ (2022) 4(2) Law, Technology and Humans 1. [↑](#footnote-ref-9)
10. Hersch Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23(l) BYIL l: 5; see also Georg Schwarzenberger, *Power Politics: An Introduction to the Study of International Relations and Post-War Planning* (Jonatlian Cape 1941) 154. [↑](#footnote-ref-10)
11. Başak Çali, ‘On Interpretivism and International Law’ (2009) 20(3) EJIL 805; see also, and for example: John Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case’ (1996) 16(1) OJLS 85; Ronald Dworkin, ‘A New Phllosophy for International Law’ (2013) 41(1) Philosophy & Public Affairs 2; Thomas Bustamante, ‘Revisiting Dworkin's Philosophy of International Law: Could the Hedgehog Have Done It Any Other Way?’ (2017) 30(2) Canadian J L & Jurisprudence 259; Oisin Suttle, ‘Rules and Values in International Arbitration: The Case of the WTO Appellate Body’ (2019) 68(2) ICLQ 399; Alex Green, ‘The Precarious Rationality of International Law: Critiquing the International Rule of Recognition’ (2021) 22(8) GLJ 1613; Nahuel Maisley, ‘Better to see international law this other way: the case against international normative positivism’ (2021) 12(2) Jurisprudence 151; Alex Green, ‘*The Creation of States* as a Cardinal Point: James Crawford's Contribution to International Legal Scholarship’ (2023) 40(1) AYBIL 67. [↑](#footnote-ref-11)
12. For example: *Law’s Empire* (Belknap Press 1986); *Justice in Robes* (Harvard UP 2008). [↑](#footnote-ref-12)
13. J.L. Brierly, ‘The Shortcomings of International Law’ (1924) 5 BYIL 4: 16. [↑](#footnote-ref-13)