

University of Michigan Law School

## University of Michigan Law School Scholarship Repository

---

Articles

Faculty Scholarship

---

2020

### International Law and Theories of Global Justice: Remarks

Steven R. Ratner

*University of Michigan Law School*, [sratner@umich.edu](mailto:sratner@umich.edu)

James Stewart

Jiewuh Song

Carmen Pavel

Available at: <https://repository.law.umich.edu/articles/2783>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Ethics and Political Philosophy Commons](#), [International Law Commons](#), and the [Law and Philosophy Commons](#)

---

#### Recommended Citation

Ratner, Steven R., James Stewart, Jiewuh Song, Carmen Pavel, and David Luban. "International Law and Theories of Global Justice: Remarks." *Proceedings of the American Society of International Law* 114 (2020): 277-288.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## INTERNATIONAL LAW AND THEORIES OF GLOBAL JUSTICE

This panel was convened at 1:00 p.m., Friday, June 26, 2020, by its moderator Steven Ratner of the University of Michigan Law School, who introduced the panelists: Jiewuh Song of Seoul National University; Carmen E. Pavel of King's College London; James Graham Stewart of the Peter A. Ballard School of Law, University of British Columbia; and David Luban of Georgetown University Law Center.

### INTRODUCTORY REMARKS BY STEVEN RATNER\*

International law (IL) and political philosophy represent two rich disciplines for exploring issues of global justice. At their core, each seeks to build a better world based on some universally agreed norms, rules, and practices, backed by effective institutions. International lawyers, even the most positivist of them, have some underlying assumptions about a just world order that predisposes their interpretive methods; legal scholars have incorporated concepts of justice in their work even as their overall pragmatic orientation has limited the nature of their inquiries. Many philosophers, for their part, have engaged with IL to some extent—at a minimum recognizing that legal rules may need to be the vehicles for their own theories of justice, or going a step further to appraise them for their underlying moral content.

Yet, there is still a lot of mutual suspicion between international lawyers, both academic and practicing, and scholars of global justice, and they have engaged in parallel play more than any kind of collaboration. This is most unfortunate for both fields—but for international law, it is particularly unfortunate because many subjects of interest to international lawyers have been dissected and appraised by philosophers, some going back decades or even centuries, some more recent: from secession to permanent sovereignty over natural resources, from the law of war to climate change, from trade and investment, to global health.

Today's panel aims to consider whether and why international lawyers, both academic and practicing, should care about philosophical theories of justice. We hope it is the continuation of a dialogue that is taking place across these disciplines. To lead us through this, we will have a discussion with four truly interdisciplinary scholars who work on both legal and philosophical questions: James Stewart, Professor of Law at the University of British Columbia Law Faculty; Jiewuh Song, Associate Professor at the Seoul National University's Department of Political Science and International Relations; Carmen Pavel, Senior Lecturer in International Politics, King's College London; and David Luban, University Professor and Professor of Law and Philosophy at Georgetown.

### REMARKS BY JAMES STEWART\*\*

I thought today that I would offer a perspective as a practitioner of international criminal justice, this for a number of reasons. First, I cut my teeth as a practitioner, and it was really in practice that

\* University of Michigan Law School. This panel was co-sponsored by the International Legal Theory Interest Group and the World Justice Project.

\*\* Peter A. Ballard School of Law, University of British Columbia.

all of the questions of moral and political philosophy that I now work on posed themselves to me. I have also been thinking in that mode for a number of months again now and its one of the things that I like the most about the ASIL conference that it invites a dialogue and symbiosis between theory and practice. There is also another reason and I guess this is a statement of humility amongst these panelists, but I suspect that I am the least adept in both moral and political philosophy among this panel presently, and likely by more than one standard deviation, so I wonder if the practical vantage point might be useful. Because I do think that an experience of a practitioner has something significant to offer to discussions of global justice and likewise that global justice has something important to contribute to our self-understanding as practitioners.

I thought in the time that is available to me for the next three or four minutes that I would offer two stories, two examples, one from moral philosophy and one from political philosophy that I hope lay the land and help orient us for international criminal justice and practice. My supposition for each of these stories is that global justice, and philosophy as a component of that, enable us to be more conscious of what is “fair” in international law, and also that they give us a far greater self-consciousness of the place in international criminal justice within a robust theory of global justice.

Let me start with the example from moral philosophy. Now when I first began as a practitioner many moons ago there was a concept that was dominant, a legal concept that was dominant in ascribing responsibility to individuals. By a legal concept what I mean is a legal notion that was doing all of the work in allocating responsibility to individuals for atrocities that took place in various parts of the world. This concept was called joint criminal enterprise, which is essentially conspiracy, I will not go too much into the concept presently. Joint criminal enterprise was reduced to the acronym of JCE, but there emerged a real concern, a real malaise about the potential excess of joint criminal enterprise which was captured in the transformation of the acronym from joint criminal enterprise to “Just Convict Everyone.” And this transformation had important morale effects on practitioners working in international criminal justice because they felt that they were involved in something that was illiberal and excessive.

What was really crucial in this process was that it emerged that it was necessary to have some external analytical platform through which to consider just how and why joint criminal enterprise may have been excessive. What was it about it that led to this concern that it was excessive as a concept of punishment? And here moral philosophy was and remains a really key component of what would constitute an external platform from which to critique those sorts of ideas. And this is really quite a significant moment in the intellectual history of international criminal justice because there became a very sudden concern about what constitutes responsibility, and those questions became all the more acute in the intricacies of dissents into totalitarianism and mass violence. So what emerges in this place is the use of moral philosophy and the broader context of ideas of global justice to think through very practical questions about what is fair, what does responsibility mean, what role do institutions have in ascribing responsibility.

The second example I wanted to put on the table as food for thought is from political philosophy. And again here my hypothesis is that political philosophy also offers practitioners of international criminal justice a better orientation around what it is that they are doing, and also a greater self-consciousness about the value of their work as potential contributions to a more just world. The story I want to tell you in this instance is about how international criminal justice labeled itself for the longest time, and a criticism of that labeling. So at least initially, there was a process whereby international criminal justice and those within it described international criminal justice as “international justice ‘tout court,’” that is, leaving out other concepts of distributive justice. It was as if corrective justice was both necessary and sufficient as a concept of global justice. Now this was obviously impoverished as a theory of justice and more than a little bit hubristic, and so in the years that followed, a number of important critical scholars drew on political philosophy to reveal this

hubris in ways that were especially helpful. Gary Simpson, for instance, speaks about the ways international criminal justice makes arbitrary distinctions between violence by hand and violence by political economy. Likewise, to draw on a theme that has animated political philosophers more than international criminal justice, from Peter Singer to Thomas Pogge and others, there is a critique that in many respects global poverty kills more people each year than atrocities, and so for all the value in memorializing atrocities through institutions like Nuremberg, there is a concern through a political critique that potentially Nuremberg is also inviting us to forget the distributive concerns about global justice that have animated political philosophy in such important ways. Now to my mind sometimes this critique goes a little bit too far, and it involves an overcorrection; it implies that corrective justice is not only insufficient but also unnecessary. At any rate I do believe that global justice provides a useful frame for this, and that this frame is helpful for practitioners in developing an understanding and self-orientation. That is everything I really wanted to contribute. I am grateful for the opportunity to participate and think about these issues.

### REMARKS BY JIEWUH SONG\*

There are diverse ways of bringing philosophy fruitfully to bear on international law. I will focus on how I connect the disciplines in my own research. I tell people that I work in the political philosophy of international law. I am interested, more specifically, in investigating whether norms of international law are justifiable to the actors who are subject to the norms. In this sense, my work so far has taken what Steven Ratner calls the “International Law as Target” approach,<sup>1</sup> that is, employing the methods of philosophical inquiry to examine questions about whether existing or potential legal rules are normatively defensible.

The “International Law as Target” approach combines (1) a normative interest in figuring out what a justifiable international legal order would like with (2) the tools of philosophical investigation, which include, at the most basic level, offering and evaluating arguments, i.e., identifying premises and conclusions, assessing the validity of the inferences from the former through to the latter, contemplating objections and counterexamples and responses thereto, and so forth. I used these basic tools, for example, in a paper on universal jurisdiction.<sup>2</sup> The standard justification for universal jurisdiction has long been that some violations are so morally heinous that they warrant a permission to exercise jurisdiction regardless of ties of territory or nationality. I began with the sense that universal jurisdiction was normatively important and worth preserving against the significant backlash it had been facing since courts started using it in human rights cases, but that the standard heinousness justification had trouble adequately responding to the backlash, for example, that it had a hard time explaining the exceptional moral gravity of piracy, which, after all, is the original universal jurisdiction crime, or why, exactly, heinousness justifies an expansion in *jurisdiction* (rather than, say, increased severity in punishment). So I worked through these counterarguments to reach an alternative justification, on which universal jurisdiction is indeed defensible, but as a response not to moral heinousness but rather to gaps in enforcement that would very likely emerge unless international law were to institutionalize something like it, that is, something like jurisdiction that transcends ties of territory or nationality.

\* Seoul National University.

<sup>1</sup> Steven Ratner, *International Law and Political Philosophy: Uncovering New Linkages*, 14 PHIL. COMP. e12564, 5 (2019).

<sup>2</sup> Jiewuh Song, *Pirates and Torturers: Universal Jurisdiction as Enforcement Gap-Filling*, 23 J. POL. PHIL. 471 (2015).

Another part of the philosophical toolkit is making distinctions—breaking down claims, arguments, or narratives into components that are conceptually independent of each other. This mode of thinking, I am sure, can sometimes come off as pedantic or tedious, but it can also be useful in making headway. For example, one question that has recently dominated discussions about human rights is whether international human rights law and the human rights movement have failed adequately to respond to the problem of increasing economic inequality across the world. This kind of critique has interacted with anxiety over recent political events to fuel suspicion that human rights may no longer be useful or relevant. In a recent paper,<sup>3</sup> I try to figure out the significance of this critique by parsing its various components. I argue that the critique consists of two distinct charges, first, that human rights law and the human rights movement are objectionably minimalist, or too modest in their normative ambitions and, second, that the human rights movement has crowded out other, more ambitious movements, in ways that have been detrimental to the fight against economic inequality. I then argue that the charge of minimalism underestimates the political potential of human rights and that the charge of crowding out is empirically under-established. The practical upshot is that international human rights do not come out to be useless or irrelevant, at least not as dramatically as these recent critiques suggest. Separating out the two distinct components of the critique helps us better to see this point.

I will conclude with an observation that is partly sociological. I did a JD/PhD degree and, upon entering law school, expected to interact a lot with legal academics (or at least the academically oriented among my classmates). I did do that, but I also ended up spending a lot of time working with and talking to a certain strand of practitioner-types, in particular those who were, or were training to become, human rights advocates. That happened, I suspect, at least partly because we shared what I earlier noted to be an important part of the “International Law as Target” approach or the project of the political philosophy of international law, namely an interest in figuring out how international law or the international legal order could be justifiable. This interest naturally brings with it an openness to entertaining alternative legal rules or legal orders, and more generally different trajectories of social change. So I think that it would be a mistake to assume that interdisciplinary work is simply or exhaustively interdisciplinary *academic* work, i.e., work among legal academics and academics from other fields. Practitioners are an important part of the conversation.

#### REMARKS BY CARMEN PAVEL\*

As a political philosopher, I have always been deeply interested in questions about state authority and individual rights, and more specifically on how to limit states’ abilities to inflict large-scale abuses against their own citizens. International law became an area where I started to look for answers, and my work in recent years focused on understanding the ways in which it changes the way states relate to their citizens and to each other, and its limitations in a world of states which jealously guard their autonomy from outside interference.

I believe international legal scholars and political philosophers stand to enrich and advance the practice and scholarship of international law by a closer dialogue and engagement.

Here are two of the ways in which political and moral philosophy can inform the study and practice of international law, both of which address very practical concerns people have about international law.

<sup>3</sup> Jiewuh Song, *Human Rights and Inequality*, 47 PHIL. PUB. AFFAIRS 347 (2019).

\* King’s College London.

The first is a contribution to a broader conceptual debate about the proper place of international law in our social and political world. In my recent work I have focused on a range of skeptical arguments that seek to delegitimize international law both in terms of the policy responses states have about problems that cross borders, but also as an academic discipline worth studying. International law suffers a legitimacy deficit not only in public discourse where it is dismissed as a mere expression of powerful states' interests but also in the humanities and social sciences, and interestingly in law schools, where it occupies a precarious position in the pecking order of various legal disciplines.

In the book project called *Law Beyond the State*, coming out with Oxford University Press in November of 2020, I have been investigating the sources of this legitimacy deficit and the skepticism which gives rise to it and have been working on defending the project of developing and institutionalizing international law. The book makes the case that international law makes a critical, irreplaceable, and defining contribution to an international order characterized by peace and justice. Thus, the book has two distinct audiences. First, it speaks to those who are skeptical that international law can ever be more than an expression of powerful states' interests. It shows that properly conceived, states' interests require the development of a system of rules that protects from each other's interference, resolve conflict, and engage in long term cooperative behavior. Second, the book speaks to those who are persuaded by the transformative potential of international law. It shows that a commitment to international law as a framework of rules is more demanding than even its supporters realize.

This is a broader conceptual domain in which political philosophers can contribute to debates in international law. The second way is to take seriously the complaints people make about specific rules or areas of international law when they are judged to not be sufficiently just or are deemed to be morally deficient in some way. Some examples are criticisms of jurisdiction of the International Criminal Court, of trade rules under the World Trade Organization, or of the legal regime for the protection of refugees. Philosophers typically unpack those concerns and explain why they are justified or not from the standpoint of justice, and if the former what can be done to address them.

Some of the philosophers working on the interface between political philosophy and international law are Sarah Fine and David Owen on immigration and refugees; Colleen Murphy on transitional justice; Leif Wenar on economic justice and the resource curse; Catherine Lu on the legacies of colonial rule; Darrel Mollendorf on environmental justice; Andrew Altman, Christopher Heath Wellman, Larry May, and Jamie Mayerfeld on the boundaries and justification for international criminal law; and Anna Stilz and David Miller on the importance of states for collective self-determination.

#### REMARKS BY DAVID LUBAN\*

Our guiding question in this symposium is what use contemporary moral and political philosophy may be to international lawyers who are not themselves students of the philosophical literature. In the few minutes we have, it will be possible only to touch lightly on a large subject. I will focus on a topic that has occupied me for my entire career: the theory of just wars, and its legal counterpart, the Law of War (both the *jus ad bellum*—the law governing the use of force—and the *jus in bello*, international humanitarian law (IHL)). Obviously, the connection between them goes at least

\* Georgetown University Law Center.

back to Grotius and perhaps beyond. But if we wish to put a start date to the modern conversation, 1977 seems like a propitious choice.

That was the year of the first two Additional Protocols to the Geneva Conventions, which codified the legal framework for modern IHL, the *jus in bello*, for the purpose of “protecting the victims of armed conflict” (Preamble to Additional Protocol I (AP I)). Although the Protocols do not use the phrase “human rights,” the focus on victims, and the *in bello* rules protecting civilians, are clearly a turn toward human rights thinking.<sup>4</sup>

Historically, laws of war did not originate out of concern for civilians and their human dignity; they were codes of honor for war-fighters, and focused on the warrior’s personal virtue, which distinguished him from a mere man of violence and public menace. Benefits to civilians from restrained war fighting were a distinctly subordinate issue. Not so in AP I. Take one striking example, the law of reprisals. Article 51(6) of Additional Protocol I prohibits targeting civilians in reprisals against enemy misconduct. During World War II, reprisals were regularly launched against civilians. Prohibiting them is a clear manifestation of human rights thinking in the law of war.

1977 was also the year Michael Walzer published *Just and Unjust Wars*—arguably the greatest treatise on just war theory since Vattel. Notably, Walzer declared that human rights lay at the foundation of his theory. There are striking overlaps between Walzer’s theory and international law. To take the most striking, his version of *jus ad bellum* is largely identical with the framework set up in the UN Charter’s Article 2(4)/Article 51 apparatus: a prohibition on the threat or use of force against states, with an exception for the use of force in self-defense. When Walzer calls aggression the “crime of war,” lawyers will plainly hear echoes of the judgment of the Nuremberg International Military Tribunal: “To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”

There are similarities in the *jus in bello* as well. Walzer’s moral argument about collateral damage to civilians requires attackers to take affirmative precautions against it. As he puts it, the doctrine of double effect (the philosophical counterpart to the law permitting unintended “incidental” civilian damage in legitimate attacks) requires not merely that attackers *not intend* to harm civilians, but that they *intend not* to do so, meaning that they take precautions against civilian harm. That requirement also happens to be one of the most important legal innovations in AP I: “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects” (Art. 57(a)). Constant care means doing “everything feasible” to verify that targets are not civilians or civilian objects; it means as well taking “all feasible precautions” to minimize civilian damages (Art. 57(b) and (c)). Precautions like these are exactly what Walzer means by distinguishing “intending not” to damage civilians from the merely negative and psychological “not intending” to do so.

On the other hand, Walzer’s theory is very skeptical of one of the central doctrines of modern IHL, *in bello* proportionality. That doctrine in effect permits attacks that cause civilian damage, so long as that damage is not expected to be “excessive in relation to the concrete and direct military advantage anticipated.” This doctrine is, in effect, a utilitarian trade-off between civilian damage and military advantage. Throughout *Just and Unjust Wars*, Walzer is deeply skeptical of utilitarian arguments, and this is no exception; they require impossible calculations and license too much.

In short, a human rights-based theory like Walzer’s not only buttresses some of the most powerful strands of modern thinking in the laws of war, it also provides essential critical bite.

<sup>4</sup> David Luban, *Human Rights Thinking and the Laws of War*, in *THEORETICAL BOUNDARIES OF ARMED CONFLICTS AND HUMAN RIGHTS* (Jens Ohlin ed., 2016).

Walzer's *magnum opus* began a Renaissance in just war theory, not least because he connected it explicitly to modern human rights. Yet, on reflection, human rights is an improbable moral basis for a theory of just war. Soldiers will remind you that their job is to kill people and break things. How can you possibly square that with the human rights project?

In the law, the same question arises in a different form: whether international human rights law (IHRL) or IHL applies in armed conflicts; and it is fair to say that there is no consensus answer. The International Court of Justice's *Nuclear Weapons* Advisory Opinion tries to split the baby: It says that IHRL always applies, but in armed conflict IHL is the *lex specialis* (para. 25). Obviously, that answer finesses the issue rather than resolving it. A great deal turns on the question, because arguably IHL authorizes lethal attacks that IHRL would prohibit. Interestingly, just a week ago, in the *Majid Khan* case at Guantánamo, Judge Watkins found that IHRL governs non-international armed conflicts. It does, unless he gets reversed.

In philosophy, the tension between just war and human rights sprang into vivid relief in the early 2000s, with the rise of the so-called "Revisionist" school.<sup>5</sup> Revisionism assumes a strong foundational theory of individual rights. Its central premise is that each of us has a moral right to life that strictly prohibits lethal use of force by others, unless you waive your right to life by posing a tangible threat to the lives of others. Even in wartime it is morally impermissible to kill you unless you pose an individualized mortal threat—not merely that you wear an adversary's uniform. That would prohibit a great deal of the killing of enemy troops that the law of war licenses. The intuition here is powerful: in or out of war, morality is morality, and rights are rights. The two warring sides cannot waive *MY* right to life because *THEY* happen to be fighting with each other.

Now there is no question that Revisionism is jarringly at odds with the law of war. Under IHL, uniformed enemies can be targeted and killed even if they pose no threats. Not so in Revisionism. In IHL, lawful combatants on both sides have the identical rights and privileges. Not so in Revisionism, where aggressors have waived their right to life but defenders have not. So we have to ask: is a doctrine so far removed from existing law any use to lawyers?

I would say "yes and no." Start with the "no." Quite simply, to take Revisionism totally on board would be a Very Big Gulp. And law just does not do Very Big Gulps. Even one of the leading Revisionists, Jeff McMahan, does not think the law of war should mirror what he calls the "deep morality" of war, namely Revisionism. He argues that bringing the law in line with the deep morality of war would create dangerous incentives for warriors on the unjust side of war to refuse to surrender. Furthermore, within moral philosophy itself there have been strong push-backs against Revisionism—a kind of philosophical counter-revolution.<sup>6</sup>

On the other hand, it is hard to deny that individual rights have become ever more prominent in the law of war—just as Revisionism says they should be. Theodor Meron calls this phenomenon the "humanization of humanitarian law," and Gabriella Blum has labeled it "the individualization of war." I think of it in slightly different terms, as the "civilianization" of the law of war: the recognition of the rights of civilians trapped in battle spaces, facing perils to life, limb, and property not of their own making. Whatever the label, these developments make Revisionism and counter-Revisionism legally relevant, and international lawyers ignore the philosophical debates at their intellectual peril.

<sup>5</sup> Among the Revisionist "classics" are: DAVID RODIN, *WAR AND SELF-DEFENSE* (2002); Jeff McMahan, *The Ethics of Killing in War*, 114 *ETH.* 693 (2004); and JEFF MCMAHAN, *KILLING IN WAR* (2009).

<sup>6</sup> See, e.g., Seth Lazar, *Evaluating the Revisionist Critique of Just War*, 146 *DAEDALUS* 113 (2017); Seth Lazar, *Just War: Revisionists Versus Traditionalists*, 20 *ANN. REV. POL. SCI.* 37 (2017). For a deep recent critique, see MICHAEL SKERKER, *THE MORAL STATUS OF COMBATANTS: A NEW THEORY OF JUST WAR* (2020).



Happily, some of the best philosophical writing in today's just war theory is by highly knowledgeable lawyers and legal scholars, who are masters of both IHL and moral philosophy. International lawyers with interests in IHL and IHRL would do well to study Adil Haque's brilliant new book *Law and Morality at War*, and the "trialogue" among Ziv Bohrer, Janina Dill, and Helen Duffy on the moral division of labor between IHL and IHRL, in their *Law Applicable to Armed Conflict*—both published this year. These are models of what philosophy and law can bring to one another.

### **STEVEN RATNER**

We began to sense from the four of you how philosophers' way of thinking about international issues differs from that of the international lawyer. I would like to invite each of you speak to the methodological rigor that the philosopher offers compared to what the lawyer offers. The lawyer always thinks that she or he is rigorous, thinking about what distinctions make a difference. But what is the extra added value that the philosopher offers to these debates?

### **CARMEN PAVEL**

One stumbling block that international legal scholars encounter when reading political and moral philosophy is what they perceive as its utopianism. Political philosophers by training and professional deformity think a lot about ideals of justice and about how the world that we live in differs from those ideals. Yet legal scholars might resist efforts to evaluate and criticize various areas or institutions of international law. They might label this type of thinking as utopian, unfeasible, perhaps even disruptive to the health and operation of international law if taken too seriously. There is a kind of status quo bias which prevents thinking either about the moral desirability of the features of certain legal regimes or of the institutions of international law as a whole.

But it is important to notice that international law got where it is via change. Someone imagined new rules, new institutions, and created blueprints for reform. Moral and political philosophy can offer guidance with respect to those blueprints for reform. Change can be better or worse for those who are subject to its authority. The status quo can be defensible or indefensible. Political philosophers provide the tools and methodology to evaluate changes from the standpoint of justice and for bringing international law in line with moral values and principles. It encourages both scholars and practitioners to understand law not just as an expression of power but as a constraint on power, and to use it for positive, peace-enhancing, and justice-enhancing aims. I encourage legal scholars to engage with and have more patience with this type of scholarship because it can be surprisingly rewarding.

### **DAVID LUBAN**

One difference is that philosophers will feel a need to push an inquiry maybe a step further than lawyers think is necessary. Take for example the notion of human dignity, which appears in innumerable legal documents and judicial opinions. I think it is an open secret that nobody exactly really knows what human dignity is. Philosophers will think that is a question that needs to be investigated, even if the answer to it does not have any practical implication for what the law is, although it might actually have a practical implication because some concepts of human dignity might rule out some legal implications.

A second difference is that we all understand that legal rules often are the result of political compromises and are therefore imperfect in the eyes of everybody—all sides of the compromise that looked at them. And we say that this is what compromise is and that this is the best we can get. A

philosophical argument does not want to or particularly need to compromise. So that raises questions about the art of the possible, but that is always a question about any kind of academic work, legal scholarship, as well as philosophical scholarship.

The third difference is that in the formation of legal doctrine there are always concerns about administrability, about simplicity: is this a doctrine that jurists, who are not necessarily geniuses, can use? Simple rules for a simple world, as Richard Epstein put it. That is not so much a concern for philosophy, so philosophical discussions of justice issues often do not put the same weight on administrability and simplicity that legal doctrine does and that lawyers are comfortable with. And law drafters must anticipate unwelcome loopholing, just as they must anticipate the effects changing one legal rule has on other rules—a kind of calculation of consequences that philosophers happily can spare themselves.<sup>7</sup>

### JAMES STEWART

One of the great but very difficult gifts that arose from working as an investigator on atrocities in Rwanda as a young man was that it presented a set of really acute moral problems. One of those that really resonated with me for the longest period was about the responsibility of selling weapons to notoriously brutal regimes. There was a core philosophical problem in that dynamic that really got no attention in international criminal justice scholarship and that is just the basic question about causation. Is it meaningful to say that someone who sells a weapon to a genocidal regime shares responsibility for the outcome that transpires as a consequence of that sale? That moral problem is really a deep and lasting philosophical issue in the theory of causation. Part of the theory following people like Hart and Honore is that no, the perpetrator who used the weapon interrupts the causal chain and only the perpetrator is responsible for the final outcome. And so it was really engaging with these sorts of questions that I came to work like J.L. Mackie's *Cement of the Universe*, an 800-page volume on the theory of causation, but I confess what I think is significant and what I am trying to suggest about the relationship between theory and practice is that I would never have made it through that tome without a practical question to solve. And I never would have made it through that tome without thinking that philosophers had thought far more deeply about those sorts of questions in ways that might shed light on a real practical problem, so I think there is in that something about the relationship between philosophy and practice.

### JIEWUH SONG

It is apt that you frame the question as comparing the philosopher's rigor with the lawyer's rigor: there really are two different kinds of rigor. Put somewhat crudely, the philosopher is more naturally inclined to start from premises and then simply "follow the argument." Often, the premises will reach back to fairly basic principles.

The lawyer's job often involves at least two characteristics that, at a superficial level, might seem puzzling to the philosopher. One is that the lawyer will try to work within the confines of current positive law, and try to ensure that every step taken can be traced to some bit of the current positive law. Second, lawyers, simply as a function of their role responsibilities, will often start out with a conclusion that they need to establish. This is quite different from the "follow the argument" approach. For instance, the lawyers who figured out that perhaps they could use the Alien Tort Statute to get a court in New York to exercise jurisdiction over events that happened among Paraguayans in Paraguay had that conclusion in mind when they started the investigation into the possibility. The philosopher's first question more naturally seems to be, "well, *should* a

<sup>7</sup> David Luban, *Just War Theory and the Laws of War as Non-identical Twins*, 31 ETH. & INT'L AFF. 443 (2017).

court in New York exercise jurisdiction over events of this sort?” It seems that interdisciplinary work may very well involve both kinds of rigor, though, of course, there will often be occasion to choose which kind to employ or where to put emphasis.

### **STEVEN RATNER**

Could each of you say whether there are certain strands of philosophical work that are particularly useful to a lawyer, and what do they have in common, or certain strands that are not? Is it simplistic to say that ideal or abstract theory is not going to be helpful to a lawyer, or is there something about these ideal theory and foundational pieces that is of use? Which philosophers or philosophical approaches are particularly accessible to the international lawyer, both practitioner and academic?

### **CARMEN PAVEL**

I really liked some of the examples that people mentioned, like the one James gave about what sparked his interest in moral responsibility for harm. Legal scholars are likely to become interested in philosophy if at all, through these more practical questions about particular areas of international law or specific conceptions of rights and duties which helps explain or interpret certain legal doctrines and practices.

On the first level, what is going to be the most helpful is work in moral and political philosophy that will deal with those more concrete questions and issues of justice which arise in particular areas of law. What legal scholars will tend to find is that these forays will lead them to further questions in philosophy. I want to plead with those who start down this path that even types of theorizing which seem more ideal or utopian will pay off because they will open up broader questions about the structure and role of international law as a whole and about the role of the legal practitioner in it. International law, like all legal systems, can make people’s life go better or worse. Political and moral philosophy enables us to take a broader perspective about our role as scholars or practitioners in that system and reflect on whether what our place in it is. It enables international legal scholars and practitioners to examine assumptions and presuppositions about the defensibility and desirability of existing rules.

Even if the end result is that we end up rejecting proposals for reform of international law and institutions, we will be given better tools and arguments to understand which of the current practices and institutions are defensible and how they can be defended against legitimacy challenges.

### **STEVEN RATNER**

Thank you. Can the rest of you fold into your response Carmen’s point, which is that as you think about what kind of philosophy is of most interest to international lawyers, what does that say about what it means to be an international lawyer? Because we may have people tuning in who think that their only goal is to win the case for the client, or they have a certain professional identity for which global justice questions may seem at odds.

### **JIEWUH SONG**

One straightforward answer, to echo something that David said earlier, is that there are people working in both philosophy and law who are truly bilingual. Those people and their work (e.g., the ones David mentioned), I imagine, would be useful to many lawyers.

Thinking about my interaction with human rights practitioners—and this goes back to the earlier question about lawyers’ self-understanding—many of the most competent practitioners I have met

are genuinely open to critical investigation about what they are doing, including the most basic commitments within their fields. I have in mind the kind of people who would, say, pick up Charles Beitz's recent article on the notion of human dignity,<sup>8</sup> which raises serious worries about how central a role this notion could play in justifying the range of human rights now recognized in international law, and engage with those worries instead of setting them aside as (as it were) blasphemous. For lawyers whose professional self-identity includes this kind of open-mindedness, philosophical inquiry into the basic concepts and commitments of their fields should be of interest.

## JAMES STEWART

If I can, I am going to break my answer down into two parts. The first is very specific suggestions of philosophers that I find interesting and that I think practitioners of international criminal justice would also, and the second is to pick up on the idea of idealized utopian views of philosophy and how that plays out for practitioners.

I think that the philosophical literature on emotion is fascinating and deeply underappreciated in international criminal justice, Nussbaum being the most prominent. Richard Rorty's work on human rights is exceptionally interesting for practitioners, precisely because practitioners tend to be pragmatic in different ways, and I will come back to that in the second segment. Jonathan Glover I think is very important. He has a piece called "It Makes No Difference Whether or Not I Do It" which I think should be haunting for international criminal justice, and the entire literature on human rights and global poverty I think is really quite crucial precisely because of the ways that it sets international criminal justice in a context of a broader vision of global justice that international criminal has done too little to address.

The second part where I wanted to pick up on idealized and utopian visions of philosophy is to bring to the table something that I think is very germane, and that is that the practitioner has to decide. And that is really a burden on a practitioner that I think in large part philosophers and academics do not suffer. It is more than sufficient and often very helpful to say "well the answer to this solution is between x and y. There is an interesting dialectic. Who knows?" But the practitioner in practical context actually has to make a decision, knowing that decision is fallible, and what is significant about that obligation to decide is that it mimics the responsibility of those the prosecutor or the judge is actually judging. And so I think that is an added burden on a practitioner that is really quite significant, and to the extent that academic discourse and philosophy can apply a bearing, that bearing is to orient the decision.

## DAVID LUBAN

If the question is, "What can an advocate writing a brief or making a case for a client take from philosophy?" the answer is going to be disappointing. Writing a brief is not a place to make a full-fledged philosophical argument. What they might take is a sense of what the larger contours of an argument are, and if they are trying to write a brief that is embedded in a claim of fairness, then a philosophical orientation might be useful.

What is useful to read is the well-written work, of which there are many different styles in philosophy. Walzer's book is written using real-world case studies. Other books like David Rodin's *War and Self-Defense* and Jeff McMahan's *Killing in War* do not do that. What makes them work is spareness and purity of argument and a tremendous logic of how things fit together. What is not

<sup>8</sup> Charles R. Beitz, *Human Dignity in the Theory of Human Rights: Nothing But a Phrase?*, 41 PHIL. PUB. AFF. 259 (2013).

useful for practitioners is academic literature where scholars are just talking about what other scholars have said.

It is easy, though, to put undue weight on these differences and suppose that philosophical ideas play no role in the lawyer's work. That is a mistake. In closing, I am reminded of Oliver Wendell Holmes's prescient reminder of the importance of philosophical theory to "the path of the law":

Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. . . . [S]ee how much more the world is governed to-day by Kant than by Bonaparte. . . . The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

### **STEVEN RATNER**

This is a core question that participants at an ASIL meeting ask themselves. And lawyers can actually have multiple roles. As David pointed out, when you are writing a brief for a client in front of a court, you may be in a very different role from when you are a legal adviser to an NGO or the UN or a mission at a UN meeting, when you are in a prescriptive process. Or defending international law in front of skeptics at a congressional hearing.

Alas, we have run out of time. I would like to thank the four panelists for joining us from their different locations. We hope this is the beginning of a rich conversation among political scientists, philosophers, and international lawyers about global justice questions, and we look forward to many more opportunities to discuss these issues across our disciplines.