

IS INTERNATIONAL LAW PART OF NATURAL LAW?

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The affinity of international law to natural law goes back a long way to the classic writers of international law, notably Suarez, Pufendorf and Grotius. But it is hard for us today to interpret their writings. Was the relationship that they demonstrated between international and natural law one of content, of terminology, of meaning, or of method? To ask these questions is to open up a vast debate about what "natural law" itself means, even apart from its relation to international law.

Yet the magnitude of the questions does not preclude saying a few things about the issues involved, especially if what is said encourages readers to do further research.

For my part, I believe that no definite verbal content can ever be ascribed to natural law. As soon as you say natural law means X or means Y, someone else can "deconstruct" X and Y. The mistake Aquinas made, I think, was his attempt to formulate natural law in terms of verbal norms. He did this to show that natural law had the same content as Divine law. But in so doing, his method necessarily became positivistic — the (futile) attempt to control real-world events by imperative language.

If natural law has no necessary substantive content, and it can never be captured terminologically, does it have meaning? Yes, I would say, but not a verbal meaning. Words themselves do not have "meaning," and it follows that other words cannot give meaning to the words we start out with. A word is simply something that we have learned to associate with things we see or feel or hear about; Plato was totally wrong in saying that words have intrinsic meanings. We cannot stare at the term "natural law" and derive any meaning from it, nor do we have any basis for saying that there must be a verbal meaning somewhere behind that term.

What, then, can natural law mean if its meaning cannot be captured in words? I think it stands for a certain method of dispute resolution.

"Law" itself is only and always a method of dispute resolution. There is no such thing as statutory law or precedential law, because those are only collections of words that can be deconstructed at will whenever anyone purports to "apply" them to any real-world situation. But there is such a thing as third-party dispute resolution. We have courts, we have judges, we have administrators, we have bureaucrats. Their decisions are real and they are enforced. I would argue that the

method of dispute resolution of judges and other third-party adjudicators is solely what we mean by "law."

"Natural law" is the method of dispute resolution based on a conscious attempt to perpetuate past similarities in dispute resolution. Another term for it is Professor John Finnis' "practical reasonableness." The adjudicator uses her mind, her "reason," in the pursuit of what is "practical," namely, the dispute-resolving practices that have preceded the case she must decide.

"International law" has a deep affinity to this natural law method, for it consists of those practices that have "worked" in inter-nation conflict resolution. Customary international law is a record of all those interactions between nations (and between individuals and nations) that have promoted systemic stability. Systemic stability, in turn, is always eventually promoted, the most startling example being a Treaty of Peace. The losing side can always complain that the peace treaty was forced upon it and hence invalid because it was signed under duress (Hitler made such a claim). But the peace treaty resulted in systemic stability; it ended the war. Hence it must be given normative effect in international law, no matter what arguments about national duress are made.¹

International lawyers make the Platonic-positivistic mistake when they attempt to formulate its norms in verbal terms. International law does not and cannot consist of verbalized norms, because the practices that gave rise to those norms are the actions of states and not the words of states. At best, verbalized norms of international law are surrogates for, and poor generalizations of, the underlying methodological practices.

If we today read the dense prose of Suarez, Pufendorf, and Grotius, we have a hard time knowing whether they were reflecting natural law in the methodological sense I've been talking about, or were dragging in norms traditionally associated with international law to justify their own positions. My sense is that Suarez was more of a methodological natural lawyer, but alas of the three, he knew the least about international law.

¹It's different, of course, if the persons who signed the peace treaty were themselves coerced into signing it — for example, by torture. Then it is not a peace treaty at all, because it lacks representative character for the losing side. But any peace treaty where the claim is that the losing side itself was under duress to sign it, cannot be invalidated by international law.