2

Natural Law: Current Contributions of the Natural Law Tradition to International Law

Andreas Follesdal[*]

2.1 INTRODUCTION

Many elements of current positive public international law (PIL) originated in theories of natural law, including both rules – of the law of the sea and of war, of refugee and asylum law – and constitutive conceptions of sovereignty. Several scholars argue that PIL has improved upon and replaced those origins, leaving the old natural law theories dead. PIL has come of age – indeed, laments about the need for natural law to fill its lacunae are replaced by frustrations about PIL's ungoverned growth and fragmentation. Some say it is time for PIL to kick the ladder of natural law away.[*1]

This chapter seeks to give voice to the other side. Proclamations of the death of natural law theories are premature. More plausible versions of natural law theory may still contribute as PIL continues to evolve, by treaty agreements and interpretations.

To be sure, many historical natural law theories are implausible by our standards. The main aim here is only to consider whether a core of some more defensible such theories can contribute to present-day discussions about PIL. The upshot is that a wholesale rejection of the natural law tradition is unwarranted. And some theory of legitimacy beyond state consent-centred International Legal Positivism seems

[*] Research for this chapter was partly supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274 – PluriCourts The Legitimacy of the International Judiciary. Thanks for constructive comments at the University of Liverpool, the ECPR joint sessions at Mons, and the PluriCourts International Political and Legal Theory Seminar; from the editors, and from Daniel Behn, Patrick Capps, Julie Crutchley, Joshua Curtis, Kanstantsin Dzehtsiarou, Jakob Elster, Dagfinn Follesdal, Thomas Horsley, Reidar Maliks, Alejandra Mancilla, Ben Murphy, Cara Nine, Henrik Palmer Olsen, Antoinette Scherz, Theresa Squatrito, Geir Ulfstein, Martin Vestergren, Pauline Westerman, and Yelena Yermakova.

[1] Rudiger Wolfrum, *Sources of International Law*, Max Planck Encyclopedia of Public International Law 22 (May 2011), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1471 (citing Wolfgang Friedman, The Changing Structure of International Law 121–23 (1964)); *and* Jeremy Waldron, *What is Natural Law Like?*, *in* Reason, Morality, and Law: The Philosophy of John Finnis (John Keown & Robert P. George eds., 2013).

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

needed – either natural law theories or from some other tradition. Some natural law theories may avoid the most popular criticisms, and even contribute to alleviating some of PIL's alleged crises.

Section 2.2 sketches aspects of a charitable core of the natural law tradition: Human-Oriented Minimalist International Natural Law – "HOMINAL" for short. The point here is not to provide a full theory, certainly not one that fits perfectly with all self-described natural law theories, nor to uncover from history the most "genuine" exemplars. Instead, the more modest aim is to provide part of a "rational reconstruction," to collect and connect some of the more plausible core features common to some of the more convincing of these theories, of help when addressing the questions at hand – concerning PIL and its alleged crises. This minimalist core and the theories that share it have distinct implications for PIL, different from some other normative accounts. In response to questions about the *legitimate authority* of PIL, HOMINAL hold that there are *objective* standards of right actions and rules, discernable by *human reason* based on features of *human nature*, *law*, and of the *natural* and malleable *social order*.

Section 2.3 identifies several of the historical roles and contributions of natural law theories – often compatible with HOMINAL – for PIL, in order to assess and respond to criticisms. A central cluster of concerns has been the legitimate authority of PIL, including the entities it helps constitute, sovereign states and international organizations including international courts: Whence and whither their claim to rightful authority, variously understood? This grounds further related contributions, concerning how to identify and justify the sources of PIL, and how judges of international courts should interpret and "balance" them. We briefly consider how the premises and perspectives of HOMINAL may continue to contribute to present-day theoretical debates and development of PIL.

Section 2.4 seeks to defend natural law theories in general, and HOMINAL theories in particular, against some – but not all – criticisms. Some concerns against this tradition are misguided – their popularity with positivist legal theorists notwithstanding. Aquinas, Vattel, and other central theorists did not regard unjust laws as therefore not valid law in Hart's sense. Nor is all positive law assumed to be normatively legitimate and merit compliance. And the contributions of natural law theories are not only to fill the gaps of positive PIL. Other criticisms are overdrawn, in particular that natural law theories are objectionably arbitrary.

Section 2.5 turns to some alleged current problems and crises of PIL, to consider the roles of natural law theories such as HOMINAL theories. They might often appear part of the problems, but they may also contribute to resolve some of the challenges. How to address the fragmented PIL that states have established in piecemeal pursuit of their objectives? What to make of states that not only fail to comply with PIL but argue publicly that they are justified in doing so? How to respond to states that withdraw from treaties? And what about concerns that PIL is

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

ineffective in failing to address the important global challenges, and indeed instruments of global injustice that cloak hegemonic domination?

These reflections do not seek to vindicate natural law theories in general, or HOMINAL theories in particular. They are flawed, and other normative theories of international law may help alleviate some of the crises – and indeed be more sound. Such arguments belong elsewhere. The aim here is more limited: to argue that the wholesale rejection of the natural law tradition seems ill founded and hasty, in the absence of better theories of the legitimate authority of PIL.

2.2 HUMAN-ORIENTED MINIMALIST INTERNATIONAL NATURAL LAW THEORIES

J. S. Mill claimed that "A doctrine is not judged at all until it is judged in its best form."[2] The natural law tradition has a millennia-long contested history of defenders and deriders who have left the label "natural law" in tatters. Categorizations and descriptions abound, and helpful, uncontroversial definitions are scarce.[3] Indeed, as a "meta-category" of various theories, many *bona fide* natural law theories have incompatible features. How can we assess the contributions and future of "the" natural law tradition in Mill's admirable spirit?

Consider a cluster of interconnected features or modules that we call Human-Oriented Minimalist International Natural Law theory – "HOMINAL." Different "HOMINAL theories" vary in how they specify these features – and in their other premises and aims.

Many natural law theorists share what we now might express as a concern for the normatively legitimate authority of positive law over its subjects.[4] HOMINAL holds that the grounds for such legitimate authority of PIL are *objective* standards of right actions and rules, discernable by *human reason* based on features of *human nature*, *law*, and of the *natural* and malleable *social order*. These features and standards are "objective" in the sense that the reason to value them is not simply the fact that they are desired or enjoyed by human beings: such desires may be mistaken. HOMINAL leaves somewhat open how to specify these features of individuals, the tasks of states and of law, and how to justify standards on these bases. The theoretical ambition is also left somewhat open: some theories consistent with HOMINAL may pay more attention to detail in delineating implications for PIL, others less. Among the implications are the appropriate domain of positive law – where it is needed and where not; checks on its sources and on procedural and material constraints on its creation; guides for judges of international courts who interpret PIL, including how

[2] John Stuart Mill, *Segwick's Discourse* (1835), *reprinted in* X Collected Works of John Stuart Mill 31 (John M. Robson ed., 1963).

[3] John Hittinger, *Varieties of Minimalist Natural Law Theories*, 34 Am. J. Juris. 133 (1989).

[4] John Finnis, *Natural Law Theories*, Stanford Encyclopedia of Philosophy (2015), https://plato.stanford.edu/entries/natural-law-theories/.

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

to fill gaps regarding material norms or enforcement; and/or to guide action in the absence of relevant positive law.

The following comments address these features or modules of HOMINAL. There is no claim that these features are historically more accurate or closer to the "essence" of a concept of natural law than alternative lists. Instead, HOMINAL is a proposed partial "rational reconstruction" or "explication" of components that "makes them comprehensible because they are now shown as parts of a well ordered though complex whole."[5] The cluster of features included in HOMINAL are specified differently by various fully developed theories. They need only be sufficiently exact, coherent, simple, cogent and defensible to be fruitful for our purposes concerning their current value for PIL – in the hope that "the discovery of what it was that made them plausible, would be a benefit to truth."[6]

2.2.1 *Why "Law"?*

There are at least two reasons to call HOMINAL theories natural *law*.

A main *subject matter* for HOMINAL is positive law, as developed from sources of both domestic and international law. A wide range of natural law theorists including Emmerich Vattel (1714–67) insisted that PIL, while it may express states' preferences and customs, must be *consistent* with general natural law precepts to be morally binding on its subjects.[7] These requirements apply to two important roles that positive law may serve: they are *constitutive* rules – defining sovereign statehood, property, war, etc. – and *regulative* rules concerning conduct for example among such states and other actors. Thus HOMINAL theories are neither competitors to positive law, nor blueprints for the latter. To the contrary, natural law norms requires specification – "determinatio" – among several options. This may happen by positive enactment or by established custom that becomes positive law.[8]

Secondly, a core concern of many natural law theorists including Thomas Aquinas (1225–74), Vattel and others is why and when a positive law or a larger legal system is a *legitimate authority* – whether it "binds in conscience."[9] We might say: whether it has any reason-giving force that may pre-empt other reasons for actions such as self-interest. Whether current positive domestic or international law satisfies any sound natural law requirements is an open question. There is no assumption that every existing positive law enjoys legitimate authority. In particular,

[5] Neil MacCormick, *Reconstruction After Deconstruction: A Response to CLS*, 10 Oxford J. Legal Stud. 539, 556 (1990).

[6] John Stuart Mill, *Autobiography* (1873), *reprinted in* I Collected Works of John Stuart Mill I (John M. Robson ed., 1969).

[7] Emmerich Vattel, The Law of Nations (Le droit des gens), Preliminaries, ¶ 9 (Bela Kapossy & Richard Whatmore eds., Natural Law & Enlightment Classics ed. 2008) (1758).

[8] Thomas Aquinas, I-II Summa Theologica, Q. 95, art. 3 (1265–1274) [hereinafter Aquinas, I-II]; Finnis, *supra* note 4; *and* MacCormick, *supra* note 5.

[9] Aquinas, I-II, *supra* note 8, at Q. 95, art. 4; Vattel, *supra* note 7, Preliminaries, at ¶ 9.

a law might not enjoy such legitimate authority if it drastically violates natural law standards.

2.2.2 *Why "Natural"?*

HOMINAL holds that a necessary condition for much positive law to enjoy legitimate authority is that it is enacted by certain social practices of lawmaking. But HOMINAL denies that this is ever a sufficient condition. These positive legal norms depend for their morally binding authority not *only* the existence of such lawmaking institutions, but also on their various relations to standards of natural law. There are several reasons to call these *natural* law theories.

First, many HOMINAL theories maintain that some legal norms are "natural" as opposed to *purely* artificial. Some HOMINAL requirements lay down conditions variously described as "not of our doing"[10] "that reason does not make but only considers,"[11] that are not only decided but also in part discovered. As mentioned, many legal norms are morally binding law only if they are enacted by certain social practices of lawmaking, yet do not depend for their morally binding authority *only* on the existence of institutions – because their enactment is required by natural law: the relevant authorities *should* establish positive laws to secure certain objectives – for example to reduce various risks of violence, secure property and foster human flourishing.[12] Scholars who claim that the increase in positive international law has replaced natural law may partly have this in mind.[13]

Secondly, some HOMINAL norms enjoy *normative priority over positive law* and guide and constrain the substantive contents of the latter. They are "immutable," at least in the sense of Vattel and others, that "Nations can not alter it by agreement, nor individually or mutually release themselves from it."[14] Positive laws that violate certain natural law conditions might therefore lack normatively legitimate authority, and therefore be "perversions of the law."[15] Such requirements may include "no harm": that no one should be left worse off with such positive laws than in their absence;[16] and substantive constraints on treaties. Present-day examples that reflect such attitudes, now often expressed in terms of legal validity, include *jus cogens* norms, "odious debts," and recourse to supplementary means of treaty interpretation to avoid results that are "manifestly absurd or unreasonable."[17]

[10] Hittinger, *supra* note 3, at 182.
[11] Thomas Aquinas, Commentary on Aristotle's Nicomachean Ethics 1.1 (C. I. Litzinger trans., 1964); *cf*. Hittinger, *supra* note 3, at 142.
[12] Vattel, *supra* note 7, Preliminaries, at ¶ 15.
[13] Waldron, *supra* note 1.
[14] Vattel, *supra* note 7.
[15] Aquinas, I-II, *supra* note 8, at Q. 95, art .1.
[16] Vattel, *supra* note 7.
[17] Vienna Convention on the Law of Treaties, art. 32(b), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter, VCLT].

Thirdly, the premises of HOMINAL aim to draw on "natural" experiences and human reason publicly accessible and agreeable to all subjects. Which premises theorists have regarded as uncontestable and reasonable have naturally varied over time, concerning relevant features of human beings, and the social functions of social orders such as the city and state, and that of (international) law. Historically, while some natural law theorists maintained a divine source from which experience and reason derived, many were still committed to some form of empiricism – that knowledge is based on experiences. Thus several theorists sought to avoid contested or esoteric claims, for example on the bases of religious revelation.

2.2.3 *The Individual Human Being As the Unit of Moral Concern: Egalitarian Moderate Perfectionism*

HOMINAL holds that the ultimate normative objective of law is to protect and promote certain features of individual human beings. The various theories differ in how they specify at least two important dimensions: the relevant features – rationality, vulnerability, and sociability; and distributive principles among humans. Theories vary in their attentiveness to disagreement about such premises.

Which features of human nature matter? HOMINAL identify three premises about human nature.[18]

Rationality: individuals are rational in the sense of being able to think and act on the basis of reasons to further their various objectives, including self-preservation.

Vulnerability: all depend on collaboration with others for support.

Sociability: a desire for society with others, not *only* for instrumental self-interested reasons. Hugo Grotius (1583–1645), Samuel Pufendorf (1632–94), Vattel and others address this last feature in some detail. One argument for this feature is indeed self-interest, an implication of the two prior features of Rationality and Vulnerability. So even egoistic or atomistic "individualism" as often associated with Thomas Hobbes can provide an instrumental, contingent justification for Sociability. But for most of the natural law theorists, and as a feature of HOMINAL, the mutual desire of society is also justified on the basis of other-regarding attitudes and commitments to the flourishing of others within one's communities. This Sociability constrains what we may do to each other, and what we may let others do. In particular, HOMINAL share norms to *do no harm* – that is, not leave others worse off through our actions and institutions, and some duties to *protect* others against grave injury, based on the rationale for having a civil society at all.

The second feature where HOMINAL theories may diverge concern obligations regarding how to distribute benefits and burdens. Several theories have "*perfectionist*" standards: all institutions should promote the *maximal* flourishing of a conception of

[18] And thus reject preference satisfaction or welfare – and hence utilitarianism.

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

human nature. Thus Christian Wolff (1679–1754) defended the maxim to "Do what makes you and your condition, or that of others, more perfect; omit what makes it less perfect."[19] Similarly, Vattel held that societies must seek "as far as possible to promote the advantage of each member."[20] And states have such "perfectionist" duties also toward other states: "each individual nation is bound to contribute every thing in her power to the happiness and perfection of all the others."[21]

To be sure, this maximizing consequentialism is constrained, in at least two ways. There is a varying commitment to *egalitarian individualism*: the duty to do no harm prohibits the complete sacrifice of some for the flourishing of others – though some natural law theories might limit the flourishing of some for the sake of more complete flourishing of others. For instance, Francisco de Vitoria (1483–1546) argued that under natural law, no human being was born to naturally be *dominated* by others as their slaves,[22] since a civil society should not harm any member.[23]

Moreover, the obligations to promote flourishing of foreigners were limited – but not eliminated – by some *priority of compatriots*.[24] For Vattel and others the state had an overriding duty to promote the "happiness and perfection"[25] of its own subjects – albeit with limits. Thus several theorists include at least a right or obligation of mutual aid against aggressive wars or famines, and humanitarian intervention to protect individuals against grave injustices when no domestic institutions would do so – but constrained by the risk of abuse.[26]

2.2.4 *The Role of the State and of Law: The Grounds and Limits to Sovereignty*

Natural law theories often underscore that social institutions are "artifacts" whose details may vary, and that need justification. Justifications of the authority of families, states and other institutions – including PIL – rest on claims that their legal powers are necessary to protect and promote these features of individuals and their organizations, and always subordinate to those objectives. Institutions such as property, states and rules such as PIL are legitimate only insofar as they perform their proper purpose or function – to the rational benefit of their subjects so that these objective features flourish. For instance, the institution of property, to "allow every

[19] James Fieser, Moral Philosophy Through the Ages 175 (2001).
[20] Vattel, *supra* note 7, at Bk. I, Ch. II, at ¶ 21.
[21] *Id.*, Preliminaries, at ¶ 13.
[22] Francisco de Vitoria, De indis et de ivre belli relectiones (John Pawle Bate trans., Classics of International Law ed. 1917) (1557).
[23] Vattel, *supra* note 7, at Bk. I, Ch. II, at ¶ 17.
[24] Henry Sidgwick, The Elements of Politics (1919); Henry Shue, Basic Rights: Subsistence, Affluence and US Foreign Policy 132 (1996).
[25] Vattel, *supra* note 7, Preliminaries, at ¶¶ 13–14; *id.* Bk. II., at 3.
[26] *Id.* Bk. II, Ch. I; Hugo Grotius, The Rights of War and Peace (De Jure Belli Ac Pacis Libri Tres) (Frank W. Kelsey trans., Claredon Press ed. 1925) (1625); and Vattel, *supra* note 7, Bk. II, ch xxv, § viii.

one to enjoy his own possessions," is justified on the basis of Rationality and self-preservation.[27] Such institutions of property – or for example of right of passage – are legitimate only insofar as they do not injure others, or only to a slight degree, for instance by not significantly constraining others' usage of common possessions.[28] Thus for Pufendorf the natural right to self-preservation outweighs adventitious rights of property: it is sometimes permissible for a starving person to take another's surplus food without permission.[29]

The state exercises legitimate authority insofar as it carries out these tasks, but is illegitimate if it falls drastically short of these purposes, or is not authorized to act, or abuses its powers to the detriment of human beings. The baseline is often a "state of nature" absent any institutions, under circumstances of mutual vulnerability and with some "natural duties" of sociability, from *which each* individual must benefit.

These arguments are reminiscent of "trustee" or "fiduciary" relationships, further developed in recent contributions.[30] HOMINAL theories thus acknowledge states as parts of a legitimate legal order, but reject unconditional "unrestrained" sovereignty. HOMINAL theories hold that states can make justifiable claims *only* to those powers, privileges and immunities required or warranted by natural law arguments ultimately grounded in human features, and that these must be limited to avoid harm.

Note that how natural law theorists specify the feature of Sociability has implications for sovereignty. Indeed, disagreement on these premises among natural law theorists show the implausibility of assuming that others will find the same premises "obvious" or "natural" – or draw similar conclusions from them. At the very least, we witness more sophisticated arguments by later theorists – disagreements that persist until today.[31]

Vattel held that the tasks of PIL should be limited to ensure coexistence among states, each acknowledged as sovereign and equal. States should generally be immune from interference and left to pursue their own substantive ends, without any further shared purposes. However, even Vattel would permit humanitarian intervention in principle.[32]

Other theorists, including Grotius, would include more purposes and common objectives among states, justified by the human feature of Sociability. These may include low-cost *constraints on sovereignty*, expressed more recently for example in

[27] Samuel von Pufendorf, The Whole Duty of Man, According to the Law of Nature 55 (Michael Silverthorne trans., Natural Law & Enlightment Classics ed. 2003) (1673); Hugo Grotius, Prolegomena to the law of war and peace ¶¶ 8, 10 (1957).

[28] Hugo Grotius, The Freedom of the Seas (Mare Liberum) Ch. 12 (1609).

[29] von Pufendorf, *supra* note 27, at 1.1.8.

[30] *Cf.* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 Yale J. Int'l L. 331 (2009).

[31] Coexistence, Cooperation, and Solidarity (Holger P. Hestermeyer et al. eds., 2011).

[32] Andrew Hurrell, *Vattel: Pluralism and its Limits*, *in* Classical Theories of International Relations (I. Clark & I. B. Neumann eds., 1996).

the customary international law of the right of foreign ships in distress to enter ports. More extensive obligations of sociability may include duties of cooperation to seek or join collective solutions of mutual interest to address shared problems – and indeed to exploit win-win situations. Thus several theorists regarded international trade as a right in pursuit of human flourishing – not to be hindered.[33]

Implications of Sociability therefore vary among natural law theories. They have included not only the right to trade, but to proselytize, free passage and the duties of hospitality. For Vitoria and Grotius this entailed free movement of people – for Vitoria even the right to residence, while Pufendorf and Wolff maintained that the sovereign could refuse aliens access.[34] Others claimed that this only included a right to visit.

Another important difference among natural law theories concerns international intervention. Should anyone be allowed to intervene to protect against or sanction violations of any natural law, even when not part of positive law? Vitoria argued that the Indians were rightful owners of their property, since they clearly had Rationality. The Spaniards could therefore only subjugate them or seize their property in response to violations of the rights of the Spanish. Vitoria claimed that these included rights to trade and residence.[35] Similarly, Grotius defended Heemskirk's seizing the Portuguese ship Santa Catarina in response to aggression against Dutch traders. Thus, the specific justification for intervention had drastic implications for imperialism – as criticized by Anthony Anghie and other scholars pursuing a "Third World Approach to International Law" (TWAIL).[36]

HOMINAL also offers more nuanced, less imperialist arguments. Several natural law theorists would hold that there are limits to what states can do to their citizens and still have legitimate claims to sovereignty, echoing Fernando Teson's claim, that "states are supposed to minimally protect their subjects. States that massively murder their subjects betray their raison d'être."[37] Grotius observed that when a tyrant committed "unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns."[38] Vattel agreed: "As to those monsters who, under the title of sovereigns, render themselves the scourges and horror of the human race, they are savage beasts."[39]

However, several theorists insisted that the issue of humanitarian interventions raises difficult questions of who should have the "right to punish faults."[40] The

[33] Pufendorf, *supra* note 27, at 35.
[34] Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 Eur. J. Int'l L. 901 (2016).
[35] Vitoria, *supra* note 22, De indis Q1.
[36] Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2004).
[37] Fernando R. Teson, *Natural Law as Part as part of International Law: The case of the Armenian Genocide*, 50 San Diego L. Rev. 813, 826 (2013).
[38] Grotius, *supra* note 26, Bk. II, Ch. 25, at 8.
[39] Vattel, *supra* note 7, Bk. II., Ch. 1, at 1.
[40] *Id.*, Bk. II, Ch. 1, at 7.

authority to thus intervene or sanction needed to be circumscribed: not all violations should set sovereignty aside.[41] One reason was that Grotius insisted that such actions must be regulated since "pretexts of that kind . . . may often be used as the cover of ambitious designs."[42] And Vattel worried that Grotius was too lenient, since his "opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts."[43] Attention to their arguments may reduce concerns that discussion of legitimate though illegal humanitarian intervention is fuzzy, indeterminate, and based on little more than the speaker's own moral intuitions.[44]

2.3 PAST AND PRESENT CONTRIBUTIONS OF NATURAL LAW TO PIL

This brief sketch of natural law theories must suffice as a backdrop to delineate some of their influences on PIL, and in turn to assess criticisms against HOMINAL theories.

2.3.1 *Whence the Legitimate Authority of Positive International Law?*

A core concern for HOMINAL is to explain why and when the claims of legally valid international law to be a legitimate authority are correct – that is, why and when PIL give its subjects sound reasons to defer to it. This grounds and guides the other possible contributions.

The obligation to obey might depend both on the contents of and processes of identifying and interpreting PIL. Aquinas' definition captures both when he defined law as "a *rational* ordering of things which concern the common good; *promulgated* by whoever is charged with the care of the community."[45] HOMINAL theories answer this question by considering why and when we may have social institutions and law at all, and for which areas who *should* – and when who should not – regulate our relations by law, and how. There may be moral obligations based on survival and Sociability, including nondomination, to enter into efficacious lawful relations that satisfy some substantive conditions. Lawmakers' tasks are then to comprehend these obligatory ends and design suitable PIL. Other legal regulations may be more "optional," for example to provide predictability and coordination for better pursuit of reasonable ends, relative to some baseline. HOMINAL theories thus grants several roles to positive law making, including the need to specify any natural law requirements to local circumstances, and select which alternative is to be authoritative.

[41] Grotius, *supra* note 26, Bk. II, Ch. 24, at 1.
[42] *Id.*, Bk. II, Ch. 25, at 8.
[43] Vattel, *supra* note 7, Bk. II, Ch.1, at 7.
[44] James Crawford, *The Problems of Legitimacy-Speak*, 98 Am. Soc'y Int'l L. Proc. 271 (2004).
[45] Aquinas, *supra* note 8, at Q 90, emphasis added.

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

2.3.2 *Delineate the Subject Matter and Contents of Legitimate PIL*

HOMINAL theories' answers to the previous question serve to *delineate requirements* about the topics and contents of positive domestic and international law. States should acknowledge or agree some PIL, and arguably establish some international courts tasked to resolve disputes, interpret PIL, authoritatively determine breaches of legal obligations, and to protect against some ills, ultimately based on the relevant features of individuals in their societies.

Natural law conditions may concern firstly the *substantive* contents of rules, both "constitutive" and "regulative" rules. For instance, some requirements regulate sovereign statehood, for example to require sovereign equality, prohibit aggressive wars but possibly permit humanitarian intervention under certain conditions. Regulative rules for issue-specific PIL may concern legal norms to promote flourishing and reduce threats to human survival, such as rules of property, or to prohibit certain forms and means of warfare. Other conditions are *procedural*, for example concerning who should have the authority to determine positive law, or that positive laws should satisfy standards required to serve as law – such as non-retroactivity or respect for due process. In general, these constraints are not so specific as to provide blueprints for positive law, but constrain and guide their specification by those authorized to do so.

2.3.3 *The Sources of PIL: How to Identify, Justify, Specify, and Order*

Many have noted that natural law theories were the ancestors of modern PIL.[46]

Natural law theories justify the five sources of PIL listed in the Statute for the International Court of Justice.[47] Various theories mention several of them, and sometimes discuss in what ways each source can be said to express states' will.[48]

Treaties between states are standardly held to bind due to state consent; a claim harking at least back to Grotius' distinction between civil law and natural law in that the former was voluntary based on states' will.[49] However, HOMINAL lays limits on the legitimate agreements of states. Thus treaties to cooperate for torture, piracy, genocide, or slavery do not create binding obligations. The Vienna Convention on the Law of Treaties recognizes similar limits on state consent, which voids treaties that conflict with *jus cogens* norms.[50] HOMINAL theories typically hold that the *jus cogens* norms are normative constraints that should guide states also prior to for example the Vienna Convention, and that states *recognize* them when states consent

[46] H. S. Maine, Ancient Law – Its Connection With the Early History of Society, and its Relation to Modern Ideas (5th ed. 1875) .

[47] United Nations Statute of the International Court of Justice art. 38.1, June 26, 1945.

[48] Vattel, *supra* note 7, Preliminaries, at arts. 24–27.

[49] Grotius, *supra* note 26, Bk. 1, Ch. 1.

[50] Vienna Convention on the Law of Treaties art. 53, 1155 U.N.T.S. 331 (1969).

to positive PIL. We may also see a further influence of HOMINAL by the fact that all such *jus cogens* norms appear to concern human interests, not those of states.

Customary international law is derived from the practice of States. Francisco Suarez (1548–1617) addressed customary norms at length; drawing on older Roman law to discuss what has remained the two defining features of custom: "introduced by usages and accepted as law [now discussed as *opinio juris*] when enacted law is lacking."[51] From Suarez onwards to John Tasioulas, natural law theorists have addressed how behavioral regularities become law, appealing to objective reasons based on human interests.[52] Suarez, Grotius and Vattel thought that custom was based on *tacit* consent among states – their acts expressing such customs *intending* that it be binding as law manifest consent.[53] Suarez maintained that it sufficed that a majority thus followed the custom to also bind those who did not.

General principles of law are principles recognized in many domestic legal systems in "civilized nations." They inter alia address such issues as admissibility of indirect evidence and the principle of good faith – and possibly "equity."[54] They are often said to both "refer to principles of international law proper *and* to analogies from domestic laws, especially principles of legal process,"[55] but need not satisfy the two criteria of customary PIL. Compared to customary international law, the basis of general principles in state consent is even more tenuous: they need not be found in all states' practice, and they evolve over time, as "an authoritative recognition of a dynamic element on international law, and of the creative function of the courts which may administer it."[56] Both this source and exemplars of such principles are contested, but are generally regarded as "subsidiary," "gap fillers" when treaties and customary PIL runs out. Several HOMINAL theories acknowledge such principles recognized by (several) "civilized" nations.[57] The inclusion of general principles among the sources also seems explicitly natural law based: a central concern for the drafters of the earlier Permanent Court of International Justice (PCIJ) was to avoid potential *non liquet*.[58] In 1920 the president of the Advisory Committee of jurists

[51] Francisco Suarez, The Laws and God the Lawgiver (de legibus) 6, 7.1.1 (1612); Brian Tierney, *Vitoria and Suarez on ius gentium, Natural Law, and Custom*, *in* The Nature of Customary Law 115 (A. Perreua-Sauasssine & J. B. Murphy eds., 2007).

[52] John Tasioulas, *Comment: Opinio Juris and the Genesis of Custom: A Solution to the 'Paradox,'* 26 Austral. Y.B. Int'l L. 199 (2007).

[53] Suarez, *supra* note 51, at 7.12.1, 7.14.7, 7.15.10.

[54] *E.g.*, North Sea Continental Shelf Cases [Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands], Judgement, 1969 I.C.J. Rep. 3, ¶ 90 (Feb. 20).

[55] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (2006) (emphasis added).

[56] J. L. Brierly, The Law of the Nations: An Introduction to the International Law of Peace 63 (1963).

[57] Suarez, *supra* note 51, at 1.19.8 (distinguishing two forms of *ius gentium* – the rules among states and the shared domestic rules of several states). *Cf.* Tierney *supra* note 51, at 122.

[58] For *non liquet*, *see* Hersch Lauterpacht, The Function of Law in the International Community (1933).

therefore argued in favor of including "the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations."[59] Oscar Schachter's account includes principles of justice based on "the very nature of man as a rational and social being."[60]

Judicial decisions and the writings of "the most highly qualified publicists" are further subsidiary sources of law. HOMINAL identify several reasons to emphasize prior case law in determining international law, including to enhance predictability about the actions of others, equal treatment of similar cases, to reduce the risk of arbitrariness by judges, and as one way to authoritatively specify vague norms, that grant law "qualit[ies] of clarity, certainty, predictability, [and] trustworthiness."[61] HOMINAL theories can also acknowledge several of these roles for writings of "the most highly qualified publicists" – to provide certainty and reduce judges' discretion in interpretation and specification.

2.3.4 *How to Interpret PIL: When "Law Runs Out," Proposals for Harmonization*

Judges, especially of international courts, often face situations where relevant legal sources may be interpreted and weighed or "balanced" in different ways, each of which complies with standards of legal method, yet that will yield different judgments. HOMINAL theories argue that judges' choices should not properly simply be governed by their personal preferences generally, but rather that they have a moral and professional duty to interpret in light of natural law premises – for example in the form of a "pro hominem" interpretation. Such ways to "fill the gaps" increase the reason-giving authority of PIL. HOMINAL theories thus specify the rules of interpretation of the Vienna Convention in certain ways. To illustrate: interpretations of a treaty should be made "in the light of its *object and purpose*." HOMINAL theories may hold that the specification and "weight" or value of such purposes relative to other objectives should be informed and constrained by natural law premises concerning permissible and morally required purposes of treaties.

Among the sources for interpretation are "any relevant rules of international law applicable in the relations between the parties."[62] For HOMINAL theories, such rules may include the natural law-inspired sources listed above; whether the state parties to a dispute have consented is not so central.

[59] Lauri Mälksoo, *Sources of International Law in the Nineteenth-Century European Tradition: Insights from Practice and Theory*, *in* The Oxford Handbook on the Sources of International Law (Samantha Besson et al. eds., 2017).

[60] Oscar Schachter, International Law in Theory and Practice (1991).

[61] John Finnis, Natural Law and Natural Rights 272 (2d ed. 2011).

[62] VCLT, *supra* note 17, at Art. 31(3)(c).

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

The Vienna treaty also allows supplementary means of interpretation when the interpretation otherwise "leads to a result which is manifestly *absurd or unreasonable*."[63] Such assessments would seem to rely on standards not explicitly consented to, but where HOMINAL theories may contribute to determine reasonableness.

2.3.5 *Rules in the Absence of Legitimate Positive (International) Law*

Another central topic for several natural law theorists is which rules to follow where there are no legitimate positive laws. Note that this is a second role for "state of nature" arguments. Various "contractualist" "state of nature" arguments seek to show when the state is rational for every individual, regarded as equals and with motivations that include any duties of Sociability, by comparing that state to a hypothetical baseline without such institutions.[64] In contrast, this second form of state of nature argument occurs in real circumstances where there are no such rules and hence no institutions. On this account, HOMINAL address those authorized to lay down rules, rather than those obliged to comply with them.[65] In order to be legitimate, such rules should be constrained and guided by some norms – including positive law. There are at least three kinds of situations.

Firstly, several natural law theories have held that individuals should comply with some norms even when there are no legitimate positive laws, and even without effective enforcement mechanisms that could bring violators to court. The substance of such norms may be different than in circumstances where reciprocity and general compliance may be assumed. Thus Vitoria argued that some natural law norms restrained how Europeans might treat indigenous tribes in the Americas. For instance, Spaniards should respect the indigenous own' institutions of ownership and property, even though they were unbelievers – not because Spain had consented to such respect, nor because of divine law, but because the indigenous are human and possess reason, as witnessed by their orderly polities, and regulations concerning marriage, property etc.[66] Other examples are rules of just war and warfare, where enemies will disagree about the justice of their cause (jus ad bellum), and where restraints on means (jus in bello) might not be reciprocated. Grotius, Pufendorf, Vattel, and others contributed to these issues in ways that resonate today.[67]

Second, HOMINAL theories may provide justification for establishing positive law to address certain issues, when necessary to secure outcomes that are clearly to the urgent benefit of all, such as addressing environmental challenges.

[63] *Id.* at art. 32.b.

[64] Jean Hampton, *Contract and Consent*, *in* A Companion to Contemporary Political Philosophy 383 (Robert E. Goodin & Philip Pettit eds., 1993).

[65] *E.g.*, Vattel, *supra* note 7, at 18.

[66] Vitoria, *supra* note 22, at 125.

[67] Larry May, War Crimes and Just War (2007); David Boucher, *The Just War Tradition and its Modern Legacy: Jus ad bellum and Jus in bello*, 11 Eur. J. Pol. Theory 92 (2011).

A third set of issues arise when states and individuals are faced with positive laws that they sincerely regard as not normatively binding. We consider how to respond in such cases, including by "civil disobedience," below.

2.4 CRITICISMS OF NATURAL LAW CONSIDERED

The natural law tradition has attracted its share of critics. Here, we briefly discuss some of the most enduring critiques of natural law.

2.4.1 *Need Not Be Based on Contested Sectarian Premises*

Several critics challenge the sectarian, often Christian, premises of natural law theorists. For instance, Kelsen maintained that "If the natural-law doctrine is consistent, it must assume a religious character. It can deduce from nature just rules of human behavior only because and so far as nature is conceived of as a revelation of God's will, so that examining nature amounts to exploring God's will."[68] Indeed, many natural law theorists acknowledged a divine creator of the relevant human features and the rest of nature – Aquinas held that all laws are derived from (God's) eternal law.[69] However, recognition of "reasonable disagreement" combined with concerns for international stability and tolerance among those of different religious beliefs have often led HOMINAL theories to search for premises explicitly constructed to secure sufficient support even across some substantive value disagreements. Indeed, several theorists maintained that some norms would exist even if God did not.[70] Over time, the existence of God has appeared less evident. Still, several theorists including Vitoria, Aquinas, and Grotius explicitly sought to develop standards empirically based foundations independent of divine revelation, displacing religious authorities. Aquinas distinguished in "*Summa contra gentiles*" the truths that could argued based on human reason and experience alone – including the existence of one God – from arguments based on revelation.[71]

2.4.2 *No Claim That Unjust Laws Are Invalid*

Hart criticized Aquinas' natural law theory for holding that "*Lex iniusta non est lex*" – that "man-made laws which conflict with these principles are not valid law." That is, unjust laws would not be valid in Hart's sense of valid.[72] This interpretation

[68] Hans Kelsen, *The Natural-Law Doctrine Before the Tribunal of Science*, 2 W. Pol. Q. 481, 482 (1948).
[69] Aquinas, *supra* note 8, at Q 93.
[70] Grotius, *supra* note 27; *cf.* Anghie, *supra* note 36, at 17–18.
[71] Thomas Aquinas, Summa contra Gentiles (1259–1265) (1975) (books I–II and IV, respectively).
[72] H. L. A. Hart, The Concept of Law 27 (1961); Waldron, *supra* note 1, at 186; Leslie Green, *Legal Positivism*, Stanford Encyclopedia Phil. § 1 (2003), *available at* https://plato.stanford.edu/entries/legal-positivism/.

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

of Aquinas and other natural law theories has been widely rebutted.[73] Aquinas in fact distinguished several ways that laws may be unjust – still laws, but ones that do not "bind in conscience."[74] Recall that the core topic of HOMINAL as laid out here is not whether a particular norm of positive international law is a valid law, but rather whether the subjects have a (moral) obligation to obey or otherwise defer to such a valid law. The latter is an open question also for many legal positivists including Hart and Raz, who deny that the *systemic validity* of law establishes its *claims to be a legitimate authority*, that is, any claim that subjects *should* obey or that judges should apply laws.[75] HOMINAL theorists may agree for example with Raz that the normative legitimacy of valid law is a separate question, but agree with Aquinas that "every law aims at being obeyed by those who are subject to it."[76] Natural law theories provide modes both to justify such challenges, and to lay them to rest – insofar as that legal norm, within the domestic and international legal order as a whole, promotes the relevant features of human beings and their states.

2.4.3 *Is Natural Law Arbitrary in a Problematic Sense?*

One criticism against natural law is that it appears arbitrary in a problematic way. There are "a remarkable number of different views about what the universal and immutable principles of natural law require."[77] The normative premises would appear contestable to a high degree, at the risk of providing a moral vindication by a convenient identification of the national interest with the law of nature.[78]

There are at least three main strands of response. Firstly, any claim of natural law's arbitrariness or contestability is a comparative assessment against alternative theories that address the legitimate authority of PIL. This claim cannot be assessed without examining whether the positivists, and others, propose alternatives that are less contested or arbitrary – a task well beyond the confines of this chapter.

Secondly, there have been many different natural law theories, with conflicting conclusions concerning the limits of PIL, and concerning its normative authority. The disagreements should of course not be overdrawn – there seems to be agreement concerning *some* normative premises, for example about to do no harm, and certainly repudiating genocide. At least three further reasons for the historical variations may mitigate the concern. Some differences over time may reflect

[73] *E.g.*, on the basis of Aquinas, *supra* note 8, Q. 96, art. 4, ad 3. Attempts to correct this misconception include S. B. Drury, *H.L.A. Hart's Minimum Content Theory of Natural Law*, 9 Pol. Theory 533 (1981); Philip Soper, *Some Natural Confusions about Natural Law*, 90 Mich. L. Rev. 2393, 2396 (1992).

[74] Aquinas, *supra* note 8, Q 96 Art. 4.

[75] Hans Kelsen, Pure Theory of Law 204 (M. Knight trans., 1967); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 598 (1958); Joseph Raz, *About Morality and the Nature of Law*, 48 Am. J. Juris. 1, 7–8 (2003).

[76] Aquinas, *supra* note 8, Q 92 Art. 1.

[77] Judith N. Shklar, Legalism: Law, Morals, and Political Trials 178 (1964).

[78] *Id.* at 181.

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

epistemic improvement – some premises may be better argued, and some may be less biased concerning who are included among the persons whose rationality and perfection matters. Some natural law theories also appear to integrate as a fundamental fact the extensive disagreement about some premises in ways that affect the normative requirements. Recall Aquinas' *Summa contra gentiles*, Vattel's caution about permitting sanctions against perceived breaches of natural law norms,[79] and Hart's account of a minimal natural law.[80] Some further differences are due to new institutional possibilities, such as international courts that provide some more impartial mechanisms for dispute resolution that help stabilize expectations even without formal sanctions.

Thirdly, even though premises of any of the HOMINAL theories may be contested, the general argument structure may help identify disagreements and frame the issues of contention in ways that may reduce the disagreements further.

2.5 HOMINAL THEORIES CONTRIBUTING TO THE CRISES OF PIL – OR TO THE SOLUTIONS – OR BOTH?

Historically, HOMINAL theories may have developed as responses "in times of transformation or crisis, when basic aspects of the world are questioned."[81] What roles can they play in the crises PIL are alleged to face today? Consider four topics where natural law theories and their concerns about legitimacy might at first glance seem to fuel the crises, but where HOMINAL may also contribute, albeit modestly, to their resolution.

Several crises stem from the post-1990s uncoordinated growth in PIL in ever more areas. Natural law theories would arguably welcome such issue focused treaties to help contain risks, enhance collaboration and sanction state sponsored horrors. Yet one result has been fears of a crisis of *fragmentation* of PIL, threating legal certainty.

Further crises are wrought by state responses to this growth. We witness piecemeal state resistance ranging from *noncompliance*, for example with ECtHR judgments, to threats of *withdrawal*, for example from the European Union or from the jurisdiction of the International Criminal Court. States sometimes simply voice their frustration or exit, but they have in effect closed down an international court,[82] and established new alternatives.[83] Such skepticism toward supranational authorities may find support from natural law theories that stress the need for state sovereignty to ensure inhabitants' interests, and hence the need for state consent, actual or otherwise, for PIL.

79 VATTEL, *supra* note 7, at art. 8.
80 HART, *supra* note 72, at 188–89.
81 Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L REL. 3, 13 (2012).
82 Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293 (2016).
83 Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 REV. INT'L ORG. 385 (2014).

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

The present impact of PIL may also have contributed to challenges to the "systemic" legitimacy of PIL as a whole. PIL seems unable to resolve states' global collective action problems of environment, refugees or global poverty. Indeed, some critics charge that PIL furthers global oppression and economic injustice, and natural law theories' historical contributions to imperialism seems undeniable.

The responses that follow do not aim to rebut these accusations, but rather indicate how HOMINAL may also help to address – but not resolve – some of these alleged crises facing PIL. The result may not leave PIL unscathed, for HOMINAL theories challenge state-centric accounts of legitimacy that seems assumed in "international legal positivist" focus on state consent in PIL. HOMINAL theories grant that the prominent role of states is not because the proper purpose of PIL is to protect and promote the interests and features of sovereign states, but those of individual human beings, who live in states.

2.5.1 *Fragmentation*

PIL has largely grown "bottom up" from responses to crises or where globalization has created more opportunities for conflicts and cooperation. This decentralized process has given rise to concerns over fragmentation.

HOMINAL do not hold that a full-fledged global constitution agreed to in a constitutional convention is required in response to fragmentation. Indeed, cries of crisis may be overdrawn insofar as fragmentation seems more problematic in theory than in practice: international courts and other actors employ several techniques to provide sufficient harmonization.[84] At the same time, however, HOMINAL theories may urge some steps in the direction of global constitutionalization, be it to remove some lacunae and conflicts, to establish some hierarchies, or to develop better multilevel checks and balances. How much more unity and uniformity, and what sorts of tensions should be handled more explicitly by whom, should be decided according to what best secures and promotes the relevant features of human beings.

HOMINAL may still frame discussions about who should thus harmonize and how. Alternative modes and results promote some individuals' interests more than others, some will leave individuals vulnerable to more problems of "many hands" where responsibility dissipates,[85] and at the discretion of one authority or another such as international courts and tribunals, each of which will tend to give priority to their own treaties, be they regarding trade, human rights, or investment.

[84] The Practice of International and National Courts and the (De)fragmentation of International Law (Andre Nollkaemper & Ole Kristian Fauchald eds., 2012); Joel P. Trachtman, *Fragmentation, Coherence and Synergy in International Law*, 2 Transnat'l Legal Theory 505 (2011).

[85] Dennis F. Thompson, *Moral Responsibility of Public Officials: The Problem of Many Hands*, 74 Am. Pol. Sci. Rev. 905 (1980).

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

To illustrate: HOMINAL reframes the risks of being subject to the arbitrary discretion of international courts. The concern is not primarily that the judges go beyond what states have consented to, but that their interpretations and judgments may tend to reduce the legitimate authority of PIL – more so than alternative allocations of discretion. HOMINAL theories insist that it is possible to argue about the values PIL should serve and that should guide the judges' discretion – and that more explicit justifications of their choices in this regard will reduce the suspicion that judges wield arbitrary discretion.

2.5.2 *Noncompliance*

Several are concerned about states' increasing disregard for PIL expressed as noncompliance. Leaving aside issues of measuring noncompliance when PIL increases, and whether there is indeed an increase over time,[86] consider two topics where the HOMINAL framework and theories may contribute.

HOMINAL may help promote compliance to PIL where it is due. With increased scope and influence of PIL, with weak sanctions at most, more "deference constituencies"[87] may question the source of its legitimate authority: Whence any obligation to defer to PIL, contrary to their other interests? HOMINAL based justifications may affect the domestic political debates, by mobilizing and affecting the bargaining power of domestic actors.[88] HOMINAL theories may help lay out the rationale for the rule or institution, arguing how it is necessary to respect individuals and promote human flourishing. HOMINAL may also contribute to the "shaming" of unjustified noncompliance with PIL, by helping indicate whether and how these norms are necessary to secure certain interests of individuals, although contrary to the present preferences of a state.

HOMINAL may secondly help assess and respond to cases of principled noncompliance with PIL norms or judgments by international courts. We witness some attempts of principled noncompliance, and warnings thereof – for instance to avoid a "violation of fundamental principles of the constitution"[89] – whose "principles" may not be stated but imputed; or much discussed cases of "illegal yet legitimate" humanitarian intervention.

Such acts can be more detrimental to PIL than "mere" failure to comply:

[86] Oona Hathaway & Scott J. Shapiro, *What Realists Don't Understand About Law*, Foreign Pol'y (Oct. 9, 2017), https://foreignpolicy.com/2017/10/09/what-realists-dont-understand-about-law/ .

[87] Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 Int'l Org. 363 (2005).

[88] Beth A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (2009).

[89] Görgülü [Gorgulu], Judgement at, Application no (German Federal Constitutional Court), Paras. 34–35; cf Bundesverfassungsgericht, Solange I: Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel, BVerfGE 37, 271 (1974)/Bundesverfassungsgericht, Solange II: Wuensche Handelsgesellschaft, 2 BvR 197/83 (1986); (R) Chester v. Secretary of State for Justice, Judgement at, Application no (UK Supreme Court), para. 27.

> What is a clearer sign of the inefficacy of a set of rules is the case where there is not merely a lack of conformity as between actual and prescribed behaviour, but a failure to accept the validity or binding quality of the obligations themselves – as indicated by a reasoned appeal to different and conflicting principles, or by an unreasoning disregard of the rules.[90]

How may we respond to states who thus refuse to defer to PIL, for example as interpreted and applied by international courts, or who warn that they may do so? Since HOMINAL theories seek to illuminate whether a legal norm creates a moral obligation to comply for various "deference constituencies," the framework may guide our assessment of proposed justifications. For instance, a state may be correct in its noncompliance if the standard argument for compliance in order to coordinate is flawed – for example when "the implementation and enforcement of the law's solutions may appear worse than having no solution at all" for those who suffer unjust norms.[91]

HOMINAL may also understand and assess some acts of noncompliance as a case of "civil disobedience": a violation of PIL as a last resort to correct the law or an interpretation or harmonization attempt PIL. Indeed, some hold that customary international law sometimes develops in this manner – "law making by law breaking."[92] HOMINAL can expect and help provide normative arguments about such noncompliance and its means and ends.

HOMINAL theories lay down some constraints on when positive PIL enjoys legitimate authority. However, lack of legitimate authority does not entail that disobedience is justified. A range of moral considerations may still apply: there may be reasons to comply due to the compliance of others, to avoid evil, to honor other parties' not illegitimate expectations, risks wrought by noncompliance, etc. HOMINAL theories may give some indication of how to act under such circumstances, in the form of strategies guided by the normative commitments of respect for persons and need for respect for the rule of law in general, and compliance with those laws that are normatively legitimate. There may be appropriate ways to express commitment to international law in general whilst objecting to a particular illegitimate legal norm or judgment. The objectives of such – possibly legitimate – noncompliance may vary: either to exempt the state from the interpretation or judgment, or to change the IC's interpretation or law making. So noncompliance with PIL may sometimes be justifiable, if accompanied by sound arguments about why such changes are required, legal protests are insufficient, and considering the

[90] Hedley Bull, The Anarchical Society 133 (1977).

[91] Patrick Capps, *International Legal Positivism and Modern Natural Law*, *in* International Legal Positivism in a Post-Modern World 106 (Jean d'Aspremont & Jorg Kammerhofer eds., 2014).

[92] Robert Goodin, *Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers*, 9 J. Ethics 225 (2005); Andreas Follesdal, *The Legitimate Authority of International Courts and its Limits: A Challenge to Raz's Service Conception?*, in Legal Authority beyond the State (Patrick Capps & Henrik Palmer Olsen eds., 2018).

risks of abuse of such new proposed rules. HOMINAL frames these discussions. This commitment to reasoned argument reduces indeterminacy and the risk that legitimacy talk is only a mode of domination.

2.5.3 *Withdrawal*

Is it a crisis for PIL that some states withdraw from some treaties? On the one hand, orderly exit according to the rules of the system is hardly a crisis, but a confirmation that ours is still a "Westphalian" state-centric system, the growth of PIL and influences of non-state actors notwithstanding. On the other hand, exits may signal a challenge to the liberal rule-based world order, especially when driven by domestic "populist" sentiments.

HOMINAL can agree with those who insist that such diagnoses must rely on more nuanced studies of the extent and motivations of states' exits. Some would appear to object not to PIL in principle, but to the present substantive rules and institutions – as witnessed by the creation of new multilateral institutions, for example where "Western" values are less dominant, or that reflect other power differentials.[93]

HOMINAL offers a framework for assessing when exit is normatively neutral, praiseworthy, or condemnable. In particular, HOMINAL theories can argue that states abuse their sovereignty under present PIL if they exit from certain treaties that are "morally mandatory"[94] to secure the relevant features of human beings – arguably such as international criminal law or environmental agreements.

At the same time, HOMINAL can justify exits from PIL on grounds that might sometimes too readily be dismissed as "populist." HOMINAL theories acknowledge individuals' need for "sociability," and hence for citizens within a state to share a communal life, and care about self-rule. Even if PIL for an issue area achieves its stated objectives, PIL may be unjustifiable if it turns out to substantially limit or threaten such self-rule. And HOMINAL can acknowledge a worry about elitism. The growth of treaties has increased the risk of agency drift. A standard concern is that actors may use PIL in pursuit of their own interests rather than those of the states who are masters of the treaties. In addition, HOMINAL may give expression to concerns that domestic executives may have consented to PIL in pursuit of their own preferences, at odds with their obligations to protect and promote individual human beings. HOMINAL may insist that whether such risks are real remains to be determined. And HOMINAL of course still dissent from those populist strands that limit Sociability to compatriots and who reject all duties beyond borders.

[93] Morse & Keohane, *supra* note 83.

[94] Thomas Christiano, *Ronald Dworkin, State Consent, and Progressive Cosmopolitanism*, *in* The Legacy of Ronald Dworkin (Wil Waluchow & Stefan Sciaraffa eds., 2016).

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

2.5.4 *Ineffective at Best, Unjust at Worst*

One criticism against PIL is that its dependence on state consent hinders binding regulations and changes to such regulations to better manage our urgent global crises – such as trafficking of persons, climate change, responsibilities to protect, refugees, global poverty, or corporate business's complicity in human rights violations.

HOMINAL can provide some perspectives on this possible crisis of PIL. Firstly, it would appear unreasonable to criticize PIL for not solving all global problems. And even then, its inability to deal with the varying challenges of the day is not new but has been a long-standing lament.[95]

HOMINAL may help to identify and specify which such problems warrant PIL, whilst denying that "soft law" and non-state actors are necessarily second-rate solutions. HOMINAL theories may also help identify topics and some constraints of what PIL would have to secure.[96] But HOMINAL's contribution of laying down constraints on permissible solutions and insistence on the need to specify any general norms by positive PIL provides limited insights to identify "the" correct solutions. In particular, HOMINAL appears to offer little guidance in choices among solutions that entails different distributions of benefits and burdens, that is, in "battle of the sexes" situations. At most, HOMINAL might justify several "natural law" precepts may be relevant – to each according to need, from each according to responsibility, etc. Thus HOMINAL theories may contribute by recalling the long-standing international duties to rescue and to do no harm. These theories may insist that the state system itself is an artifact that must protect and promote humans' vital interests in order to be legitimate, with obligations to organize in order to secure burden-sharing. On the one hand individuals in more stable, affluent states should not be free riding on an international legal order which privileges sovereign states that harms others – yet on the other hand, there are limits to how high burdens any state may be asked to bear in light of their duties toward own citizens.

But the HOMINAL framework does not appear to offer guidelines for how to "balance" these precepts. HOMINAL theories may be more helpful in arguments concerning global public goods without many observable costs to anyone – such as law of the sea regulations that secure equal access to all. HOMINAL theories may have less to offer for the complex distributive issues implicated by issues like climate negotiations or refugee management – unless they specify the norms more, at the risk of more disagreement.

Another crisis of PIL concerns not its ineffectiveness in resolving urgent problems, but rather its own contributions to global injustice. A broad range of theorists

[95] Wolfgang Friedmann, *United States Policy and the Crisis of International Law*, 59 Am. J. Int'l L. 857 (1965).

[96] *E.g.*, Luke Glanville, *The Responsibility to Protect beyond Borders in the Law of Nature and Nations*, 28 Eur. J. Int'l L. 1069 (2017).

acknowledge that "international laws reflect the distribution of power in which powerful nations gain and weak nations lose";[97] perhaps with Critical Legal Studies and Third World Approaches to International Law (TWAIL) offering some of the most thorough and sustained analysis.

TWAIL regards PIL as created and maintained by Western states as an instrument of domination and imperialism – often aided and abetted by natural law theories.[98] Might HOMINAL nonetheless contribute to assess and address this criticism? One contribution may be to strengthen the normative bases of such critics, insofar as PIL creates and perpetrates domination and alienation by means of law. HOMINAL would agree that international order is not sufficient to justify PIL if that order is unjust: "Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World."[99]

I submit that the HOMINAL framework and theories may contribute to more explicit and perhaps broader justifications for the normative standards TWAIL endorses, and possibly also its conclusions. HOMINAL theories may insist on the need to compare alternative institutional arrangements against each other, since all institutions runs the risk of domination and other abuse. HOMINAL theories may also provide further, deeper justifications, by insisting that institutions that dominate and disempower are objectionable *because* they harm individuals instead of contributing to their betterment or perfection. Indeed, HOMINAL may help mobilize "struggles of emancipation in its name."[100] One implication is that HOMINAL may support TWAIL scholars who criticize not only PIL, but also governments and states when they fail to act in the best interests of their people, or ignore the rights of women.

Against this supporting role, some might think that HOMINAL is based too much on atomistic, self-interested individualism, compared to TWAIL's premises that often focus on "third world *peoples*."[101] However, this contrast seems overdrawn: all HOMINAL theories assume that individuals are sociable and have duties of Sociability, and grant intrinsic value to various social ties – though the value of societies, states etc. are ultimately values *for* individuals.

2.6 CONCLUSION

These reflections have a modest aim: to defend some recognizable fragments of the natural law tradition against criticisms that this tradition is too vague, contested, and

[97] Jack L. Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 964 (2000).

[98] For more on TWAIL, *see* Gathii, Chapter 7 this volume.

[99] Makau Mutua, *What is TWAIL?*, 94 PROC. ANN. MEETING AM. SOC'Y INT'L L. 31 (2000).

[100] Umut Özsu, *The Question of Form: Methodological Notes on Dialectics and International Law*, 23 LEIDEN J. INT'L L. 687, 698 (2010).

[101] James Thuo GathiI, *TWAIL: A Brief History of its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L & DEV. 26, 32, 35 (2011).

https://doi.org/10.1017/9781108551878.002 Published online by Cambridge University Press

oppressive to merit attention, especially after positive public international law has replaced it.

The defense has proceeded by first identifying a more plausible core of interconnected features many natural law theories share – Human-Oriented Minimalist International Natural Law – and then seek to defend this HOMINAL against common criticisms. Finally, we considered how some natural law theories may contribute in current alleged crises facing PIL – sometimes defending PIL, but sometimes perhaps supporting its critics. This defense of the natural law theory tradition and its current usefulness should not be overstated: other normative theories of PIL may serve similar tasks better, and be better justified. The argument has not sought to vindicate the natural law theories in general, or HOMINAL theories in particular.

One central contribution of the natural law theory tradition that is seldom among normative theories of global justice is its particular challenge to state-centric account of legitimacy. HOMINAL theories remind us that the prominent role of states *within* PIL, and in *creating* PIL, should not lead us to conclude that the purpose of PIL is to promote the interests of states. Rather, HOMINAL holds that the justifying purpose of PIL must be to secure and promote certain features of individual human beings – which yields some constraints on the PIL states may legitimately agree. However, HOMINAL also affirms that states in principle may be legitimate, and that their "priority of compatriots" may be justified – within limits. States may serve valuable tasks for individuals within their borders, and their sovereignty may be justifiable – including some reasons to value the role of state consent in PIL. HOMINAL theories acknowledge individuals' need for "Sociability," and hence for citizens within a state to share a communal life, and care about self-rule. These are some of the insights of populists that may merit more recognition.

On the other hand, HOMINAL rejects claims that the proper objective of any state be limited to promote the interests and preferences of their own citizens only. The duties of sociability constrain the extent of priority to compatriots, and may require states to consent to treaties that forgo some benefits to them and their citizens for the sake of those outside the borders, for the sake of our common, equal Sociability. For the natural law tradition, these remain the legitimating objectives of Public International Law.