
Law Beyond the State: Some Philosophical Questions

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Abstract

Legal philosophers have rightly been criticized for neglecting international law since H.L.A. Hart's chapter in The Concept of Law. At the same time, international legal theorists have not shown terribly much interest in reaching out to legal philosophers for enlightenment. Part of the reason may be that Hart's chapter, full of insight though it was, made some quite perplexing observations about the nature of international law that have to a certain extent stood in the way of productive discussion. With the hope of encouraging more of a more productive dialogue, this article addresses a number of important philosophical questions about the nature of law beyond the state. The aim is as much to clarify what is at stake as to offer answers of my own, although I do provide those as well. At the same time, I will take some first steps towards linking those philosophical issues to what strike me as some of the most important recent questions and projects within international legal theory. Issues addressed include: How should we understand 'positivism' and 'natural law' in the case of non-domestic law?; Is international law a system?; Is it law?; International Responsibility; and Do subjects of non-domestic law have a duty to obey it?

With the exception of Hans Kelsen, whose systematizing and unifying intellectual inclinations made the topic inevitable for him, legal philosophers have not thought much about international law over the past century.¹ Ronald Dworkin's recent article, 'A New Philosophy for International Law',² written at the very end of a long career, is the first extended discussion by a philosopher writing in English since the final chapter

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¹ See generally H. Kelsen, *General Theory of Law and State* (2006); H. Kelsen, *Pure Theory of Law* (2nd edn, 1967); H. Kelsen, *Principles of International Law* (1952). For discussion, see Giudice, 'Hart and Kelsen on International Law', in L. Green and B. Leiter (eds), *Oxford Studies in Philosophy of Law* (2013) vol. 2, 148.

² Dworkin, 'A New Philosophy for International Law', 41 *Philosophy and Public Affairs* (2013) 1.

of H.L.A. Hart's *The Concept of Law*, published in 1961.³ This half-century of neglect has often been denounced, especially in the last ten to twenty years as globalization, urgent global problems such as climate change, and the emergence of a sole world hegemon greatly increased the political significance of the global legal order.⁴ But, until very recently, legal philosophers have continued to stay away.

Part of the reason for the neglect, I believe, is that although there has not been much self-described philosophy of international law, there has been plenty of international legal theory. This extensive theoretical writing has a complexity and historical depth that can be intimidating for the legal philosopher whose own background is likely to be limited to a single basic course, taken long ago. Another part of the reason may be that Hart's chapter on international law, full of insight though it was, made some quite perplexing observations about the nature of international law that have stood in the way, to a certain extent, of productive discussion.⁵

My aim in this article is accordingly partly one of philosophical and theoretical housekeeping. I will address a number of important philosophical questions about the nature of law beyond the state as much to clarify what is at stake as to offer answers of my own, although I do that too. At the same time, I will take some first steps towards linking those philosophical issues to what strike me as some of the most important recent questions and projects within international legal theory. My questions, in the following sections, are these: (i) how should we understand 'positivism' and 'natural law' in the case of non-domestic law; (ii) is international law a system; (iii) is it law; (iv) is it morally objectionable that the burden of international legal sanctions fall primarily on people who are not in any way responsible for breach of law and (v) do subjects of non-domestic law have a duty to obey it?

1 'Positivism' and 'Natural Law' in International Law and Legal Theory

For legal philosophers, 'positivism' is the name of a view about the grounds of law – the factors that are appropriately taken into account when determining the content of

³ H.L.A. Hart, *The Concept of Law* (3rd edn, 2012).

⁴ Especially thunderous denunciation has come from Jeremy Waldron: 'The neglect of international law in modern analytic jurisprudence is nothing short of scandalous. Theoretically it is the issue of the hour' (footnote documenting this neglect omitted). Waldron, 'Hart and the Principles of Legality', in M.H. Kramer et al. (eds), *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (2008) 67, at 69. In a later article that criticizes Hart's 'embarrassing' chapter on international law, Waldron writes: 'Analytic legal philosophy has been disgracefully bereft of good writing on international law, and on adjacent issues such as the rise of global law and global standards (such as human rights) for the legitimacy of national law.' Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?', in Luis D. d'Almeida, J. Edwards, and A. Dolcetti (eds), *Reading HLA Hart's 'The Concept of Law'* (2013) 209, at 211.

⁵ For critical discussion of Hart's chapter, see Giudice, *supra* note 1; Lefkowitz, '(Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach', 21 *Canadian Journal of Law and Jurisprudence* (2008) 129; Payandeh, 'The Concept of International Law in the Jurisprudence of HLA Hart', 21 *European Journal of International Law (EJIL)* (2011) 967; Waldron, 'International Law', *supra* note 4.

the law currently in force. It is the view (simplifying) that only questions of fact are relevant and that, in particular, moral considerations are never relevant.⁶ The opposing view – non-positivism – just denies this claim. In its most important version, developed over many decades by Ronald Dworkin, non-positivism holds that legal interpretation is always necessarily a ‘moral reading’ of legal texts, a reading that aims to interpret legal texts in their morally best light. The law – the content of the law in force – is the morally best it can be consistently with it being what it is, given the legal materials.⁷

So positivism, within legal philosophy, is just a view about the particular and rather narrow issue of whether morality plays a role in fixing the content of the law in force. Within international legal theory, by contrast, the word has frequently been used in a more expansive sense that associates positivism also with voluntarism – which is the view that the content of international law flows from states’ consent. A canonical statement of the voluntarist view was made by the Permanent Court of International Justice in the *Lotus* case in 1927: ‘The rules of law binding upon States ... emanate from their own free will.’⁸ As Hart pointed out, if we read such a statement as being about the very sources of law, it is confused. Leaving aside the complications of customary law for now, it mischaracterizes even the law of treaties.⁹ It is true that no state is bound to a treaty without its consent. But that it is a rule of law that states perform their treaty obligations is not itself a matter of states’ wills. No state consents to *pacta sunt servanda* as a legal principle.

Voluntarism about the very sources of international law is incoherent, but there is a better way to interpret this view. The sources of international law being what they are, legal obligations are never imposed on states without their consent. My guess is that most defenders of voluntarism would be content to rephrase their claim in this way. The claim, discussed further in the fifth section of this article, is false (though perhaps it once was true), but it is perfectly coherent, and it is not absurd to wish that it were (still) true.

Neither version of voluntarism is implied by the idea that the grounds of law are matters of fact. It is just an accident of usage that ‘positivism’ has been understood to entail voluntarism. Still, there are a number of historical and political reasons the two views have been associated. Hugo Grotius distinguished natural law from civil law and explained that the latter, unlike the former, was voluntary, grounded in acts of will, and the law of nations was a branch of civil law.¹⁰ Thus, for Grotius, we have, on the one hand, morality or natural law and, on the other hand, norms that are derived from acts of will. This suggests that if international law is distinct from morality, it is grounded in acts of will (just like all positive law on Grotius’ account).

⁶ Here, I ignore so-called ‘inclusive’ positivism, which allows a role for moral considerations if there is, in the legal system in question, some factual warrant for this. See W.J. Waluchow, *Inclusive Legal Positivism* (1994). For further discussion of positivism, see Murphy, *What Makes Law*, first unnumbered note, ch. 3.

⁷ This is the classical Dworkinian position, as developed in R. Dworkin, *Law’s Empire* (1986). For further discussion, see Murphy, *What Makes Law*, first unnumbered note, ch. 4.

⁸ *S.S. Lotus (Fr. v. Turk.)*, 1927 PCIJ Series A, No. 10, at 18.

⁹ Hart, *supra* note 3, at 224–226.

¹⁰ H. Grotius, *The Rights of War and Peace*, edited by Richard Tuck (2005), book 1, ch. 1, at 162–163, para. xiv.

In effect, positivist legal theory until the early 20th century agreed, since for the English positivists following Jeremy Bentham the source of law was found in the command of the sovereign. German ‘statutory positivism’ of the late 19th and early 20th centuries was also voluntarist in insisting that law is what has been ‘set down’ by an act of legislative will. It is not until Hart that a version of positivism completely free of voluntarism emerged.

There is also a political connection since voluntarism goes along with a traditional view of state sovereignty that is naturally hostile to the possibility that someone’s idea of morality would become a source of legal duties. Thus it is that ‘positivism’ about international law acquired a bad political odour in some circles, which can come as something of a surprise for a newcomer.

It is obviously preferable to keep the two ideas entirely distinct, as Prosper Weil did in his celebrated 1982 defence of a traditional sovereignty-centred view of international law against the inroads of ideas such as *jus cogens*.¹¹ Weil defended both voluntarism and positivism, which for him was just the view that the grounds of law in international law are matters of fact.

Understanding the use of ‘natural law’ in international legal theory also requires some care. Natural law theory is a theory of morality, a particular account of how to think about that which is naturally or objectively good and bad, right and wrong. Like other early modern writers in the natural law tradition, Grotius was not always terribly careful to mark the boundary between natural law and positive law. Be that as it may, the contemporary issue for legal philosophy is the role of morality in determining the content of the positive or ‘human’ law. There is no ‘natural law’ theory of the grounds of law; no one thinks that the positive law just is what morality requires or even that any conflict with morality renders a legal norm invalid. The relevant contrasting view is non-positivism, the view that legal interpretation will always require moral judgment, most plausibly in the manner of the ‘moral reading’ interpretation of legal materials developed by Dworkin.

A positivist approach and the moral reading will potentially yield different conclusions across the range of international legal sources. The potential for divergence is perhaps most obvious in the context of the interpretation of treaties. Thus, a reading of the Charter of the United Nations (UN) that does not involve moral judgment has it that the North Atlantic Treaty Organization’s (NATO) bombing of Kosovo in 1999 was illegal since it was neither authorized by the UN Security Council nor an act of self-defence. As Martti Koskenniemi reports, most international lawyers have taken the view that though probably morally justified, the NATO action was illegal.¹² A moral reading could certainly find material to work with to reach the opposite legal conclusion. Taking the overall purpose of the establishment of the UN to be the securing of peace, the prevention of slaughter, and the protection of human rights, and acknowledging the legitimacy deficits of the Security Council, and so on, it would not be too hard to reach the conclusion that the NATO campaign was legal after all.¹³

¹¹ Weil, ‘Towards Relative Normativity in International Law?’, 77 *American Journal of International Law (AJIL)* (1983) 413.

¹² Koskenniemi, ‘The Lady Doth Protest Too Much: Kosovo and the Return to Ethics in International Law’, 65 *Modern Law Review (MLR)* (2002) 159, at 162.

¹³ See Dworkin, *supra* note 2, for his own much more detailed argument to this conclusion.

The moral reading could also yield different results in the interpretation of the content of customary legal rules. Moreover, and more interestingly, it could affect the doctrine of *opinio juris*, such that the moral appeal of the proposed rule could affect the determination of whether there is a sufficient *opinio juris*.¹⁴

I believe that the standoff between positivists and non-positivists reflects fundamental differences of belief about the nature of law and that no compelling argument is likely to be available to move one side closer to another.¹⁵ Nonetheless, for law beyond the state as for state law, there is considerable overlap between the legal conclusions to which the two approaches lead. We are not left always having to say that according to positivistic law the answer is this and to non-positivistic law the answer is that. There will be a range of cases – in the nature of things, typically very contentious cases – where the two approaches will yield different conclusions, but it is very important that this is not always going to happen. It is not the case that we must first decide between positivism and non-positivism before we can be confident that there is any law in force. But I will not pursue the issue of the grounds of law further here.

2 A System?

In the final few pages of *The Concept of Law*, Hart argues that international law might best be understood not as a legal system, the rules of which are valid in virtue of a rule of recognition, but, rather, as a set of rules that are valid or binding simply in virtue of being accepted and functioning as such. Although international law could therefore be compared to ‘primitive’ law, this did not mean that international law was any less law or any less binding as law.¹⁶ Hart’s point, to the contrary, is that it was a mistake to assume that the hierarchical structure of domestic legal systems was essential to law or a condition of its normative force.

Nonetheless, Hart’s argument has not proven to be popular among international lawyers. As Koskeniemi and Päivi Leino put it:

Hart’s famous description of international law in terms of ‘rules that constitute not a system but a simple set’ prompted generations of international lawyers to argue that a position which associated international law with ‘primitive law,’ denied its *grandeur* and was thus mistaken.¹⁷

Half a century on, the profession has not forgotten Hart’s discussion. In 2006, the International Law Commission (ILC) adopted the Conclusions of the Work of the

¹⁴ See generally Tasioulas, ‘Customary International Law and the Quest for Global Justice’, in A. Perreau-Saussine and J.B. Murphy (eds), *The Nature of Customary Law: Philosophical, Historical and Legal Perspectives* (2007) 307.

¹⁵ See Murphy, *What Makes Law*, first unnumbered note, ch. 6.

¹⁶ Hart seems to have been widely misunderstood about this. See, e.g., Harold Hongju Koh’s mysterious conclusion that ‘Hart defined the very notion of “obedience” out of international law’. Koh, ‘Why Do Nations Obey International Law?’, 106 *Yale Law Journal* (1997) 2599, at 2616. For a discussion of other cases of misunderstanding of Hart’s theory by international legal theorists, see Lefkowitz, *supra* note 5.

¹⁷ Koskeniemi and Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden Journal of International Law* (2002) 553, at 558.

Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (ILC Study Group). Hart's claims are engaged in the study group's very first conclusion:

- (1) *International law as a legal system.* International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.¹⁸

Hart evidently subscribed to the view that international law is all customary law. On this view, treaties are not a separate source of law but, rather, are agreements legally binding in virtue of a principle of customary international law, *pacta sunt servanda*. Furthermore, Hart claims that there is no rule of recognition that determines when a rule of customary international law is in force. A Hartian rule of recognition sets out the ultimate criteria of legal validity in a legal order; if there is no rule of recognition, there are no criteria of validity. So each rule of international law, according to Hart, is in force directly, as it were. There is no such thing as systemic validity, nothing in virtue of which each rule is in force. It would have been possible for Hart to have made his point not by denying that international law has a rule of recognition but, rather, by saying that it was all rule of recognition. As he writes, '[t]he rules of the simple structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such'.¹⁹ Both rules of international law and ultimate criteria of validity in domestic legal systems are valid, according to Hart, just because they are accepted as valid and not because of the applicability of any further norm within the system.

To further illustrate this point, it may be helpful to note that the so-called 'chronological puzzle' about customary international law is matched by an exactly analogous puzzle about changes in the Hartian rule of recognition. A rule of customary international law exists when there is a general practice of states attended by an 'opinio juris' – the belief that the practice is a case of following the law. The apparent paradox, or circle, in this criterion is that it appears that belief that the practice is legally required has to precede its being legally required, which, unless law is to be founded on irrational or false beliefs, seems impossible.

¹⁸ International Law Commission (ILC), Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (ILC Study Group), UN Doc. A/61/10 (2006), para. 251. The other implicit target of the last sentence seems to be Weil, *supra* note 11. The leader of the study group was Martti Koskenniemi, who 'finalized' the long report of the ILC Study Group. ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (2006).

¹⁹ Hart, *supra* note 3, at 235.

The paradox is only apparent. First, there is no problem with rules of long standing. Everyone relevant may believe that such and such is a customary rule of law just because that is what has generally been believed for a long time. Consider next changes in customary international law. It would be rational to come to believe that a practice is legally required on the basis of a reasonable, but false, belief that there is a general belief that it is legally required. Still, it would be troubling if this were the only way a new customary norm could get off the ground. But there is also a non-troubling possibility, which we might call the orthodox route to a practice becoming legally required. States may converge in the belief that it would be good if a certain practice had the status of law and so be disposed to treat it as law so long as enough others do. Once the initial leap is made, and enough others are treating the practice as law, the belief of any one state that the practice is law need not be contingent on everyone else's attitudes or dispositions anymore, and the validity of the rule will just depend on the fact that most states believe it is law.

The analogous puzzle for the rule of recognition is this. A rule of recognition is in effect, in Hartian positivism, so long as legal officials accept it. But on what, exactly, are they supposed to ground their acceptance? Not on any beliefs about what the law is, obviously, since what they accept as the rule of recognition determines what the law is. It seems they have no rational basis at all for coming to believe that a certain list of norms provides the ultimate criteria of validity in their legal systems. Once again, the main solution to the apparent bootstrapping problem is found in the history of law. In an ongoing legal system, judges, law professors, and so on are not reduced to asking each other what they think at any particular time. One thing they all believe, for a variety of reasons, is that the ultimate criteria of legal validity do not typically change radically from moment to moment. And so there is something to anchor all of our beliefs about the grounds of law now; it is what we know about what has been generally believed up until now.

But, of course, legal orders can undergo revolutionary change. When change happens, the relevant people can no longer look to history to ground their beliefs about the criteria of legal validity, and so a different account is needed. The positivist account of radical constitutional change must be that legal officials somehow reach the position, at roughly the same time, that it would be better if these were the ultimate criteria of validity (those set out in the new constitution) rather than those (the constitutional rules that had been traditionally followed). The officials are disposed to appeal to certain criteria to determine legal validity, contingent on their belief that others are similarly disposed. If all goes well for the revolutionaries, there will be a convergence, and a new legal order will have been constituted. Once people believe that this has happened, then they can straightforwardly be said to have beliefs about the grounds of law.²⁰

In arguing that international law lacks a rule of recognition, Hart seems to have been motivated by a desire to debunk what he saw as Kelsen's *a priori* assumption

²⁰ This and the previous three paragraphs draw on Murphy, *What Makes Law*, first unnumbered note, 37–41. I am influenced by A. Marmor, *Social Conventions: From Language to Law* (2009), at 155–175. See also Lefkowitz, *supra* note 5; Tasioulas, *supra* note 14.

that all legal orders have the same structural features. Rather than assume that there must be a basic norm, Hart asks, why not look to see if there is one? Though Hart's reservations about Kelsen's essentialist inclinations are entirely reasonable, here they appear to lead him astray. For Kelsen, the *Grundnorm* has a function that Hart's rule of recognition does not – the function of animating a system of rules with genuine reason-giving force.²¹ For Kelsen, legal validity implies a genuine 'ought', and the mere fact of acceptance that a practice is required by law obviously cannot get you that. So Hart is wrong to imply that Kelsen's suggested *Grundnorm* for international law – '[t]he States ought to behave as they have customarily behaved'²² – is redundant and silly. It is not redundant for Kelsen, just because in his legal theory some such 'presupposed' ought is required to get from facts to valid (in his sense) norms.

It is hard to disagree that if we use 'validity' in Hart's sense, which implies no objective reason-giving force, then a rule's being part of a simple set is irrelevant to its potential legal validity or its reason-giving force. And that is one of the main points that Hart wished to make. But there was also the substantive legal claim that there are no 'general criteria of validity for international law',²³ and for this he provided little if any argument.

If anything is accepted among international lawyers, it is that the sources of international law include custom and treaties. The question is whether Hart is right that treaties are not a separate source of law but just contracts binding in virtue of a customary legal rule, and if he is right also that customary legal rules are valid just because they are directly accepted as such, not because of the satisfaction of some separate accepted criterion of validity.

Taking the second question first, the orthodox view is that customary law requires a state practice coupled with an *opinio juris*. Since in Hart's view a rule of recognition exists in virtue of being practised and accepted, we can understand why he could see no daylight between the criterion and the particular rules that it validates. But, in fact, the criterion is doing some work. A criterion for the existence of customary law would do no work in the Hartian scheme if its content were 'those rules which are accepted and function as legal rules among legal officials'. Once a rule is accepted and functioning as a legal rule among the relevant people, just because it is and not for any reason of pedigree, it is already in force – that is the end of the line in the Hartian account of validity.

But now, in the first place, what matters for customary international law is the practice and opinions of state officials, not the beliefs and attitudes of international legal officials generally, including, for example, international judges and officials of international legal organizations.²⁴ Second, there is a substantive inquiry to be had, as the criterion is currently understood, about the interplay between state practice and *opinio juris*. There are questions about what exactly would demonstrate an *opinio juris*, whether it could predate a practice, how uniform the practice must be, whether and how the two requirements could be balanced against each other (less practice, more

²¹ See, e.g., Kelsen, *Pure Theory*, *supra* note 1, at 217–219.

²² Kelsen, *General Theory*, *supra* note 1, at 369.

²³ Hart, *supra* note 3, at 236.

²⁴ See Lefkowitz, *supra* note 5.

opinio and vice versa) and so on.²⁵ State practice plus *opinio juris* is simply not the same as ‘accepted and functions as a binding rule’ among (all) international legal officials.

On the question of whether treaties are a separate source of law, *pacta sunt servanda* can certainly be regarded, and traditionally has often been regarded, as a rule of customary international law. This is defensible as a matter of logic, but it also seems somewhat misleading as it assimilates all treaties to the model of ordinary contract. Though Hart himself is inclined to think that ordinary contracts between individuals involve the exercise of ‘limited legislative powers by individuals’,²⁶ it is a rather peculiar view. Ordinary contracts are agreements that are legally enforceable; that entering into a contract affects my legal obligations does not mean that I have made law. Multilateral treaties, on the other hand, such as the UN Charter, the UN Convention on the Law of the Sea, the agreements that establish the World Trade Organization and the entire legal order of international trade, are naturally regarded as law creating.²⁷

A particularly clear example is the UN Convention on Contracts for the International Sale of Goods (CISG), which operates as commercial code for international commercial sales.²⁸ It is hard to keep a clear grip on the idea that, in applying the terms of the CISG, a domestic court is enforcing its national government’s international contractual obligations. For many treaties, then, it is more natural to treat them as sources of law in their own right rather than enforceable agreements under a customary rule.²⁹ Still, it must be said that this is all it is – a more natural way of talking. There does not seem to be anything more at stake in the issue of whether the legal force of treaties derives from a norm of customary law validated by the criterion of validity for customary international law or rather directly from a distinct criterion of validity. Either way, it seems that a Hartian perspective should allow that there is at least one criterion of validity for rules of international law and that there is therefore a substantive rule of recognition for international law.

But suppose Hart were right that there are no criteria of validity for international law and, therefore, that validity in international law is direct rather than systemic. In this case, as Hart says, a rule of recognition would be just an ‘empty restatement of the fact that a set of rules are in fact observed by states’.³⁰ Since this restatement of all the rules of customary international law would tell us the content of the international legal order, in what sense would it be empty? It would be empty because the rule of recognition would not set out criteria in virtue of which the norms of international law were norms of international law. The rule of recognition would therefore not ground

²⁵ See generally Besson, ‘Theorizing the Sources of International Law’, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 163; Tasioulas, *supra* note 14; Thirlway, ‘The Sources of International Law’, in M.D. Evans (ed.), *International Law* (2nd edn, 2006) 115.

²⁶ Hart, *supra* note 3, at 96.

²⁷ Convention on the Law of the Sea 1982, 1833 UNTS 3.

²⁸ Convention on the Law Applicable to Contracts for the International Sale of Goods 1985, 24 ILM 1575 (1985).

²⁹ Payandeh, ‘The Concept of International Law in the Jurisprudence of HLA Hart’, 21 *EJIL* (2011) 967, at 982–985.

³⁰ Hart, *supra* note 3, at 236.

a system of law in the sense that Hart had in mind – a normative order in which the validity of lower-level norms was systematically derived from higher-level norms.

So we can say that, had Hart been right that there were no criteria of validity in international law, international law would not be a system in his specific sense. But this is entirely compatible with international law being a system in the sense that is proclaimed by the first conclusion of the ILC Study Group. A set of rules that have direct, rather than derived, validity can nonetheless be connected in that they refer to each other and develop in the context of the existence of the others. Within international law, there are centuries-old customary rules for dealing with conflicts among rules, such as *lex specialis derogate lex generali*. These connections among the rules (discussed further below) enable us to say, in a sense entirely different and much more important than Hart's, that this group of legal rules makes up a legal system. In Joseph Raz's classification, we could say that, so understood, international law is a system of 'interlocking norms' even if, because there are no criteria of legal validity, it is not a system in Hart's sense.³¹

As I said at the outset, it is clear enough why Hart's conclusion that there is no international legal system in his sense does not lead him to think that international law is any less real or potentially binding. We now see that this conclusion also provides no grounds for attributing to him the view (to use the words of the ILC Study Group again) that 'international law is ... a random collection of ... norms' with no 'meaningful relationships between them'.³² Nonetheless, Hart certainly did not try to forestall such an interpretation. And, in any case, international lawyers are quite right that he did think that international law was defective in some way.

In saying that international law is a 'primitive' legal order, Hart associates it with three disadvantages of primitive law described earlier in his book: those of uncertainty, static rules and the lack of an authoritative body that can resolve all disputes.³³ Since international law lacks a legislature and a court of compulsory and general jurisdiction, it is not difficult to conclude that it has the second and third defects (if that is what they are). Hart's main concern was evidently the lack of an international legislature. When explaining what it means for a legal order to lack criteria of validity, he writes: 'In the simpler form of society we must wait and see whether a rule gets accepted as a rule or not; in a system with a basic rule of recognition we can say before a rule is actually made, that it *will* be valid *if* it conforms to the requirements of the rule of recognition.'³⁴

This statement evidently reflects Hart's view that treaties are not a distinct source of law but, rather, contracts binding in virtue of a norm of customary international law. But he goes on to suggest that if one day multilateral treaties bind non-parties, 'such treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules'.³⁵ What is odd here is that in Hart's legal theory, the primary thing a legislative process gives us is a 'rule of change'. The rule of

³¹ J. Raz, *Practical Reason and Norms* (2nd edn, 1999), at 111.

³² ILC Study Group, *supra* note 18.

³³ Hart, *supra* note 3, at 92–93.

³⁴ *Ibid.*, at 235.

³⁵ *Ibid.*, at 236.

recognition, by contrast, is supposed to deal with uncertainty, and the existence of a rule of recognition is compatible with the lack of a rule of change.³⁶

Perhaps the main reason these last pages of *The Concept of Law* are confusing is that there is a disconnect between Hart's theoretical focus on the rule of recognition and what appears to be his main substantive complaint – that international law, lacking a legislature and (as he appears to have believed) rules of change generally, is a static legal order. It is as if he was trying to kill two birds with one stone – rejecting Kelsen's insistence on a basic norm for international law while, at the same time, bringing out international law's 'primitive' lack of rules of change – but he missed.

But, now, does international law make up a legal system or not? It depends on which sense of 'system' is worth worrying about. One might decide, of course, to reserve the label 'system' for institutionally more complex legal orders, perhaps those with legislatures or those with the right kind of courts, but it would still be misleading to characterize what is not a system in that sense as a mere random collection of unconnected rules. To use Raz's terminology again, we might better characterize domestic law as an 'institutionalized' system as opposed to international law's system of interlocking norms.³⁷ Or we might simply say that these two legal systems differ in their institutional structures in obvious ways.

But there is more at stake here than a choice between classificatory schemes. That there is a sense of 'system' that matters in connection with international law is brought home by the discussion in recent decades of the issue of fragmentation, which was the topic of the ILC Study Group.³⁸

'Legislative' multilateral treaties have proliferated in the past half-century, and some of them create organizational structures that can be seen as continuing to make law beyond the treaty-making stage.³⁹ Furthermore, multilateral treaties can be picked up by customary international law and, for that reason, bind non-parties in the course of time. Non-parties still cannot be automatically bound just because the treaty is in effect, so we do not have the 'legislative enactments' to which Hart refers, but an enormous amount of new law has been made since Hart wrote nonetheless. Although some of it can count at least partly as codification of customary international law, much of it cannot. Salient multilateral treaties that have come into force since Hart wrote include the Vienna Convention on the Law of Treaties (VCLT), the UN Convention on the Law of the Sea, the Marrakech agreements that established the World Trade Organization (WTO), the CISG and the Rome Statute of the International

³⁶ Waldron puts pressure on the need for rules of recognition in the Hartian system, suggesting that all the work can be done by rules of change. His argument is compelling for much of domestic law, but there is a residual need for a rule of recognition in the case of an entirely static legal order that does not recognize any canonical process for changing its content. See Waldron, 'Who Needs Rules of Recognition?', in M. Adler and K.E. Himmah (eds), *The Rule of Recognition and the U.S. Constitution* (2009) 327, at 327–349.

³⁷ See Raz, *supra* note 31, at 123.

³⁸ See generally sources cited in note 18 above.

³⁹ See generally J. Alvarez, *International Organizations as Law-Makers* (2005).

Criminal Court (ICC).⁴⁰ Most significant of all, perhaps, is the emergence of an entire new supranational legal system in Europe.

Ironically, given Hart's discussion, the very fruitfulness of the mechanism of law-making by treaty led many commentators to see a danger of fragmentation in international law – lots of legal change leading to less, rather than more, system. This anxiety was expressed by successive presidents of the International Court of Justice (ICJ) in 1999 and 2000, who focused especially on the fact that many of these new treaty-based international organizations have their own tribunals for the resolution of disputes.⁴¹ Important new adjudicatory bodies include the International Tribunal for the Law of the Sea, the Dispute Settlement Body of the WTO, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the ICC, and, of course, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights.

The worry about fragmentation is that these new sources of law, with their own adjudicatory bodies, might break off from international law generally. International law could split apart so that, say, trade law – though it is law and it is international – is not plausibly thought to be a part of a wider international legal system. This worry can be pitched at the normative and the institutional levels. At the normative level, the question is whether there remains a coherent overall normative structure to international law that can accommodate the 'diversification and expansion' of international law and provide legal grounds to resolve conflicts. We could say that this is the question of whether international law can remain a single normative system that, in principle, could be in force. The institutional question relates to the proliferation of new subject-specific adjudicatory bodies. The apparent institutional danger is that even if in principle there is a single system of international law capable of correct interpretation, judicial practice will diverge so greatly among the new bodies, leading to forum shopping and divergence in the conduct of states, that we will no longer be able to claim that this single system of international law is in fact in force; rather, several distinct legal systems will be in force.

Would this matter? It may be wondered why fragmentation is a cause for concern at all.⁴² One might believe that only a single unitary international legal system is conceptually possible – perhaps because all legal systems are thought necessarily to claim both supremacy and universality in their subject matter jurisdiction and so only one system can be in effect at the same time. But it is not hard to understand the idea of distinct legal orders relating to distinct subject areas, and not relating to each other, all being generally complied with by states. If, say, trade law and environmental law made up such distinct systems, and their norms did yield conflicting accounts of states' obligations, there would be no all-things-considered answer to the question of what 'the law' required states to do. This would leave a practical normative problem for states; there might be a right thing to do, all things considered, but that would be compatible with there being no single legal answer. This kind of conflict is in fact quite familiar –

⁴⁰ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331; Agreement Establishing the World Trade Agreement 1994, 1867 UNTS 154; Rome Statute on the International Criminal Court 1998, 2187 UNTS 90.

⁴¹ See Koskenniemi and Leino, *supra* note 17.

⁴² Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' 31 *New York University Journal of International Law and Politics (NYUJILP)* (1999) 679.

indigenous law may provide a different answer to state law, which may be different from regional law, which may be different from international law. And, of course, at the horizontal level, we are familiar with conflicts of laws between different domestic jurisdictions and among different courts in the same jurisdiction – bankruptcy courts and courts of general jurisdiction, for example. In most such familiar cases, legal doctrine resolves the conflict, and so the distinguishable legal orders do in fact relate to each other via that doctrine. But take away the doctrine that legally regulates the conflict, and the legal orders would not disappear in a puff of smoke.

Now international law, as it currently exists, seems neither to consist in distinct international legal systems or regimes that do not relate to each other via rules and methods of interpretation that resolve conflicts nor a single international legal system where there is always a single answer to the question of what ‘international law’ says about the matter. It is somewhere in the middle. International law does not present itself as being in principle free of conflict between, say, different treaty regimes, but neither are techniques lacking to reduce or avoid conflict in many or most cases.⁴³ At the very least, all treaties are connected by the principles of interpretation found in the VCLT, which is part of customary international law. The question is whether it would be better to be moving to a genuinely unified single legal order or in the other direction or whether it does not matter either way.

On the face of it, it seems likely that the fragmentation of international law into distinct legal systems would be a bad development because it would reduce the instrumental value of international legal practice overall. As discussed in Section 5 of this article, the basis of states’ obligations to obey international law lies in the good that a practice of general obedience with law may do. This value seems likely to be increased if there is a single legal order covering all subject areas, primarily because self-interested or moral allegiance to the system as a whole can promote compliance with those areas of legal regulation that impose net costs on individual states. If a violation of environmental law is considered a violation of the very same law, in a broad sense, as trade law, that is all for the good as far as the environment is concerned.

Now, of course, this assumes that international legal governance is a good thing – in the sense that we would do better working with it and trying to make it better than pulling it down. But even apart from that, the situation is more complicated than it may at first seem.⁴⁴ For example, champions of international human rights law may not welcome attempts by WTO tribunals to find an all-things-considered legal answer where trade law and human rights law speak on the same subject because this may lead human rights law in an unwelcome direction.⁴⁵ By the same token, however, making law via multilateral treaties with very narrowly defined subject matter is a mechanism suited, and, it could be argued, designed, to increase the power of the most

⁴³ Crawford and Nevill, ‘Relations between International Courts and Tribunals: The “Regime Problem”’, in M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2012) 235.

⁴⁴ Koskeniemi, ‘Hegemonic Regimes’, in Young, *supra* note 43, 305.

⁴⁵ Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’, 13 *EJIL* (2002) 815.

powerful states, especially, of course, the United States. Among other factors, this way of proceeding prevents weaker states from forming effective cross-issue coalitions.⁴⁶

Some of these points turn on both the institutional and the normative aspects of fragmentation. The ILC Study Group declined to address the institutional side of the issue. One can understand why since everything turns on the practice of the various tribunals; a full survey would obviously be an enormously complex undertaking. But it is clear that there is no reason of principle why a proliferation of adjudicatory bodies must lead to diverging interpretations of the law. After all, the ICJ never has had compulsory jurisdiction, so it is not as if an existing hierarchical system on the domestic model has been replaced with a horizontal free for all. The question is whether the new landscape of multiple tribunals of specialized jurisdiction has in fact increased disagreement and uncertainty about the content of law. Here, there is debate. Many international lawyers and legal theorists are rather optimistic on this front.⁴⁷ Much is made of ‘dialogue’ among national, supranational and international courts and the desire of judges or those assuming an adjudicatory role to try to agree with one another.⁴⁸ For others, the distinct institutional settings and affiliations of adjudicators on different tribunals inevitably push in the other direction towards fragmentation.⁴⁹

On the normative question, the forty-two conclusions and the accompanying five-hundred-odd-page report of the ILC Study Group present an elegant and compelling legal argument to the effect that international law, especially as expressed in the VCLT, contains principles of interpretation and conflicts rules sufficient to justify the statement in the first conclusion that ‘as a legal system, international law is not a random collection of ... norms’. In other words, for many and perhaps most cases of conflicting legal sources, international law does provide a single answer.

This conclusion is also not uncontroversial. But this is not the right place to look further into the issue, for the main point to make is that whether international law is a single unified normative system is a doctrinal question to be resolved by looking at the norms of international law that are common to various different subparts of it. Different legal theories – different theories of the grounds of law – will approach this inquiry differently, of course, and it seems plausible to think that non-positivists would more easily find a single system than positivists. But this also depends on whether it would, morally speaking, be better if there were a single system; and, as we have seen, this also is a complex question that cannot be fully addressed here.

Supposing international law is a single system, there remain complex and deeply important issues of how this system interacts with other systems. There is rather obviously not just one legal system in the world, with all conflicts resolvable according to the rules of hierarchy and interpretation provided by that single legal order. The

⁴⁶ Benvenisti and Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, 60 *Stanford Law Review* (2007) 595.

⁴⁷ See generally, e.g., J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003).

⁴⁸ See Burke-White, ‘International Legal Pluralism’, 25 *Michigan Journal of International Law* (2005) 963.

⁴⁹ Alvarez, ‘The Factors Driving and Constraining the Incorporation of International Law into WTO Adjudication’, in M.E. Janow, V. Donaldson and A. Yanovich (eds), *The WTO: Governance, Dispute Settlement, and Developing Countries* (2008) 611.

current legal landscape for member states of the European Union is most naturally described as involving three distinct legal systems.⁵⁰ This raises questions of hierarchy and conflict resolution that particular states and particular courts will have to resolve without a single source of purely legal guidance. Was the CJEU right to hold in the 2008 *Kadi* case that European regulations implementing a UN Security Council resolution concerning the freezing of assets of those on a 'terror list' were invalid for being inconsistent with fundamental rights found in European law?⁵¹ What about the similar stance taken by the German Constitutional Court with respect to European law in relation to the German Constitution?⁵² The issues here are not only doctrinal and jurisdictional but also, for both courts and executive branches, political. These kinds of issues seem likely to grow ever more important as and if legal systems beyond the state continue to proliferate.⁵³

3 Law? and More Law? The Question of Enforcement

It may be a system of norms, more or less institutionalized, but is it law? The old question of whether international law is really law relates to the classification of distinct types of normative orders. What makes a legal order distinct from, say, 'positive morality,' as John Austin characterized international law?⁵⁴ This is a question about the nature of law or the content of the concept of law, but it is distinct from the issue of the grounds of law. There are some connections, of course. Positivists about the grounds of law will be disinclined to accept as a criterion for the existence of a legal system that the norms of the system are sufficiently just or otherwise good. If you are convinced that a rule's validity is one thing and that its merit or demerit and reason-giving force are quite another, you are likely to feel the same way about the system as a whole. Similarly, if you hold that legal rights and duties are real moral rights and duties, gross systemic injustice would appear to disqualify some political coercive orders from being legal systems right from the start. So it is no surprise that positivists and Dworkinian non-positivists have argued about whether there was a legal system in Nazi Germany, even though their primary debate is about the grounds of law.⁵⁵

⁵⁰ See Dickson, 'How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations between, Legal Systems in the European Union', 2 *Problema* (2008) 9. But see, e.g., Kumm, 'The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection', in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (2012) 216.

⁵¹ Joined Cases C-402 and 415/05P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, [2008] ECR I-6351. For discussion, see de Búrca, 'The EU, the European Court of Justice and the International Legal Order after *Kadi*', 51 *Harvard International Law Journal* (2010) 1.

⁵² Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005) 262.

⁵³ See Besson, *supra* note 25; W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009).

⁵⁴ J. Austin, *The Province of Jurisprudence Determined* (1995), at 112.

⁵⁵ See, e.g., Dworkin, *supra* note 7, at 101–108.

But other suggested criteria for the existence of law have nothing to do with the relation between law and morality. Even Lon Fuller's account of law as a distinctive kind of system of governance is entirely compatible with a positivist outlook,⁵⁶ so long as we treat the 'inner morality of law' as an implication of his account rather than as its motivation.⁵⁷ It is intuitively appealing to think that law as a mode of governance is distinctive for treating its subjects as responsible deliberative agents. A mode of governance that violates Fuller's principles of prospectivity, publicity, constancy, generality and so on is not one that offers people norms that they may choose to accept, and it is easy to feel that it is therefore inappropriate to call it a 'legal system' – even without engaging the issue of whether it is morally better to govern people as agents.⁵⁸

The criteria for the existence of a legal system that have been raised against international law typically relate to its supposed institutional deficiencies and are therefore similarly neutral as between positivists and non-positivists. We can leave aside Austin's demotion of international law to positive morality on account of there being no sovereign to do the commanding. And few are inclined to argue anymore that the lack of a legislature or a hierarchical court system with compulsory jurisdiction is disqualifying.⁵⁹ But there is one apparent difference between global and domestic law that does continue to get attention. For many, the problem for the status of law beyond the state is not that it lacks a sovereign to do the commanding but, rather, that it lacks a sovereign – an executive branch – to do the enforcing.

It is important to distinguish the issue of enforcement from that of compliance. From the point of view of legal theory, it is clear enough that a legal system is not in force if it is not generally complied with. This is just Kelsen's criterion of effectiveness. This is an entirely separate issue from the place of enforcement or coercion in an account of the nature of law. But the two have been run together somewhat in international legal theory.

Is international law generally complied with? Louis Henkin's common-sense observation that 'almost all nations observe almost all principles of international law and almost all of their obligations most of the time' has been confronted with two distinct responses.⁶⁰ First, there is the attempt to test this statement by empirical studies of particular areas of international law. Although there is much to think about methodologically here, the results so far do not dramatically undermine Henkin's common-sense guess.⁶¹ If Henkin's guess is right, it supports – what, again, seems to be common sense – the idea that international law is effective in Kelsen's sense. It is a system in force.

⁵⁶ See L. Fuller, *The Morality of Law* (1969).

⁵⁷ See K. Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (2012); S. Shapiro, *Legality* (2011), at 392–395.

⁵⁸ See Waldron, 'The Concept and the Rule of Law', 43 *Georgetown Law Review* (2008) 1.

⁵⁹ For a compelling debate between legal anthropologists about the idea that law requires a state, see Roberts, 'After Government? On Representing Law without the State', 68 *MLR* (2005) 1; Pirie, 'Law before Government: Ideology and Aspiration', 30 *Oxford Journal of Legal Studies* (2010) 207.

⁶⁰ L. Henkin, *How Nations Behave* (2nd edn, 1979), at 47.

⁶¹ See Simmons, 'Treaty Compliance and Violation', 13 *Annual Review of Political Science* (2010) 215, for an excellent review.

A very different line of response insists that compliance in the sense of acting in conformity with legal rules is not at all interesting. We need to know whether international law makes a difference, it is said, in the sense of affecting states and other global legal subjects' incentives. Jack Goldsmith and Eric Posner's analysis leads them to conclude: 'The best explanation for when and why states comply with international law is not that states have internalized international law, or have a habit of complying with it, or are drawn by its moral pull, but simply that states act out of self-interest.'⁶² On the face of it, Goldsmith and Posner's theoretical argument seems question begging since self-interest is defined as preference maximization and states are assumed to have no 'preference' for compliance with international law.⁶³ But the argument is important for being part of a more general turn in international legal theory, one that tests the worth of international law in terms of the difference it makes to states' calculations of self-interest, narrowly construed.⁶⁴

The traditional idea in legal philosophy that a legal order must be generally complied with if it is to be in force leaves entirely open why exactly legal subjects might comply; what matters is compliance, not its ground.⁶⁵ For these purposes, empirical studies of the behaviour of states are of course directly relevant; modelling that aims to show that only self-interest ever motivates compliance is beside the point. So what is the purpose of such analyses? In the case of Goldsmith and Posner, the overall aim seems to be to undermine the 'conventional wisdom' that states act on the belief that international law has moral force and that this belief is true.⁶⁶

More interesting for legal philosophy is the methodologically similar approach of a friend of international law, Andrew Guzman. Guzman argues that international law generally does provide narrowly self-interested reasons for compliance because of the role of what he calls the three Rs of compliance – reputation, reciprocity and retaliation. But he notes that so-called soft law – non-legally binding agreements and declarations such as the Basel banking accords, the Helsinki accords, the declarations of the UN General Assembly and so on – may provide exactly the same reasons for compliance (even before they become the basis of new customary law, if they do).⁶⁷

⁶² J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005), at 225.

⁶³ Golove, 'Leaving Customary International Law Where It Is: Goldsmith and Posner's the Limits of International Law', 34 *Georgia Journal of International and Comparative Law* (2005–2006) 333.

⁶⁴ For an elegant and state-of-the-art example of this school of thought, see Sykes, 'When Is International Law Useful?', 45 *NYUJILP* (2013) 787. By way of critical response, see Murphy, 'More Than One Way to Be of Use', 45 *NYUJILP* (2013) 821; and, more generally, Howse and Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1 *Global Policy* (2010) 127.

⁶⁵ B. Tamanaha, *A General Jurisprudence of Law and Society* (2001), at 145–145, appears to understand compliance to mean that legal subjects 'obey' law in the sense that they act in accordance with it because they believe they have some kind of standing reason to do what is legally required. He is right to reject efficacy understood in that way; it would not be a remotely plausible criterion for the existence of a legal system. We might, for example, hope that most of us act in accordance with most of criminal law for reasons that have nothing to do with law. For relevant remarks, see J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994), at 343. The criminal legal system is nonetheless in effect.

⁶⁶ Goldsmith and Posner, *supra* note 62, at 185.

⁶⁷ A.T. Guzman, *How International Law Works: A Rational Choice Theory* (2008).

He goes on to claim that this result requires a revision in our understanding of the nature of international law. International law, for Guzman, includes any supranational agreement or perceived obligation that changes the incentives that states confront.⁶⁸

What has happened here is that, even though sceptically minded international legal theorists are no longer comfortable simply asserting that international law is not really law because it lacks a central institutionalized enforcement apparatus on the model of the domestic state, many apparently feel that something else must be performing the same function for there to be law in any recognizable sense. For Guzman, the claim is that a distinctive characteristic of a legal system is that its demands come accompanied by prices for non-compliance. Guzman labels his approach a ‘compliance’ theory of international law, but it is really all about enforcement. Guzman’s approach is over-inclusive to the extent of eliminating law as a distinctive normative order since it simply labels as ‘legal’ any norm with which self-interest counsels compliance: ‘A vocabulary is needed to distinguish those obligations of states that affect incentives and behavior, and the term law seems to be sufficient for that purpose.’⁶⁹ On such a view, a theory of legal sources is a theory that enables states to know when others expect them to do something and that there will be a price to pay for not doing it.⁷⁰

It will obviously not do to identify law with all norms that are enforced in the sense that a price is attached to non-compliance. (I make a promise that is not enforceable under contract law. Am I nonetheless legally required to perform if non-performance will ruin my reputation?) But Guzman’s approach is helpful in bringing out a broader idea of enforcement, one that goes beyond the coercive power of centralized institutions to include any situation where non-compliance attracts penalties. Along these lines, Oona Hathaway and Scott Shapiro propose to show that international law does satisfy the demand that legal systems enforce their norms.⁷¹ It is just that, in the case of international law, enforcement is not carried out by legal institutions themselves but, rather, by states, for the most part, and it often takes the form of the withdrawal of benefits of membership in some institutional schemes – what they call ‘outcasting’ – and usually not brute force.

Hathaway and Shapiro for the most part describe the external sanctioning measures provided for by specialized treaty regimes, such as the WTO. But the overall structure they describe has a long history in the international law of state responsibility. This body of doctrine explains the responsibility of states in terms of breaches of obligations of international law, prescribes obligations of repair and, in some circumstances, allows the enforcement mechanism of countermeasures, which are defined as the non-performance of obligations that the harmed state otherwise has to the

⁶⁸ Guzman, ‘A Compliance-Based Theory of International Law’, 90 *California Law Review* (2002) 1826, at 1882.

⁶⁹ *Ibid.*, at 1878.

⁷⁰ See Guzman, *supra* note 67, at 195.

⁷¹ Hathaway and Shapiro, ‘Outcasting: Enforcement in Domestic and International Law’, 121 *Yale Law Journal* (2011) 252.

non-complying state.⁷² Kelsen, who held that legal orders were necessarily coercive, frequently emphasized this decentralized mode of enforcement of international law.⁷³

What is important to Hathaway and Shapiro is that the international legal order itself provides for – permits or requires – the sanctioning actions in question. The enforcement of international law in this way goes beyond the natural (as it were) effects on reputation and so on, which are equally present in the case of non-legally binding agreements. Is this what lies behind the intuitive connection that so many feel between law and coercion – a sense that a legal order must itself in some way provide for sanctions that will encourage compliance, even if no centralized enforcement institutions are in place?

If this proposal means that any particular legal norm must be backed by sanctions contemplated by the legal order itself, we must reject it. There are no sanctions specified for breaches of domestic constitutional law by the executive branch. And as Hathaway and Shapiro themselves note, there is no outcasting sanction available for stand-alone human rights or environmental treaties. Their response to this fact is to treat it as a matter of institutional design – a human rights regime could be bundled in with other mutually beneficial schemes, as is the case with the European Convention on Human Rights.⁷⁴ But, of course, the lack of an international police force could also be cast as just a matter of institutional design. Moreover, this suggests that, in the meantime, the legal status of the stand-alone, and not materially mutually beneficial, treaty regimes is in doubt. This does not seem at all plausible.

On the other hand, it also does not seem plausible to sever the link between law and coercion entirely. So perhaps we should say this. It is not that status as law requires provision for effective enforcement. It is that when it comes to law we would regard it as obviously appropriate for provision to be made within the normative order itself for effective enforcement. Properly regulated third-party enforcement is always in principle appropriate. This is precisely what we do not think for the case of an agreement that the parties expressly announce is not legally binding. If there is to be any insistence on a close connection between law and enforcement, I believe that it must take this form. One thing that is distinctive about legal systems is that effective coercive enforcement is considered appropriate in the nature of things. Thus, I agree with Grant Lamond that the link between a legal system and coercion is, as he puts it, justificatory rather than constitutive: ‘Law claims the right to reinforce its directives with coercive measures.’⁷⁵ Of course, substantive conditions of legitimacy have to be satisfied if enforcement is justified, but the thought that law presents itself as a set of legitimate demands that, things being in order, may justifiably be enforced in accordance with rules and standards provided for by law itself, with brute force where appropriate,

⁷² See Crawford and Olleson, ‘The Nature and Forms of International Responsibility’, in M.D. Evans (ed.), *International Law* (2010) 445.

⁷³ See, e.g., Kelsen, *Pure Theory*, *supra* note 1, 323; Kelsen, *Principles*, *supra* note 1, 20–25.

⁷⁴ See Hathaway and Shapiro, *supra* note 71, at 321. Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

⁷⁵ Lamond, ‘Coercion and the Nature of Law’, 7 *Legal Theory* (2001) 35, at 55.

rings true. None of this means that, in situations where legitimate enforcement is not possible or practicable, the status of a norm as legal is diminished. But it does help to distinguish law from other normative systems.

There is a connection here with John Locke's position that there is a natural right, in the state of nature, to punish violations of the law of nature. I agree with Elizabeth Anscombe that this confuses the issue of whether I deserve punishment with the issue of who may inflict it: 'One may be wronged in a secondary way by getting one's deserts at the hands of someone who had no right so to inflict them.'⁷⁶ What a third party may do to me if I act (morally) wrongly is a substantive moral question; but it seems clear that the mere fact that I have acted wrongly doesn't automatically justify enforcement measures by just anyone. By contrast, if it is (legitimate) law I have violated and the law itself specifies the proper agency and nature of punishment, the appropriateness of some coercive response is taken for granted – though there will always be questions about the justice of the type and measure of the sanction.

In the moral realm, we need to ask: do we have the right to get involved and start trying to change people's behaviour by imposing sanctions of some kind? (Sometimes we do, sometimes we do not.) In the legal realm, we do not ask whether the appropriate people have the right to impose sanctions for non-compliance with law but, rather, whether the conduct in question was properly subject to legal regulation in the first place or whether the legal order is legitimate.

To pursue from a different perspective, the question of what distinguishes the legal from other normative orders, and perhaps to justify raising it in the first place, we can consider the case of emerging law. The most important and interesting discussion in contemporary international legal theory concerns what is usually referred to as 'global governance'. The precise scope of this term is itself the subject of scholarly articles, but the rough idea is to highlight the impact made by international organizations on the policy options of states and the lives of people globally. It is important that while these institutions may be the creatures of treaties and so too of international law in the classical sense, that is just one possibility. They may also be informal club-like arrangements between states' executive branches, hybrid public/private institutions or even fully private institutions. The political issue raised by this aspect of globalization is that there is a global institutional sphere of great impact that is not necessarily subject to the control of states and so potentially lacks even so much accountability as customary and treaty law may have. As we have already noted, even organizations that are created by treaty, such as the UN Security Council, have taken on the creation of rules and decisional functions that are not under the continuing 'legislative' control of the parties to the UN Charter.⁷⁷

⁷⁶ Anscombe, 'On the Source of the Authority of the State', in J. Raz (ed.), *Authority* (1990) 142; Kingsbury *et al.*, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15; von Bogdandy *et al.*, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008) 1375; Walker and de Búrca, 'Reconceiving Law and New Governance', 13 *Columbia Journal of European Law* (2007) 519.

⁷⁷ J. Alvarez, *International Organizations as Law-Makers* (2005).

There are at least two questions concerning the relationship between law and this change in the way the world is governed. The first is the extent to which it makes sense to think of the rules and decisions made by these various bodies as legal rules and decisions. The other is whether and how law might assert some control over all of this consequential institutional activity. The answer to the first question will depend on the organization in question. Thus, when the Security Council places a person on its 'terror list', directing member states to freeze that person's assets, this is regarded as a decision with legal force. If it were not, the CJEU's *Kadi* decision would not have become a celebrated case. At the other extreme, decisions by the purely private International Standardization Organization (ISO), though they can have pervasive impact both on domestic law and decisions by treaty-based international organizations, surely do not have legal force. If they did, so too would decisions of private ratings agencies, such as Moody's. Or consider the decisions, especially the anticipated decisions, of (global) bond traders, which impose rigid constraints (or are at least perceived to) on the range of feasible economic and social policies for most states.

That it is a non-governmental organization rather than a corporation or a collective of independent individuals obviously does not in itself make the ISO's standards law, nor does the fact that it is made up of representatives from all countries in the world. Nothing could make the ISO standards law since they are available for a fee, on a take-it-or-leave-it basis. The issue of what to make of non-compliance simply does not arise since there could be no such thing. It is true that ISO standards are incorporated into legal regulation – for example, through the WTO – but that fact does not make the standards themselves legally binding – no more so than the regulation of banks and other financial institutions that refers to, and incorporates, the decisions of private ratings agencies makes Moody's a lawmaker.⁷⁸

Of course, that an organization's decisions do not have legal force does not mean that it would be inappropriate to regulate them by law, private ratings agencies have been regulated by US law since the financial crisis of 2008. Once our attention is broadened from law-making entities to any global organization or activity that may have an impact on people's lives, however, it is natural to wonder why the focus of the global governance discussion is on international organizations of various kinds rather than on any activity – private or public, individual or collective – that affects people's lives globally. But leaving this aside, the current question is this: if legal regulation of an international organization is thought appropriate, how should it be done?

In the case of decisions by bodies that are creatures of treaty regimes, one obvious solution would be legislative change – revise the treaty to mandate whatever procedural rules on decision making we believe to be appropriate. But, apart from being unlikely in practice, this would not cover precisely the cases that are of most concern from the point of view of accountability – those international organizations that are not creatures of law. To a certain extent, the impact of such organizations could be regulated at the point of incorporation into legal regulation – at the point at which ISO standards are appealed to in trade law, for example. But the impact of these kinds

⁷⁸ Kingsbury *et al.*, *supra* note 76, at 23.

of organizations is not exhausted by their incorporation into law. We need a broader or a more inclusive approach.

There are a number of inclusive approaches currently under discussion. There is the idea that the organizations in question make up a ‘global administrative space’ that is appropriately regulated by ‘global administrative law’ on the model of domestic administrative law.⁷⁹ Another option is to broaden the understanding of what has traditionally been called international institutional law.⁸⁰ This whole field is extremely complex, and I cannot hope to do it justice. So I will just use as an example the global administrative law model. Here, the claim is that accountability for the effects of the actions of these multifarious international organizations requires compliance with such norms as transparency, consultation, participation, rationality and review.⁸¹ In the absence of more robust democratic accountability, compliance with these norms of process would obviously be a good thing. But the proposal is that a global administrative law is emerging, and my question is what exactly this means in a context where conventional jurisprudence currently recognizes no such law.

There ought to be a law. In a context of effective enforcement, this most naturally means that ‘the authorities’ should put a stop to it. What does it mean in the absence of enforcement? That there ought to be a (global administrative) law, or that one is emerging, must mean more than that these global institutions, since they have such a significant impact and since they are not subject to democratic control, really ought to comply with certain formal and procedural standards in decision making. After all, if this is true, it is already true. Perhaps there is a range of equally acceptable procedures, and it matters that all of the relevant organizations adhere to the same ones. But a proposal that all of the relevant entities get together and solve this coordination problem would still not bring us to a role for law. That there ought to be a law must mean more than that it would be good if the relevant decision makers practised some code of ‘international organization ethics’; to say that a new law is emerging is evidently to say more than that people are starting to converge in their ethical views.

The question, as Jutta Brunnée and Stephen Toope put it, is ‘[w]hat value does “law” add?’⁸² Their own answer is that if a normative practice satisfies the requirements of legality, or the rule of law, as set out in Fuller’s account, this alone is sufficient to qualify the norms as legal norms and that the value that it adds is that the system of governance is more deserving of ‘fidelity’.⁸³ This answer cannot be right, however, because all sorts of normatively structured cooperative practices could satisfy Fuller’s formal requirements. Those requirements may be necessary for law, but they obviously are not sufficient. It is also obvious that the various institutional criteria (courts, legislatures, enforcement agencies), now generally rejected for the case of

⁷⁹ *Ibid.*

⁸⁰ Von Bogdandy *et al.*, *supra* note 76.

⁸¹ Kingsbury *et al.*, *supra* note 76.

⁸² J. Brunnée and S. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010), at 20.

⁸³ *Ibid.*, at 27.

public international law, are not helpful in this case. Comprehensiveness and a claim to supremacy – two criteria for the existence of a legal system suggested by Raz⁸⁴ – seem question begging in the case of law beyond the state, even, given the prospect of fragmentation, for public international law. What is left?

Brian Tamanaha's discussion of criteria that have been suggested to mark the boundary between law and other kinds of normative order in effect concludes that nothing is left.⁸⁵ Tamanaha does want to acknowledge such a boundary, he does not want any old thing to count as law, but the only criterion he can accept is a purely nominal one: 'Law is whatever people identify and treat through their social practices as "law" (or *droit*, *recht*, etc).'⁸⁶ Although Tamanaha's sceptical remarks about proposed substantive criteria for distinguishing legal from other forms of normative order seem compelling one by one, the position he arrives at is not plausible. For one thing, it makes translation puzzling – perhaps we are comfortable about '*droit*' and '*Recht*', but how would we choose between 'law' and 'mores' when translating some language for the first time? If no beliefs at all are associated with the word 'law', we have nothing to go by.⁸⁷ More important, it leaves us with nothing to think about when we ask ourselves whether an activity or practice ought to be legally regulated. Suppose we suggest that there should be a new supranational legal system, addressing issues both of human rights and trade in our region. What exactly are we saying? Something different from the claim that states really ought to play fair when it comes to trade and to respect the rights of their subjects, no doubt, but what?

Might the right response be that while none of the criteria just mentioned is necessary or sufficient on its own, the group of them together do determine, in a loose and aggregative way, the boundary between law and other kinds of normative order? If there is a lot on all of these dimensions, you have law; not much and you do not? The trouble is, it seems, that even total failure to satisfy any of these criteria (no legislature, courts, centralized enforcement or claims to comprehensiveness and supremacy) does not rule out the idea of global administrative law. Similarly, if public international law did fragment, and international environmental law, say, were properly regarded as a separate regime, it would not satisfy any of the criteria.

There are more criteria that could be discussed, but I will not attempt a comprehensive treatment in this article.⁸⁸ Rather, my hope is that this review of the issue of what makes law law in the context of calls for new law will provide intuitive support for the position arrived at earlier. When we say that there ought to be a law, we are not necessarily saying that existing authorities should put a stop to some conduct. But part of what we are saying does seem to be that we want the kind of normative order

⁸⁴ Raz, *supra* note 31, at 150–152.

⁸⁵ Tamanaha, *supra* note 65, at 133–170.

⁸⁶ *Ibid.*, at 166.

⁸⁷ See Twining, 'A Post-Westphalian Conception of Law', 37 *Law and Society Review* (2003) 199, at 223–231, for an effective sustained critique of Tamanaha's proposal.

⁸⁸ For a relevant discussion, see Yankah, 'The Force of Law: The Role of Coercion in Legal Normativity', 42 *University of Richmond Law Review* (2008) 1195.

that would appropriately (where feasible) include some rules designed to encourage compliance and that it would be right and proper for the authorities (if there are any) to enforce the norms coercively in the ordinary course of events. We have in mind a normative order whose rules are generally taken to be, and are presented as being, appropriately enforced – if feasible and done in accordance with rules of that very order. That is one main difference law makes, one value that it adds. And that is why, I venture, you would want a global administrative law if you are concerned about the impact of unaccountable global institutions on our lives, rather than just international organization ethics.

In effect, to call for new legal norms is to express confidence that any moral objection to enforcing them could be met. Whether enforcement should or will in fact take place will turn on issues of feasibility and institutional design. Of course, to say it is law you want is not just to say something about enforcement. Surely, it is also to say something about the formal characteristics of the normative order you have in mind as well.⁸⁹ As I have said, though satisfaction of Fuller's formal criteria clearly are not sufficient to identify a legal system, his view that gross violation of them collectively means that we are not dealing with a legal system does seem plausible. Any full account would also have to consider the special significance of adjudicatory institutions – real or possible – for legal orders; even if you can have law without courts, they are rather central to most legal systems and much else besides. My aim here is by no means to attempt a full account of the nature of legal normative orders. (I am not sure that such a classificatory project is particularly important, just for its own sake.) Rather, the focus has been on the significance of enforcement, in particular, as that is so salient an issue for law beyond the state. As it turns out, it seems that we can make good on the common-sense idea that law has got something to do with the exercise of power without having to go near the disastrous idea that no person, institution or state is subject to law unless it is subject to an actually existing and effective coercive order.

4 International Responsibility

International law already provides for a measure of enforcement through countermeasures, and further feasible modes of enforcement of global law may emerge. Enforcement means sanctioning the non-complying legal subject. But do the burdens of those sanctions fall on the right people? The subjects of global law include individuals, organizations of various kinds and states. There is no puzzle about the legal and moral obligations individuals have under international criminal law or about the moral responsibility of those who fail to comply. (There are questions about the legitimacy of international criminal trials and punishment, but that is a different matter.) But when it comes to corporate entities such as states and international organizations, it is sometimes suggested that neither obligation nor responsibility makes any sense. Only people can have duties; only people can be responsible for violating them.

⁸⁹ F. Pirie, *The Anthropology of Law* (2013).

There is actually no puzzle about abstract entities having legal or moral obligations. The obvious analogy here is to corporations. Corporations do not have minds, so they cannot deliberate about whether to comply with law or to do the right thing, but the management and membership certainly can. Likewise, the people with decision-making authority in the governments of states and the governing bodies of international organizations can choose whether to comply with law. These abstract entities comply (or not) with their obligations through the decisions of their officials.

It is crucial to this common-sense story that there be some institutionalized mechanism for making decisions. We cannot in any meaningful sense say that Christians, as a group, have an obligation not to violate the rights of non-Christians. It is not the group but, rather, each individual that has that obligation. But we can talk about the obligations of the Roman Catholic Church, with its officials and decision-making procedures. There is also no problem with responsibility. Responsibility for violations of international law by a state lies with the officials who made the decision. There is no metaphysical puzzle here.

But what about the rest of us, the ordinary citizens; are we also responsible? Suppose I vote for the party that promises to comply with international law, but this party loses to the non-compliance party. I am not responsible for subsequent violations of international law committed by my government. What about those who voted for the non-compliance party? We may say that they together are responsible for any violations that were explicitly promised in the campaign, such as a promise to wage an illegal war. But merely voting for a candidate who later violates law does not make anyone responsible for those decisions. Thus, in the vast run of cases, private citizens cannot be said to be morally responsible for acts of non-compliance by their state; responsibility lies entirely with those officials who made the relevant decisions.

Since legally wrongful acts by a state may attract sanctions that will burden the entire population of the state, some have seen a serious problem here. Antonio Cassese writes:

The international community is so primitive that the archaic concept of collective responsibility still prevails. Where States breach an international rule, the whole collectivity to which the individual State official belongs, who materially infringed that rule, bears responsibility.⁹⁰

Now one possible response to this objection is to offer an account of states as constituting political communities in some strong sense that would make sense of genuine collective responsibility. Such an account would extend the responsibility for a state's action even to those citizens who did everything in their power to prevent it. Dworkin's theory of associative obligations and the role of law in forming a genuinely fraternal political community would be one possibility.⁹¹ I do not find such accounts

⁹⁰ A. Cassese, *International Law* (2005), at 241, quoted in Crawford and Watkins, 'International Responsibility', in Besson and Tasioulas, *supra* note 25, 289. Crawford and Watkins and my companion piece, Murphy, 'International Responsibility', in Besson and Tasioulas, *supra* note 25, 299, on which this section draws, discuss these issues in more depth than I can here.

⁹¹ See Dworkin, *supra* note 7, at 164–224; Nagel, 'The Problem of Global Justice', 33 *Philosophy and Public Affairs* (2005) 113.

plausible even as descriptions of an ideal, but, in any case, we can leave them aside. In our actual non-ideal world, probably no state satisfies the strong preconditions of domestic justice required for the kind of community in which all are plausibly thought responsible for the activities of their leaders.⁹²

The fact is that individuals in most states most of the time are not responsible in any meaningful sense for the particular decisions made by their leaders. But it does not seem to me that international law and practice suggest otherwise. The better way to put Cassese's objection is this: given that it is the leaders who make decisions who are morally responsible and not the public at large or officials assuming office subsequently, it is objectionable that those decisions can generate sanctions that affect the whole population and whose effects can survive a change of government. Exactly the same objection can be raised about states' contractual liability in cases of 'odious debt'. Loans taken out by one government, no matter how corruptly spent, must nonetheless be repaid after a change of regime, and the burdens will typically fall on everyone.⁹³

Of course, it is also true that both liability to sanction and contractual liability on the part of individuals can burden other non-responsible individuals, such as family members. This raises a *prima facie* objection that is not different in kind to the one we are considering for state responsibility. But the problem is starker in the case of state responsibility because there is not even the attempt to concentrate the burdens on the responsible officials.

In the actual world, where states do not overlap with communities within which genuine collective responsibility might make sense, the justification for making states, rather than government officials, the subjects of law and the targets of sanctions is going to have to be instrumental. If states are sanctioned for non-complying actions taken by particular officials, people with no responsibility for those decisions will inevitably incur burdens that they do not deserve in any sense. The challenge is to show that these kinds of burdens are outweighed by the relative advantage, in terms of good effects, that the current system of state responsibility has over feasible alternatives.

Note that the burdens imposed on people because of the wrongful acts of officials of their states are typically financial. They are not in the nature of punishment, nor do they rise to the level of rights violations.⁹⁴ The burdens of state contractual responsibility or responsibility for wrongful acts may be significant but so too may be the advantages of the state system. Yet this does not mean that the state system cannot be made more sophisticated in order to distribute these burdens more fairly and provide better incentives to government officials. The state system is an order of law. The law of state responsibility, as well as the whole international financial architecture within

⁹² Murphy, *supra* note 90, at 291.

⁹³ See Robert Howse, The Concept of Odious Debt in Public International Law, United Nations Conference on Trade and Development Discussion Paper no. 185 (2007), available at http://unctad.org/en/Docs/osgdp20074_en.pdf (last visited 30 December 2016); T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002), at 112–115.

⁹⁴ Crawford and Watkins, *supra* note 90; Murphy, *supra* note 90.

which loan contracts are enforced, could in principle allow for the lifting of the state veil in certain circumstances.⁹⁵

The law of the responsibility of international organizations is currently a matter of controversy. The ILC's recent Articles on the Responsibility of International Organizations have not been received with unanimous praise.⁹⁶ The problem any law of responsibility for international organizations must face is the same as the problem any kind of justificatory account faces – there are a great many very different kinds of international organizations, with different legal bases, different kinds of affiliations with states and different kinds of impacts on the global scene. The overall question is what the best feasible legal regime would be with regard to the legal liability of non-state organizations? And it seems likely that the answer to this question will have many parts. Structurally, the issue is the same as that discussed for states: why and how would it be justified to impose burdens on people in the form of liability for the decisions made by officers of various international organizations? But it is not as if there are states and just one other kind of organization – there are an unlimited number of possibly relevant distinctions to be made among international organizations. Needless to say, I cannot venture an opinion on where work on this important issue is likely to end up.

5 The Duty to Obey Global Law

In the domestic context, several deontological, or non-instrumental, arguments for a general ('overridable') duty to obey the law have been made. I do not find any of them plausible, but this is not the place to go over the reasons.⁹⁷ In any case, some of those arguments, such as those that turn on fraternal or associative bonds among members of a political community⁹⁸ or on democratic processes,⁹⁹ are clearly not apt for the non-domestic case. One classical deontological argument for a duty to obey domestic law, however, fares better in the international, than the domestic, context: the argument from consent. An obvious problem with the consent argument in the domestic case is that most legal subjects never consent to law's authority over them. In the context of international law, by contrast, it can at least be argued with a straight face that states are not subject to international obligations to which they have not expressly consented. In the case of customary law, the argument relies on the doctrine of the persistent objector. Despite the fact that objecting is no doubt onerous, to infer implicit consent from the failure to object is hardly absurd in the context of the

⁹⁵ Murphy, *supra* note 90.

⁹⁶ For a survey, see McRae, 'The Work of the International Law Commission, 2007–2011: Progress and Prospects', 106 *AJIL* 322 (2012). Articles on the Responsibility of International Organizations, Doc. A/66/10 (2011).

⁹⁷ See Murphy, *What Makes Law*, first unnumbered note, ch. 7.

⁹⁸ See Dworkin, *supra* note 7, at 164–224.

⁹⁹ See, e.g., T. Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (2008), at 231–259.

relations among states, not to be compared to Locke's idea that my presence on the king's highway counts as an implicit promise to obey his commands.

The doctrine of the persistent objector may itself not be terribly secure.¹⁰⁰ But there are, in any case, other elements of international legal doctrine that in the end undermine the claim that international law imposes no obligation without consent. There is the idea of *jus cogens*, pre-emptory law that states cannot contract out of. More secure, doctrinally speaking, is the exception that Hart focused on in his discussion of this issue: new states are taken to be subject to customary law as it exists at the time they come into existence. Finally, international organizations such as the UN Security Council have taken on legislative roles that were arguably never anticipated in the original treaties. Thus, though the case for the actual fact of consent by legal subjects is not laughable for the international context (as it is for the domestic context), it is in the end not made out.

In any case, the factual basis of the consent argument has never been its gravest weakness. The more important point is that there is more at stake with the persistence of legal orders, both domestically and globally, than that the valuable practice of honouring commitments should be supported. It is true that this is a valuable practice in the international context, both for each state and for people collectively. But, just as the moral stakes of a president's compliance with law are hardly exhausted by the fact that he took an oath of office, there are much stronger reasons for a state to comply with international law than those that flow from any promise or expression of consent.¹⁰¹

Another way to bring out the point is to remember the difference between treaties and soft law agreements. If consent is the basis for the duty to obey, it applies equally in both cases. Since this is not the way participants in the system think of it, something has gone wrong. Of course soft law agreements impose obligations; the basis of that obligation is the importance of the practice of making and keeping international agreements. But something more is going on with the obligation to obey the law.

Though consent is not the ground of states' obligations to obey international law, the fact that most states have in fact consented to most of international law is, nonetheless, very important. The moral significance of the fact of consent lies not with its generation of a duty to obey but, rather, in providing an element of accountability.¹⁰² Of course, law-making by way of treaty is hardly to be thought of as a globally

¹⁰⁰ Thirlway, *supra* note 25, at 127.

¹⁰¹ In my view, the reasons a person, or corporate body, have to keep a promise are instrumental – they turn on the good that the practice of making and keeping promises does. Others hold that there is a non-instrumental reason to keep a promise, *vis-à-vis* the fact that the promisee has a right to performance. I cannot defend my position here, but it does not matter, since even if promises ought to be kept for some non-instrumental reason there would still be weightier reasons to comply with the law. That a state has consented is simply not a terribly strong positive ground for compliance with law. It may nonetheless be important, as we will see, for blocking an objection to the imposition of legal obligations, but that is a very different matter.

¹⁰² Buchanan and Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics and International Affairs* (2006) 405.

democratic legislative process, but the possibility of a state refusing to sign up adds considerably to the legitimacy of calling non-compliers to account and applying sanctions. The role of consent in international law is thus politically very significant, even though it is not the basis of states' duty to obey.

In the case of domestic law, the basis of individuals' obligation to obey the law, where it exists, is the political obligation to support the institutions of the state. In the case of international law, the obligation is to support the practice of general compliance with the law.¹⁰³ That general compliance (supposing the content of the law is not too bad) is good, generally speaking, seems hard to deny. International humanitarian law has arguably been enormously important in disciplining the conduct of war. To have a settled law of the sea that is usually complied with, even if it is less than fully just, is clearly preferable to having no law of the sea at all. Similarly, the content of international environmental law is hardly what it needs to be, but to have international environmental law at all is a precondition of having good law. It would not be a wise strategy to refuse to comply until a law with the right content came about since other states will have different views about what content is right.

In the case of individual subjects of domestic law, the fact that general compliance is better than general non-compliance does not translate into an instrumental duty of obedience to all law by everyone all the time. Particular acts of non-compliance by individuals may do no harm or even do good. But, in the case of international law, that general compliance is better than general non-compliance comes close to entailing a duty of all states to comply with all law. In part, this is because of the weakness of the enforcement mechanisms available in international law. The more compliance is in effect voluntary, the more harm non-compliance may do. But it is also just a matter of numbers. There are very few states, relatively speaking, and individual acts of non-compliance by one or a handful of the 200-odd states could and can make a very significant difference to the practice of compliance. It would seem to be especially important that states that can get away with illegality in self-interested terms should comply. The signal that non-compliance by powerful states sends – that only the weak or the foolish would follow the law if non-compliance were better in self-interested terms – is particularly destructive.

The moral case for compliance with international law, then, is simple. With so few legal subjects, each act of non-compliance has a reasonable chance of being part of a pattern of increasing non-compliance that snowballs into a situation where compliance is no longer the norm. The fact that, if Guzman is right, self-interest usually counsels compliance does not undermine this point. For the lower the overall level of compliance, the less considerations of reputation and so on will counsel compliance on self-interested grounds. Those who argue that there is never a moral duty for states to obey international law must believe that a world without international law would be as good as a world with it. They must believe that the world will become no worse if each state decides for itself what seems right and proper, rather than constraining

¹⁰³ See A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2007), at 293–299.

itself to shared standards of conduct while trying to improve the content of those standards. It goes without saying that the current content of international law, and the process of its making, both fall way short of feasible alternatives. But to say that states should comply with international law as it now is because that will make the world better need not involve illusions about our non-ideal world and is fully compatible with recognizing that the content of the law may be bad enough in a particular case that the benefits of non-compliance outweigh the harms.