
Law Beyond the State: A Rejoinder

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It is an honour to receive replies to my article by four distinguished scholars of international law. I have learned a lot from each reply and am very grateful to the authors for taking the time to engage so thoughtfully with my piece. Two of the replies, however, in parts do somewhat misread my article and its motivation. This is my fault, of course, and I would like to try to make amends by starting with a few sentences about what I was trying to achieve.

My article is not an attempt to survey all philosophical work that has been done on international law or to discuss all of the philosophical issues that could be raised about international law. It is, primarily, an attempt to relate some salient issues from contemporary legal and political philosophy to contemporary issues in the theory of international law. My own work converses mainly with English language philosophy, which of course affects my focus. There is, however, nothing especially ‘analytic’ about the philosophy I write or read, if that is taken to imply any kind of rejection or intolerance of philosophical work produced in continental Europe since Hegel or a method that abstracts from institutional realities. Even more alarming, Christoph Möllers appears to read me as aligning myself with those who make breezy armchair claims of ‘conceptual truth’ and embrace ‘a universal semantic’ that must abstract from particulars (and so on in that vein).¹ Since this kind of philosophical methodology is anathema to me, I fear that a casually applied label, or some kind of assumed guilt by association, here interferes with the ability to read me straight. There is a lesson in that for me about the importance of anticipating how apparent affiliations will affect how you are understood.

A main aim of my article is to discuss two central issues from legal philosophy relating to the nature of law – the grounds of law and what makes a normative order an order of law – as they arise for international law. For the former issue, my aim is just to make clear what the real stakes of positivism or non-positivism are for international law; I make plain that I endorse neither side in the debate. For the latter issue, I do offer a tentative suggestion. In addition to the issues about the nature of international law, I address two specific issues of political morality: the responsibility of individuals for the legal responsibilities of their states and states’ duty to obey international law. There are obviously other relevant issues of political morality, such as the fundamental one of the legitimacy of international law, that I do not address. My choice of issues

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¹ Möllers, ‘Law Beyond the State: A Reply to Liam Murphy’, in this issue, 251, at 253, 255.

is guided in good part by my sense of whether I might have anything distinctive to say that, moreover, can be usefully said in a limited space.

Another part of my overall aim, as I said, is a kind of house cleaning. Thus, my reason for discussing Hart's idea that international law is not a legal system is to set aside his concern (which has been taken to require an answer but generally misunderstood) and to show that it is irrelevant to an important matter of recent interest among international legal theorists – namely whether international law makes up a single legal system or is rather best understood as several distinct legal orders. Many theorists have criticized H.L.A. Hart's Chapter X over the decades, without, I think, managing to locate exactly where the argument goes awry. In part because of my enormous admiration for Hart, but also because of the continuing (mostly negative) attention his chapter receives, I thought it was important to get this matter of critical interpretation right. Let me now turn to each reply in turn.

Samantha Besson's thoughtful and generous reply focuses on the normative significance of state consent in international law. We are in agreement that consent cannot be the source of the very sources of law² or the ground of a duty to obey international law.³ We are also in agreement, I believe, that state consent can play a role in an account of the legitimacy of international law. Besson herself develops an interesting argument along these lines both in her reply and in a recent article.⁴ I have some reservations about details, but the plausibility of some such account is gestured at in my article when I say that the moral significance of the fact of consent lies in its 'providing an element of accountability'.⁵ I did not myself develop this suggestion but merely referred to an article by Allen Buchanan and Robert Keohane. I agree with those authors that, though consent is hardly sufficient for the legitimacy of international law, 'there is a strong presumption that global governance institutions are illegitimate unless they enjoy the ongoing consent of democratic states'.⁶

Besson's reply and her article provide a much more fully worked-out account within this same space, one that is both subtle and compelling. I plead guilty to neglecting the issue of the legitimacy of international law, and I applaud Besson's contributions to this topic. But there are disagreements between us, it appears, and, to my surprise, the clearest of them is a matter of interpretation of international legal doctrine. Besson holds what I in my article denied, that no state is subject to a rule of international law without its consent. Besson holds that my statement that new states are bound by existing customary law 'is false because each state may oppose its persistent

² Besson, 'Law Beyond the State: A Reply to Liam Murphy', in this issue, 233, at 233–234.

³ *Ibid.*, at 236–237.

⁴ Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox', 29 *Leiden Journal of International Law* (2016) 289.

⁵ Murphy, 'Law Beyond the State: Some Philosophical Questions', in this issue, 203, at 230.

⁶ Buchanan and Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics and International Affairs* (2006) 405.

objection'.⁷ To me, it had seemed that there was a clear consensus that, since the doctrine of the persistent objector requires that objection be timely, expressed as the norm was emerging, new states could not avoid being bound by well-established customary norms by objecting, any more than a state that had existed all along could object once a legal norm was established. Much commentary criticizes this position either on the grounds of fairness or on the ground that no state should be subject to a rule of international law without its consent. Nonetheless, as James Green concludes, in his recent book-length treatment of the persistent objector rule: 'For good or ill, as the law stands, new states cannot be persistent objectors to existing rules of customary international law.'⁸

I mentioned two other bases for my claim that states can be bound to international legal norms without consent. Against one of them, Besson rightly points out that it is plausible to say that unanticipated (in the original treaties) quasi legislative roles for international organizations depend upon subsequent converging state practice. As for the other one, *jus cogens* norms, it seems that Besson actually agrees with me. She notes that 'a *jus cogens* norm cannot arise without the consent of the states it binds'.⁹ States, yes, since *jus cogens* norms, as defined in Article 53 of the Vienna Convention on the Law of Treaties, depend on the recognition as such 'by the international community of States as a whole', but not each state.¹⁰ Besson herself, in her argument that withholding consent allows a state to avoid the bindingness of otherwise legitimate international law, notes that there are exceptions and that consent will not give a state an out when it comes to 'the shape of non-discrimination rights ... and of absolute or minimal human rights duties or other *jus cogens* norms'.¹¹ This leaves me wondering why she also writes that 'international legal obligations are never imposed on states without their consent'.¹²

Still, in the end, I think Besson and I agree more than we disagree. I myself would not ground international law's legitimacy the way she does, drawing on Joseph Raz's theory of authority. For one thing, this theory ties the issue of legitimacy too closely to the distinct (as I see it) issue of law's subjects' reasons to comply. But I do agree that consent cannot ground a duty to obey international law – though the 'classical argument' I rely on is that of David Hume, which is more radical than the one of Raz she discusses.¹³ I also accept Besson's criticism of one part of my own instrumental

⁷ Besson, *supra* note 2, at 236. She goes on to note that the 'self-determination of newly created states was actually one of the justifications for the introduction of the possibility to waive a persistent objection in the 1960s'. *Ibid.* But the need for waivers, to allow for the self-determination of newly created states, would seem to arise only if otherwise the new states would be bound.

⁸ J.A. Green, *The Persistent Objector Rule in International Law* (2016), at 178. Similar statements can be found in many textbooks. I do not find anything in the section on persistent objection in International Law Commission, Third Report on Identification of Customary Law, by Michael Wood, Special Rapporteur, UN Doc. A/CN.4/682, 27 March 2015, cited by Besson, *supra* note 2, n. 9 that contradicts this.

⁹ Besson, *supra* note 2, at 236.

¹⁰ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

¹¹ Besson, *supra* note 2, at 236.

¹² *Ibid.*, at 234.

¹³ *Ibid.*, at 236–237.

argument for the duty of states to obey international law – in arguing that the duty to comply is stronger for states than for individuals under domestic law, in part because enforcement is weaker in the former case, I neglect the enforcement of international law domestically. And the main thing is that, in the big picture, we agree. Consent is not in itself the basis for the legitimacy of international law, nor the ground of states' moral reasons to comply, but it contributes to legitimacy by providing for a measure of democratic accountability, at least as far as democratic states are concerned.

I am extremely grateful to Nehal Bhuta for his sympathetic presentation and enrichment of several themes of my article and for placing the article within the wider context of themes from my recent book.¹⁴ I am especially indebted to him for bringing out, as my article does not, my view that 'law for states', and not domestic law for individual subjects, should be the focal case for jurisprudential inquiry. I am grateful too for the important challenge Bhuta makes to my argument that states have an instrumental moral duty to comply with international law. In my view, there are no direct deontological reasons to obey the law, either domestic or international. Private citizens and state officials should obey the law, if they should, because that will do some good. In the domestic case, the underlying good is the support of (good enough) state institutions that bring about public goods and social justice. So the basis of the duty to obey the law is the political obligation to support the state. Not every act of non-compliance by private subjects will undermine the institutions of the state, but general non-compliance will, and non-compliance by state officials will often be very harmful. In the case of international law, I wrote, 'the obligation is to support the practice of general compliance with the law'; the difference, obviously, is that there is no world state.¹⁵ But it now seems to me that the point could have been better put, since compliance with law is not a good in itself. The basis of the duty to obey international law is the obligation to support beneficial international institutions and beneficial coordinated state practices.

In response, Bhuta notes that the well-known differences between domestic and international law as far as the depth and effectiveness of their institutionalization is concerned makes a great difference to what we can plausibly claim is the good done by compliance with law as such.¹⁶ He makes the astute remark, which I think is compatible with my understanding of Hart's real worry about international law, that 'this extensive capacity for the creation of public goods seems to me to be really what is at stake in the distinction between *Stufenbau* legal orders exemplified by the ideal-typical municipal order and other kinds of legal systems'.¹⁷

I am inclined to reply that general compliance with the main structural features of international law may in fact be a necessary condition of the ability of individual states to achieve more than the most basic goods. For the state system is an order of international law. If we suppose that the state system implements an instrumentally

¹⁴ Bhuta, 'Law Beyond the State: A Reply to Liam Murphy', in this issue, 241, at 242–245.

¹⁵ Murphy, *supra* note 5, at 231.

¹⁶ Bhuta, *supra* note 14, at 248.

¹⁷ *Ibid.*, at 248.

desirable division of labour that enables at least fortunate and well-functioning ‘territorially-bound coercive political orders’ to produce very great goods for (at least most of) their populations, we must credit international law for making this division of labour possible – at least for all but perhaps one or two extremely powerful states. The international legal order does not all on its own produce human goods as high up an absolute scale as the best domestic legal orders do, but its role as a condition for the possibility of the production of those goods must be recognized.

But now this kind of foundational role is not plausibly attributed to all parts of international law, which brings us to Bhuta’s second criticism: ‘Moreover, if the international legal order is better understood as being composed of several interlocking normative regimes, it seems plausible to think that some regimes effectively deliver public goods and others do not or do so only very weakly.’¹⁸ The upshot here is that my instrumental argument should be applied regime by regime, with the results of such an inquiry likely to be very varied, leading to ‘a very piecemeal approach to compliance’ even among state actors doing their best to do what they have moral reason to do. And this in turn implies that:

an argument for an instrumentalist duty to obey and not undermine international law as a system of law requires a *commitment to legality* that can be justified only through a wider consequentialist account of the purposes achieved by *the ideal of an international legal order*. But if I am right, then it seems to me that the difference between deontological and consequentialist arguments is slim at this point. What we are perhaps interested in doing is reminding ourselves of the benefits to our present reality of a continued belief in a kind of collective dream.¹⁹

There is a lot to this challenge. Let me note first, making a virtue of one of Besson’s criticisms, that it is not clear why the fact that international human rights law relies on states’ coercive political and legal orders to achieve good results undermines the importance of compliance with international human rights law. Yes, ‘international human rights law does not directly generate political and economic security for anyone’, but then no legal norms do that, and whether enforcement is centralized or decentralized does not seem to affect the amount of good compliance that the law brings about.²⁰

But Bhuta’s point is well taken. In my second section, I note that on the face of it non-fragmented international law – a single legal order covering all subject areas – would likely increase the instrumental good law can do, primarily because self-interested or moral allegiance to the system as a whole would motivate compliance with those areas of the law that impose net costs on individual states.²¹ Supposing a unified international legal order, and assuming that some or most of those areas of law that do impose compliance costs on some states nonetheless do good, there are good reasons to comply with law as law. This, it seems to me, is a ‘wider consequentialist account of the purposes achieved by the ideal of an international legal order’, and

¹⁸ *Ibid.*, at 248.

¹⁹ *Ibid.*, at 250 (emphasis added).

²⁰ *Ibid.*, at 248.

²¹ Murphy, *supra* note 5, at 215.

it differs from a deontological account in that it remains entirely instrumental and, thus, hostage to changed facts. Moreover, there is no appeal to false beliefs and, thus, no need to think that a commitment to the ideal of an international legal order is based in some collective illusion.

But now, suppose that international law is fragmented, not unified. In that case, there is no reason not to evaluate the good each regime does case by case, and thus we lose the support of beneficial regimes demanding sacrifice by regimes that are well supported by states' self-interest. I do not see a way to argue with that – other than to say again that this does give us one reason to resist or reduce fragmentation. So I agree with Bhuta (and am grateful for his formulation) that states and relevant international legal and political actors have 'a moral duty to maintain the order of juridical relationships that in sum constitute the international legal system, on the grounds that we are ... better off with such an order of relationships than without it'.²²

It is gratifying that Christoph Möllers thinks that it may be fruitful to explore the thought that legal orders, among normative orders, are those for which we think enforcement is in principle appropriate.²³ I myself remain very hesitant on this point, in part because it goes so much against the grain for me to offer anything like a conceptual claim about a social/normative phenomenon such as law. Still, the sceptical position that there is nothing to our idea of law that distinguishes legal orders in politically important ways from other kinds of normative order strikes me as equally uncomfortable.

In any event, that is where Möllers' sympathy for my project appears to end. He is sceptical about the importance of the debate about the grounds of law; it is 'intellectually worn out', and no interesting answers will come of it.²⁴ Strangely, though, he then proceeds to make a contribution to it. I do not know why he believes that 'it is conceptually necessary in legal philosophy to juxtapose positivism and non-positivism so that there is no third option available'.²⁵ But, in any case, he is attracted to 'inclusive' legal positivism, one possible view among many about the grounds of law. That human rights 'also receive moral ... authority from the fact that they belong to a corpus of formalized consensus carried out by the international community' makes no difference as it is irrelevant to the issue of how to determine the content of the law in force.²⁶ Moreover, human rights law is hardly unique in this respect – think of domestic legal protection of rights or, indeed, on some views, pretty much any legal right or duty.

Möllers also doubts that there is a 'meaningful systematic connection between Hart's doubts about the status of international law as a system ... and the contemporary debate on the fragmentation of international law'.²⁷ Since I argued against such

²² Bhuta, *supra* note 14, at 249–250.

²³ He wonders, however, where I get my reading of Kelsen on effectiveness as a condition (*Bedingung*) though not a reason or ground (*Grund*) for legal validity. Möllers, *supra* note 1, at 256. I get it from paragraph 34(g) of the second edition of the *Reine Rechtslehre* (1960). I do agree, however, that the boundary between effective and ineffective is by no means clear (n. 16).

²⁴ Möllers, *supra* note 1, at 253.

²⁵ *Ibid.* What concept is in play here?

²⁶ *Ibid.*

²⁷ *Ibid.*, at 254.

a connection, my only disappointment is that he is not sure about this. I also agree that there is no 'inherently defined' need for any particular degree of systematicity in a legal order;²⁸ I argued that the matter turns rather on institutional and doctrinal contingency. But I disagree with Möllers that the debate on fragmentation presupposes that there is a more or less systematic international legal order,²⁹ other than in the trivial sense that there has to be a whole before there can be fragments. The genuine questions now are what degree of systematic integration there is, what the trend is and whether the trend is for good or ill.

Jochen von Bernstorff is surely right that the influence of Hart's chapter on international law was not as great in Continental Europe (or, for that matter, in Latin America) as it was throughout the English-speaking world.³⁰ In Europe and Latin America, Hans Kelsen's voluminous and brilliant writings on domestic and international law have been far more influential. In part for that reason, then, it is a pleasure for me that my article, which tilts to Hart more than Kelsen, is appearing in the *European Journal of International Law*.

Nonetheless, when it comes to the main focus of von Bernstorff's reply – legal interpretation – Hart's views are not importantly different from Kelsen's. In particular, both Kelsen and Hart believed that often a legal decision maker, such as a judge, will often have to draw not just on legal norms in order to reach a decision, even though the legal norms should always constrain or frame adjudication – to use Kelsen's famous metaphor, which appears in the passage that von Bernstorff quotes.³¹ Hart entirely agreed with this position – thus, his acceptance of judicial discretion, which was the focus of Ronald Dworkin's very first criticisms. By 'legal interpretation', I mean in my article what we do when we are trying to figure out the content of the law as it already is; the law in force.³² This is not the same thing, for Kelsen or Hart, as what judges do when making a decision (even though the word 'interpretation' is sometimes used to mean adjudication). In fact, that it is not the same thing, for them, is the very thing that makes them positivists, since no one denies in good faith that judges and other legal decision makers must sometimes draw on moral beliefs in order to reach a decision. So Kelsen's position here is entirely consistent with Hart's positivism, which is no surprise since, in this respect, Hart can be said simply to have followed Kelsen's lead. Neither Kelsen nor Hart had much to say about how judges should decide cases, beyond the acknowledgement that they would have to go beyond the law.

The early Carl Schmitt evidently had something in common with Dworkin: both believed that the kind of indeterminacy or incompleteness of the content of the law in force that a positivist view of law makes inevitable is a threat, but only a false one because if you embrace a better theory of law the indeterminacy goes away. For Schmitt, as von Bernstorff reminds us, right answers are to be found in the practice

²⁸ *Ibid.*, at 255.

²⁹ *Ibid.*

³⁰ Von Bernstorff, 'Law Beyond the State: A Reply to Liam Murphy', in this issue, 257, at 258.

³¹ *Ibid.*, at 261.

³² Murphy, *supra* note 5, at 205–207.

of judges; for Dworkin, right answers are to be found in the morally best interpretation of the legal materials. Though I find Dworkin's position more plausible than Schmitt's, I do not embrace Dworkin's view. (As I say in the first section of my article, my view is that there are no compelling arguments for either side of the positivism/non-positivism debate; my natural inclinations, however, have always lined up with Kelsen and Hart. Which explains why I have never found the idea of legal indeterminacy a threat.) The discussion of the Kosovo case was merely meant to provide an illustration of the different kinds of arguments the two camps could make about the state of the law at the time of the bombing, and I did not mean to endorse Dworkin's own argument in relation to the Kosovo case, an argument to which von Bernstorff raises compelling objections.