INTRODUCTION

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I. The Emergence of the Philosophy of International Law

Since the publication in 1961 of H. L. A. Hart's *The Concept of Law*, powerfully augmented a decade later with the appearance of John Rawls's *A Theory of Justice*, the philosophy of law in the English-speaking world has enjoyed a renaissance. Legal philosophers during this half-century have engaged extensively with what might loosely be called conceptual questions about the nature of law, legal reasoning, and notions integral to an understanding of law, such as authority, obligation, and coercion. They have also addressed normative questions about the values that the institution of law ought to serve and in light of which it should be assessed and reformed—values such as justice, liberty, equality, toleration, and integrity. And, of course, they have reflected on the enterprises of conceptual and normative philosophical inquiry into law, sometimes calling into question the coherence or utility of any such distinction. The result has been an outpouring of theories about the nature and value of law, many of them developed in considerable detail and with remarkable ingenuity, often as a result of sustained dialectical exchange among their various proponents. These developments have taken place both in General Jurisprudence, which addresses conceptual and normative questions about law in general,[1] and in Special Jurisprudence, with important contributions being made to the philosophical investigation of discrete

[1] What follows is a highly selective list: Hart, H. L. A., *The Concept of Law* (1961; rev. edn., Oxford: Clarendon, 1994); Fuller, L. L., *The Morality of Law* (New Haven: Yale University Press, 1964); Raz, J., *The Concept of a Legal System* (Oxford: Clarendon, 1970); Dworkin, R. M., *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978); MacCormick, N., *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 1978); Raz, J., *The Authority of Law* (Oxford, Clarendon, 1979); Finnis, J. M., *Natural Law and Natural Rights* (Oxford: Clarendon, 1980); Dworkin, R. M., *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986); Raz, J.,

provinces of law such as criminal law, contract law, and the law of torts, or specific types of law, such as municipal state law, judge-made law, and customary law.[2]

The philosophy of international law can be readily envisaged as a branch of Special Jurisprudence, one that encompasses both conceptual and normative questions about international law. The conceptual questions include those of whether international law is genuinely law (as distinct from a form of social morality or convention); how the existence and content of its norms is to be ascertained; what relationship obtains between the international legal system, if one exists, and the legal systems of individual states, among many others. The normative questions include those of whether state consent, democracy, or some other standard is the touchstone of international law's legitimacy; whether human rights and distributive justice, in addition to peace and co-operation, figure among the values international law should realize; what conditions must be satisfied to justify the creation of international criminal law and the infliction of punishment on those who violate it; whether international environmental law should be ultimately responsive only to the interests of (existing) human beings, among many others.

Now, it is certainly true that philosophers from Grotius to Kelsen have grappled with both conceptual and normative questions about international law. Yet it is also the case that, until comparatively recently, the post-1960 revival of legal philosophy has tended to neglect international law. As a result, the philosophy of international law is significantly less developed than, say, the philosophy of criminal law. This 'poor relation' status is probably attributable to a variety of causes. In part, it may reflect a commendable intellectual prudence. For one might reasonably suppose that many of the questions of legal philosophy are best approached in the first instance via their application to municipal state legal systems, which are both more familiar and more highly developed, before advancing to their international counterparts. Of course, one should guard against this prudential policy hardening into the dogma that the philosophical study of international law can shed no independent light on philosophical questions either about law in general or its municipal instantiations. However, there are probably less obviously benign causes as well. These include the relative insularity of international law as a field within

Ethics in the Public Domain (Oxford: Clarendon, 1994); and Coleman, J., *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Clarendon, 2001).

[2] A merely indicative list includes the following: Hart, H. L. A., *Punishment and Responsibility* (Oxford: Clarendon, 1968); Fried, C., *Contract as Promise* (Cambridge, Mass.: Harvard University Press, 1981); Feinberg, J., *The Moral Limits of the Criminal Law*, vols. 1–4 (Oxford: Clarendon, 1984–8); Munzer, S. R., *A Theory of Property* (Cambridge: Cambridge University Press, 1990); Coleman, J., *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992); Weinrib, E. J., *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995); Dworkin, R. M. *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996); Duff, R. A., *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007).

legal studies, widespread scepticism about whether international law is really law, as well as the nagging suspicion that, with its cumbersome and obscure methods of norm-creation and its frail enforcement mechanisms, international law does not yet constitute a worthwhile subject for normative inquiry. Another likely cause is the corrosive influence of the general 'realist' thesis that political morality does not reach beyond the boundaries of the state, or that only a very minimalist morality does, or more charitably still, that although a richer political morality might eventually come to apply globally, to elaborate on it in the current state of the world is to engage in a wistfully utopian endeavour. Finally, there is a comparative dearth of empirical, as opposed to doctrinal, investigation of international law, which in itself poses a problem for any philosophical theorizing about international law that 'pretends to be grounded in reality and to have practical import'.[3]

To the extent that international law has been the object of theoretical attention in recent decades, much of it has come from writers drawing on either international relations theory or various approaches inspired by post-modernism. Whatever one's view of the respective merits of these two schools of thought, their prevalence has had the consequence of sidelining the discussion of philosophical questions, particularly those of a normative character. Adherents of both schools tend to be sceptical about the coherence, tractability, interest, or utility of the conceptual questions addressed by philosophers. More importantly, the purportedly scientific, 'value-neutral' method favoured by the great majority of international relations theorists, especially adherents to the dominant 'realist' tradition, and the scepticism about reason endorsed by post-modernists, seem to allow little scope for an intellectually respectable form of normative inquiry. So, from the perspective of contemporary legal philosophy, the similarities between these two camps are perhaps at least as important as their differences. But this common ground is hardly surprising given their shared historical lineage; in particular, it is worth noting that a theorist who has exerted a remarkable degree of influence on both the realist and post-modern traditions of thought about international law, in the former case indirectly through his follower Hans Morgenthau, is the controversial German jurist Carl Schmitt. From Schmitt they inherit—philosophically—both a grim view of human nature as driven by a quest for power and a general scepticism about the possibility of reasoned normative argument and—politically—a hostility to a broadly 'liberal' agenda aimed at the global spread of principles of human dignity and human rights.[4]

[3] This last theme is well developed in Buchanan, A., 'International Law, Philosophy of', in Craig, E. (ed.), *Routledge Encyclopedia of Philosophy* (London: Routledge; retrieved 18 July 2008, from <http://www.rep.routledge.com/article/T070SECT4>).

[4] For a general discussion of Schmitt's life and ideas, including his role as Hitler's 'crown jurist', see Lilla, M., *The Reckless Mind: Intellectuals in Politics* (New York: New York Review of Books, 2001), ch. 2. For a critical appraisal of his ideas on international law, see Koskenniemi, M., *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2004), ch. 6.

The marginalization of normative inquiry into international law is especially regrettable, since the most pressing questions that arise concerning international law today are arguably primarily normative in character. On the one hand, the ambit of the authority claimed by international law has grown exponentially in recent years, with the proliferation of international legal institutions and norms entailing that many more aspects of life on our planet are now governed by international law than ever before in human history. For example, post-war institutions such as the United Nations, and its judicial arm, the International Court of Justice, have been joined in recent years by new institutions, such as the World Trade Organization (WTO), the International Criminal Court (ICC), a plethora of human rights treaty bodies, regional organizations and courts, and so on. On the other hand, the emergence and intensification of various problems with a strong global dimension—widespread violations of human rights, the proliferation of weapons of mass destruction, the rise of global terror networks and the 'war on terror' launched by some states in reaction to them, the mutual interdependence and vulnerability wrought by economic globalization, the environmental crisis, the threat posed by pandemics, illegal movements of people across state boundaries, and so on—appears to outrun the problem-solving capacity of any individual state or group of states to deal with adequately, and seems to necessitate the development of appropriate international legal frameworks.

One manifestation of the pressing nature of these normative questions is that even those international relations and post-modern theorists who purport to desist from any form of ethical advocacy often seem, at least to their opponents, to be operating with a normative agenda. But surely it is preferable to be explicit about one's normative commitments? And this self-consciousness is in turn a necessary preliminary to defending, or else revising or abandoning, that agenda in light of the criticisms it attracts as well as the results of trying to implement it in practice. Now, of course, it is possible to adopt a self-critical normative approach to international law without drawing on anything recognizable as a tradition of *philosophical* thought. The writings of the New Haven School, and especially those of its most influential contemporary representative, Richard Falk, offer ample testimony of the potential value of such an approach.[5] So too do some critical writings on international law that draw their inspiration from the feminist, environmental, and anti-globalization movements. It would be a mistake to suppose that the normative questions thrown up by international law can *only* be fruitfully clarified and addressed by recognizably *philosophical* modes of inquiry. Nonetheless, this book has its origins in the conviction that the philosophical tradition in which both Hart and Rawls are central figures has an important contribution to make to both of these tasks.

[5] From among his many publications on international law over many years, see Falk, R. A., *Law in an Emerging Global Village: A Post-Westphalian Perspective* (Ardsley, NY: Transnational Publishers, 1998). The work of the Cambridge international lawyer Philip Allott, although in some ways more philosophical in orientation than that of Richard Falk, deliberately distances itself from Anglo-American philosophy of the last hundred years or so. See Allott, P., *Eunomia: New Order for a New World* (Oxford: Clarendon, 1990).

Indeed, in many ways this volume owes its existence to the fact that philosophers have already started tackling such questions over the last few decades. Comparatively early landmark works on international themes in normative political philosophy, such as Michael Walzer's *Just and Unjust Wars*,[6] Charles Beitz's *Political Theory and International Relations*,[7] and Henry Shue's *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*[8] have more recently been joined by the influential writings of philosophers and lawyers such as James Nickel, Onora O'Neill, Thomas Pogge, Fernando Teson, Martha Nussbaum, Larry May, Mortimer Sellers, James Griffin, and William Twining.[9] Special mention should be made of three important monographs. The first is Thomas Franck's treatise *Fairness in International Law and Institutions* published in 1995, a pioneering effort by a distinguished international lawyer to apply Rawls's theory of justice to large tracts of international law, one that outdoes Rawls himself in its ambitions for international justice.[10] Especially important, given his dominant influence on Anglo-American political philosophy, has been the publication in 1999 of John Rawls's final work, *The Law of Peoples*, which has already sparked a voluminous secondary literature.[11] Finally, Allen Buchanan's *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, which appeared in 2004, is arguably the most systematic and comprehensive discussion of the morality of international law by a contemporary philosopher.[12] The rapid growth of the philosophy of international law as a field of inquiry is

[6] Walzer, J. *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977; rev. edn., New York: Basic Books, 2006).

[7] Beitz, C., *Political Theory and International Relations* (Princeton: Princeton University Press, 1979).

[8] Shue, H., *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (1980; 2nd edn., Princeton: Princeton University Press, 1996).

[9] Nickel, J., *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human* Rights (Berkeley and Los Angeles: University of California Press, 1987; 2nd edn., Oxford: Blackwell, 2007); Teubner, G., *Global Law Without a State* (Aldershot: Dartmouth, 1997); Twining, W., *Globalisation and Legal Theory* (Evanston, Ill.: Northwestern University Press, 2000); O'Neill, O., *Bounds of Justice* (Cambridge: Cambridge University Press, 2000); Pogge, T. W., *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Oxford: Polity Press, 2002; 2nd edn., Oxford: Polity Press, 2008); Teson, F., *A Philosophy of International Law* (Boulder, Colo.: Westview Press, 1998); Nussbaum, M. C., *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000); Buchanan, A., *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004); May, L., *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2004); Sellers, M. N. S., *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (New York: Palgrave Macmillan, 2006); May, L., *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007); May, L., *Aggression and Crimes Against Peace* (Cambridge: Cambridge University Press, 2008); Griffin, J., *On Human Rights* (Oxford: Oxford University Press, 2008); and Twining, W., *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009).

[10] Franck, T. M., *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995). Issue 13 of *European Journal of International Law* (2002), 901–1030 contains a review essay symposium on this book.

[11] Rawls, J., *The Law of Peoples with 'The Idea of Public Reason Revisted'* (Cambridge, Mass.: Harvard University Press, 1999). For a useful collection of critical essays, see Martin, R., and Reidy, D. (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell Publishing, 2006).

[12] Buchanan, A., *Justice, Legitimacy, and Self-Determination* (above, n. 9).

underlined by the fact that eight years after the publication of its first, print edition, the online version of the *Routledge Encyclopedia of Philosophy* has since 2006 included a lengthy entry on 'International law, philosophy of'. Nearly three-quarters of the items listed in its extensive bibliography were published from 2000 onwards.[13]

This volume aims to build on these recent developments that have led to the emergence of a tradition of philosophical inquiry into international law, partly by spurring philosophical reflection specifically on international *law* rather than just on the more general topic of international *political morality*. What constitutes such a tradition and how are its boundaries demarcated? Perhaps the most useful answer is one along the lines given by Rawls in response to a similar question about moral philosophy:

> Here I think of the tradition of moral philosophy as itself a family of traditions, such as the traditions of the natural law and of the moral sense schools, and of the traditions of rational intuitionism and of utilitarianism. What makes all these traditions part of one inclusive tradition is that they use a commonly understood vocabulary and terminology. Moreover, they reply and adjust to one another's views and arguments so that exchanges between them are, in part, a reasoned discussion that leads to further development.[14]

Among the merits of this characterization is its emphasis on the open-endedness of a living tradition: participation in it is not defined by subscription to a fixed doctrine or adherence to a well-defined and highly constraining methodology, but by entry into an ongoing dialogue on an evolving range of questions that draws on a shared fund of concepts, themselves liable to revision and refinement as the dialogue proceeds. All living traditions, so understood, are a work in progress: 'a reasoned discussion that', one hopes, 'leads to further development'.

The next two sections address in a preliminary way two sources of deep scepticism—themselves ultimately philosophical in character—about the prospects for a philosophy of international law as roughly sketched here. The first questions whether international law is really law; the other is doubtful about the possibility of subjecting international law to robust ethical standards of appraisal even if it does qualify as law.

II. What is International Law? A Response to Conceptual Scepticism about International Law

Two major conceptual questions in the philosophy of international law are (i) whether what we call international law is really law and, if so, what it is that makes

[13] Buchanan, A., 'International law, Philosophy of' (above, n. 3).

[14] Rawls, J., *Lectures on the History of Moral Philosophy* (Cambridge, Mass.: Harvard University Press, 2000), 8–11.

a norm a norm of international law (as distinct from, say, a political or social norm) and (ii) how we identify a norm as an international legal norm. Those two conceptual questions about the identity and the identification of international law are at the core of one type of deep scepticism about a philosophy of international law. If so-called international law is not law but an ensemble of moral, political, or social norms, there can be no such thing as a philosophy of international law. So-called philosophy of international law would merge into political, social, or moral philosophy as applied to international relations.

Conceptual questions of this kind were addressed in the middle of the last century by general theorists of law such as Kelsen and Hart.[15] According to Hart, the legality of international law is problematic because it 'resembles, [. . .] in form though not at all in content, a simple regime of primary or customary law'.[16] International law is clearly more than a set of social or moral norms, but at the same time it does not fit (entirely) the concept of law developed for domestic law. The emergence of more normative discussions since the 1970s has tended to sideline the question of the legality of international law. Whether or not those norms and institutions are legal, their impact on individuals justifies subjecting them to moral scrutiny. But conceptual and normative questions about an institution, such as law, that purports to impose binding standards of conduct on its subjects, cannot be entirely separated from each other. A complete understanding of the normative questions raised by international law requires a clear understanding of the legality of international law—and vice versa.

The reasons for the meagre interest in those conceptual issues, despite the persistence and even strengthening of scepticism about the legality of international law,[17] are multiple. Partly this is a result of the more general lack of interest in the philosophy of international law until recent times, as discussed in the previous section. This is especially true when those conceptual questions are contrasted with more concrete substantive discussions of contemporary questions arising daily in international affairs. More generally, legal philosophers have tended since the 1970s to shift their interests towards Special Jurisprudence, and, as a result, away from the core legal theoretical endeavours of the 1950s.

A more problematic reason is the challenge posed by international law to General Jurisprudence. The sceptical challenge to the legality of international law is usually understood as a one-way street: if key features of a domestic legal system are missing

[15] e.g. Hart, H. L. A., *The Concept of Law* (above, n. 1), ch. 10, p. 214. See also Kelsen, H., *Principles of International Law* (New York: Reinhart, 1952).

[16] Hart, H. L. A., *The Concept of Law* (above, n. 1), 232.

[17] See e.g. the challenges raised in Goldsmith, J. and Posner, E., *The Limits of International Law* (Oxford: Oxford University Press, 2005) and the discussion their book has triggered since (see e.g. excellent critiques by Franck., T. M., 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', *American Journal of International Law*, 100/1 (2006), 88–106; and Buchanan, A., 'Democracy and the Commitment to International Law', *Georgia Journal of International and Comparative Law*, 34 (2006), 305).

at the international level, so-called international law is not really law[18]. While there may have been a reason historically to use domestic law as a paradigm of law in general, this is no longer the case. Although there are pre-established features of a legal system in legal theory that ought to be exhibited at the international level for there to be international law, those state-centred features are not immune to theoretical challenge. As a result, if international law does not fit the criteria of the concept of law used at the domestic level, it may not (only) be a problem for the legality of international law, but (also) for those criteria themselves and hence for a given legal theory.[19] In any case, the domestic legal order is no longer self-contained and separate from the international one, so that legal theory has to account for this complex new legal reality in a holistic and integrated way.

Of the two questions distinguished at the outset of this section, only the first shall be addressed here. Once the legal nature of international law has been clarified, ways of identifying valid international legal norms and their content are a matter for the sources of international law. Two of the early chapters in the book address the sources of international law in depth.[20] Among the key features of law that are allegedly missing at the international level, three will be discussed here: a complete system of abstract and general norms stemming from an official and centralized legislature; a monopoly on the use of coercion to enforce legal norms, through centrally organized sanctions or at least a courts system with universal and compulsory jurisdiction; and, finally, the absence of effective compliance with those legal norms in practice.[21] One may also mention the alleged absence of states' moral obligations under international law (and the related complexity about a self-binding sovereign),[22] but that critique is addressed in the third section of this introduction and in four chapters in the book.[23]

Replies to these sceptical critiques may be of two kinds: theoretical answers that deny that the supposed essential feature of law really counts as such and, second, replies of a more factual kind that refer to developments in international law. Clearly, answers to those three questions have varied with the rapid developments of international law and in particular the significant changes in its subjects, objects, and normativity in the past thirty years or so. Those developments have gradually made it either more integrated within domestic legal orders and hence an integral part of their legality in this sense, or more state-like in its own spheres of competence. By reference to what was said before about the need to adapt legal theory to the new

[18] Hart, H. L. A., *The Concept of Law* (above, n. 1), 214–15.
[19] See Twining, W., *Globalisation and Legal Theory* (above, n. 9), 50–90.
[20] Besson, S., Ch. 7 in this volume; Lefkowitz, D., Ch. 8 in this volume.
[21] On those (multifarious) doubts and critiques, see e.g. Hart, H. L. A., *The Concept of Law* (above, n. 1), 214; Buchanan, A., *Justice, Legitimacy, and Self-Determination* (above, n. 9), 45–53; Goldsmith, J. and Posner, E. *The Limits of International Law* (above, n. 17).
[22] Hart, H. L. A., *The Concept of Law* (above, n. 1), 216–32.
[23] In this volume see Buchanan, A., Ch. 3; Tasioulas, J., Ch. 4; Endicott, T., Ch. 11; Cohen, J., Ch. 12. See also Besson, S., 'The Authority of International Law: Lifting the State Veil', *Sydney Law Review*, 31/3 (2009, 343).

circumstances of domestic law in an international setting, and not only to make sure international law fits the criteria for the concept of law derived from domestic jurisprudence, it is essential not to fall into the trap of minimizing differences between domestic and international law and hence of lapsing into a statist bias.[24] As a result, and although a straightforward response to the sceptics would simply be to show that international law is evolving into a proper legal system, it is primarily from a theoretical perspective and not one of facts only that a convincing rebuttal of the sceptics' critique needs to be launched.

The first, and most problematic doubt expressed by sceptics pertains to the making of international law, its norms and their articulation. Three sub-critiques need to be unpacked here. First of all, the absence of a centralized and official law-maker, and especially of a vertical relationship between that law-maker and its legal subjects is the most striking difference between a domestic legal system and international law. Law-makers and legal subjects are usually one and the same international subjects: states. Besides, there are many processes of law-making that coexist without being either centralized or standing in a hierarchical relationship to each other. Critics also invoke, second, the nature of the norms that are referred to as international law, and more particularly the absence of general and abstract rules in international law. International norms are often thought to stem exclusively from bilateral agreements between states and to create relative and concrete obligations. Finally, doubts about the legality of international law are often based on the alleged absence of secondary rules (rules of change and adjudication) or even of a rule of recognition which, as Hart showed, lies at the foundation of a fully-fledged and autonomous legal system.

With respect to the first sub-critique, it is true that the official or public nature of law may bear on its legality, since law is the product of a collective enterprise. The legality of customary law shows, however, that a formal legislature is not always required in a municipal legal system.[25] In practice, moreover, much of international law nowadays stems from multilateral processes that are increasingly distinct from treaty-making, but also, as a consequence, from what may be thought of as a private exchange of promises or horizontal contract-making. It suffices here to mention legislative treaties, multilateral codifications of customary law, but also, conversely, the creation of customary law through those multilateral conventional codifications of existing practices.[26] In a similar way, official international law-making has become distinct from the transnational albeit private production of standards (e.g. global administrative law). With respect to the centralization and hierarchy requirement, one should say that legal hierarchies can be of many kinds (sources, regimes, norms, etc.) and all of them are not necessarily present

[24] Hart, H. L. A., *The Concept of Law* (above, n. 1), 232.
[25] See Buchanan, A., *Justice, Legitimacy, and Self-Determination* (above, n. 9), 47.
[26] See e.g. Boyle, A. and Chinkin, C., *The Making of International Law* (Oxford: Oxford University Press, 2007), 98 ff. and 163 ff.

in all domestic legal orders.[27] Further, even if international law remains largely decentralized and non-hierarchical, there is a fixed set of sources. Moreover, relationships between norms and regimes are coordinated in many other ways than through a hierarchy of sources. Hierarchies of norms (e.g. *jus cogens* or imperative norms) are developing and certain regimes are increasingly deemed superior to others (e.g. general international law).

As to the second sub-critique, it is indeed essential to prove that international law norms are legal rules and that they are both general and abstract. From a practical point of view, however, the critique does not cut much ice. It gives a skewed view of the state of international law. International legal norms are distinct from moral norms: they are often quite indifferent morally and may be changed by a decision of international law-makers.[28] And they are general and abstract. General international law has developed extensively in the past twenty years or so, and norms that apply to all subjects of international law are numerous—and the same may be said about *erga omnes* norms, i.e. norms enforceable by all states. Also, international law has become more abstract as its norms potentially apply to many different situations and no longer only concern concrete situations. Prosper Weil's prognosis of the emerging 'relative normativity' of international law has now been confirmed in practice:[29] some international legal norms bind subjects who have not agreed to them (e.g. third-party effect of treaties) or who have expressly objected to them (e.g. limitations on persistent objections to customary law); they bind them even if they have made reservations when agreeing to them (e.g. objective norms such as human rights); and, finally, they sometimes bind them in an imperative fashion (e.g. *jus cogens* norms).

Regarding the third sub-critique, a set of primary legal rules may be regarded as law even in the absence of secondary rules, being deemed, in Hart's phrase, a 'primitive legal order'. This is the case if international law lacks a rule of recognition that can establish the validity of individual primary rules by reference to some ultimate rule of the system. This was Hart's view of international law given his rejection of the Kelsenian *a priori* assumption of an international *Grundnorm*.[30] While such a reductive view of international law may have been factually correct in 1961, it no longer is. General international law has internal rules that determine its own validity and may therefore be deemed an autonomous legal order, and this is true of international conventional law as much as of customary law. In the context of the discussion of the processes of international law-making and hence of the sources or identification of its norms, the question of the kind of norms created

[27] See Hart, H. L. A., *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), ch. 15.
[28] Hart, H. L. A., *The Concept of Law* (above, n. 1), 228–30.
[29] See Weil, P., 'Towards Relative Normativity in International Law' *American Journal of International Law*, 77 (1983), 413. See for a discussion, Tasioulas, J., 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', *Oxford Journal of Legal Studies*, 16 (1996), 85.
[30] Hart, H. L. A., *The Concept of Law* (above, n. 1), 234.

by international law will be discussed extensively, and in particular the distinction between primary and secondary rules (e.g. in the field of treaty law with the so-called law of treaties, but also of customary law with conditions of customary law-making) and the existence of a rule of recognition (by reference to the customary nature of Article 38 of the ICJ Statute, e.g.).[31]

The second main critique of the legality of international law concerns the absence of a centralized enforcement system, and in particular of a sanctions system or at least a courts system with universal and compulsory jurisdiction. The violation of certain norms of international law can trigger official coercion and (military and non-military) sanctions, but those sanctions are rare, diverse in character, and often non-systematically applied (for lack of political will or knowledge). Further, enforcement of international law is largely left to the different subjects of international law and to states in particular (e.g. self-defence, counter-measures) and this makes it akin to a primitive system of private sanction. International jurisdiction remains the exception and, when it exists, it is mostly non-universal and non-compulsory. In response, it is important to stress that very few conceptions of law nowadays make the existence of sanctions or threats a necessary condition of legality. This Austinian, and respectively Kelsenian, legacy was already discredited by Hart in 1961, both with respect to domestic and international law.[32] Its predictive component, which may be granted, ought not be conflated with a conceptual requirement. In any case, modern domestic legal systems show that not all disputes may be resolved by a supreme law enforcer; examples may be given from constitutional law or from the less formal area of customary law.[33]

Even if one concedes that in domestic law certain provisions prohibiting the use of force are necessary, together with making the official use of force a sanction for the violation of prohibitions of the use of force among individuals, international circumstances are different. The private use of force in international relations cannot remain private for long, and this fact helps prevent the spiral of violence one would fear in similar circumstances among individuals. Further, centralizing the use of force in the hands of a few states backing compliance with international law could become a source of unacceptable inequalities and also potentially of fearful risks. Natural deterrents have secured long periods of peace. Pressure for conformity with international law need not be channelled exclusively through formal sanctions, as is shown by the increasing role of civil society. In any case, international law is constantly evolving and sanctions are one of the fields in which it is becoming increasingly state-like. The law of individual and collective sanctions, especially economic ones, and of counter-measures has developed intensely

[31] See in this volume Besson, S., Ch. 7; Lefkowitz, D., Ch. 8.

[32] Hart, H. L. A., *The Concept of Law* (above, n. 1), 217–20. See also recently O'Connell, M. E., *The Power and Purpose of International Law* (Oxford: Oxford University Press, 2008), 62–8.

[33] See Buchanan, A., *Justice, Legitimacy, and Self-Determination* (above, n. 9), 47 for a discussion.

through the UN organs' practice and the ICJ's case-law. New peace-keeping and peace-making mechanisms have developed over the years. And regional agreements and organizations have been constantly strengthened to provide a more effective enforcement of international law norms at the local level. The same may be said about rules of adjudication. International dispute settlements, and compulsory judicial mechanisms in particular, have proliferated since the 1990s. True, they apply mostly at the regional level and often in certain specific international legal regimes only. However, their constant development and the expanding use of third-party and formalized settlement mechanisms are signs of the development of secondary rules of adjudication in international law.[34]

Finally, the international legal order is said to lack a third important legal feature and that is the absence of effective compliance with international law in practice.[35] Independently of the existence of enforcement mechanisms, legal norms in a legal order need to be complied with, at least in part. Compliance is a necessary albeit insufficient condition of legality.[36] A set of rules that is never complied with can hardly be regarded as valid law. It is clear, however, that what matters for the law's legality is enhanced conformity with its rules than would otherwise be the case, and not perfect conformity. After all, most municipal legal orders have serious difficulties with non-compliance. Moreover, the notion of effectivity is itself vague; it suffices to mention human rights to see that compliance with human rights can take many different forms and degrees.[37] But, in any case, international law is in large part complied with in practice.[38] True, this varies depending on the areas of law in question and on the existence of formal or informal pressures for conformity.[39] The reasons for compliance can be very different; compliance may be a reaction to the exercise of power or to the existence of sanctions, but may also result from many other (instrumental and non-instrumental) reasons, e.g. consent to legal rules, strategic reasons for respect, moral reasons to comply with a legal order that is minimally just, etc. Notwithstanding, effective compliance is easily demonstrated by reference to the ways in which powerful states seek justifications for their breaches of international law; one may mention the invocation of self-defence or of a state

[34] See e.g. Brown, C., *A Common Law of International Adjudication* (Cambridge: Cambridge University Press, 2007).

[35] See e.g. Goldsmith, J. and Posner, E., *The Limits of International Law* (above, n. 17), 165, 185 ff. for a recent version of this sceptical argument. For a discussion, see O'Connell, M. E., *The Power and Purpose of International Law* (above, n. 32), 99–149.

[36] On compliance and the sources thesis, see Raz, J., *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 65, 75–6; and Raz, J., 'The Problem of Authority: Revisiting the Service Conception' *Minnesota Law Review* 90 (2006), 1003, 1005–6.

[37] Buchanan, A., *Justice, Legitimacy, and Self-Determination* (above, n. 9), 51–2.

[38] See Besson, S., 'The Authority of International Law' (above, n. 23).

[39] See Henkin, L., *How Nations Behave* (2nd edn., New York: Columbia University Press, 1979) for the first shift of focus away from enforcement (and sanctions) to compliance and the argument that international law enjoys the minimum amount of compliance needed to be regarded as law. For a discussion, see O'Connell, M. E., *The Power and Purpose of International Law* (above, n. 32), 1–16 and 57–98.

of necessity, or at least the reference to the conditions for counter-measures (which are legalized under existing international law).

In sum, there are provisionally good answers to sceptical doubts about the legality of international law. International law has specificities of its own, both in terms of form and of content, but those specificities can be accommodated in the concept of law. Theoretical arguments can be advanced for that contention, but it is also supported by factual considerations. International law is no longer the inter-state law of the 1950s; it has evolved to become more like municipal legal systems. But nor is domestic law what it used to be. International law has become more integrated within municipal legal systems than it was in the past. This has to do with developments in its material and personal scope that make it an integral part of the law applying to individuals subjects in domestic legal orders. Law itself has changed as a result of globalization and so should legal theory.

III. Does Morality extend to Public International Law? A Response to Normative Scepticism about a Morality of International Law

A key aim of this book is to contribute to the formulation of moral standards for the evaluation of public international law, both in general and with respect to its main parts. Such standards, the thought naturally goes, should play a vital role in guiding the reform of international law and institutions and in determining the basis and proper extent of our allegiance to them. What is meant by calling them 'moral' or 'ethical' standards (we use these two adjectives interchangeably)? This is a far from uncomplicated question, but the simple answer that must suffice for our purposes is that moral standards are concerned with what human beings, as individuals or groups, owe to other human beings, and perhaps also other beings (such as flaura and fauna), in light of the status and interests of the latter, where the breach of the relevant standards typically validates certain characteristic responses: blame, guilt, resentment, punishment, and so on. More concretely, we can refer to a rich and diverse repertoire of concepts through which the notion of moral concern has historically been elaborated: obligation, justice, rights, equality, among many others. Morality, therefore, consists in a set of standards which, among other things, place restrictions on our—often self-interested—conduct in order to pay proper tribute to the standing and interests of others.

Given its nature, it might be reasonably supposed that there are potentially two kinds of moral standards that have special relevance for international law.[40] On the one hand, transnational moral principles, which apply within all political communities. On the other hand, international moral principles, which govern relations among agents that are not members of the same political community (or, perhaps, that are not members of any political community or that do not stand in the relationship of governed to government within a political community). Some moral standards, of course, might be of both sorts. For example, human rights norms are typically conceived as applying within all political communities, but their (threatened) breach is also often taken to justify (at least *pro tanto*) some form of preventive or remedial response by outside political communities or international agents. The task of a normative theory of international law is to elaborate the content and draw out the practical implications of such moral principles for international law.

This enterprise, however, has provoked considerable scepticism. Sometimes this takes the form of denying the very possibility of a normative theory of international law: doubt is cast on the existence of justifiable transnational and international moral standards that might appropriately be reflected in international law. More often, however, it is scepticism about their scope and content: even if it is conceded that some moral standards obtain in the case of international law, they are thought to be severely limited in their coverage and very minimal in their demands. Let us call these two brands of scepticism, respectively, radical and moderate.

On what grounds is scepticism about a normative approach to international law advanced? One basis for radical scepticism, in particular, consists in scepticism about the objectivity of morality itself. Consider, for example, a representative statement by a leading member of the 'realist' school of international relations, in an influential work originally published in 1930:

> In the last fifty years, thanks mainly though not wholly to the influence of Marx, the principles of the historical school have been applied to the analysis of thought . . . The realist has thus been enabled to demonstrate that the intellectual theories and ethical standards of utopianism, far from being the expression of absolute and *a priori* principles, are historically conditioned, being both products of circumstances and interests and weapons framed for the furtherance of interests. 'Ethical notions', as Mr. Bertrand Russell has remarked, 'are very seldom a cause, but almost always an effect, a means of claiming universal legislative authority for our own preference, not, as we fondly imagine, the actual ground of those preferences.' This is by far the most formidable attack which utopianism has to face; for here the very foundations of its belief are undermined by the realist critique.[41]

[40] The distinction that follows is adapted from the discussion of Buchanan, A., *Justice, Legitimacy and Self-Determination* (above, n. 9), 190–1.

[41] Carr, E. H., *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (1930; London: Palgrave Macmillan, 2001), 65.

The thought here is that morality (pejoratively described as 'utopianism') presents itself as a set of constraints, discoverable by reason, on the pursuit of self-interest by individuals and states; in fact, 'realist critique' reveals all moral principles to be themselves 'products of circumstances and interests and weapons framed for the furtherance of interests'.

The first thing to say is that, even if correct, the corrosive implications of scepticism about moral objectivity extend not just to the normative theory of international law, but to any form of thought involving moral judgment. This is not necessarily an argument against it, but it does show that it is not a problem uniquely afflicting normative theorizing about international matters. Moreover, it places its advocates under special pressure to avoid self-refutation, since they typically do wish to assert the appropriateness of moral judgments in some non-international contexts. The second observation worth making is that it is far from obvious that either the Marxist or any other brand of 'realist' critique has securely established the advertised conclusion that morality is merely the product of, and perhaps also ideological window-dressing for, underlying interests (or preferences, desires, and so on). Moral scepticism of this sort is highly controversial in philosophical circles today, whatever may have been the situation when Carr was writing in the 1920s. How easy is it to dispute, after all, that the proposition 'Slavery is unjust' is plainly true, even as '$2 + 1 = 3$' is plainly true? And why must the best explanation of anyone's belief in the former proposition, unlike their belief in the latter, necessarily exclude appeal to the fact that the proposition in question is true?[42] All this is compatible with one needing some element of good fortune in one's historical and personal circumstances to be in a position to grasp the truth of the first proposition, but this is also true of the second.

Perhaps the more constructive observation that needs to be made is that there are many ways in which morality can be admitted to be 'subjective' without thereby failing to be 'objective' in some significant sense that allows for moral propositions to be straightforwardly true or justified, for belief in true moral propositions to consist in knowledge, and for changes in moral belief over time to represent genuine cognitive progress or regress.[43] In particular, the objectivist need not embrace the metaphysical claim that moral values, such as justice, are radically mind-independent, like the famed Platonic forms, existing in splendid isolation from human modes of consciousness and concern. In Ronald Dworkin's amusing formulation, the moral objectivist is not committed to the existence of 'some special particles—morons—whose energy and momentum establish fields that at once constitute the morality or immorality, or virtue or vice, of particular human acts and institutions and also interact in some way with human nervous systems so

[42] See Nagel, T., *The Last Word* (Oxford: Clarendon, 1997), ch. 6 and Wiggins, D., *Ethics: Twelve Lectures on the Philosophy of Morality* (London: Penguin, 2006), pt. III.

[43] For a development of the thought that morality can be coherently conceived as both 'objective' and 'subjective', see Wiggins, D., *Ethics* (above, n. 42), ch. 12.

as to make people aware of the morality or immorality or the virtue or vice'.[44] So, a nuanced appreciation of the kind of 'objectivity' requisite to the meaningful pursuit of a normative approach to international law may serve to quell sceptical concerns of the first sort about the prospects for developing a normative theory of international law. And this is just as well, since many of those who press such concerns seem themselves to subscribe to numerous moral propositions.

Other forms of scepticism about the enterprise of a normative theory of international law concentrate not so much on the nature of morality, but on the putative subject-matter—in particular, relations among states—regarding which such theories seek to make moral judgments. Even if moral reasoning is in principle capable of attaining a respectable degree of objectivity, the thought goes, its remit either does not extend to the case of international law, or else does so only in a highly attenuated form.

One line of argument of this kind turns on regarding the sphere of international law's application, at least in the present and the foreseeable future, as a *state of nature*. This is because it is a domain in which the key agents, territorial states, exhibit three important features (i) they are ultimately motivated by the fundamental aim of ensuring their own survival, (ii) they are approximately equal in power, in the sense that no one state (or stable grouping of states) can permanently dominate all the others, and (iii) they are not subject to a sovereign capable of securing peaceful co-operation among states by authoritatively arbitrating conflicts among them. In such circumstances, it is contended, it would be deeply irrational for a state to conform its conduct to moral demands; hence, morality is inapplicable to the sphere that international law purports to govern.[45] As Allen Buchanan has emphasized, the supposed 'inapplicability' of morality in the international domain is open to at least three interpretations. First, that there are no true or justified statements about what anyone morally ought to do in that sphere. Second, that no one in fact acts on the basis of moral considerations in international relations either now or in the foreseeable future. Third, that moral behaviour in international relations is fundamentally irrational and, in consequence, very infrequent.[46] There are interesting relations among these claims, but we can take the first one to represent an attempt to motivate radical scepticism. An alternative deployment of the state of nature analogy defends a moderate, rather than a radical, form of scepticism about the applicability of moral standards in the internationalist sphere. Perhaps the most minimalist version of this line of thought contends that, in light

[44] Dworkin, R. M., 'Objectivity and Truth: You'd Better Believe It', *Philosophy and Public Affairs*, 25 (1996), 87, 104.

[45] We follow here the version of the state of nature thesis about international relations outlined in Buchanan, A., *Justice, Legitimacy, and Self-Determination* (above, n. 9), 29–30, and which he attributes to 'realist' scholars in international law such as George F. Kennan and Kenneth Waltz.

[46] Ibid. 31. For persuasive critiques of the state of nature argument, which we have drawn on in our discussion below, see Beitz, C., *Political Theory and International Relations* (above, n. 7), pt. I and pp. 185–91 and Buchanan, A., *Justice, Legitimacy, and Self-Determination* (above, n. 9), 29–37.

of the character of international relations as a Hobbesian state of nature, the only moral imperative operative in the international domain is one that requires state officials to ensure the survival of their respective states.[47]

As formulated above, we have already found good cause to resist this sort of sceptical argument. If the international sphere were a state of nature, it is very doubtful that it could sustain any institution meriting the name of 'law'. Yet, as we saw in the previous section, it makes good sense to speak of international law governing the relations between sovereign states through norms and institutions enabling co-operation in matters such as financial regulation, trade agreements, scientific and technological advances, environmental protection, telecommunications, economic development, disaster relief, and the international propagation and protection of human rights, even in the absence of a global sovereign. More generally, recent work in international relations theory undermines the dogma that the ultimate or predominant determinant of a state's behaviour is the desire to ensure its survival (or, in another version, to maximize its power). In any case, it is obviously not the case that compliance with moral standards inevitably imperils a state's chances of survival. Finally, 'liberal' approaches to international relations have emphasized the responsiveness of a state's preferences to the internal character of the state (e.g. whether its constitution is democratic) and of its society (e.g. the extent to which it is pluralistic and accommodating of internal differences). Moreover, the activities of these groups within the state are powerfully shaped by transnational and international governmental and non-governmental networks to which they belong. In response, an advocate of the state of nature analogy might be tempted to stretch the notion of a state preference for survival, or power, so that it encompasses more than one might have originally imagined. But this strategy has its limits. In particular, there is the worry that, in seeking to accommodate all of the seemingly countervailing evidence for the irreducible diversity of states' interests, it leads to the trivialization of the state of nature argument, rendering it unfalsifiable by any empirical evidence.[48]

Nothing in the foregoing observations is inconsistent with acknowledging a core of authentic insight in the state of nature argument. One way of spelling it out is in terms of the feasibility constraints on an acceptable normative theory of international law (whether an ideal theory or a non-ideal theory concerned with problems arising from non-compliance with ideal standards and, in particular, effecting a transition to a state of full compliance). These are different from, and in all probability far more limiting than, those that apply in the domestic case.[49] What

[47] This is referred to as fiduciary realism in Buchanan, A., *Justice, Legitimacy, and Self-Determination* (above, n. 9), 35–7.

[48] The points in this paragraph, among others, are developed with due reference to the relevant literature in international relations, in Buchanan, A., *Justice, Legitimacy, and Self-Determination* (above, n. 9), 31–7.

[49] See, in this context, Charles Beitz's illuminating discussion of 'heuristic realism', which is a 'cautionary view about the role that normative considerations should be allowed to play in practical reasoning about international

we may rightly take issue with is the sweepingly negative conclusion that sceptics who appeal to the state of nature analogy seek to wring from this insight.

There are more plausible ways of motivating moderate scepticism regarding the prospects for a normative theory of international law than by invoking a state of nature analogy. One general line of thought appeals to the ethical-political significance of an important feature of the international domain: the great diversity that exists in ethical and political concepts among different cultures, and also the considerable divergence in judgments among those who deploy the same concepts. One way of elaborating this line of thought is by means of the notion of ethical pluralism. The latter doctrine is wholly compatible with the objectivity of ethics, and so is not to be confused with ethical relativism. But, given the profusion of objective ethical values, and the diverse number of ways in which their content may be acceptably elaborated and relations between them ordered, proponents of this view are doubtful that a 'global ethic' applicable to all states, and suitable for embodiment in international law and institutions, will be other than minimalist in content. Instead, it will predominantly consist in a limited set of universal norms prohibiting certain specific evils. As David Wiggins has recently put it: 'With declarations against torture, genocide, imprisonment without charge, slavery, forced labour, etc., we are in the home territory of the international spirit at its finest and least controversial, the universally valid proscription of specific evil. It is a tragic mistake to suppose that these can be a paradigm for the positive and general prescriptions of "global ethics".'[50]

A second line of thought purports to stand aloof from all philosophical controversies, such as that concerning ethical objectivism, and focuses instead on the conditions of a legitimate international law, one that can credibly claim to be binding on all its subjects. Thus, John Rawls has argued that it is necessary for the principles underlying law, in both the domestic and the international cases, to be justifiable to all those subject to them. In both cases, the operative form of justification must be in terms of a form of *public reason*—rather than ordinary, truth-oriented moral reasoning—that is responsive to the fact of reasonable pluralism. In the case of a liberal society this is a pluralism in conceptions of the good held by individual citizens, who are nonetheless reasonable in that they accept the criterion of reciprocity (they are prepared to co-operate with others on fair terms as free and equal citizens) and the burdens of judgment. In the international case, however, the justification is directed at political communities, rather than the individuals who compose them,

affairs, particularly that of individuals charged with making decisions about national foreign policy. It warns of the predictable kinds of errors that can occur when moral considerations are applied naively or in the wrong way', in Beitz, C., *Political Theory and International Relations* (above, n. 7), 187 (Beitz's discussion at 187–91 is generally relevant).

[50] Wiggins, D., *Ethics* (above, n. 42), 355–6. Arguing along rather different lines, Michael Walzer has challenged the applicability of norms of distributive justice to the international realm in its current form, see Walzer, M., *Spheres of Justice: A Defense of Pluralism and Equality* (Oxford: Blackwell, 1993), 28–30.

and reasonable pluralism extends to conceptions of justice, not simply conceptions of the good.[51] This means that, for Rawls, decent but non-liberal societies may be counted members in good standing of the Society of Peoples, i.e. they have good standing even in the terms of an ideal theory of international justice. This is despite the fact that such societies are not democratic and may engage in various illiberal practices such as discriminating against some of their members on the grounds of sex, ethnicity, sexual orientation, or religion. Rawls's approach also leads to a notoriously truncated list of human rights, certainly as compared with the Universal Declaration of Human Rights, and to the inapplicability of principles of distributive justice (including Rawls's famous 'difference principle') to the global sphere: neither the difference principle nor any other principle of distributive justice bears on relations *between* societies, nor is respect for it mandated *within* each society in order to ensure its good standing under the Rawlsian Law of Peoples.

Now, of course, there is a great deal that needs to be said in assessing the pros and cons of moderate scepticism of the last two varieties. Some of it is said by contributors to this volume. But the key point is that moderate scepticism of this stamp is not really all that sceptical; on the contrary, it presents itself as a self-consciously moral position *within* the enterprise of articulating a normative theory of international law. And this is just what we should expect. It would be a grave error to assume that a commitment to a normative theory of international law necessarily carries with it some specific ethical-political commitment, such as a liberal cosmopolitanism that insists on the appropriateness of implementing an essentially liberal-democratic political vision through the medium of international law. On the contrary, the appropriateness of doing so is a central question for debate once we have accepted that normative international legal theory is a viable and worthwhile enterprise.

IV. Preview of the Chapters

The volume is distinguished by its 'dialogical' methodology, modelled on the format of the annual supplementary volume of the *Proceedings of the Aristotelian Society*. There are two essays on each topic, with the second author spending some time responding to the arguments of the first as well as developing their own take on the topic (in the case of the topic of human rights, given its centrality in the normative theory of international law, we have enlisted three authors).

One reason for adopting the dialogical approach is to underscore, especially for students new to philosophy, that there is a diversity of views that might be defended on a given topic, as opposed to some canonical 'philosophical' view.

[51] Rawls, J., *The Law of Peoples* (above, n. 11), 11, 19 (the international case) and 136–7 (the domestic case).

However, we have not gone further and made a point of choosing in each case pairs of authors with radically contrasting views.[52] Quite apart from anything else, this would have conveyed a seriously distorted impression of the nature of philosophical disputation. Sometimes, the most interesting and instructive disagreements are between philosophers who share a lot by way of agreement on fundamentals. More importantly, we have opted for a dialogical methodology in recognition of the fact that philosophy develops through a process of genuine dialectical engagement with the views of others. Others' views are not simply fodder for literature surveys or scholarly footnotes; instead, they are to be carefully articulated and subjected to critical scrutiny in light of the best arguments that can be formulated in their support. This intellectual virtue is one that analytical legal philosophy is especially well placed to foster in contemporary theorizing about international law.

The book is divided in two main parts: General Issues in the Philosophy of International Law and Specific Issues in the Philosophy of International Law. Chapters in the first group tackle general topics such as the history of the philosophy of international law, the legitimacy of international law and in particular its democratic legitimacy, the sources of international law, the nature of international legal adjudication, the significance of state sovereignty, and the contours of international responsibility. The second group of contributions addresses problems arising in specific domains of international law, such as human rights law, international economic law, international criminal law, international environmental law, and the laws of war. In the case of each chapter, authors were invited to be selective and to concentrate on elaborating upon and responding to some questions that seemed especially pressing or interesting to them. No attempt was made by any author, or combination of authors, to offer a comprehensive discussion of the legal or philosophical questions arising within their topic. Instead, each author has had to limit their chapter's scope of coverage in order to enhance its depth.

1. General Issues

The first pair of chapters offer necessarily highly selective perspectives on themes within the vast terrain of the history of the philosophy of international law. The two chapters are ordered chronologically, around a divide in the history of international ideas: Benedict Kingsbury and Benjamin Straumann discuss the international political and legal thought of Grotius, Hobbes, and Pufendorf, while Amanda Perreau-Saussine addresses that of Kant and some of his followers. According to Kingsbury and Straumann, Grotius, Hobbes, and Pufendorf differed in their views

[52] Nor did we adopt the policy of ensuring that at least one of the authors on any given topic is a professional international lawyer. This is because this book is, first and foremost, a contribution to the *philosophy* of international law, and philosophy is a discipline with its own distinctive questions, approaches, and traditions of thought.

of obligation in the state of nature (where *ex hypothesi* there is no state), on the extent to which they regarded sovereign states as analogous to individuals in the state of nature, and in the effects they attributed to commerce as a driver of sociability and of norm-structured interactions not dependent on an overarching state. In her chapter, Perreau-Saussine highlights the limits of reading Kant's philosophy of international law as independent of his moral philosophy, arguing that in Kant juridical or external freedom and moral freedom (autonomy) are mutually dependent ideals. She goes on to trace the relationship between Kant's plan for peaceful international federation and his account of the moral obligations to institute systems of coercive, republican domestic law and to become members of an ever-expanding, enlightened ethical community, a 'universal republic based on the laws of virtue'.

Allen Buchanan's chapter on the legitimacy of international law characterizes legitimacy as the right to rule. It includes two main elements: the legitimate institution must be morally justified in attempting to govern (must have the moral liberty-right or permission to try to govern) in the sense of issuing rules (that prescribe duties for various actors) and attempting to secure compliance with them by imposing costs for non-compliance and/or benefits for compliance; and those toward whom the rules are directed (chiefly, though not exclusively states) have substantial, content-independent moral reasons for compliance and others (including citizens of states) have substantial content-independent moral reasons for supporting the institution's efforts to secure compliance with its directives or at least have substantial, content-independent moral reasons not to interfere with those efforts. Buchanan then identifies six key questions pertaining to the legitimacy of international law and discusses potential answers. John Tasioulas also adopts a conception of legitimate authority as the 'right to rule' but argues, in contrast to Buchanan, that the Razian normal justification condition is the appropriate standard for determining the legitimacy of international law. He outlines and assesses four broad challenges to the legitimacy of international law: the exceptionalist claim that some states are not bound by (certain) features of the international legal order which nonetheless bind other states; the claim that international law lacks legitimacy in virtue of the parochial values (or orderings thereof) that it embodies, distinguishing between sceptical and pluralist versions of this objection; the freedom-based contention that the legitimacy of international law is severely diminished in light of a due regard for state sovereignty; and formal and procedural constraints on the legitimacy of international law.

The third pair of chapters pertains to international democracy. Both authors agree in their assessment of the democratic illegitimacy of current global institutions, but disagree as to how their democratic credentials can be redeemed and also, therefore, about the needed institutional reforms. Thomas Christiano sketches an account of the moral basis of inherent legitimacy grounded in a fundamental principle of justice entitled the principle of public equality and concludes that the current

international legal system is not legitimate on this criterion. He then defends what he calls the system of Fair Democratic Association. He argues that even as an ideal, the case cannot be made for global democracy. Christiano argues tentatively that the system of fair democratic association is superior to international democracy under current and reasonably foreseeable conditions. Philip Pettit outlines a neo-republican response to the same problem. He focuses on two distinctive issues. One is the membership problem regarding which entities are to play the role, in the international context, corresponding to the role played by non-dominated citizens in the domestic context. His answer is that it is legitimate domestic states or states that can be made legitimate. The other is the imbalance problem, which concerns how such states can be equally empowered in fashioning the international order. Pettit argues that there is no easy answer, but that there are no grounds for despair.

Samantha Besson and David Lefkowitz, in their chapters on the sources of international law, criticize the allegation that international law in general, and customary international law in particular, constitutes not a legal system but a primitive legal order. They both adopt a positivist approach to international law and explore difficult questions regarding the identification of international law on that basis, disagreeing about the exact relationship between international law and morality and between international legality and legitimacy. Samantha Besson develops a normative positivist argument about the legality of international law and its sources that corresponds to a democratic (coordination-based) account of the legitimacy of international law-making processes. Against that background, she discusses the existence and contours of secondary rules in international law and of a rule of recognition, in a way that illuminates the differences and the relations between domestic, regional, and international law (internal and external legal pluralism). In his contribution, David Lefkowitz discusses three rival accounts of the relationship between morality and the validity of international law, with a focus on international human rights. He then turns to the relationship between the sources of international law and its legitimacy and proposes a consent-based account of legitimacy and modifications of the current international law-making processes to make it fit that account. Finally, Lefkowitz discusses the legality of customary law and the existence of secondary rules of customary law-making.

In his chapter on international adjudication, Andreas Paulus observes that third party adjudication continues to be the exception to the rule of 'auto-interpretation' of international law by its subjects. He argues that international adjudication needs to remain within the bounds of its jurisdiction as determined by states, but should within this framework consciously embrace a larger role for consensus on values emerging in the international legal community. Donald H. Regan's chapter replies to Paulus on three main points. He begins by arguing that if our goal is to understand the activity of judging, the most important distinctive feature of international adjudication is not the absence of compulsory jurisdiction and generally reliable enforcement, but rather the difficulty of identifying sources of law such as custom

and general principles. He then argues that the multiplicity of treaty regimes is not currently a major problem and criticizes the International Law Commission's expansive reading of Article 31.3(c) of the Vienna Convention on the Law of Treaties. Finally, Regan discusses the WTO's treatment of so-called 'extra-regime values' and claims that authors usually misapprehend how the WTO actually deals with conflicts between trade and other values.

Both chapters on sovereignty start from the paradox of the bound sovereign and agree that sovereignty is not only compatible with moral and international legal constraints but also that it has moral value. Timothy Endicott contends that a state is sovereign if it has complete power within a political community and complete independence. It may seem that the idea of sovereignty is objectionable because of two moral principles, or incoherent because of a paradox. The paradox is that a sovereign state must be capable of binding itself and must also be unable to bind itself. The moral principles are that no state can justly exercise complete power internally or complete independence (since complete independence would imply freedom from norms of *jus cogens*, and from interference even when it perpetrates mass atrocities). An analogy with human autonomy allows Endicott to show that the paradox is only apparent, and that the moral principles are compatible with state sovereignty. Sovereignty is to be understood as internal power and external freedom that are complete for the purposes of a good state. In her contribution, Jean Cohen argues that there are good empirical, normative, and political reasons to affirm the compatibility between state sovereignty and supranational law. She argues for a dualistic world system in which sovereign states and globalizing transnational and supranational institutions, based in part on cosmopolitan principles, can and should continue to coexist. She develops a theoretical framework for 'squaring the circle', utilizing the key concepts of changing sovereignty regimes and constitutional pluralism.

Both chapters on international responsibility contend that one cannot evaluate the current system of international responsibility without comparing the rights and obligations assumed to attach to states with those assumed to attach to governments, nations, collectives, nongovernmental institutions, and individuals. In their jointly authored chapter, James Crawford and Jeremy Watkins discuss the system of international legal responsibility to which states are subject when they violate their international obligations. They address the question of whether it is fair to impose civil liability on states when this has the effect of making whole populations pay the price for the misdeeds of their leaders and officials. An argument is then presented which is designed to show that the current law not only avoids the ethical objections which are sometimes directed against it, but also conforms to a positive standard of fairness which can be articulated in terms of hypothetical consent. Liam Murphy turns to the broader topic of international responsibility and takes it beyond the state. A foundational issue for Murphy is the moral status of states. The chapter explores the merits of an instrumental account. Such an account defuses

the objection that state responsibility in international law imposes an illegitimate kind of collective responsibility, but at the same time explains why the moral justification of the state system remains an open question.

2. Specific Issues

The chapters on human rights begin with Joseph Raz's provocative critique of traditional philosophical theories of human rights, exemplified by the work of Alan Gewirth and James Griffin, which conceive of human rights in purely moral terms, as essentially moral rights possessed by all human beings simply in virtue of their humanity. Raz contends that such theories tend to overlook the distinction between values and rights and, in any case, lead to a conception of human rights that risks irrelevance because it does not adequately engage with contemporary human rights practice. In place of the traditionalist conception, Raz builds on the Rawlsian insight that human rights are the sub-set of moral rights that sets limits to state sovereignty: their violation provides a defeasible reason for intervention by external agents. However, he departs from Rawls in not conceiving of human rights as essentially triggers for *coercive* external intervention and resisting the latter's conflation of state sovereignty with legitimate authority. In his response, James Griffin restates his particular version of a traditionalist conception of human rights—the personhood theory, according to which human rights are protections of universal human interests in autonomy, liberty, and minimum provision—and responds to Raz's criticism that the theory cannot identify a plausible threshold at which a human right comes into existence. Griffin also makes independent objections to the 'political' interpretations of human rights advanced by Rawls and Raz. He concludes by offering some tentative suggestions on the unduly neglected question of the conditions under which human rights vindicated within moral philosophy should form part of international law. In his contribution John Skorupski shows greater sympathy for the sort of 'political' interpretation of human rights offered by Raz. Although the question of what rights exist is not treated by him as a political one, the utility of introducing a special sub-category of human rights in international law is. Beginning first with an account of the nature of rights in general, Skorupski contends that declarations of human rights should be understood as levers that help to eliminate serious violations of moral rights in all states. Among the criteria he identifies and elaborates for determining which rights should be declared to be human rights are universality, cross-state demandability, and efficacy.

The section on self-determination and minority rights begins with Will Kymlicka's comparison of the development of the idea of minority rights since 1989 in international law and in political philosophy. On the one hand, various attempts have been made to codify international standards relating to the treatment of

ethno-cultural minorities, both at the global and regional levels. On the other hand, philosophers have sought to develop liberal theories of multiculturalism and of minority rights. Kymlicka focuses on how 'minorities' are defined and characterized in these respective traditions, and which minorities, if any, are regarded as possessing rights to self-government or self-determination. Jeremy Waldron's contribution relates specifically to the right to self-determination. He contends that it may be interpreted either (1) as a principle entitling the inhabitants of each distinct and politically viable territory to govern themselves in that territory, or (2) as a principle entitling the members of an ethnic or cultural community to govern themselves in a single territory. Waldron argues that interpretation (2) relies on conceptions of cultural distinctiveness that are outdated in the modern world, and that it yields a dangerous and misguided principle, even in more moderate versions. Interpretation (1), by contrast, is premised on the assumption that the point of political community is not to affirm cultural identity but to provide a framework for settling disputes, providing public goods, and facilitating interactions among strangers. Waldron outlines the Kantian basis of interpretation (1), which he regards as far more attractive than (2), showing how it embodies the notion of respect for individuals.

Both papers in Section X use the phenomenon of global poverty as a perspective from which to engage with the evaluation of international economic law. Thomas Pogge contends that while international human rights law enshrines certain protections against specific severe harms, it also establishes and maintains structures that greatly contribute to human rights violations. Fundamental components of international law, as well as key international organizations such as the World Trade Organization, the International Monetary Fund, and the World Bank, systematically obstruct the aspirations of poor populations for democratic self-government, civil rights, and minimal economic sufficiency. In response, Pogge advocates the abolition of such human rights deficits through the eradication of structural injustices in the existing global institutional architecture. In their chapter, Robert Howse and Ruti Teitel offer a sustained critique of Pogge's argument. They question whether the failure to adopt an international economic order of the sort Pogge advocates constitutes a violation of a duty of justice, on the grounds that it is very uncertain that Pogge's proposed alternative order is either feasible or would foreseeably make a significant contribution to the reduction or non-maintenance of extreme poverty. Although they find merit in some of Pogge's proposals, they would rather place emphasis on building a future international economic order that promotes human security and fulfils social and economic rights, rather than on a backward-looking argument that seeks to apportion responsibility for the failure to realize such an order hitherto.

James Nickel and Daniel Magraw's chapter on international environmental law covers three main topics. First, they defend as intelligible and workable the demand of international environmental law that the world's governments seriously take into

account the interests of future generations in deciding issues involving resources and pollution. The second concerns philosophical issues about value raised by the requirements of international environmental law that species and ecosystems be protected. Here they express doubts about whether plausible accounts of the intrinsic value of nature can generate high-priority environmental rights and duties. The third topic is international environmental law's attempt to promote measures that mitigate and adapt to climate change, regarding which they defend a polluter pays approach to dealing with the costs of dealing with climate change. In his contribution, Roger Crisp contends that obligations should be attributed only to persons and that we should not understand obligations to future generations as a duty of fairness. He criticizes Nickel and Magraw's critique of the claim that nature has inherent intrinsic value, and proposes the following alternatives to their general approach: (1) environmental virtue ethics; and (2) a dualistic view combining a form of consequentialism with a self-regarding principle. Crisp argues that justice between generations requires at most giving priority to the worse-off who do or will exist, regardless of our choices. The 'repugnant conclusion' for well-being-maximizing principles when applied to issues of population is discussed. Crisp closes with some reflections on the implications of deep disagreement for ethical theory and for the making of international environmental law.

After presenting a brief history of the evolution of ideas about both the morality of war and the laws of war, Jeff McMahan contends that although the laws of war are neutral as between those who fight in just wars and those who fight in wars that are unjust because they lack a just cause, morality in fact imposes far greater restrictions on the latter than on the former. Whilst McMahan acknowledges pragmatic reasons why the law must at present diverge from morality in this way, he insists that our aim should be to design institutions that can gradually secure increasing convergence between the law and morality in this area. Henry Shue, in his companion paper, argues that McMahan's proposal mistakenly over-moralizes war. In particular, his attempt to formulate rules of war permitting attacks only against those who are morally liable to attack would require assessments of individuals that are impossible to make during combat. Instead, Shue suggests shoring up the prohibition on attacking non-combatants against its current erosion by the bombing practices of the most advanced air forces, and urgently resisting the progressively more permissive reading of the legally crucial category of 'military objective'.

Existing international law prohibits humanitarian intervention except with the prior authorization of the Security Council. Thomas Franck's chapter considers whether the law should be reformed to confer a 'right' to humanitarian intervention. Noting problems revealed by history with establishing such a right, Franck proposes instead a 'second-order' response that clarifies the terms of the putative right and establishes reliable institutional mechanisms for determining when the conditions for exercising it have been satisfied. More specifically, he argues that in the case of a 'technical' failure to authorize intervention under existing law (one due to

the opposition of one or two veto states), the case for strict compliance is weakened, potentially constituting mitigation that approximates exculpation. Repeated Security Council failure may eventually lead from a practice of selective mitigation to a change in the relevant norm, but this has not yet occurred and is unlikely to be successful in the absence of reliable procedures for verifying humanitarian crises and assessing the motives and means of the would-be interveners. Danilo Zolo's contribution questions whether Franck has formulated adequate criteria for distinguishing between genuine and insincere or opportunistic humanitarian interventions. In particular, Franck's claim that humanitarian intervention 'is justifiable if, demonstrably, it saves substantially more lives than it sacrifices' is argued to be an untenable, *ex post*, criterion. Zolo stresses that any war declared unilaterally is a war of aggression under international law and that military operations inevitably cause civilian casualties which impair their legitimacy. Most importantly, the fundamental human right to life cannot be evaluated in the aggregate, therefore no political authority is entitled to destroy the lives of innocent people in order to save the lives of others.

David Luban's chapter examines the legitimacy of international criminal trials and defends them against objections grounded in the principle of legality. It advances four principal theses. First, the centre of gravity in international criminal tribunals lies in the trials themselves more than the punishments inflicted. Second, the aim is norm projection. International trials are meant to project the message that mass atrocities are heinous crimes, not political deeds that exist 'beyond good and evil'. Third, the legitimacy of the tribunals derives from the fairness of their procedures and punishments, not their political pedigree. Fourth, that the two motivating arguments behind the principle of legality—concern about fair notice, and concern about despotic abuse of the power to punish—are less compelling in international criminal law than they are in domestic law. Antony Duff's chapter focuses on the question of what can give international criminal tribunals moral legitimacy and authority. It begins with a critique of Luban's attempt to ground their legitimacy in their procedural fairness, and bases an alternative account on a conception of the criminal trial as a process through which alleged wrongdoers are called to account. This conception highlights a crucial jurisdictional issue: who has the standing to call alleged wrongdoers to account—to whom are they answerable? A plausible answer in the context of domestic law is that they are called to account by their fellow citizens, as fellow members of the political community. Duff then explores whether it can be argued in the context of international law that for some crimes the wrongdoer should be answerable to humanity, in whose name international courts should act.