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A Practice Theory of International Law

DISSERTATION

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by

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## DEDICATION

To

Claire, Kathy, and David

But not Sara. Definitely not Sara.

As long as you catch self-thrown things  
it's all dexterity and venial gain –;  
only when you've suddenly caught that ball  
which she, one of the eternal players,  
has tossed towards you, your center, with  
a throw precisely judged, one of those arches  
that exist in God's great bridge-system:  
only then is catching a proficiency, –  
not yours, a world's. And if you then had  
strength and courage to return the throw,  
no, more wonderful: forgot strength and courage  
and had *already* thrown . . . . (as the year  
throws the birds, those migrating bird swarms,  
which an older to a younger warmth sends  
catapulting across oceans-) only  
in that venture would you truly join in.  
No longer making the throw easy; no longer making  
it hard. Out of your hands the meteor  
would launch itself and flame into its spaces . . .

-Rainer Maria Rilke (translated by Edward Snow)

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## CURRICULUM VITAE

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## ABSTRACT OF THE DISSERTATION

A Practice Theory of International Law

By

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Doctor of Philosophy in Philosophy

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Why should states follow international law? We are currently witnessing trends towards rapid expansion of international legal rules and a spreading presumption that treaties, custom, and other forms of law are binding for states. Despite this, work on the normative foundations of international law has not kept up. The predominant theories advanced in the contemporary literature focus on revising law to match some ideal set of criteria, rather than taking seriously the task of evaluating current regimes. Rather than ask what law should be, I ask: Is it possible to justify law as it is? In response, I investigate whether we can construct an independently attractive theory that can justify the authority of international law as we find it. My inquiry begins with an interpretive analysis of current practice, to identify both the form and scope of international legal authority. I then offer an analysis of current theories to see whether any can capture both aspects of current practice. While they cannot, this process gradually produces a silhouette of what a successful theory would have to look like. In light of this, I offer a positive answer to the question: the practice approach to international law. I propose that states have a duty to comply with international law because of the corrective function that system of rules fills in global politics.

## INTRODUCTION

At the moment, most practitioners within global politics assume that states are bound by international law. To some, this may seem obvious in an age when news media front pages tell stories of how a world leader has flouted international law in a recent state action. While international law has arguably been around for centuries, if not millennia, the widespread acceptance of international law as an authoritative source of binding legal norms is something of a modern development.

At least, it is in the academy. Ronald Dworkin tells us,

When I was last instructed in international law – at Oxford in the 1950s – the first and most lively question, bound to appear on the examination paper together with tedious questions about navigable bays, was existential. Is there any such thing as international law? ...the question whether there is international law seems no longer to trouble anyone. Almost everyone assumes that there is international law and also assumes that it includes, for example, the Charter of the United Nations and the Geneva Conventions—or at least some of them.<sup>1</sup>

Dworkin appears to be satisfied that scholars and practitioners of international law have [nearly] reached a consensus about the existential question. Yet skepticism persists.

Famously, H.L.A. Hart argued that there is no secondary rule of recognition for primary international legal rules, thus dismissing the existence of international law.<sup>2</sup> More recently, Jack Goldsmith and Eric Posner have reaffirmed the realist position that international law is nothing more than the product of states pursuing their own interests, and Thomas Nagel has argued not only that international law does not exist, - at least not in any normatively binding way - but also that global justice altogether lacks the kind of justification it would need to bind international actors in the way that many believe it does.<sup>3</sup>

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<sup>1</sup> Dworkin, “A New Philosophy for International Law.” 1

<sup>2</sup> Hart, *The Concept of Law*. 230-231

<sup>3</sup> Goldsmith and Posner, *The Limits of International Law*; Nagel, “The Limits of International Law”; Nagel, “The Problem of Global Justice”. See also Blake, “Distributive Justice, State

For Dworkin, the existential question about international law can be interpreted in two ways: sociologically and doctrinally. The sociological question is a descriptive one; “a question for social scientists: whether there is any system of practices that can sensibly and usefully be described, for their sociological or anthropological purposes, as international law.”<sup>4</sup> Few, I imagine, would venture to argue against the existence of international law in the purely sociological sense. We have documents, drafted and signed by powerful and important figures and officials, that lay out bodies of imperatives to be followed by states and other global actors. And in general, or at least within tolerable limits, these commandments are often respected and followed from a sense of legal obligation. Though I will spend some time exploring a sociological description of international law, as we find it today, I will mainly assume that, at least descriptively, international law exists in this sense.

The doctrinal question about the existence of international law is somewhat more complicated. For Dworkin, international law exists in the doctrinal sense only if it allows “people to invoke a special kind of right or obligation.” He goes on to say that doctrinal questions can only be answered with “a theory of political morality about the circumstances in which something ought or ought not to happen.”<sup>5</sup> Questions about the relationship between doctrinal questions and political *morality* aside, Dworkin clearly believes that there is a version of the existential question about international law that is fundamentally normative.

We should understand the difference and relation between the sociological and doctrinal questions about the existence of international law in the following way: The sociological question can be answered by reference to empirical evidence that agents act with certain attitudes, as though they are legally obligated to comply with certain bodies of

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Coercion, and Autonomy”; Cohen and Sabel, “Global Democracy”; James, “Distributive Justice without Sovereign Rule.”

<sup>4</sup> Dworkin, “A New Philosophy for International Law,” 4.

<sup>5</sup> *Ibid.*, II.

imperatives, presented in socially salient documents. The doctrinal question can only be answered with a normative theory that justifies that putative obligation – a theory that argues for the claim that international agents are the genuine bearers of the obligations that they act, sociologically, as though they have. Put otherwise, and in the language that I will use throughout this essay, the sociological question asks whether there are norms that participants in international political life *treat* as legally authoritative, and the doctrinal question is whether and how norms could genuinely or justifiably *be* authoritative in that sense.

By framing the question this way, especially the sociological question, I make a strong presumption in favor of the existence of international law in the sociological sense. This presumption marks a significant methodological departure from modern legal scholarship by according a privileged position to the practice and self-understanding of practitioners. Some, likely including Hart and perhaps Fuller, will object to the existence of international law – Hart because he thinks there is no obvious secondary rule of recognition; Fuller because his specified structural and procedural standards are not met.<sup>6</sup> But, as Hart happily concedes, there is clearly a body of rules that regulates international political life, that is followed from a sense of legal obligation, that is used by international courts and tribunals, and that exhibits other features shared with domestic law.<sup>7</sup> Rather than take the differences (“disanalogies,” Hart might have called them) between domestic and international law to be evidence that international law is not actually law, I propose we use these differences to rethink what it is to be law. In a phrase, Hart's *modus ponens* that international law is not law is my *modus ponens* that Hart's concept of law should be broadened.

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<sup>6</sup> Hart, *The Concept of Law*, Ch II; Fuller, “Eight Ways to Fail to Make Law,” 33–38.

<sup>7</sup> Hart, *The Concept of Law*, 228–229.

Given this presumption, my project takes an interest in both the sociological and doctrinal questions about international law, specifically as it currently exists. I am interested in the doctrinal question as it applies to the modern context, which in turn means that I will have something to say about the state of international law in that context. More and more, scholars and practitioners agree that states have an obligation to comply with international law, that the law has authority over them, that it is wrong to disobey or at least that non-compliance can be justifiable grounds for censure, and so on. My question is how this could be. How it could be that states have such an obligation? How could international law, as we find it, be authoritative?

My answer will come in four chapters, each taking successive steps towards a positive analysis. In Chapter I, I interrogate the concept of legal authority in two venues - first as it is discussed in philosophical literature, second as it is understood by legal practitioners. In the literature, authority, speaking loosely, is what makes laws reason-giving for agents. If the traffic laws in my neighborhood are authoritative, then I ought to obey the rules of the road under normal circumstances. Authors, with important exceptions, frequently take this concept for granted - something that competent users of language understand well enough to support meaningful discourse. However, a sustained interrogation of the varied uses of the concept of authority across different legal arenas - and specifically ones that propose to answer the doctrinal question - suggests significant semantic diversity. This diversity seems not to be accidental, but connected to the other philosophical commitments implicit in these competing views.

Given the apparent intractability of disagreement between competing doctrinal theories of law – especially in the long stand-off between natural law theorists and legal positivists – the recognition of diversity in usages of the concept authority opens a promising

line of inquiry. If we had independent reason to prefer one concept of authority over the other, then this preference could serve as the basis for an argument for one answer to the doctrinal question over another. More precisely, any theory that could not justify legal authority in our preferred sense would be at a philosophical deficit, and this might be enough to make some progress on old questions.

But is there any independent reason to prefer one concept of authority over another? I believe there is. Philosophers, including legal philosophers, are given a fair amount of latitude in how far their imaginations are allowed to run. A person could spend an entire career writing about the concept of authority in an unlikely utopia and her colleagues would not bat an eye. But there is, I believe, independent reason to be interested in the concept of authority *presumed in modern practice*. This is because, while there are many worthy reasons to engage in political philosophy, one of the most best and most important is to assist and promote good practical reasoning, and this is only accomplished when we engage with the world reasoning agents find it.

Questions about the authority of law are nothing new to political philosophy or to political life, and there is a long tradition of authors who wrestle with them. It hardly needs saying that some of the most illuminating and cherished philosophical work about the authority of law and the corresponding obligation to obey (or whether there is one) come to us from Socrates himself. But this thread of argument marks a methodological shift for legal philosophy. For the most part, the concept of authority has been a kind of byproduct of philosophizing about law. I propose to reverse that ordering and allow arguments about the appropriate concept of authority to constrain whatever else we say about law.

To that end, the latter half of chapter I is an interpretive analysis of current international legal practice, with special attention paid to the kind of authority that

international law is generally presumed to have. More specifically, I argue that the concept of legal authority implicit in modern practice has three basic characteristics: when law is authoritative, it (1) gives states reasons for action, (2) which are defeasible in overall practical reasoning, and yet (3) binds states independent of the moral (or immoral) content of any given legal rule. Summarized more succinctly, when international law is authoritative, agents ought to comply, whatever it commands, unless they have particularly good reason not to. If this is indeed the kind of authority that law is presumed to have in international legal practice, the question, then, is: how could international law, as we find it, have *that*?

One important result from this line of inquiry is the identification of a particular objection to natural law theories. By denying the separability thesis - that legal rules may contradict moral rules - natural law theories deny that states might have legal obligations to comply with immoral laws. This means that, at least without further explanation, natural law theories seem unable to capture the content-independent character of legal authority in practice. I will explore one way that natural law theorists have tried to overcome this obstacle in Ch. 3.

Chapter 2 is a first pass at an answer to my question based primarily on the familiar (and almost universally rejected, at least in the academic literature) state consent thesis: that international law is authoritative only if and because states consent to it. It turns out that this view, with deep roots in the legal positivist tradition, can be augmented to incorporate the kind of authority implicit in practice. Given my favored methodology, this speaks in favor of taking state consent seriously as a contender to answer Dworkin's doctrinal question. Indeed, given the widespread popularity of social contract views in political philosophy about domestic issues, it is surprising that the state consent thesis - a close cousin - would be so readily discarded, as it seems to have been.

Despite my optimism, sustained discussion of state consent theory as an answer to the doctrinal question about international law shows that it does fail. However, *that* it fails is of less interest to my project than *how* it fails. State consent theory is indeed a way to justify a legal system that wields the form of authority we are looking for, so, in that regard, counts as successful. The problem with state consent theory is not one of form, but rather one of scope. As so many authors have shown, not all of international law can be rightly described as the object of state consent. So accepting state consent as an answer to the doctrinal question forces us to be extremely revisionistic about the sociological question. Perhaps this is not so bad. Surely, one might think, the international legal system is an imperfect conglomeration of bits and pieces of custom and precedent and, like any legal system, it could bear a bit of pruning. But, I will suggest, this would vastly understate the extent to which state consent theory would demand revision of present legal rules - even those widely accepted as law and as legally authoritative.

Speculating historically, this shortfall in scope may be due to the close relationship between state consent theory and social contract theory. Most saliently, social contract theory - by far the more fully developed of the two - is concerned with domestic society. This orientation towards the domestic, specifically apparent in the examples and analogies taken to be persuasive evidence for state consent theory and for legal positivism more generally, obscures the fairly large differences in the kinds of rules authorized by the theory and those presumptively authorized in practice. This inherited parochialism accounts for why and how the scopes of state consent theory and of real practice might have diverged from one another.

Of course, the fact that state consent theory is revisionistic is not itself a knock down argument against the view. It may be the case that international law as we find it cannot justifiably bear the kind of authority it is presumed to have, but this would have to be shown.

So just as there is independent reason to wonder about the concept of authority we find in practice, the same reason supports the search for an alternative that defends the concept of authority in practice *and* is minimally revisionistic. So the question we started with persists, though now with further specification. If at all, how could international law as we find it have the kind of authority it is presumed to have?

Chapter 3 is a close analysis of Ronald Dworkin's posthumously published "New Philosophy of International Law", which is among the most promising answers to precisely this question. We find an important ambiguity at the core of this view, and one interpretation of the new philosophy (though likely not Dworkin's favored interpretation) does answer the doctrinal question of the authority of international law.

Dworkin argues that international law is authorized by the corrective function it plays within international political life. He argues, contrary to the state consent theorists but at least consistently with prominent constructivist authors in international relations theory, that states owe their sovereign rights to their participation in the state system, and the justifiability of their claims to those rights to the legitimacy of that system. The catch is that the state system is prone to a number of morally salient and negative side-effects of distributing political power the way that the state system does. For example, by organizing international political life such that states are given wide-ranging rights to domestic legislation and enforcement, the international community leaves minority groups especially vulnerable to oppression. Similarly, by granting states rights to extract and use resources at will, the international community creates coordination problems with respect to cross-border problems like atmospheric degradation and pollution.

These pathologies undermine the legitimacy of the state system, but can be corrected for through various institutional instruments including, especially, international law. The

oppression of minorities can be stopped when states comply with, and mutually enforce, legal standards of conduct like the UDHR. Climate change and environmental degradation can be addressed by states negotiating, complying with, and enforcing treaties like the Kyoto Protocol (which is a particularly interesting example). By complying and building assurance of future compliance, states can address pathologies and legitimate the state system.

But how does this translate into a state's *obligation* to comply with international law - what Dworkin calls the "duty of mitigation" - rather than just something that it would be nice or even advisable for the state to do? His answer to this question is, I believe, where the ambiguity arises. It might be, as Dworkin sometimes seems to imply, that states have a duty to improve their own legitimacy because citizens have a correlative natural right to legitimate governance. This would be consistent with Dworkin's established commitment to his own version of natural law theory as well as his skepticism about positivist views. On this view, states would have an obligation to improve their own legitimacy, which can (only?) be done by improving the legitimacy of the state system. This, in turn, can only be done by complying with the most "salient" solution to the pathologies of the state system, which, Dworkin believes, is international law.

Matthias Kumm offers another interpretation of the new philosophy. While the above version depends on the state obligation to improve its own legitimacy, Kumm grounds his version in the state obligation of non-domination. When states take the resolution of pathologies of the state system into their own hands, without consulting other states through proper procedural channels, they are essentially dictating the issues that affect many states will be resolved. This, Kumm believes, is a morally objectionable form of domination. Only by addressing pathologies through international law, supposing procedural safeguards that make sure the international legislative procedure is not *itself* a form of domination, can

pathologies be permissibly addressed and the legitimacy of the state system upheld. Thus law is authoritative for states not (necessarily) because they have obligations to their citizens, but because they have obligations of non-domination towards one another.

Both of these interpretations offer natural law theories, though with some finessing of the separability thesis. Dworkin is willing to allow that what is presumed to be international law is law in the sociological sense, but has reservations about its authority, in the doctrinal sense. That is, the norms states recognize and treat as law are indeed law, but they are not *authoritative* for states and state actors unless compliance with them helps states satisfy their natural duty to improve their legitimacy. By ultimately linking the authority of law to the natural duties of states, Dworkin (and Kumm) run into what I have called the problem of form: legal duties are ultimately moral duties, and so the possible content of authoritative law depends on its relation to true moral claims. But, again, this is not the content-independent form of authority we find assumed in practice, in which case we can take objection to Dworkin's view.

Chapter 4 offers another way to interpret the ambiguity in Dworkin's stated position, although it may be more correct to say that Dworkin's attention to the state system's pathologies points us in a new and fruitful direction towards what I call the practice theory of international law. According to this view, established international law is authoritative for states (and states have an obligation of compliance) insofar as it corrects for the pathologies of the state system. Unlike other salient problems, the state system's pathologies are *caused by* the state behavior that also generally constitutes the state system. The fact that agents are involved in a pathological but largely cooperative social practice suffices to justify an associative obligation of mitigation, which obliges states to comply with international law much as Dworkin envisions.

To briefly elaborate, the following is a sketch of my version of the new philosophy as grounded in associative obligations. In our world, sovereignty is an institutionally defined right to rule distributed amongst a decentralized group of territorially bounded protective associations. These associations (i.e. pre-states, or nominal states, or state-like-entities-prior-to-recognition) gain the sovereign right to rule only by being recognized as a state by other states. Together, these states populate the state system, a social practice that both distributes and legislates the terms of rule. This system is presumed to be good for many reasons, including the fact that it promotes shared and widely acceptable goals, such as prosperity, security, and toleration. But by pursuing these goals through such a decentralized system of governance, the system also has harmful side effects.

Two basic means have emerged within the state system to address these pathologies, or untoward tendencies. First, the state system has developed a number of mechanisms for creating norms general compliance with which would help mitigate these pathologies. Among these mechanisms are the sources of law specified in Article 38 of the UN Charter - treaties, custom, and so on. Second, the state system has - through these mechanisms - developed a number of regulatory norms presumed to bind states such that, absent special countervailing considerations, they ought to comply with those norms regardless of what they command. When states claim the right to rule - the rights of sovereignty institutionally specified by the state system - they become members of this problematic but presumptively justifiable practice, and as members, undertake an obligation to the other members to do their part in mitigating the system's problems. In the current world context, that obligation can only be discharged by complying with international law.

A practice theory of this kind not only offers a logically consistent answer to the doctrinal question of law, it captures both the form and scope of law presumed in practice, at

least better than the considered alternatives. First, it explains how law can give the kind of reasons it is presumed to give both from an “external” and an “internal” perspective. From the outside, the practice approach offers an argument that states have associative obligations to other states to comply, which, like any obligation, ought to suffice as a reason for action. From the internal perspective of states themselves, the practice approach links whatever reasons they might have to claim the rights of sovereignty — power, wealth, clout, status, etc — and links those reasons to the need to uphold and improve the legitimacy of the state system, since that system is the source of those rights. Compliance with international law is the only means available to states to ensure their claim to the rights of sovereignty. This account of the reason-giving character of law also allows us to distinguish legal imperatives from advice and requests, since heeding advice and granting requests is not “owed to” others the way that associative obligations are.

While law’s grounding in associative obligations may ground a kind of reason for action, other more familiar cases — like familial duties — show us that associative obligations can sometimes be overridden or defeated by sufficiently grave countervailing concerns. Thus, while law gives reasons for action, it may yet be defeasible by other countervailing norms.

Finally, legal authority, on this view, is content-independent in the sense identifiable in practice. In the first place, the state obligation to comply does not depend on whether the content of a legal rule corresponds with widely accepted moral truths. In fact, it is even conceivable that certain legal rules might be immoral in isolation, but nevertheless play an important corrective function in the overall global political practice. Thus, for example, a bilateral agreement to liberalize trade might give wealthier countries certain economic advantages, which is morally objectionable from an egalitarian perspective, but be part of a larger international legal movement towards global trade liberalization that pursues the

purpose of global prosperity. So even when the law asks them to do something immoral, if the law fulfills its corrective function in the overall picture, then that law is authoritative for states and they have an obligation to comply.

The practice view is also better able to capture the scope of international law as we find it, even if it may not capture *all* of the rules treated as authoritative. It explains legal authority and illuminates the interpretation of the paradigmatic cases raised in Chapter 1, cases that raise problems for competing theories. In this regard, the practice view ought to be preferred on the basis of being minimally revisionistic *for these cases*. But I also argue that *only* the practice view can accommodate rules treated as law *from every one of the recognized sources of law*. Positivist views have difficulty explaining customary international law and much of administrative international law, including *jus cogens* norms, human rights, and the *pacta sunt servanda* principle. These blind spots force positivists to render vast parts of international law lacking in authority. Natural law views struggle to explain treaty and administrative law without supposing a fairly *ad hoc* set of “natural” states rights and duties.

The practice approach avoids these problems by linking authority to the *function* legal rules play in a larger social practice rather than the source from which the rule arises. Positivist views are highly revisionist because they only authorize laws that come from sources that are sensitive to consent, while natural law views are revisionist because they only authorize laws that come from sources sensitive to morality. The practice view is, in this respect, more pragmatic. It matters less where a law comes from and more whether it helps legitimize the legal practice overall. Law is, above all else, a tool. And just like any other tool, it is good or bad, better or worse, in virtue of its ability to do what we need to use it for. In the case of international law, that function is to govern global political life so that the state system

might be freed from charges of illegitimacy, for forcing states to coexist on terms that are not mutually acceptable.

## CHAPTER 1: The Concept of Authority in International Legal Practice

### *Introduction*

Why should countries comply with international law? One simple answer, bordering on tautology, is that states ought to conform international law because it is a legal system that has *authority* over them. Without further analysis, this answer would neither illuminate our question nor seem promising as an answer to dissenting and obdurate participants in global politics. The bald assertion that international law *has* authority passes the buck, as it were. It simply raises the question: But why does international law have authority for states? The assumption, both common and easy to make, is that these questions are nearly identical, and that the latter cannot illuminate the former.

This assumption is a mistake because an analysis of the authority of international law can in fact illuminate and offer guidance to an investigation of why states ought to comply with international law. How? Because different answers to Dworkin's doctrinal question will either imply or presuppose different accounts of legal authority. These implications are not merely judgments that positivists, natural law theorists, and others arbitrarily make as a supplemental consideration. They are necessary consequences of the other commitments these theorists make in describing their views, and they can be evaluated for their plausibility and fit on their merits.

The recognition of the intimate relationship between competing legal theories and their implicit concepts of authority raises the possibility of using a favored understanding of authority as a basis for adjudicating between competing views. If there were some conception of authority for which we had independent reason to judge appropriate to a theory of international law, then how well a theory is able to capture *that* sense of authority would serve

as a basis for adjudication. More simply, a theory of international law that could not capture the preferred *kind* of legal authority has a problem, or at least is at a comparative deficit relative to a theory that can.

More than allowing adjudication between theories, such a preferred conception of authority could guide the development of new theories. By focusing philosophical work on that particular kind of authority and trying to understand its basic characteristics, we could refocus normative work on thinking about how best to justify a body of norms with those characteristics. This would offer an entirely new set of handholds in a notoriously slippery climb.

All of this of course depends on our ability to identify a conception of authority that we have independent reason to prefer. But do we have any such conception? A skeptic might remind us that different projects in legal theory may well need to make use of different conceptions of authority. Sure, the values that underlie their respective goals could serve as the kind of independent reason to prefer one concept to another *for that project*. The concept of authority most appropriate to a theory of law in Nazi Germany, for example, will almost certainly be distinct from that most appropriate for a theory of utopian law. But, the skeptic might continue, because different projects have different purposes, no one conception of authority stands out above the rest. So long as theorists are free to choose their projects, and different projects are equally valuable, there is no independent reason to prefer one conception of authority to another.

At the same time, unlike many areas in philosophy, political and legal theory are largely motivated by real practical problems like human rights abuse, poverty, hunger, the threat of nuclear war, and the belief that we can contribute to the resolution of those problems by offering resonant analyses to guide practitioners. Contributing to the resolution

of these problems is arguably a more important task than philosophical abstraction or historical speculation. Therefore, if there is a project in legal theory that has this purpose, then this purpose should serve as the independent reason to prefer the concept of authority implicit in that project. The question, then, is What might such a project be?

The project I propose is a philosophical investigation into why states ought to comply with international law *as we find it*. Today, in our world, international law represents one of the best chances we have for making real progress on precisely the practical problems mentioned earlier. And in any case our understanding of why countries have an obligation to comply with international law as we find it is at best underdeveloped. In fact, states do generally comply with international law, or at least their actions are observably shaped by their presumption that it has a kind of authority over them. This assumed conception of authority can be studied. Once properly interpreted, the question is then, Can we justify *that* kind of authority in the modern context?

I believe we can. This chapter begins the investigation into the character of international law as we find it and the conception of authority implicit therein. I begin with an analysis of international law itself, specifically focusing on what are commonly referred to as the “sources” of international law: treaties, custom, court rulings, and administrative commands. Before offering an interpretive argument about the characteristics that authority is presumed to have within this legal system, I turn to existing theories of law and legal authority to get some sense of how others have characterized the authority of law in the past. This review illuminates the kinds of characteristics typical of a theory of authority, and so gives some sense of the kinds of questions we should ask during an interpretive analysis of the modern international legal system. This will also foreshadow extended discussions of the predominant theories of international law that follow in chapters 2 and 3.

Finally, I offer my interpretive analysis of the concept of authority implicit in modern international law. Central cases, I argue, reveal three main characteristics of authority. First, international law gives states directed reasons for action that are distinguishable from the kinds of reasons given by advice and requests. State behavior is observably shaped by awareness of the legality or illegality of an action, and a state's failure to comply is presumed to be appropriate grounds for accountability seeking behavior by other states. This indicates that practitioners presume (a) that *states* are the primary — though perhaps not the sole — subjects of international law, (b) that states *owe* conformity to other states in some sense, and (c) that non-compliance is a kind of *wrong*, though not necessarily a moral wrong.

Second, while international law is presumed to give states reasons for action, these reasons can be overridden by sufficiently weighty countervailing concerns. For instance, many countries fail to comply with human rights standards, but we can observe variations in the kinds of accountability seeking behaviors that other states react with. These variations appear to track the material capabilities of non-compliant states such that human rights violations in developed countries are treated more harshly than in developing countries. The presumption appears to be that although states ought to comply with the law, that duty or obligation can be defeated by other considerations.

Finally, states are presumed to be bound by international legal rules even when they are inconsistent with widely accepted moral truths. Legal authority is, in other words, “content independent.” The bindingness of international law does not depend on the morality or immorality of what it commands. The North American Free Trade Agreement (NAFTA) is, for example, an apt target of significant and, I think, justified moral criticism. Nevertheless, these legal rules are recognized as law and, as such, hold a kind of authority over states.

These three characteristics — directed reason giving, defeasibility, and content independence — form the core of my conception of the legal authority implicitly presumed in international practice. Collectively, they establish standards for adjudicating between competing theories, and offer guidelines for the development of new alternatives, a task that will occupy the subsequent chapters of this project.

### *The Scope of International Law As We Find It*

When legal scholars and practitioners use the term “international law”, what do they mean? We might answer this question in either or both of two ways. First, we might try to list the objects to which people refer when they use the term – that is, we might offer the extension or scope of international law. Second, we might offer a conceptual analysis of the concept that those speakers invoke – a list of the general characteristics of a kind of norm. Let us begin with a discussion of the former – the scope of international law – in hopes that it will lead us to the latter.

It has become common practice among legal scholars, when discussing the scope of international law, to abbreviate what would be a long list of principles, customs, and statutes, to a shorter list of the sources of international law. The assumption is that if we can identify the sources of law, then the scope of law is just whatever has been or will be produced by those sources. Nowhere are the sources of international law, at least in the modern context, more clearly or definitively spelled out than Article 38.1 of the Statute of the International Court of Justice within the UN Charter, which reads:

- The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;

- d. subject to the provisions of Article 59 , judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>8</sup>

This statute identifies three unique sources of international law: (1) conventions and treaties, (2) general customs and recognized principles, and (3) court rulings.<sup>9</sup>

### *Treaties*

Treaties are bi- or multi-lateral agreements between states. Parties may and do negotiate the terms of the agreement, until a mutually acceptable version of the agreement is discovered.

When both or all parties give the appropriate signs of consent (for the US, this includes legislative ratification domestically), treaties are subsequently recognized as sources of legal rights and obligations for signatories.

International legal scholars frequently treat treaties as the paradigmatic example of international law, and this preeminence can be speculatively attributed to the concordance between the doctrines of state consent at the international level and popular sovereignty at the domestic level.<sup>10</sup> Domestically, Hobbes, Locke, and others teach us that subjects come to have legal obligations by consensually conceding some measure of their natural rights to the

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<sup>8</sup> United Nations, “Article 38.I Statute of the International Court of Justice.”

<sup>9</sup> I make two interpretive claims here. First, I collapse general customary practice and general principles, because I take these to be mutually constitutive if not simply identical. Second, I collapse the “teachings of highly qualified publicists” into court rulings. Scholars, it seems to me, can offer practitioners of the law novel ways to interpret the law, and this interpretive function is normally attributed to the courts. However, as will be come apparent in subsequent sections, it is not obvious to me that such interpretation only happens in judicial fora. In fact, it seems very likely that all state action, including the treaties and customary practice, is an interpretation of international law and the boundaries of permissible activity. Perhaps, then, it is better to say that the relevance of scholarly work as a source of law is implicit in all sources of law, but is not obvious a source independent from the others.

<sup>10</sup> Goldsmith and Posner, *The Limits of International Law*, 23–24; Brierly, *The Basis of Obligation in International Law*, 9, II, 79.

society for the sake of security, collective welfare, etc.<sup>11</sup> On such a view, the basis for legal obligation is the consent of the governed. Treaties allow us to tell a similar story about international law: they are consensual contracts that limit state rights, but only so far as those states will.

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (hereafter Convention on Chemical Weapons or CCW) is a helpful example of a modern treaty. Originally adopted in 1993, the CCW represents an international effort to “to eliminate an entire category of weapons of mass destruction”.<sup>12</sup> To date, 190 countries around the world have ratified this agreement, notably including Syria in 2013.<sup>13</sup> Signatories are obligated to other parties to the agreement to promote the goal of elimination and security, and are vulnerable to legal sanction in case of noncompliance.

### *Custom*

The second source of international law is custom or customary practice. Customary law can be generally described as the norms and principles that are not necessarily codified in a treaty of convention, but are instantiated by regular state behavior done from a sense of legal

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<sup>11</sup> Hobbes, *Leviathan*; Locke, *Second Treatise of Government*.

<sup>12</sup> Organization for the Prohibition of Chemical Weapons, “Chemical Weapons Convention.”

<sup>13</sup> The Syrian case is of particular relevance for two reasons. First, while the Syrian government was widely criticized for its use of chemical weapons against its own citizens in early 2013, its actions were not illegal, at least not with respect to the CCW. This fact inhibited the political and legal authority of observers inclined to intervene. Intervention in the form of the coerced removal and destruction of Syria’s chemical weapons stockpiles (currently underway) only began *after* Syria ratified the CCW in September, 2013. Second, Syria ratified the CCW only under extreme pressure from the international community. Thus the Syrian case serves as an example of a treaty that maintains legal authority despite the fact that consent was coerced.

obligation.<sup>14</sup> Some familiar examples of customary international law, or at least salient examples from legal history, are the extension of territorial boundaries into international waters (which expanded alongside the reach of cannons), and the special legal immunities afforded foreign diplomats.

Unlike treaties, customary international law need not be the product of formal legislative procedures. The laws constitutive of treaties are generally highly specific, explicitly negotiated, and consciously drafted. Customary law need not, and frequently is not, like this. Legal customs typically form gradually. They change and emerge with changing and emerging technologies, needs, and cultural norms.<sup>15</sup>

Some customs, whether because they are of particular importance or controversy, have been codified in the form of conventions. For example, the modern standards for diplomatic immunity, though a longstanding and widely recognized tradition, were codified in the 1961 Vienna Convention on Diplomatic Relations.<sup>16</sup> Something similar can be said about the state's right to make treaties which, though a long standing tradition, was codified in its current form as late as 1986.<sup>17</sup> Other customs are so basic to international relations and social life that they do not warrant codification. The customary principle *pacta sunt servanda*, for example, is so fundamental to social life, and so widely followed and recognized, that

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<sup>14</sup> Cassese, *International Law*; Goldsmith and Posner, *The Limits of International Law*. The language of acting "from a sense of legal obligation" is interesting for at least two reasons. First, in the context of international law, we are normally talking about corporate actors, groups. It would be unusual to attribute sentiments to groups, since they are generally not thought to have minds, and therefore the capacity to have feelings. Second, although this sense of legal obligation is usually only discussed with respect to customary law, one might expect that international agents act from such a sense when they comply with treaties and court rulings as well.

<sup>15</sup> This need not always be the case, however. Bin Cheng provides an interesting example of "instant custom" regarding territorial border in airspace during the cold war. See Cheng, "United Nations Resolutions on Outer Space."

<sup>16</sup> Denza, "Vienna Convention on Diplomatic Relations."

<sup>17</sup> Zemanek, "Vienna Convention on the Law of Treaties."

scholars and practitioners allow it to be taken for granted as a general expectation in international relations.<sup>18</sup>

### *Court Rulings*

As in the case of domestic law in most countries, judicial decisions are a source of international law. It is the widely accepted function of judges and tribunals to interpret the outputs of these sources of law (treaties, customs, previous rulings), and to determine how those ought to be applied to novel cases brought before them. In the modern context, the preeminent international courts are most likely the International Criminal Court (ICC) and the International Court of Justice (ICJ).

One significant complication in trying to establish court rulings as a distinctive source of international law is that these predominant examples, the ICC and ICJ, are both the products of treaties – the Rome Statute and the UN Charter respectively. This fact makes the legal authority of court rulings appear to be dependent on the legal authority of treaties. But there is, I think, better reason to reject such a claim. Consider the ICC, probably the most widely recognized international judicial body with the jurisdiction to prosecute individuals (the ICJ does not have this legal right). If rulings of the ICC only bound signatories to the Rome Statute, then the ICC could not possibly make authoritative rulings over individuals. But the prosecution of individuals is precisely the function of the ICC, and one that is widely accepted as justified. So at least speaking sociologically, it is, I think, helpful to distinguish international courts as a distinct source of international law.

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<sup>18</sup> Thinking of *pacta sunt servanda* as a legal custom makes it seem strange that, in modern scholarship, treaties should be seen a paradigmatic and customs problematic. As Lauterpacht points out, treaties are entirely dependent on custom, a point to which I return. See Lauterpacht, *The Function of Law in the International Community*, 420–422.

## *Administrative Law*

An additional source of international law, not explicitly recognized in the UN Charter, is administrative international law (AIL).<sup>19</sup> The fact that this source is not recognized in the UN Charter is not necessarily an indication that AIL is not a kind of law, but a reminder that the UN Charter is not *the* secondary rule of recognition for international law.

Administrative law is a growing body of rules for the regulation of global political life, designed by specialized non-government organizations, and followed from a sense of legal obligation. One prominent example of administrative law is the International Labor Organization's labor standards. These standards outline the appropriate treatment and working conditions for employees in various industries around the world. Failure to meet these standards is widely perceived as a source of national shame and a wrong.

Administrative law is unique in that it has many of the formal and procedural elements of treaties – it comes about from the deliberate and conscious efforts of individuals and groups, for instance – but can emerge without the consent of the states that are subsequently bound. It might seem strange to say this, since even in the case of the ILO, states are only formally bound to the labor standards after domestic ratification. But by garnering widespread support, invoking widely accepted values, and raising awareness of improper practices, standards like the ILO's can come to exert the same sort of reason-giving force that treaties and other forms of international law do, until it seems more clearly just to be one more source alongside the others. That said, administrative law is certainly an emerging (if not fully developed) source of international law, so it may yet be inappropriate to call it a full-fledged source.

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<sup>19</sup> Kingsbury, Krisch, and Stewart, *The Emergence of Global Administrative Law*.

*What is legal authority?*

The preceding was a discussion of the content or *scope* of international law as we find it. A complete description of international law will also describe its *form*. International law does not present itself simply as a set of inert norms. It is a set of commandments that seems to demand action or at least purports to be action-guiding in some sense. International law presumes (and, I will later argue is presumed to have) its own legal authority. But what is legal authority? Using broad strokes, Joseph Raz induces a sense of perplexity when he writes,

Sometimes things are referred to as authoritative simply to indicate that they are binding, perhaps because they can be trusted to guide one correctly, they are dependable. 'The authority of reason' is perhaps used in this way... This, however, is an extended and watered down use of 'authoritative'. In its central meaning the authoritative is what was made binding or reliable by an authority. An authoritative edition of a poet's work, or the authoritative text of his poems, or the authoritative version of it, are those which were prepared by authorities in his work...<sup>20</sup>

Raz employs at least three different senses of authority. First, in the phrase "the authority of reason", authority is a quality of a form of practical deliberation (reasoning) such that its prescriptions are appropriately treated as reasons for action. Second, a text can be "authoritative" in that it is best version, or the most widely recognized, or the one preferred by the creator. Third, an agent can be authoritative or an authority when he or she has the standing to make demands on or otherwise change the normative circumstances of others. Thus a literary author has authority over his or her work – that is, the normative power to tell others which is the correct interpretation. And a police officer has authority over individual comportment in public spaces- the normative power to command and even coerce legally compliant behavior like driving the speed limit.

But when we speak of the authority of law, it is not obvious that any of the senses listed above captures precisely what we mean. As in the first sense, authority is a quality associated

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<sup>20</sup> Raz, "Introduction," 1–2. Compare Hart, *The Concept of Law*, 198–199.

with practical deliberation. But unlike reason, law is a body of norms, not a form of deliberation. As in the third sense, the fact that law is authoritative seems to give it the standing to make demands of its subjects. But again, that is not quite right. Law is not an agent, unlike the police officer and the literary author. So while these distinctions are helpful in getting a feel for the concept for which we are casting about, they offer little towards really understanding what legal authority is.

One important distinction that we should establish right at the outset is that between genuine and false authority. This distinction is a familiar one. Genuine authority is a command from a norm or an agent that actually gives one a reason for action. False authority fails to give reasons for action, but acts as if it does. So while a police officer may have the authority to give me a speeding ticket, a person merely dressed as a police officer, on his way to a costume party, who gives me what he calls a “citation” does not have the genuine authority to do so. Raz captures this distinction perfectly, though in different terms, when he writes:

Authority in general can be divided into legitimate and de facto authority. The latter either claims to be legitimate or is believed to be so, and is effective in imposing its will on many over whom it claims authority, perhaps because its claim to legitimacy is recognized by many of its subjects. But it does not necessarily possess legitimacy.<sup>21</sup>

I will reserve the term ‘legitimacy’ for something more specific later in this dissertation, but Raz’s idea is clear enough. Many agents and norms act as though they have authority, but only some really do. Hereafter, I will use the term ‘authority’ to stand for genuine authority (legitimate authority, in Raz’s terms), and will specify if I mean otherwise.

*Natural Law: Legal Authority is Moral Authority*

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<sup>21</sup> Raz, “Authority, Law, and Morality,” 296.

A review of the extant literature on legal authority reveals a variety of accounts, most of which tend towards either of two poles. At one end, authors identify legal authority with moral authority and say that law exerts the same kind of normative force as correct moral principles. On the other end, theorists claim that legal authority has a specific character, distinct from the kind of authority that true moral principles wield.

Views in the first camp – those who claim that legal authority is a version of moral authority – are primarily associated with the natural law tradition. On the relationship between morality and law, John Finnis, a distinguished proponent and defender of natural law theory, writes

If we may translate the relevant portion of, for example, Thomas Aquinas's theory into Kelsenian terminology (as far as possible), it runs as follows: The legal validity (in the focal, moral sense of 'legal validity') of positive law is derived from its rational connection with (i.e. derivation from) natural law, and this connection holds good, normally, if and only if (i) the law originates in a way which is legally valid (in the specially restricted, purely legal sense of 'legal validity') and (ii) the law is not materially unjust either in its content or in the relevant circumstances of its positing.<sup>22</sup>

Elsewhere, specifically writing about authority in general, Finnis writes:

...in some forms of human community, that something be done [about coordination problems] is not just a matter of optional advantage, but is a matter of right, a requirement of justice... There are, in the final analysis, only two ways of making a choice between alternative ways of co-ordinating action to the common purpose or common good of any group. There must be either unanimity, or authority.<sup>23</sup>

Here, Finnis seems to claim that whether or not something has authority is a matter of political morality. It is morally imperative, "a matter of right", that humans establish and adhere to systems of rules to coordinate their behavior on salient issues. This duty is discharged by establishing an authoritative regime to regulate coordination, and is the basis for the authority of that regime and its commandments. Elsewhere, Finnis explicitly extends

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<sup>22</sup> Finnis, *Natural Law and Natural Rights*, 27; Aquinas, *Summa Theologica*, Part I-II, Q. 96, Art. 4.

<sup>23</sup> Finnis, "Authority," 175.

this distinctly moral conception of authority to law. Discussing the conception of authority contained in Dworkin's *Law's Empire*, Finnis sympathetically writes about "the legal and thus the moral authority of most of the law's rules and institutions," which is perhaps an even clearer statement of the idea that legal authority appears, for Finnis, to be a kind of moral authority.<sup>24</sup>

What would it mean for legal authority to be a kind of moral authority? It has been alleged, primarily by those opposed to natural law theory, that such a thesis would imply that human law is nothing more than a copy, an "emanation", of natural law.<sup>25</sup> Kelsen is prone to such antagonistic ascriptions, and the associated skepticism about whether all of law must or even could be derivable from a full account of the moral truths of the universe. He writes:

An unbiased analysis of the natural-law doctrine shows that it is impossible to deduce from 'nature' any rights. For the right of an individual presupposes the duty of another individual, and nature, that is, a complex of facts determined by the laws of causality, does not impose duties and therefore does not confer rights upon men or other beings.<sup>26</sup>

Finnis, in reply, calls this "a travesty". But even without going as far as Kelsen, we might say at least the following: If legal authority is a kind of moral authority, then immoral laws are neither legally nor morally authoritative. Assuming that morality is internally consistent with itself – which follows from the idea that ought implies can – it could not be the case that a legally (and so morally) authoritative norm was inconsistent with some other morally authoritative norm. It would be impossible not to violate one or the other norm. But assuming that ought-implies-can is correct, this could not be the case. One or the other presumptively authoritative moral norms must not in fact be.

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<sup>24</sup> Finnis, "On Reason and Authority in Law's Empire," 380. See related in Dworkin, *Law's Empire*, 110–114.

<sup>25</sup> Finnis, *Natural Law and Natural Rights*, 28.

<sup>26</sup> Kelsen, *Principles of International Law*, 149.

This result is significant, because it portrays one important aspect of the natural law theorist's conception of legal authority. The legal authority of a norm is *content-dependent*: whether or not a law is legally authoritative depends on whether its content follows from (or is at least consistent with) true moral claims. Thus, sociologically speaking, an immoral law might have such-and-such origins, such-and-such linguistic structure, and agents might act as though it has authority, while people go to jail for violating it, and on. But normatively (or doctrinally) speaking, because the content of immoral law is inconsistent with moral truth—because legal authority is moral authority, which is itself internally consistent—immoral laws could not be authoritative.

### *Positivism and Legal Authority*

At the other end of the theoretical spectrum, some hold that legal authority is of the same kind as the authority of a contract or promise – not necessarily moral, but dependent on some form of consent or social recognition. The theorist to whom most commentators ascribe this view is H.L.A. Hart, though Kelsen and Anscombe will also be helpful in this connection. Hart's view of authority is, in certain respects, not so dissimilar from the natural law view. Like Dworkin and Finnis, Hart explicitly tells us that the difference between the gunman who issues commands and the representative of a (legitimate) government who issues commands is that the latter has the *authority* and the former does not.<sup>27</sup>

At the same time, the differences between Hart's view, what I will call the “positivist” view, and the natural law view are as important as the similarities. On the relationship between law and morality, Hart writes,

Those who accept the authority of a legal system look upon it from the internal point of view, and express their sense of its requirements in internal

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<sup>27</sup> Hart, *The Concept of Law*, 198–199.

statements couched in the normative language which is common to both law and morals: 'I (You) ought', 'I (he) must', 'I (they) have an obligation'. Yet they are not thereby committed to a moral judgment that it is morally right to do what the law requires.<sup>28</sup>

I take Hart's remarks here not simply to be about the kinds of beliefs that persons tend to be committed to upon certain utterances, but what the content of those utterances logically implies. Specifically, assertions about the authority of law, perhaps by a legal system itself, as in the above quotation, are not assertions of moral judgments. Questions of moral authority and questions of legal authority are, to use Hart's term, separate.<sup>29</sup> Anscombe summarizes this idea perfectly when she writes

Legal authority, legal validity, legal obligation: these are one thing; their presence or absence is to be ascertained by looking at certain institutions and their rules. It is another question altogether whether one should grant moral authority, moral validity, and moral obligation.<sup>30</sup>

Familiar cases of immoral laws and the possibility of civil disobedience support Anscombe's convictions. The Jim Crow laws spring to mind immediately. Despite the fact that these laws perpetuated and institutionalized morally abhorrent systems of belief, they were the law. People followed them from a sense of legal obligation. It may be the case that, all things considered (including moral facts) agents should not have followed these laws. But it would be a mistake, I think, to dismiss, out of hand, the possibility that even immoral laws such as these were genuinely authoritative. This, of course, is an example of domestic law. Later in this chapter, I will discuss at length cases of specifically international law that make a similar point.

One element of particular significance to the current conversation that comes out in these considerations is that, on the positivist view, law might be *defeasible*. That is, it might be

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<sup>28</sup> Ibid., 199.

<sup>29</sup> Hart, "Positivism and the Separation of Law and Morals."

<sup>30</sup> Anscombe, "On the Source of the Authority of the State," 142.

the case that sometimes, when all reasons for action are considered, an agent ought not to follow the law. As mentioned, certain outstanding instances of civil disobedience can be perfect examples of when a person really ought to break the law. This does not make their action legal. In fact, it is central to the very idea of civil disobedience that the action *be* illegal – for it is that very illegality of an otherwise morally permissible (or obligatory) act that makes civil disobedience a powerful political tool.<sup>31</sup>

But how do Hart and the others propose to make the leap from the fact that agents act as though law has authority (including their behaviors, what they say, whether they comply, how they respond to official censure, etc.) to the claim that law is *genuinely* authoritative and not falsely so? Kelsen writes

Only human beings are capable of creating norms, that is, rules obligating and authorizing men. Insofar as human actions are supposed to be brought about by a psychic phenomenon called 'will,' norms are considered to be created by acts of will. The human will creating norms may manifest itself in acts consciously directed at the creation of norms, namely, in commands, in legislative acts, and the like; or in custom, that is, the habitual or usual course of acting accompanied by the conviction that men ought to act in this way.<sup>32</sup>

This is a familiar view, and one indebted to early modern social contract theory. Laws, one might say, generally are authorized for their subjects because those subjects have, in one form or another, willed to be bound by them. They accept the constraints that law or proposed law would place on them, and in that act of acceptance authorize the law. This is perhaps mostly clearly visible in the case of contract law. When I sign my contract with the university, both parties take on new responsibilities. I will teach and do research for the university, and in

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<sup>31</sup> It is worth here mentioning that *defeasibility* is difficult to hold on a natural law view. If legal authority is moral authority, then the claim that law is defeasible is also the claim that morality is defeasible. But it is difficult to say that while morally, one ought to behave in one way, one ought to behave otherwise all things considered. What else is there to consider? While it is not so hard to think of cases where law is defeasible, it is harder to think of cases where morality is.

<sup>32</sup> Kelsen, *Principles of International Law*, 150.

exchange, the university will provide a salary and health care. These actions are enforceable as law, at least once both parties have given the appropriate signs of consent (a signature, a handshake, etc.).

In contract law, parties to the contracts are the ones bound by its terms. In international law, states are the primary objects of regulation. So just as individual consent is necessary for the terms of a contract to be legally authoritative, Kelsen and others argue that *state consent* is necessary for international law to be authoritative. The emergence of the treaty as the primary and favored vehicle for international legislation speaks to this point. Unlike custom (despite the UN's explicit inclusion of custom as a source of international law, and Kelsen's insistence that custom is also an expression of consent), treaties almost always come with clear indications of state consent (often both signature and domestic ratification).

Another significant aspect that this discussion of contracts brings out, an aspect that again diverges from natural law, is that this positivist conception maintains that legal authority is *content independent*. Law is authoritative because parties agree to it, but those parties might agree to anything – even something immoral. But with regards to authority, what matters is not the content, but the consent. Contrast this with natural law theory, which demands that the content of law be consistent with moral truths in order to be authoritative.

Chapter 2 of this dissertation discusses the state consent view of international legal authority in detail, so I will end this initial presentation with some summary remarks. According to the positivist view, legal authority has at least the following three characteristics: (1) *defeasibility* – authoritative law can be overridden by countervailing considerations (at least moral ones) such that an action may be illegal while also the right thing to do, all things considered; (2) *willed* – law depends on an act of will (however tacit) by its subjects in order to

be authoritative; (3) *content-independent* – law can be authoritative even if its content is inconsistent with the best moral theory available.

### *Raz's Conception of Authority*

While the first two views dominate modern conversations about the authority of law, Joseph Raz has also made significant and sustained contributions to the question of legal authority, and has advanced his own account which is worthy of independent consideration.

Raz writes that “We should regard authority as basically a species of power, where (normative) power is the ability to change protected reasons.”<sup>33</sup> He defines ‘protected reason’ as “both a reason for an action and an (exclusionary) reason for disregarding reasons against it.”<sup>34</sup> Raz provides the following helpful example: A mother tells her son to wear a coat, but the coat is ugly, and the father tells the son to disregard his mother's command. The ugliness is a reason not to wear the coat. The mother's command is a reason *to* wear the coat. The father's instruction is an “exclusionary” reason, a second-order reason, that is a reason not to consider the mother's instructions during practical deliberation. A “protected reason” is a reason for action that is also an exclusionary reason to disregard countervailing reasons. Power is the ability to change or, I assume, provide protected reasons, and authority is a kind of power.

Raz's attention to protected reasons is primarily motivated by two thoughts: First, that authority is appropriately distinguished from advice and requests and second, that authority is sometimes rightly defeated by countervailing concerns. Law is importantly different than advice and requests since, in some sense, violating the law constitutes a wrong in a way that ignoring advice does not. Raz differentiates advice from commands (like laws) by saying that

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<sup>33</sup> Raz, *The Authority of Law*, 18–19.

<sup>34</sup> *Ibid.*, 18.

commands are always “given with the intention that their addressees shall take them as protected reasons,” whereas advice “is not [necessarily] given with an intention to be taken as a protected reason.”<sup>35</sup> So when I command you to wear that ugly sweater, I intend for my demand to exclude other reasons you might have not to wear it. If I merely advise you not to wear it, I do not necessarily have that intention. He writes:

If you request you submit yourself to the addressee's judgment on the balance of reasons, while at the same time trying to add a reason on one side of that balance. But one who commands is not merely trying to change the balance by adding a reason for the action. He is also trying to create a situation in which the addressee will do wrong to act on the balance of reasons.<sup>36</sup>

In advising, I provide new reasons to be compared with others the advisee already has. In commanding, I supply new reasons *in place of* reasons held otherwise.

This difference between advice and commands has implications for how Raz understands defeasibility. Like Kelsen, Hart, and other positivists, Raz agrees that law is defeasible. That is, it may be the case that an agent ought not to follow the law, all things considered. That said, the fact that law claims authority means that its commands presumptively give exclusionary reasons – that is, they presumptively exclude certain kinds of facts as reasons.<sup>37</sup> A parent's command is defeasible by strong moral facts, but not by personal fashion sense. State law is defeasible by federal law, but not by local custom. So for Raz, law is still defeasible, but only by non-excluded kinds of reasons that he must specify.

What kinds of reasons does an authoritative command exclude? Raz is somewhat cryptic on this point, but helpfully tells us that “what is excluded by a rule of law is not all other reasons, but merely all those other reasons which are not legally recognized.”<sup>38</sup> So moral

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<sup>35</sup> Ibid., 22.

<sup>36</sup> Ibid., 24.

<sup>37</sup> Ibid., 22.

<sup>38</sup> Raz, *The Authority of Law*, p.

reasons that have not been socially recognized as legal (perhaps by being used in previous court rulings, or invoked in the preamble to important legal documents) are excluded from practical deliberation about what to do. But moral customary and stipulative reasons that *have* been legally recognized can still play this exclusionary role.<sup>39</sup>

This view, that authority is the power to change protected reasons – that is, that authoritative commands are defeasible but only by certain kinds of reasons – allows Raz to capture two intuitive aspects of legal authority: (1) it can be defeated, such that *prima facie* illegal actions may not actually be, and (2) it takes the form of an authoritative command, in contrast with mere advice or requests.

The question remains: What gives law this authority? The answer, what Raz calls his “service conception of law,” says that law is authoritative when two conditions are satisfied:

First, that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority’s directives than if he does not (I will refer to it as the normal justification thesis or condition). Second, that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority (I will refer to it as the independence condition).<sup>40</sup>

Essentially, the view seems to be that the law has authority over an agent when that agent would better comply with his or her own reasons for action by following the commands of law than by following her own deliberative procedures. It is difficult, I think, to understand “better” here in anything but moral terms, since Raz clearly agrees that convenience and

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<sup>39</sup> One problem to mark here, to which I will return later in this chapter, is that Raz does not offer much discussion about whether countervailing legally recognized rules suffice to make a *prima facie* illegal action *legal* or whether they make it the right thing to do, all things considered. It seems that by limiting the scope of exclusion only to *legally* recognized rules, the fact that a legal command is overridden by countervailing legal commands would make the action legal. But there are cases, like human right which I will discuss later, which are overridden by socially, but not necessarily *legally* recognized reasons. This broadens the scope of defeasibility beyond what Raz’s view recommends, though the cases seem persuasive to me.

<sup>40</sup> Raz, “Problem of Authority,” 1014.

desire do not suffice as justifications for legal authority.<sup>41</sup> But Raz also says that legal commands can exclude moral reasons, so it is unclear how legal authority could itself be a source of moral reasons. This is only further confused, when Raz tautologically asserts that “what is excluded by law is not all other reasons, but merely all those other reasons which are themselves not legally recognized.”<sup>42</sup>

The details of Raz's view aside, the valuable insight we can take from him is the importance of distinguishing between advice and legal command. Raz uses the idea of exclusionary reasons to make this distinction, but struggles, I think, to successfully incorporate this idea of exclusionary reasons into a larger conversation about the relationship between law and morality. Still, the distinction is an intuitive one, and it should be accounted for in any successful account of legal authority.

#### *Recognition of International Legal Authority in State Action*

Even given these existing views about the authority of law, I believe that there is reason to persist in the investigation of what authority generally is. This belief stems not from considered objection to these views (alone), but from the simple observation that none of these, perhaps with the partial exception of Kelsen, develops a conception of international legal authority for the international, rather than domestic, arena. Finnis, Hart, and Raz are all interested in law within the state, particularly thinking about the relationship between state power and individual autonomy. But the challenging questions to ask in the international realm are very different from this. States are no longer simply sovereigns, but are instead intermediaries between the global order and the lives of individuals. The subjects of domestic law are people, the subjects of international law, peoples. Given these significant differences,

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<sup>41</sup> Raz, *The Authority of Law*, 22.

<sup>42</sup> *Ibid.*, 33.

it seems presumptuous to hold that accounts of legal authority settled in a domestic context should also apply in an international setting. Some such view might well be defended, but it would have to be defended in light of an interrogation of international law as we find it. I will now turn to such an interrogation.

Any view that posits the authority of law is open to an early objection – one from the descriptive or interpretive side of the discussion. International law, the anarchist’s objection goes, does not exert any normative force on states.<sup>43</sup> If international law did exert such normative force, states would at least sometimes comply with international law even when doing so was not in their own state interests. However, because international law is notoriously “toothless”, states rarely if ever comply with international law just because they have a legal obligation to do so.<sup>44</sup> Simply, given the vast amount of non-compliance apparent in modern practice, state action cannot be faithfully interpreted as action guided by the law or done from a sense of legal obligation. States may invoke international law as a justification for actions, but this is only a veil for their true motives -- self-interest and the accumulation of power.

But this is too quick. Simply because many states are selective about compliance, because non-compliance is common, and because compliance frequently (or usually)

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<sup>43</sup> One might imagine such an argument coming from realist camp in international relations theory. See, for example, Morgenthau *Politics Among Nations*, and Waltz *Realism and International Politics*. Compare Chayes and Chayes 8.

<sup>44</sup> One might point to the recent Russian involvement in Crimea for an example. Given the apparent unwillingness on the part of the US and NATO to become involved in further military conflict after the Iraq and Afghanistan wars, Russian leadership perceived an opportunity to violate international law with impunity. The Maidan protests over former Ukrainian president Yanukovich’s dealings with the EU were an opportunity to take advantage of this weakness, despite the illegality of interfering with the internal governance of a sovereign state. States only selectively comply with international law, and only then because it is in their interest.

coincides with state interest, it does not follow that states do not treat international law as authoritative. In a similar vein, Chayes and Chayes write:

If national security regimes have not collapsed in the face of significant perceived violation, it should be no surprise that economic and environmental treaties can tolerate a good deal of non-compliance... As we have noted, a considerable amount of deviance from strict treaty norms may be anticipated and allowed for from the beginning, whether in the form of transitional periods, special exemptions, or limited substantive obligations, or by the informal expectations of the parties.<sup>45</sup>

Their idea, it seems, is that non-compliance is insufficient evidence both for the claim that international law is not authoritative, and for the claim that international practice implicitly denies the authority of international law.

So given the prevalence of non-compliance, what evidence is there in states' actions that they recognize international law as authoritative? To answer this question, it will be helpful to distinguish some of the forms of compliance and non-compliance. As Chayes and Chayes write, "Compliance is not an on-off phenomenon"<sup>46</sup>, by which I take them to mean that there are different levels and forms of compliance. By understanding this more nuanced conception of compliance, we will be in a better position to see how state actions are in fact compliant, and how even truly non-compliant actions still implicitly recognize the authority of law. For current purposes, I will distinguish six forms of compliance and/or non-compliance: good faith compliance, strategic compliance, rogue action, simple failure, failed proposal, and successful proposal.

The first pair, *good faith* and *strategic compliance*, shows that even perfectly compliant actions can have significantly different normative characters. Good faith compliance occurs when a state (or a state representative) acts in full accordance with international law, and that action is motivated by a sense of legal obligation. Kant's idea of actions *from* duty, as opposed

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<sup>45</sup> Chayes and Chayes, *The New Sovereignty*, 19.

<sup>46</sup> *Ibid.*, 17.

to actions *in accordance with* duty is a helpful analogy. Strategic compliance, by contrast, is legal action motivated by state interest or some basis other than a sense of legal duty. Because corporate agents are at issue, it can be difficult to tell what a state's "true" motive is. With many different representatives and internal disagreement, state action is hardly univocal.

Part of the realist's objection seems to be that when we see compliance with international law, we find only strategic compliance, and never good faith compliance. From this, she wishes to conclude that even compliant actions are not performative assertions of the authority of law. But strategic compliance *does* implicitly recognize the authority of law, since part of a state's strategic calculation to comply will include the political immunity and normative high-ground granted by legal action. Compliant states can reasonably expect legal actions to go unchallenged by the international community, which is itself an implicit assertion of the normative priority of law in the international community.

The next pair, in this case two forms of *non-compliance*, also helps to illustrate how even non-compliant actions can assert international legal authority. *Rogue action* is the violation of the letter of international law with blatant disregard for the illegality of the action. Such actions are perhaps the closest examples of state actions that do not implicitly recognize the authority of international law.<sup>47</sup> Again the use of chemical weapons in Syria can serve as a helpful example. Although Syria had not yet ratified the CCW, one might reasonably believe – given the international uptake of the prohibition against chemical weapons – that Assad's use of chemical weapons violated customary international law, and that this was sufficiently evident to deem it a rogue action.

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<sup>47</sup> It is significant, I think, that despite the fact that rogue actions are probably the closest we can get to a state action that does not invoke the authority of international law, rogue actions still do so. One might argue, following Chayes and Chayes and Anne-Marie Slaughter, that state sovereignty is defined by international law (or at least a network of international norms for Slaughter), so any state action that uses the powers granted the state by international law (even rogue actions) is an implicit invocation of the authority of international law.

Rogue actions should be distinguished from *simple failure* to comply with international law. Simple failure occurs when a state violates international law although there is substantial evidence that the state did what it could not to do so. Given the aspirational character of much of current international law, like the ILO's labor standards and parts of the Universal Declaration of Human Rights (UDHR), history is rife with suitable examples of states falling short of the mark despite their good faith efforts. Unlike rogue actions, simple failures can explicitly acknowledge the reason-giving capacity of international law, just as Aristotle's akratic man acknowledges virtue without being able to attain it.<sup>48</sup>

In both cases, states knowingly violate international law and nevertheless implicitly assert its authority. Consider an analogy with driving. Drivers knowingly and willingly violate speed limits. But usually those violations are minor, departing from the marked speed limits by tolerably small amounts. If we think that agents only implicitly acknowledge the authority of law when they comply perfectly, then speeders and drivers in slow and broken cars would not be examples of such acknowledgment. But if we recognize that even these departures are minor, and that, in general, they stay within tolerable limits generally expressed by speed limits, then we can see how traffic law is even implicitly acknowledged in these cases. Traffic law shapes deviant driving.

We can say the same about international law: It shapes deviance, such that departure from the norm is an implicit act of recognition. For instance, by limiting the scope of government violence to his borders, Assad implicitly recognized the boundaries of his right to rule. Moreover, when he was accused of acting illegally, his immediate response was denial, but this, *in itself* is an assertion of the authority of law. If Assad did not perceive international law as binding, in some sense, then he would have no reason to deny that he had violated it.

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<sup>48</sup> Aristotle, *Nicomachean Ethics*, Book 7.

“Yes,” he might say, “International law applied to the state I represent and prohibits the action that my state did. I violated international law. But what of it? It has no authority!” But this is precisely what we do not see. Violators deny that they have broken the law, or deny that the scope of the law includes their state or that particular action (as we see with Syria’s best defense – that it had not yet accepted the CCW). What states do not do, or only very rarely do in extreme cases, is deny that international law is authoritative.

The final pair of related state actions are *failed proposal* and *successful proposal*. In the absence of a world congress, and during the development and emergence of a global judicial system, much of the legislative and interpretive work of international law falls to states themselves. This is transparently the case with treaties, where states are usually the parties involved in drafting and negotiation. What is somewhat more complicated is the recognition that even when states are not involved in explicitly legislative activities (like treaty negotiations), their actions are, as one might put it, “proto-legislative”.

To say that state actions are proto-legislative, is to assert that state action should be understood as a performative and interpretive proposal about what the law is, or, more precisely, what the rights of states are as determined by international law. Because there is no global sovereign, and because political power is decentralized in our world, state actions must be judged as legal or illegal by other states; there is no other sufficiently powerful entity to fill this role. When states act, they employ their right to rule. But this is not simply the exercise of perfectly understood rights. State action is a performative interpretation of what the acting state takes its rights to be. This proposal may be rejected by other states, resulting perhaps in sanctions, public shaming, or even violent conflict if the action is radical and offensive enough. Alternatively, the proposal might be accepted, allowed, and used as precedent for the

future actions of other states. Chayes and Chayes mark just this phenomenon when they write that

It is, of course, by no means unheard of that states, like other legal actors, take advantage of the indeterminacy of treaty language to justify indulging their preferred course of action. Indeed, a state may consciously seek to discover the limits of its obligation by testing its treaty partners' responses.<sup>49</sup>

While this passage lacks the ambivalence that Chayes and Chayes exhibit elsewhere about such informal methods of legislation and interpretation, it suggests that state action can be a kind of legislative proposal, a performative motion, as if the state were saying, "By my action I propose that actions like this be considered legal." In doing so, its hope is that other states will follow their example and, in so doing, recognize that new right as part of what it means to be a state.

For a clear example, consider the 2014 treaty between Russia and Crimea. By recognizing Crimea itself, the Russian government performatively proposed to the world that Crimea be recognized as an independent political entity (this appears to have been largely successful). It was as if Russia were proposing to the world: "Here is something new that states can do. States can make treaties with the Crimean government as if they were independent from Ukraine". Whether the statehood of Crimea becomes international law, sociologically, will depend on whether other countries besides Russia decide to follow suit.

On a purely descriptive level, such proposals sometimes succeed and sometimes fail. Failed proposals are ultimately violations of international law. Consider the analogous case of civil disobedience. If one violates the letter of the law, doing so with the intention to bring attention to the perceived injustice of that law, but fails ultimately to get the law changed, then that person has simply violated the law. Successful proposals are less clear, and might

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<sup>49</sup> Chayes and Chayes, *The New Sovereignty*, 12.

actually be indistinguishable from compliance in certain cases. If what initially seems like civil disobedience were accepted subsequently as the customary interpretation of the contested law, then successful proposal is really just following the law – just according to an interpretation that not everyone shared.<sup>50</sup>

While these six forms of state action with respect to compliance are almost certainly not exhaustive, they create a picture of several kinds of ways that state action invokes the authority of law, however indirectly. In some cases, states follow international law in good faith because it is the law. But the authority of law is not acknowledged only by good-faith compliance, since even non-compliance can tacitly imply the authority of international law. After all, states are corporate agents, so their actions often have diverse purposes and the way that they acknowledge international legal authority is more indirect. Sometimes states try to propose new law, hoping that others will accept the change and augment the norms of state behavior in their favor. Even when states break the law, often that failure is accompanied by apologies, excuses, and justifications for an exception that equally well reflect that states take themselves to be bound by international law.

### *The Conception of Legal Authority Implicit in State Action*

State actions not only imply that international law is presumptively authoritative in modern global politics, widely perceived trends in state behavior also offer some guidance about the form of authority that states seem to take international law to have. More precisely, state

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<sup>50</sup> This analogy between performative proposals and civil disobedience is limited in that while state actions may often play this interpretive role, it is less obvious that the actions of citizens do the same. Part of why state actions play this role is that the international legal regime is still emerging, so that regime lacks many of the stable legislative organs that many domestic legal regimes have. Consequently, the potential for performative proposal in domestic law might be limited to minor reinterpretations of customary law, which are mutable by informal means, whereas the potential for performative proposal in international law ranges across all sources of law.

behavior with respect to international law indicates not only that international law is authoritative, but that that authority has a specifiable form. In this section, I will argue that the best interpretation of state action is one in which states act as though international law is legally authoritative, which is to say that international law (1) gives states directed reasons for action (2) is defeasible in light of countervailing considerations, and (3) is reason-giving independently of its content.

*Reason-Giving:* Part of what it means for international law to be legally authoritative is that it gives agents reasons for action. This characteristic of authority can be described in different, but compatible ways. Raz, as we saw, offers some general insights into the reason-giving nature of law.<sup>51</sup> First, the fact that something is legal or illegal can suffice to conclude rational deliberation. Second, the reasons given by law are different in kind from the reasons given by requests and advice, a difference that can be explained in terms of protected reasons. I believe that Raz's characterization of law is substantiated by practice, though I think that there is a simpler explanation of the difference between law, advice, and requests that is more faithful to public understandings of international law. It seems uncontroversial to say that if I am deliberating about what to do, and I am informed that one of the two options I am considering is illegal, then that fact will bear on the ultimate decision I make. A second way to express what it is for law to be reason-giving is to say that the legality or illegality of an option suffices to end practical deliberation when all else is equal. So, again, if I am deliberating between two options that stand equally before me in terms of moral cost, preference satisfaction, ease, efficiency, and so on, and I discover that one of the two is illegal (though I know that this will have no impact on the relevant costs and benefits that I can reasonably expect on either side),

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<sup>51</sup> Raz, *The Authority of Law*, 19.

then the mere fact that the option is illegal suffices to end my reasonable deliberation in favor of doing the legal action.<sup>52</sup>

The US's response to the beginning of what has now become the Syrian civil war is, I think, helpful in this connection.<sup>53</sup> The US did not send military aid to Syria. Given the US's fiscal and political situation in early 2011, this might have seemed like the obvious outcome. Two long wars had stressed its economy and quashed any popular support for a new conflict. But at the time, the possibility of military intervention under the aegis of the North Atlantic Treaty Organization (NATO) seemed a real possibility. Opposition members in Syria were almost univocally requesting external assistance, NATO had already played a role in a similar conflict in Libya, and the presence and use of chemical weapons was a genuine shock to the global conscience.

It would be a mistake to say that any one reason or any one event turned the tide against US military involvement in Syria. It was surely a complex decision based on a delicate balance of equally important and competing values. But one major moment during these deliberations was the United Nations Security Council's (UNSC) refusal to approve intervention. With Russia's veto, the UNSC's decision rendered military involvement in Syria illegal under international law (at least in the absence of special circumstances like the emergence of a credible threat to the territorial integrity of another country). What is striking though, and what speaks in favor of the presumed authority of law, is that this decision by the UNSC made any difference at all. The political and economic situation before and after the vote at the UN was unchanged. What *did* change was the legal status of intervention, and with

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<sup>52</sup> To say that law is authoritative only if it suffices to close deliberation when all else is equal is not to say that law cannot also close deliberation when all else is not equal. Thus it could be the case that even though acting legally will in fact result in significant costs for an agent, the law in question might be important enough to outweigh those costs.

<sup>53</sup> Gritten, Rodgers, and Macguire, "Syria: The Story of the Conflict."

it, the likelihood that Syria would see western military involvement. This, to me, is a clear case in which the fact that something became illegal served as a reason, in itself, for an agent not to do that thing.

This is an example of international law sufficing to end practical deliberation of states, but does it show a distinction between law on one hand and advice and requests on the other? It would seem to. When one goes against advice or chooses not to grant a request, one is not normally presumed to become the appropriate target of accountability seeking behaviors. Even when it is good advice, we generally presume that it is not wrong to choose not to take it. But had the US sent military aid to Syria after the UNSC's decision, this would almost certainly have been the case. Apologies, justifications, and excuses would have been necessary on the part of the US, which show that the UNSC's decision changed the presumed normative playing field from one where it was uncertain whether US intervention would have constituted a wrong to one where it almost certainly would. This should not be a surprising result. As I said before, Raz's distinction between advice and law is an intuitive one, and a successful account of international law will be able to explain it.

A second characteristic of the reason-giving capacity of law stands out in this example. States that violate international law, or that choose to comply to avoid being held accountable, are accountable *to* other agents. The US, had it contravened the decision of the UNSC would have been accountable to the members of the UNSC and the states who it represents. This presumption that compliance is, in a sense, *owed to* other agents is not unique to this case. Signatories to a treaty are accountable for noncompliance *to the other signatories*. States subject to customary law are presumed to owe conformity *to* other adherents of that custom. Margaret Gilbert describes this phenomenon as the "directedness" of duties. Focusing on promises, she writes

There is a well known connection... between directed obligation and *owing*.... In terms of the previous example: If Olive has a directed obligation to Roger to go to Chicago tomorrow, then, equivalently: Olive owes Roger her going to Chicago tomorrow... This construal of owing suggests a particular amplification of an important further point about promising... that by virtue of one's status as a promisee one is in a position to demand the promised act from the pertinent promisor... Intuitively, a promisee is in a position to *rebuke* the promisor for non performance.<sup>54</sup>

Here, Gilbert's idea is that when two parties enter into a promise, they become bound together by a web of correlative rights and obligations. Promisors have duties to promisees; promisees have correlating rights *against* promisors; promisees have the normative standing to demand performance from promisors; and promisees are specially licensed to rebuke promisors for non-performance. In many ways, the example of the UNSC and Syria is isomorphic with Gilbert's view of promises such that, like everyday contractual obligations the presumed duty to conform to international law appears to be directed.

One final characteristic also stands out about legal reasons. While international law occasionally addresses other kinds of agents, it is primarily addressed to states. The UNSC's decision determined whether intervention in Syria *by* states was legal or illegal. This makes a certain kind of sense, since only states have the material resources necessary for such an endeavor. That the reasons given by law are reasons *for states* is not limited to this case, but apparently pervasive. Treaties are signed by and are presumed to bind states. The UDHR, which we turn to next, is explicitly addressed to states as a specification of the duties they owe their citizens. The ILO's labor standards, which are importantly *not* a treaty but rather are a form of administrative law, are explicitly addressed to states.<sup>55</sup>

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<sup>54</sup> Gilbert, "Three Dogmas About Promising," 306–7.

<sup>55</sup> International Labor Organization, "ILO Declaration on Fundamental Principles and Rights at Work." "Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to

Interestingly, recent years have seen the emergence of efforts to create international law that addresses non-states. Legal frameworks to address terrorist organizations, for example, might be an example.<sup>56</sup> Likewise, the Accord on Fire and Building Safety in Bangladesh — an document that bears a striking resemblance to better established examples of administrative international law but for which it is hoped that corporations with factories in Bangladesh, rather than states, will sign on — might be an example of international law addressed to non-states.<sup>57</sup> In the immediate post-war period, it might have been more plausible to say that states were the exclusive addressees of international law, but that appears to be changing. We can, I think, still confidently say that states are the *primary* addressees of states. However, the superior account of international law will explain how international law might also apply to *secondary* addressees like terrorist organizations, NGOs, and multinational corporations.

*Defeasible:* While norms with legal authority suffice to end practical deliberation in some cases, legal authority can also be overridden by countervailing considerations in others — at least such seems to be the presumption implicit in current international legal practice. Sometimes, given the specific contours of and balance of values at play in a specific situation, the action demanded by law may come at a sufficiently grave moral or pragmatic costs that disobedience is justified on the whole.

Human rights law is an excellent example of defeasibility. Human rights, particularly those specified in the UDHR, are generally taken to be an instance of international law and are followed from a sense of legal obligation (as well, perhaps, a sense of moral obligation). At

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respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions,”

<sup>56</sup> Asad, *On Suicide Bombing*; Mamdani, *Good Muslim, Bad Muslim*.

<sup>57</sup> International Labor Organization, “Bangladesh Accord.”

least, *when* they are followed, they are followed from this sense. But many of the articles of the UDHR demand that governments provide services that go beyond their material capabilities. Consider Article 26, which guarantees every person a free elementary education. For many countries, the infrastructure, training, and general institutional upheaval necessary for compliance is Herculean at best and practically impossible. So given the sundry exigencies of political life in much of the world, and given the practical impossibility for governments in many of these places to institute such a system of free elementary education, is it wrong, overall, for a government to fail to comply? My sense of the international community is that no, they do not. Are these countries in violation of the law? Yes. Is this wrong of them, on the balance of moral, legal, and prudential interests? The international community seems not to think so. We do not, for example, see representatives at the UN mulling over sanctions against the Philippines because of the suspension of public education during Haiyan. Nor do we see countries publicly criticizing the Burundian government on its problematic education system, because we understand that they have bigger problems to attend to first (like its alarming levels of food insecurity).<sup>58</sup> In such cases, international law is still authoritative. It is simply overridden by countervailing concerns.

Considering these cases, though, one might object that in fact, the fact that countries can fail to comply with international law and nevertheless avoid sanction means that the law is *not* authoritative at all. I think there is reason to disagree. First of all, I have already discussed, earlier in this chapter, how even non-compliance can still tacitly acknowledge the authority of law. Second, and specifically with respect to this example, we do see international pressure for compliance in the cases of countries that do not have countervailing concerns the way that the Philippines and Burundi do. Saudi Arabia, for example, almost certainly has a far

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<sup>58</sup> World Food Programme, “Hunger Statistics.”

better developed primary education system than Burundi. Nevertheless, it has been subject to various forms of “soft coercion” by UNICEF and the UNDP and other international regulatory bodies.<sup>59</sup> Whatever the reasons are – whether recognition of economic differences between the countries, a substantive moral objection to Shar’ia, or relevant political exigencies – the case seems to be that the laws that guarantee elementary education to all are indeed authoritative, they are just overridden in specific cases.

*Content-Independence:* To say that legal authority is content-independent is to say that law can be authoritative independently of the relationship between its content and generally accepted or otherwise true moral claims. Put simply, international legal practice seems to reflect the belief that non-moral and even immoral laws can bind states. The most common examples of content-independence are morally arbitrary laws. The locations of borders, for example, are almost always morally arbitrary as cosmopolitan theorists of global justice are wont to remind us.<sup>60</sup> Nevertheless, the laws ensuring those borders, however morally arbitrary they may be, are legally authoritative.

Again, one might object to this point by arguing that while specific borders may be morally arbitrary, the laws protecting borders in general are not morally arbitrary because, for instance, borders help states avoid violent conflict by harmonizing and coordinating public understandings of the scope of state power. *Where* borders are may be arbitrary, but *that* states have border is not morally arbitrary. Therefore, even apparently non-moral or morally arbitrary laws are authorized by true moral claims.

But this objection is more difficult to sustain for cases of immoral laws that are nevertheless treated as authoritative. Consider the North America Free Trade Agreement

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<sup>59</sup> Hamdan, “Women and Education in Saudi Arabia.”

<sup>60</sup> Rawls, “The Law of Peoples”; Pogge, “An Egalitarian Law of Peoples,” 465.

(NAFTA). In 1994, the US, Canada, and Mexico agreed to gradually lower economic trade barriers between their countries.<sup>61</sup> This process was completed in 2008. The hope was that trade liberalization would improve *per capita* income and quality of life for members of all countries, but in fact we are seeing unexpected and morally problematic consequences emerging from the deal. Perhaps most striking among these is that Mexican corn and dairy farmers are being displaced from their land because of a sudden inability to compete with (subsidized) foreign crops. Because NAFTA does not take care to correct for such externalities, the law simply and straightforwardly harms these people. Despite the economic and political advantages promised (and even delivered) by NAFTA, it is not obvious that these suffice to save the law from these fairly damning moral objections. Nevertheless, the US, Mexico, and Canada refrain from introducing new economic barriers to trade that might protect agriculture in Mexico and other vulnerable industries. NAFTA contradicts morality, but it is still acknowledged by all parties as legally authoritative.

### *The Idea of Legal Authority*

From these suggestive examples, we can distill the idea of legal authority presumed in international practice. International law, and perhaps law more generally, gives states reason for action. Cases such as the US's choice not to become involved militarily in Syria after the UNSC vote show that law can suffice to end well-reasoned practical deliberation – it can tip the scales without any further evaluation or judgment by the agent. These given reasons are presumed different from the reasons given by advice and requests because, unlike refused requests or ignored advice, violations of law constitute a wrong of some kind. These reasons for action, the duties or obligations that states have to comply with international law, are

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<sup>61</sup> Teslik, “NAFTA’s Economic Impact.”

directed. Compliance is presumed to be *owed* to other states. Although states are the primary addressees of international law, and therefore the primary actors affected by these reasons, international law might also apply to some secondary addressees including NGOs, terrorist organizations, and multinational corporations.

While the legality or illegality of some proposed action can suffice to end practical deliberation, it does not always do so in practice. Cases like the widespread violation of human rights law show that international law and its authority can be overridden by strong countervailing considerations. Even though law demands that governments provide their people certain basic primary goods like education, some countries simply lack the material resources to do so. What we find in practice is that countries that genuinely lack the material resources to provide these goods, or otherwise can provide convincing reasons that excuse their non-compliance, experience far less political and legal pressure than countries with these resources, even when legally required social programs are comparably limited. In a sense, the international community forgives or excuses such violations in recognition of the practical limitations of governments while nevertheless maintaining that such human rights deficiencies are illegal under international law. In a word, international law is presumed to be defeasible by sufficiently grave countervailing concerns.

Finally, we find that the presumption of law's reason-giving capacity and defeasibility persists independently of the content of international law and its relations to true or widely accepted moral claims. Even immoral laws are presumed to give states reasons for action, and in this way, legal authority is presumed to be content-independent.

These central cases of the practice of international law support the identification of three characteristics that are necessary elements of legal authority — directed reason-giving, defeasibility, and content-independence. At least, an explanation of these characteristics will

be a central and important part of any theory of legal authority aimed at understanding and justifying modern practice.

If what I have said is correct and international legal practice supports my characterization of these three characteristics of legal authority as we find it in the global context, then the question is: How could a legal order justifiably bear this kind of authority? I turn to this question next.

## CHAPTER 2: State Consent

### *Introduction*

In Chapter 1, we discussed four accounts of authority, arriving finally at a conception of authority derived from an interpretation of going international legal practice. To summarize, when participants in international politics engage in activities that they themselves take to be governed by legal rules, however obliquely, their actions implicitly presume its authority. An interpretation of those actions can identify the *kind* or *form* of authority presumed, and I argued that legal authority as presupposed in practice has at least the following three features, what we may call its *authority characteristics*.

**REASON GIVINGNESS:** Law gives states reason for action such that (1) they owe their performance to other states, and (2) these reasons are distinct from advice and requests.

**DEFEASIBILITY:** The obligation to comply with international law can be overridden by sufficiently grave countervailing concerns; and

**CONTENT-INDEPENDENCE:** Whether a law is authoritative or not is not a function of the morality of its content.

But of course the fact that practitioners take law to have this kind of authority does not make it so. The mere fact that an agent believes or accepts some propositions is insufficient evidence to justify the further claim that the propositions in question are themselves true. After all, epistemic agents are fallible, whether individual or corporate. So, assuming that the goal of this project is something like to offer some argument for the *actual* authority of international law, more must be said.

Even so, the foregoing analysis of presumed legal authority remains of great value to us. It would be a mistake, for a project aimed at justifying international legal obligations, to

take these purely sociological facts as normative justification. They are not the *justificans*. (Or at least I will not be among those who treat them as such, as Austin, for example, might, however fruitful this may be for certain projects.) A different and philosophically more interesting project is to take the form of authority presumed in practice to be the *justificandum*. As we saw in Chapter 1, other theories so far have started from armchair conceptions of legal authority (or, at best, conceptions designed to suit the domestic context), and then asked how international law might come to meet the criteria necessary or sufficient to have that kind of authority. One might plausibly speculate that this methodology is partially to blame for enduring disagreements in legal theory. Rather than starting from an armchair conceptions of authority – ones that, perhaps, are never even imagined by practitioners – I am proposing that we begin from the conception of legal authority that participants in international political life actually seem to use and invoke in their activities, and then see whether any argument can be given for international law's indeed having *that* form of authority.

To that end, the question of this chapter and the next is whether international law as we find it is really is authoritative, in the interpretive sense specified, and if so, how this might be so. This chapter will be dedicated to one answer, the state consent argument, and the next to a different answer, Dworkin's New Philosophy.

The discussion in this chapter will proceed as follows. First, I will offer an argument for two criteria of success in any attempt to justify the legal authority of international law as we find it. Any successful answer must satisfy two criteria:

FORM CRITERION: what is justified must have the kind or form of authority interpretively implicit in the practice.

SCOPE CRITERION: all or at least the preponderance of rules respected as authoritative international law must be accounted for.

I will argue that, while an appeal to state consent presents the form of authority we are looking for, it would force us to deny the presumed authority of a large subset of current legal rules. Large swaths of law, perhaps even including treaties, are not consented to – explicitly, tacitly, or hypothetically. The failure of state consent theory to meet the scope criterion then raises the question whether some less-revisionary position is available, a question I take up in later chapters.

### *Form, Scope, and Explanatory Success*

If legal scholars agree about anything, it is that existing legal systems are open to constructive criticism. Certainly existing legal systems are not perfect, and there is value in prescribing corrective measures. Yet this assumption discourages us from asking questions about how our current international legal system, or something like it, might actually be justifiable at all. Unlike questions motivated by a desire for change, this question is motivated by an optimistic conservatism — a sense that calls for revolution are premature, and that a specific, immanent form of critique may be more powerful. We already know, presumably that our world is not a utopia. But it would be quite another matter to find that our legal system, and anything like it, *could not be what it purports to be*, and that its practitioners suffer from some kind of grand illusion.

In Chapter 1, I argued that the body of rules recognized by states as international law is presumed to have a specifiable form of authority and presented the fundamental question of this project:

THE BASIC QUESTION: How could international law have the kind of authority it is presumed in contemporary practice?

Any theory meant to answer this question must satisfy two criteria. First, it must offer some

justification for international law that explains how law could have the three authority characteristics specified earlier. Second, given the scope criterion, that justification must apply to all or at least the preponderance of existing law.

But why, one might wonder, should international law have any presumed kind of authority at all? People presume all sorts of crazy things, and so why take the presumption of practice to be an indicator of truth or anything of interest to anyone outside of sociology? Putting the objection more concretely: because there is nothing special about what practice presumes *per se*, the discovery that international law might genuinely be authoritative in the way it is presumed to be would not illuminate any interesting philosophical questions. Putting the objection more bluntly: Why is the basic question worth asking?

There is independent reason to pursue a theory that not only non-revisionary about the scope of law, but also about its form. Morally speaking, it would only be necessary to abandon current practice to the extent that either the scope or the form of law cannot be justified somehow. Such social upheaval may be difficult and costly, fraught with false starts, political resistance, and the threat of undermining the parts of society that are not objectionable – in the proverbial throwing of the baby out with the bathwater. Moreover, while the current international legal order may be objectionable in certain local issues, it does not seem rotten to the core. Our world has made significant steps in the past century towards securing basic human rights, economic prosperity, and global security, many of which have to do with the establishment and maintenance of the emerging body of international law. These points at least suffice to justify asking the question whether international law as we find it in both form and scope might be justified. It may be the case that no argument can be given for this claim, but there seems, to me, to be both reason to look for such an argument and reason to hope that that search will not be futile.

### *State Consent Theories*

The state consent view is perhaps the most familiar account of the authority of international law, if only because, at least lately, it is also the most roundly rejected. Presenting the view, Kelsen writes

An essential element of this view is the idea that the international community, or the legal order constituting this community, i.e., general international law, is based on the common consent of the states, or, which amounts to the same, on a contract of the members of this community.<sup>62</sup>

The basic idea behind the state consent view is that international law has authority for states because they have in fact previously consented to comply with it. International law, according to the theory, is akin to a contract, which is binding only for participants, on whatever the parties can agree to.

Treaties and multi-lateral conventions are almost certainly the paradigmatic examples of international law on this model. In the standard case, treaties are generally responses to crises or potential crises in international politics. This crisis might be a military conflict, the emergence of an environmental threat such as global warming, general concern about the existence and potential use of particularly terrible weapons, or any of a number of other events. Whatever the specifics may be, these conditions align the interests that states have in coordinating their behavior to resolve or prevent the crisis. States send representatives to discover, negotiate, and enumerate mutually acceptable terms for this coordination. This done, states communicate their will to comply with the negotiated terms, usually by signing the treaty and then ratifying domestically.

Two arguments can be mobilized in favor of state consent theory. The first emphasizes

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<sup>62</sup> Kelsen, *Principles of International Law*, 153.

the sovereignty of states. States, the argument begins, are sovereign. Sovereignty, by definition and tradition, includes the right to autonomous self-governance. Generally, this right is presumed to include the rights to control borders, to raise and control a military, to extract and sell resources from owned territory, to pass and enforce laws domestically, and perhaps more. If a state is forced to act against its own will, in any of the above mentioned areas covered by state sovereignty, perhaps by another state or by some other global power such as a terrorist organization, then this violates its right, unjustifiably. However, if a state agrees to act according to the terms of some negotiated deal, such as a treaty, then that state has an obligation to other signatories to do as it said it would. This is true not only of treaties, but also whenever it can be rightly said of a state that it consented to what would otherwise be an unjustified infringement of its right to self-determination. Thus even customary and administrative law might be justifiable, if we can rightly say that states consent to them. States therefore have an obligation to comply with international law – that is, law is authoritative for them – but only, it is maintained, when states consent to this.

The second argument gives more attention to why it is that states have the right to self-governance in the first place, by focusing on the rights of individual citizens within states. One might be skeptical that states, which are artifacts and tools created by human persons, are endowed with any rights at all. Rights are held by persons, one may claim, but not by corporate entities like states unless granted to them by persons. Thus, the familiar argument goes, states do not have a right to self-governance unless they are granted that right through some sufficiently democratic domestic process. Persons must express their wills to transfer their natural right to self-governance to their state. And, likewise, the state must give consent to transfer its second-hand right to the international legal regime. Assuming that any state action must reflect the will of its citizens, however indirectly, the consequence of this line of

thought is that if a state is forced to do some action that it does not consent to, then (at least some of) its citizens are being forced to do something that *they* have not consented to, in violation of their personal right to self-determination.

This theory has clear roots in the social contract tradition most closely associated with authors like Hobbes, Locke, and Rousseau, but it's history reached much further. Brierly writes

The doctrine that consent may be the basis of legal obligation is at least as old as the *Digest*, where Hermogenianus is quoted for the proposition that rules which have been approved by long custom and observed for very many years, are observed no less than those that are written, *velum tacita omnium conventio*; and it would be possible to collect an imposing array of authority to a similar effect from the subsequent literature.<sup>63</sup>

It also resonates with prominent 20th century authors in the legal positivist tradition. Hart's discussion of "mutual restriction" as the grounds of political obligations, for example, exemplifies the same commitment to voluntarism.<sup>64</sup> Kelsen's skepticism towards natural duties also resonates, like when he writes

Legal principles can never be presupposed by a legal order; they can only be created in conformity with this order. For they are "legal" only because and insofar as they are established on the basis of a positive legal order ... Certainly the creation of substantive law is not a creation out of nothing. Legislation as well as custom is directed by some general principles. But these principles are moral or political principles, and not legal principles, and consequently cannot impose legal duties or confer legal rights upon men or states as long as these principles are not stipulated by legislation, custom, or treaties.<sup>65</sup>

We also see similarities between the state consent view and other contemporary conceptions of political obligation. Margaret Gilbert's joint commitment theory, for example, shares Kelsen's sense that political obligation is best understood in terms of the social relations

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<sup>63</sup> Brierly, *The Basis of Obligation in International Law*, 9. Brierly 9

<sup>64</sup> Hart, "Are There Any Natural Rights?" 185; Also see Arneson, "The Principle of Fairness and Free-Rider Problems," 616.

<sup>65</sup> Kelsen, *Principles of International Law*, 150.

between agents rather than universalistic moral theories.<sup>66</sup> She writes

I believe that *there is a central kind of obligation other than moral obligation such that if one is so obligated, one has sufficient reason to fulfill the obligation.* In focusing on a “demoralized” problem of political obligation, I do not mean to downplay the importance of the following question: Does one have a moral obligation to support the political institutions of one’s own country in particular — and if so, what precisely is the ground of such obligation? This, or something like it, is the way the problem of political obligation is generally couched in terms of moral obligations. I hope to show that much is lost if the *only* version of the problem considered is moralized in this way.<sup>67</sup>

Despite a venerable lineage and a few sympathetic proponents, state consent theory has become something of the whipping boy of contemporary international legal theory, and has been for the last century or so. In 1933, Lauterpacht argued that the view is self-contradictory. The view depends on the assumption of the legal principle *pacta sunt servanda*, whether or not states accept *that* principle, while also denying the existence of such unconsented legal norms.<sup>68</sup> Decades later, Kelsen, who had sympathetic philosophical leanings to the state consent project, argued that state consent was at odds with the empirical facts about international law, that states do and have not actually or tacitly consented to international law, and that state consent poses peculiar problems for how to understand the obligations of newborn states.<sup>69</sup> By the publication of D'Amato's book *The Concept of Custom in International Law* in 1971, the state consent view had already become the view that any “serious author” had to reject, but that nobody would seriously defend except “Soviet jurists who have seized upon the notion of strict consent as a way to either reject 'capitalist' norms or simply, in Lissitzyn's words, 'to pick and choose among the norms of international law'.”<sup>70</sup> Thus swung the pendulum between positivists and natural law theorists up to the present time. While there

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<sup>66</sup> Gilbert, *A Theory of Political Obligation*.

<sup>67</sup> Gilbert, “De-Moralizing Political Obligation,” 390.

<sup>68</sup> Lauterpacht, *The Function of Law in the International Community*, 417–420.

<sup>69</sup> Kelsen, *Principles of International Law*, 152–155.

<sup>70</sup> D'Amato, *Concept of Custom in International Law*, 188.

are still some willing to defend the state consent view, they seem to constitute something of a minority.<sup>71</sup>

But state consent theory should be taken seriously. After all, the widely cited ruling of the World Court in the *Lotus* Case upheld the state consent thesis and installed it as legal precedent when it held that

international law governs relations between States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing and independent communities or with a view to the achievement of common aims.<sup>72</sup>

Given the general methodology of deference to practice preferred in this dissertation, and assuming that this important case is indeed representative of practice, it seems that state consent is at least worthy of consideration. Nothing I will say will vindicate the state consent view—Kelsen arguably did away with any chance of doing that sixty years ago.<sup>73</sup> But I will suggest that, like a canary in a coal mine, even its failure is instructive, particularly for our questions about the nature and basis of authority in contemporary practice.

### *State Consent and the Form Criterion*

I have proposed two criteria for any successful answer to the basic question how international legal rules recognized in practice might genuinely have the kind of authority they are presumed to have. Part of why one might think that the widespread rejection of the state consent view was premature is that this theory perfectly satisfies the form criterion.

*Reason-giving:* As discussed earlier, the reason-giving authority characteristic has three

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<sup>71</sup> See, for example, Rocheleau, “State Consent vs. Human Rights as Foundations for International Law.”

<sup>72</sup> S. S. *Lotus* (Fr. v. Turk.) (PCIJ 1927).

<sup>73</sup> Kelsen, p. 154-5

necessary and collectively sufficient elements. First, a legal rule is reason-giving only if it can suffice to conclude practical deliberation *for states* in normal circumstances about whether to comply. For the state consent view, the international legal order is essentially a global contract between states or at least it is made up of many of smaller contracts including treaties and conventions. Generally, theorists agree that agents have sufficient reason to keep their end of an agreement, though they disagree about why. I discussed two such explanations at the beginning of this chapter. But assuming that agents do give themselves sufficient reason to perform by consenting to the terms of a contract, and assuming that states are just like any other agent with respect to this fact, if states do in fact consent to international law then it appears to give them such conclusive reason.

Second, a rule is reason-giving in the relevant sense only if it gives directed reason for action. Again, the analogy with agreements is instructive. As Gilbert correctly says, promises and agreements give directed duties and rights.<sup>74</sup> These are directed reasons for action — reasons that explicitly make reference to what one owes to others or is owed by them. If international law is a kind of agreement or contract between states, and the duty to comply is a contractual duty, then that duty is owed to the other contracting parties and correlates with their right to conformity against others.

Third, a rule is reason-giving in the sense relevant for authority only if it can be distinguished from the kinds of reasons given by advice and requests. According to the state consent view, violating international law is wrong in the sense that it violates an important practical norm — likely something to do with trustworthiness or keeping one's word. Gilbert, for instance, thinks that violating the terms of an accepted contract in otherwise normal

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<sup>74</sup> Gilbert, "Three Dogmas About Promising"; Gilbert, "Is an Agreement an Exchange of Promises?"

circumstances contradicts standards of rationality.<sup>75</sup> Without necessarily saying that it is *morally* wrong to violate an agreement — it is probably morally *right* to violate an immoral promise — we can nevertheless agree that it is wrong in some sense. Since the state consent view makes legal duties a kind of contractual obligation, it can use this analysis to explain why it is wrong to violate international law in usual circumstances. By contrast, there is no wrong at all in ignoring advice or rejecting requests in normal circumstances. Perhaps it is impolite or imprudent to do so, but not *wrong* in such a way that a person would become the appropriate target of rebuke. Thus the state consent-view can distinguish these different forms of reason-giving.

*Defeasibility:* Practice presumes that legal rules suffice to conclude practical deliberation in normal circumstances, but also that those rules can be defeated by countervailing considerations in special situations. It is never legal to break the law, and that counts for something, but sometimes one ought to break the law all things considered. Again, the analogy with contracts helps make sense of this. One usually ought to keep agreements. However, if an agent makes an agreement and subsequently discovers that performance demands the violation of a significant moral rule, or is incompatible with a pre-established commitment, or even demands extreme personal risk or harm, then one probably should not perform. International law is just another agreement, perhaps prioritized above other agreements in virtue of the vast impact it can have on persons' lives but not because legal obligations are different in kind. And like any other contract, it is at least conceivable that a situation could arise such that, although the contract was still in full effect and had not been excused or completed or otherwise terminated, all things considered, one ought not perform.

*Content-Independence:* Finally, practice presumes that whether a legal rule is binding for

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<sup>75</sup> Gilbert, "De-Moralizing Political Obligation."

states is not a function of that rule's content. Of the authority characteristics, this, I think, is the most controversial for the state-consent view. Do immoral agreements bind? If the state consent view is going to capture the form of authority presumed in practice, that theory must either claim that immoral agreements do bind, or claim that there is something special about agreements between states that socially excuses them. Because the state consent view relies so heavily on the analogy between agreements between individuals and agreements between states, the latter option seems perilous.

The contention that immoral promises *do* in fact bind is not uncommon, but philosophers certainly have not reached consensus on this point. Here Hobbes is ambiguous on this point. He claims that covenants that violate standards of self-care are void but also allows covenants extracted coercively.<sup>76</sup> Gilbert is less ambiguous on this point. She prefers what she calls Pritchard's Point — "Once call some act a promise, and all question of whether there is an obligation to do it seems to have vanished"<sup>77</sup> — to the dogmatic insistence that immoral promises do not bind.<sup>78</sup> As support for this preference, she writes, "...if what seems to be an immoral promise has not been kept, it can intelligibly invoked by the promisee as a basis for complaint against the promisor." This, she takes to be evidence that immoral promises can be made, but separates that from the question whether they obligate. On that point, she writes:

I propose that what is intuitive is this: promising is a source of obligation such that if one has made a promise one is in some sense obligated to do what one has promised, *all things considered*. In particular, a promise obligates *irrespective of its content*.<sup>79</sup>

If what Gilbert has said about promises is correct (and I think it is), and if promises are in

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<sup>76</sup> Hobbes, *Leviathan* Book I Ch. 14.

<sup>77</sup> Prichard, *Moral Obligation and Duty and Interest*, 198.

<sup>78</sup> Gilbert, "Three Dogmas About Promising." See also Anscombe, "Rules, Rights, and Promises."

<sup>79</sup> Gilbert, "Three Dogmas About Promising," 304.

relevant respects like agreements,<sup>80</sup> and if international law is a kind of agreement between states, then international law binds states, as Gilbert says, “irrespective of its content”.

I have used the work of Margaret Gilbert to argue that the state consent theory, if correct, can explain and justify the presumptive form of international legal authority. To my knowledge, this represents a novel application of elements of her more general plural subject theory of joint commitment, though I will not here go into the details of that view.<sup>81</sup> I should be clear: to my knowledge, the state consent account of legal authority is not a view to which Gilbert has committed herself, nor it one to which published views commit her, though I believe it is consistent with her wider contributions to social and political philosophy.

If what I have said is correct, the state consent theory could justify the form of international legal authority presumed in practice. The state consent view reimagines the international legal order as a (social) contract between states. By limiting their own sovereign rights through expressions of willingness, states take on rights against other consenting parties that they comply but also undertake duties to the others to do their part. By supplementing this basic thesis with details from Gilbert’s theory of agreements and promises, we can see how law might give states directed reasons for action, be defeasible, and bind states independent of its content.

### *State Consent and the Scope Criterion*

While state consent theory might be able to satisfy the form criterion, it cannot satisfy the scope criterion. If for no other reason, this is because there is no available interpretation of going international legal practice in which all states consent to all of the international legal rules presumed to bind them. This is not a new objection. In fact, as far as I can tell, this is the

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<sup>80</sup> Gilbert, “Is an Agreement an Exchange of Promises?”.

<sup>81</sup> Gilbert, *On Social Facts*; Gilbert, *A Theory of Political Obligation*.

most influential objection to state consent theory, though it has a variety of versions. Hart, the leading philosopher of legal positivism, writes

...it is submitted that there is no basic rule providing the general criteria of validity for the rule of international law... It is true that, on many important matters, the relations between states are regulated by multilateral treaties, and it is sometimes argued that these may bind states that are not parties. If this were generally recognized, such treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules. A basic rule of recognition could then be formulated which would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states. Perhaps international law is at present in a stage of transition towards acceptance of this and other forms which would bring it nearer in structure to a municipal system.<sup>82</sup>

For Hart, the problem is not that states do not consent to or otherwise accept individual rules to which they are subsequently bound. Instead, the problem is that states do not generally accept any secondary rule of recognition that would suffice to bind some states to certain rules, even when they have not consented to them specifically. Thus while rules that govern interactions within a society of states, they do not comprise a proper legal system. This has the dual implications that (a) nothing that states presume to be international “law” really is genuine law, and (b) states that do not consent to treaties and other supposedly legal arrangements are not bound by them, even though they are frequently presumed to be.

Kelsen, one of Hart’s major interlocutors and the person to whom Hart takes himself to be responding in the above passage, writes

But actually men are by their nature neither free nor equal; and even if they were free and equal by their nature, they are, by law, bound to behave in a certain way, without their consent. The theory of a common consent of the states voluntarily entering the international community, as the basis of this community or of the international law constituting this community, rests on the same fiction. The states are

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<sup>82</sup> Hart, *The Concept of Law*, 230–231; Dworkin’s arguments against the state consent view seem also to follow this train of thought. See Dworkin, “A New Philosophy for International Law,” 6–10.

bound by general international law without and even against their will. Thus, for instance, a new state, as soon as it comes into existence, has all the rights and all the duties stipulated by general international law, without any act of recognition of general international law on the part of this state being necessary.<sup>83</sup>

Even Kelsen, who Hart casts as the last, best, positivist defender of the authority of international law, rejects the state consent thesis. His specific objection is different from Hart's however. For Hart, the failure of international law is that states do not consent to a secondary rule of recognition. For Kelsen, it is that specific states do not consent to specific (primary) rules, yet are bound by them.

What is of interest to the current project is not that the state consent thesis fails, but *how* it fails. According to Kelsen's diagnosis, the problem with state consent theory is that, in practice, each state does not consent to each rule. From this we can infer his vision of the state consent thesis: every state must consent to every individual rule to which it is held. This is a very strong thesis — so strong that I doubt whether many philosophers would defend it seriously. But according to Hart's vision of the state consent thesis (which, remember, he rejects), each state would not have to consent to each rule. Rather, states would only have to accept a secondary rule of recognition. That they in fact do not is the real problem for state consent theory.

What both of these authors assume, I think rightly, is that any normative theory of law has to be to some extent responsive to the facts on the ground. What both Kelsen and Hart are trying to draw our attention to, and the basis of their respective critiques, is that the state consent thesis, if correct, would demand vast and sweeping revisions of current practice. Customary law would be out. Administrative law would be out. Any multilateral treaty or

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<sup>83</sup> Kelsen, *Principles of International Law*, 154; See also Dworkin, "A New Philosophy for International Law," 8, where Dworkin raises a similar objection, though he does not cite Kelsen.

convention (including the very treaty of Westphalia) would not be binding for states that did not exist at its creation without some explicit sign of acceptance. *And this is a problem for state consent theory*, Kelsen and Hart say.

Why is being highly revisionistic a problem? After all, everyone agrees that the current international legal system has problems that demand revision. Sure, states *act* as if what they call international law is authoritative, but humans and the collective agents they constitute are fallible. What, in principle, is wrong in holding that they are simply wrong about much, most, or all of law? The problem is that such vast revisionism represents a fatal break between philosophy and the lived world. There is something we do, in our world, called international law. It appears to be normative. It is widely accepted. It shapes behavior and high stakes decisions for real people every day. That such a system exists in a sociological sense is undeniable. What Hart and Kelsen can teach us is that we should be doing work about *that* system; that if *anything* is genuinely normative, then so is this; and that if we have a legal theory that teaches us that the entire system is, or even just *could be*, a mistake, such incompatibility should count *against the theory*, not against the genuine normativity of the practice. Dworkin, I think, misses precisely this point when he writes

Hart himself raised the question whether so-called international law really counts as law on his new test. However, though he phrased that question in the traditional way, he actually changed the subject. He asked a question for social scientists...<sup>84</sup>

It might be overly charitable (even self-indulgent) to claim that something like the argument I have suggested here is what Hart or Kelsen had in mind. But neither author was unclear about their interest in Dworkin's doctrinal question, and it is certainly *uncharitable* to say that they are simply talking past it.

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<sup>84</sup> Dworkin, "A New Philosophy for International Law," 4.

### *In Defense of State Consent*

There is one, and perhaps only one, way to save state consent theory from this objection: we can lower the bar for what counts as consent. The view that Hart and Kelsen (particularly Kelsen) critique seems to assume that the kind of consent necessary to authorize legal rules is explicit. Handshakes, signatures, or the utterance akin to Hobbes's oath: "*I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.*"<sup>85</sup> But perhaps these explicit signs of consent are not necessary. After all, informal agreements between friends (informal, but still agreements with all attendant obligations and rights) can be accepted with a nod, a smile, and perhaps even silence in the proper context. Even if each state has not given explicit consent to each international legal rule by which it is bound, perhaps they have given consent in one of these watered down senses. If we could offer an intuitive argument for other forms of consent, and if we could show that states have engaged in *these* behaviors, then maybe we could save the state consent view with respect to the scope criterion.

There are two main directions this "watering down" strategy might take. The first maintains that individual states must consent to the individual rules to which they are bound, but broadens what it takes to give consent. Thus we go from Hobbes's oath to a signature, to a handshake, to a nod, to a wink, until we arrive, in Locke's hands, at tacit consent where mere compliance or residence within the physical boundaries of an area governed by a legal order reigns. The second direction suggests that states need not consent to each individual rule, but to some second order proposition. Hart thought states would only need to consent to a secondary rule of recognition. A Gilbertian might think that states only need to consent to becoming part of the collective governed by international legal rules. We could even

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<sup>85</sup> Hobbes, *Leviathan*, Book II, Ch. 17, Par. 13.

intertwine the two directions to produce a view in which states do only have to accept some small number of second order propositions *and* tacit consent suffices.

While these are possible ways to save state consent, I think they are best avoided. The further we go in these directions, the more strained it is to call what states do “consent,” in the sense required to bear on questions of rightful authority, especially in view of the ideas of legal obligation and rights to freedom and autonomy that motivate state consent theory in the first place. What is worse, even the most watered down version of actual (including tacit) consent arguably cannot capture all or even most of international law as we find it. As suggested earlier, even as regards treaty law, it makes little sense to say that states consent to the principle *pacta sunt servanda*, the principle by which consent is supposed to bind in the first instance.

Still following one narrative popular in the western analytic political philosophy tradition, the next step after tacit consent is hypothetical consent. Rather than ask what states do accept, we can ask what they *would* accept, or what they would accept if they were thinking straight, or behind a veil of ignorance, or willing to cooperate on reasonable or mutually acceptable terms. But importantly, this is a step that a state consent theorist cannot take. As Dworkin rightly says, “a hypothetical contract is no contract at all.”<sup>86</sup> This does not imply that hypothetical contract views are to be rejected. But if they are true, it is not because something is special about consent, as opposed, say, to there being something special about engaging in particular forms of practical reasoning specially connected to the social forms of life we participate in.

Gilbert’s work might offer us another way to avoid the scope issues of the state consent view. She offers a version of the problem of political obligation, what she calls the

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<sup>86</sup> Dworkin, *Taking Rights Seriously*, 151.

“membership problem”. She writes

It may be that *membership* in any social group involves obligations. If so, political obligations may constitute the political society version of these obligations of membership. That there are obligations of membership in general is an important part of what I shall argue.<sup>87</sup>

What she suggests in this passage and subsequently argues for is that membership in a group may suffice to ground certain forms of obligation. She goes on to argue that these membership obligations have the form of contractual obligations. Her idea, it seems, is that contract obligations might actually be a kind of membership obligation, and not vice versa as is sometimes assumed. Mere group membership, perhaps little more than simple association, could suffice to ground directed duties. It would be a mistake, however, to call this a “consent” theory, since membership, not consent, does the normative work.

Whether such an “associative” view could suffice to ground legal obligations in such a way that it also satisfies the scope criterion depends, this chapter has argued, on how voluntaristic our conception of group membership is. Certainly agents must explicitly consent to join many groups like political parties, campus clubs, and marriages, at least in the standard cases. But we might not consent to joining all groups to which we have obligations. The family is an important example. It is as certain that we have familial obligations as it is that we do not consent to who our families are. If we could develop a non-consent based theory of group membership, perhaps that could suffice to ground the kinds of legal obligation we are looking for. I will propose one such view in Ch. 4. This might be seen as a version of Gilbert’s joint commitment account that focuses on the international case and so marginalizes the relevance of consent as far as possible. In this way, it seems to me that the practice approach is distinct from her general theory of joint commitment.

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<sup>87</sup> Gilbert, *A Theory of Political Obligation*, 18 (italics added).

### *Looking Forward*

Consideration of the state consent view illuminates our larger problem of understanding the justification for contemporary law and the accompanying obligation to conform. In its favor, the state consent thesis offers an intuitive explanation of the presumed form of international law. Substantiated by Margaret Gilbert's account of promising and agreements, this presumptive form is isomorphic with contractual obligations. However, the voluntarism essential to the state consent view limits its ability to justify legal duties that defy interpretation as consensual. Thus the state consent view fails to satisfy the scope criterion. However, thinking about ways to water down the idea of consent, thus reclaiming larger portions of the presumed scope of law, suggests promising directions for further inquiry, though they demand departure from forms of actual consent. The next chapter considers one such view, presented by a person who is widely considered to be the pre-eminent legal scholar of the 20th century.

## Chapter 3: Dworkin's New Philosophy

### *Introduction*

One of the most promising answers to the doctrinal question of legal obligation in international affairs is Ronald Dworkin's posthumously published "New Philosophy" of international law.<sup>88</sup> Dworkin's own arguments are woven into diverse discussions of history, policy, and legal theory, but it may be helpful to reconstruct the analytical core of the argument lying behind Dworkin's own commentary. I hesitate to lose the richness of the view, and indeed will draw on a number of additional sources to provide substance where Dworkin prefers to stay quiet. But my main task in this chapter is to give a clear account of an encouraging development in the field, as both enhanced by contributions in other disciplines, and as interrogated with the scrutiny characteristic of modern analytic philosophy.

To oversimplify, the New Philosophy grounds international legal obligation in the state's duty to improve its own legitimacy. In the context of Dworkin's wider body of work, and along with his accompanying discussion of the "principle of salience", this claim has led at least one commentator to take the New Philosophy to clearly be a modern version of natural law theory.<sup>89</sup> This is certainly a natural interpretation of Dworkin's words, but it is not the only available interpretation.

In reconstructing the arguments behind Dworkin's view, I will suggest that we discover an ambiguity in the New Philosophy. A state's duty to improve its own legitimacy, the cornerstone of the view, need not be a *natural* duty (as Dworkin and at least one commentator seem to contend). Indeed, Dworkin's own attention to the sociological

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<sup>88</sup> Dworkin, "A New Philosophy for International Law."

<sup>89</sup> Compare Lauterpacht, *The Function of Law in the International Community*; Griffin, *On Human Rights*.

circumstances of international legal practice lends itself to quite different, more contextually sensitive accounts of political obligation. This includes normative accounts that a legal positivist – Dworkin’s expressed and opposed interlocutor – might adopt. Far from an objection, the possibility of a more “positivistic” account represents a fruitful avenue for future research in international legal theory, which I begin to consider in this and the following chapter.

In this chapter, I take first steps toward outlining a practice-based version of the New Philosophy, a version grounded, not in natural duty, but in associative obligations. Although it is essential to his view, Dworkin himself says very little about the relationship between the legitimacy of a state and the legitimacy of the state system. By clarifying this relation, it becomes clear that a practice approach is not only a distinctive possibility, but also has the best chance of surviving philosophical and social scientific scrutiny.

### *Summary of the New Philosophy*

Before offering a sustained analysis of the New Philosophy, I begin with a brief overview of Dworkin’s basic argument. For the moment eschewing good philosophical practice of considering alternatives, making clear distinctions, heading off objections, etc., I focus on briefly summarizing the main outlines of Dworkin’s position, simply to put a version of the view on the table, with a promise to provide sustained arguments subsequently.

In our world, political power is divided among semi-autonomous political entities called states. Each of many states is invested with more or less the same formal right to rule. In the course of governing well, the state necessarily exerts coercive force on its citizens. Unlike a highway bandit, coercing passersby at gunpoint, states presume, and are widely presumed by citizens and other states, to legitimately have a right to exert such force. A state’s legitimacy is

what distinguishes state governance, which is permissible, from mere coercion, which is unjustifiable by presumption. Accordingly, states have a duty to uphold and improve their own legitimacy, to insure that its exercise of coercion is and remains justifiable to all affected.

Whether or not this has always been the case, as states engage in governance and exercise the right to rule, they frequently interact with each other in the modern global context. This has led to a complex social practice of alliances and dispute resolution, trade relations, and diplomatic standards, which bind states to one another as members of and participants in a state system. This system is primarily instantiated and constituted by the states themselves and by the actions and judgments that are recognized by the community of states. For instance, as we witness the growing recognition of various non-state actors (NGOs), as well as international organization such as the United Nations (UN), the International Labor Organization (ILO), and the World Trade Organization (WTO), the international community of states is increasingly able to (perhaps rightfully) enforce certain rules against particular members of the larger state system.

Like NGOs, states too must be recognized. Descriptively, states themselves only have the right to rule in virtue of recognized participation in the state system. The state system, then, is best understood as a global social practice of mutual recognition.<sup>90</sup> Normatively, the legitimacy of a state's right to rule depends on the legitimacy of the state system itself. Because states have an obligation to uphold and improve their own legitimacy, they have an obligation to uphold and improve the legitimacy of the state system.

But the state system is pathological, which is to say, it normally tends to impose risks of harm and real injuries on its participants, even in the course of functioning well, according to

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<sup>90</sup> See, for helpful discussion, Wendt, *Social Theory of International Politics*, 73–74.

its basic underlying purposes.<sup>91</sup> Whatever its aspirations, these risks and harms undermine the system's legitimacy. If a state is to fulfill its duty to be legitimate, it must take steps to ensure that the state system itself is legitimate, and so take steps as necessary to address these pathologies.

International law, then, is the general means by which states, through compliance, can fulfill this basic duty. That is to say, international law is a body of legally authoritative norms that addresses the pathologies of the state system, by seeking to ensure that risks and harms it imposes are reasonably justifiable to those imposed upon, consistent with its basic, politically decentralized structure. In addressing pathologies by establishing the international rule of law, the state system avoids being subject to decisive moral objection. By adopting a body of norms that are presumed to be *legally* obligatory, independently of their specific content, the state system can demand obedience despite moral disagreement about individual laws. Alternative means for upholding and improving the legitimacy of the state system are either impracticable (like the establishment of a world state), or are not obviously normatively superior.

Why then should states comply with international law? States have an obligation to improve their own legitimacy, and so the legitimacy of the state system. The only way to uphold and improve the legitimacy of the state system is to help address its pathologies, and the best way to do that is to comply with international law, even if individual laws conflict

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<sup>91</sup> I borrow the term "pathology" from Aaron James ("A Practice Theory of Global Justice." unpublished outline), who uses it in a suggestive way in order to distinguish untoward tendencies of a decentralized political system from mere states of affairs or outcomes attributable to other social activities. This rough class has also been termed "standard threats" (Beitz, *The Idea of Human Rights.*), and "justice sensitive negative externalities" (Kumm, "Constitutionalism and the Cosmopolitan State."). Although he was one of the first authors to recognize the special normative significance of these harms, and although they are clearly what he has in mind, Dworkin did not provide a clear analysis of them. See, for example, the discussion of coercion on p. 16.

with a state's own conception of morality. States, therefore, have a legal obligation to comply with international law because, and to the extent that, international law corrects the pathologies of the state system.

### *States and the State System*

I now turn to a more detailed exposition of Dworkin's position as he himself presents it. A useful point of entry is his sociological analysis of the current state of affairs in modern international law and politics. "The world is divided," he writes, "into sovereign states, each of which is in principle immune from interference by other states".<sup>92</sup> Their political powers are expressed as what we call sovereignty or the right to rule, a bundle of rights and obligations. These rights include, but are not limited to the right to pass and coercively enforce laws within a territory, the right to control movement across borders, the right to extract, use, and sell resources, the right to treaty, the right to borrow money, and the right to forcibly repel invading forces.<sup>93</sup>

Whatever may have been the case in the past, or could have been the case in humankind's counterfactual departure from earlier history or an imagined state of nature, today there are many states. Together, these states form a global community called the state system. Very little is said in Dworkin's account about the relationship between the state and the state system, which is surprising since this relationship is essential for Dworkin's

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<sup>92</sup> Dworkin, "A New Philosophy for International Law," 15–16, compare with Krasner, "Sovereignty An Institutional Perspective"; Krasner, *Sovereignty*. Though he refers to this view as "conventional", part of the strength of the New Philosophy is that it appropriates central parts of its competitors for its own purposes.

<sup>93</sup> Krasner, "Sovereignty An Institutional Perspective"; Krasner, *Sovereignty*; Lauterpacht, *The Function of Law in the International Community*; Paul, "Sovereignty, Survival and the Westphalian Blind Alley in International Relations"; Ruggie, *Constructing the World Polity*. Krasner, Ruggie, Paul, Lauterpacht.

argument for the legal obligations of states, and since there is a vast literature, in international relations theory and political science, about this relationship.<sup>94</sup>

This is not to say that Dworkin is silent on the relationship between the state and the state system, and we can piece together a view from remarks provided. In what I believe is a key passage, which Dworkin offers as a passing comment, he writes that “each of those states derives its moral title to govern a particular territory from the arrangements that make up that international system”.<sup>95</sup>

To elaborate, Dworkin seems to be suggesting that all states bear the same rights as a matter of being recognized sovereigns within this “Westphalian” system, which “balkanized” sovereignty over distinct territories. Yet it would be a mistake to think that states are merely the passive recipients of commands from the state system, because, after all, it is “the individual states that make up the system.” What emerges from these descriptions is a picture of a three-tiered international system. At the top is the Westphalian regime in virtue of which political power is held by states. States, the second tier, are more or less homogenous entities, at least so far as the right to rule is concerned (i.e. all states have the same right to undertake treaties, even if they use it differently; they all have the same right to territorial integrity, even though they govern over different territories; and so on). States are only sovereign (and only legitimately so, as we will see) because of their participation in the state system. Individuals, over whom the state has the right to govern, populate the third tier.

Here it is tempting to conclude that Dworkin is affirming the conceptual priority of either the state or the state system over the other. After all, if states get their powers from the

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<sup>94</sup> To name only a few, some of the major contributions to this discussion are Chayes and Chayes, *The New Sovereignty*; Krasner, *Sovereignty*; Kratochwil, “Limits of Contract, The”; Onuf, *International Legal Theory*; Ruggie, *Constructing the World Polity*; Wendt, *Social Theory of International Politics*.

<sup>95</sup> Dworkin, “A New Philosophy for International Law,” 16-19.

state system, then the state system must come first, conceptually and perhaps practically speaking. At the same time, given the current and foreseeable absence of anything resembling a world state, the state system is instantiated by the interactions between states and their mutual recognition of one another. So, it may seem, the state must precede the state system.

Here we might compare the “agent-structure” debate, one of the most persistent and well-explored debates in 20<sup>th</sup> century international relations theory.<sup>96</sup> On one side are the realists, who argue that the structure of international relations (e.g. the state system) determines the actions of agents within that structure.<sup>97</sup> Structure is explanatorily prior. On the other side are the liberals, who argue that the actions of agents are what shape the international system in the first place, and so agents are conceptually prior.<sup>98</sup> Constructivists, notably including Alexander Wendt, try to accommodate both sides of this explanatory debate.<sup>99</sup> State identities and interests are shaped by the world they live in, but as states act, they shape and reshape the very social world that constitutes and defines them as states in the first instance.

Dworkin seems to agree most closely with the constructivists. As states act, they performatively construct the state system. Their actions are performative interpretations and expressions of the state system itself. At the same time, those actions are constrained, descriptively and normatively, by the very system being performatively constituted. So Dworkin might say, with Wendt, that the state and the state system are mutually constitutive. I return to this point and its importance momentarily.

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<sup>96</sup> Wendt, “The Agent-Structure Problem in International Relations Theory.”

<sup>97</sup> Morgenthau, *Politics Among Nations, Revised by Kenneth W. Thompson*; Waltz, *Realism and International Politics*.

<sup>98</sup> Kant, *Perpetual Peace, and Other Essays on Politics, History, and Morals*.

<sup>99</sup> Wendt, *Social Theory of International Politics*.

### *State, System, and Legitimacy*

We might further elaborate Dworkin's basic picture. In the simplest terms, states rule. They use coercive force to constrain and manage the lives of the individuals who live under them. But implicit in state rule is the assertion that this rule is not merely coercion, it is governance. In a recent article, Daniel Bodansky offers a helpful description of governance when he writes that "Although definitions vary, the essence of governance involves making decisions for a collective – decisions that not merely affect others indirectly, but are directed at them and are intended, in some way, to constrain their behavior."<sup>100</sup> Bodansky continues by contrasting legitimate governance with mere compulsion. Unlike compulsion, legitimate governance "has a normative quality. A legitimate institution has a right to rule; it is 'morally justified in attempting to govern'".<sup>101</sup> By purporting to govern, in Bodansky's sense, states performatively assert the legitimacy of their claim to the right to rule. Furthermore, and still as a matter of description, states and their citizens generally recognize the legitimacy of each state's claim to these rights. Though legitimacy can be (and is) contested, states and other international actors generally respect the claim of states to rule legitimately, according to widely accepted legitimacy expectations.

At the core of Dworkin's view about the state's obligation to comply with international law is the state's duty to improve its own legitimacy. Bodansky's distinction between mere coercion and governance helps us understand why Dworkin might maintain that states have such an obligation. State legitimacy is what distinguishes governance from mere coercion, the state from the highwayman. And although Dworkin is largely silent about the ground of the state obligation to be legitimate, he clearly affirms it. A natural interpretation is that he means

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<sup>100</sup> Bodansky, "Legitimacy in International Law and International Relations," 5.

<sup>101</sup> *Ibid.*, 7; quoting from Buchanan, "The Legitimacy of International Law."

to affirm a natural duty of legitimacy, perhaps akin to Rawls' "natural duty of justice," which he takes to be relatively uncontroversial and widely acceptable.

Dworkin does speak to long-standing questions about the normative grounding of a state's claim to the right to use coercive force to govern, in the following passage:

The old assumption that hereditary monarchs have an absolute right to govern, at least in the temporal sphere, was gradually replaced by a starkly different assumption: that coercive political power is consistent with the dignity of citizens only if it can be justified not just in pedigree but in substance—in the way it is exercised—as well. Competing theories of legitimacy were constructed and debated; these finally settled into theories about the best conceptions of democracy and of the rights of individual citizens in a democracy. But all these theories were confined to arrangements within sovereign states.<sup>102</sup>

We might explicate what Dworkin has in mind as follows. In the history of western political philosophy, there have been two predominant views about the source of state legitimacy. The first, the "endogenous view," as we may call it, holds that a state is legitimate if approved or otherwise authorized by its citizens. The second, the "exogenous view," holds, by contrast, that state legitimacy depends on normative considerations outside the state. Though each is worthy of consideration, Dworkin seems to believe that only the exogenous view can explain legitimacy in the modern context.

One might think that states become (more) legitimate by receiving approval or other authorization from their subjects. This is the endogenous view of state legitimacy – legitimacy comes from within. Such a view would conform nicely to the popular sovereignty tradition.<sup>103</sup> But, descriptively, there are many states that appear to be legitimate bearers of the right to rule, even though they make no pretenses to democracy or popularity. It would seem a mistake to say that the Saudi Arabian government is not the legitimate ruler in Saudi Arabia, or the Chinese government in China. These may not be just rulers, given the severe

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<sup>102</sup> Dworkin, "A New Philosophy for International Law," 16.

<sup>103</sup> Hobbes, *Leviathan*; Locke, *Second Treatise of Government*; Rousseau, *The Social Contract*.

oppression and high rates of political and economic inequality in those countries, but they are certainly the legitimate rulers there.

Moreover, if state power is somehow derived from the will of citizens, one would expect vast diversity in the form of the state. One nation would have consented to invest its state with one set of powers, and another nation its state with another set of powers. But this is not what we see. States may be diverse in terms of the kinds of domestic policies they accept, but are strikingly homogeneous otherwise. All states have the rights and obligations listed when we first introduced the idea of the state – the right to govern domestically, control borders, extract resources, etc. Even newly recognized states, prior to any form of election or popular demonstration, have these rights. This homogeneity is inconsistent with the popular sovereignty thesis in particular, and with the endogenous view generally.

Instead, Dworkin encourages us to take seriously the exogenous view that, descriptively, state power is granted as a matter of global politics. As suggested earlier, in the beginning, states are members of the state system. But rather than thinking of states as so many mushrooms, popping up independently in different corners of the world and expanding until they bump into one another<sup>104</sup>, we should think of states as political entities endowed with rights in virtue of their recognized membership in an international society. Put otherwise, states bear the sovereign right to rule only if and because they are recognized members of the state system.

“We the People” are not the source of state power, at least not anymore, and we see this played out in modern practice. Not only are oppressive and unpopular regimes able to maintain their hold on power by sheer force, these regimes frequently maintain international recognition as the sovereign governing body in that region. Syria serves as a helpful current

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<sup>104</sup> Hobbes or even Plato might have held such a view

example. This government has killed scores of its own citizens by horrific and brutal means and has displaced millions more. Nevertheless, this government is the internationally recognized sovereign of the Syrian territory and population, largely because of the absence of a widely acceptable alternative governing body. It would be a mistake to say that Assad's government is not sovereign in Syria, or that it does not have the internationally recognized and right to rule. It is and it does.

But Dworkin might have taken this a step further. Not only does Assad's government rule, its continued rule is the performative assertion of the right to rule. That is, Assad is asserting the legitimacy of his government, in both official pronouncements and its failure to ceded the reins of power to other claimants. By recognizing those assertions, if only by not publicly contesting them—by letting them stand, as setting the score in global politics—the international community in effect recognizes the legitimacy of the Assad regime. We can of course still criticize the Syrian government, and hold it accountable for injustices. But the deeper assumption is that, for the modern world, state power and legitimacy are not endogenous – they do not come solely from the will of the people, suitably defined – and so cannot be justified by reference to internal processes or conditions.<sup>105</sup>

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<sup>105</sup> Current events in Crimea also serve as a helpful example. In light of the mid-March 2014 referendum, it appears that the vast majority of Crimeans (even taking into account the Tatars' and other minority groups' abstention from the vote) are in favor of secession from Ukraine and inclusion in the Russian Federation. But the international community is far from univocal about the significance of this vote. Russia has recognized the sovereignty of the new Crimean government, even going to far as to cosign a treaty with them. But the United States, the EU, and the Ukrainian government do not recognize the legitimacy of the new government. At the moment I write these words, the following seems to be the right interpretation of the situation: despite the will of the Crimean people, the legitimacy of a sovereign Crimean state is yet to be determined. If the international community comes to recognize the Crimean state, then it will have been a state ever since the referendum. If the international community does not recognize the Crimean state, then it never was a state and has always been part of Ukraine. My point, however, is that it is not the domestic process that will decide whether Crimea is a state. Instead, legitimate statehood depends on international recognition.

Gift-giving might help us better understand the exogenous account of state legitimacy. When we give a gift, we purport to imbue the recipient with a set of rights to that gift, usually the rights of property. But for these rights to be genuine, for the receiver to be the legitimate owner of the gift, the givers must have been in a normative position to imbue those rights. In the usual instance, gift-giving is a transfer of ownership. If I am the owner, I am in a position to transfer my rights of ownership to you. If I am not the owner, I may be able to physically hand an object to you in a way that resembles gift-giving, but I cannot imbue you with the rights of ownership.

Something similar may happen between the state and the state system. The right to rule is like a gift. When a state (or proto-state) is recognized as sovereign by the state system, the state system purports to imbue the state with a new set of rights. These rights are the right to rule. But in order for this allocation of rights to have genuinely occurred, in order for the state to be the legitimate bearer of the right to rule, the state system must have been in a normative position to give those rights in the first place. To use Dworkin's terminology, in order for the state to be legitimate, the state system must also be legitimate.

So, on this view, in order for a state to satisfy its obligation to be legitimate, two conditions must be met: First, the state must be a recognized participant in the state system; second, the state system must be legitimate. Dworkin is very clear on this point when he writes:

It follows that the general obligation of each state to improve its political legitimacy includes an obligation to try to improve the overall international system. If a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive government, then it has a political obligation to do what it can in that direction.<sup>106</sup>

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<sup>106</sup> Dworkin, "A New Philosophy for International Law," 17.

To highlight the point, Dworkin adds, “That requirement,” what he calls the “duty of mitigation”, “sets out, in my view, the true moral basis of international law.”<sup>107</sup>

*The Legitimacy of the State System and the Duty of Mitigation*

The question to answer, then, seems to be: What must states do to uphold and improve the legitimacy of the state system? But before this question can be answered, Dworkin thinks that we need a sense of what could threaten the legitimacy of the state system in the first place. Just as a physician must diagnose the cause of a pain before she can prescribe a cure, so we must identify the potential sources of illegitimacy in the state system, before we can tell states how they ought to address them. With this intention, Dworkin offers a discussion of “the different ways in which individual states fail their responsibilities to their own citizens when they collectively accept the benefits and burdens of the pure unrestricted sovereignty that the Westphalian system gives them.”<sup>108</sup> He elaborates as follows:

These are all ways in which the unchecked state sovereignty system impairs or threatens the legitimacy of the individual states that make up the system. But since each of those states derives its moral title to govern a particular territory from the arrangements that make up that international system, it therefore has the further, independent reason...for concern that the system on which its legitimacy depends in that more fundamental way is not itself illegitimate.<sup>109</sup>

What Dworkin proposes in these remarks is that there is a specific class of morally salient problems, specific to the “unchecked state sovereignty system”, that threaten the legitimacy of that system and so the legitimacy of states.

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<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid., 19.

What are these problems, and how do they damage the legitimacy of the state system? Dworkin himself offers very little guidance on this question, except that he gives four helpful examples of the kinds of problems he has in mind. To paraphrase, they are as follows:

- 1) Because states in the modern Westphalian state system are allowed a great amount of autonomy in deciding the structure of domestic governance, citizens of states are exposed to the risk of tyranny and oppression by their own government.
- 2) Because states in the modern Westphalian system are permitted to autonomously govern themselves, these permissions serve as institutional barriers to justified intervention and aid when people in foreign countries are in need.
- 3) Because political power is decentralized in the Westphalian system, otherwise autonomous states must coordinate with one another to address cross-border issues. But such collective action can be difficult in prisoner's dilemma and stag-hunt type situations.
- 4) Because states in the modern Westphalian system are allowed autonomy in determining the structure of domestic politics, citizens are at risk of not being afforded their right to political representation.

Certainly these are not the only adverse tendencies of the state system, though these suggest paradigmatic examples. We might further characterize the larger class of problems at issue as follows.

First off, the “problems” in question are risks of harm and real injuries that agents are forced to bear while living under the state system. Generally, however, they are attributable to the state system, in virtue of untoward tendencies or “pathologies” that arise from its politically decentralized nature.

This is to exclude hardships due simply or mainly to bad luck, which may not be caused by human activity, such as harsh weather that washes away a farmer's crops, a person or electrical grid being struck by lightning, or a sudden state-wide water shortage in desert countries. While many such events may be addressed through precautionary social policy, to the extent they cannot be prevented or entirely rectified, the resulting hardships would not count against the state system's legitimacy. Not only are natural accidents and acts of God problems for any political order, they cannot be causally linked, however indirectly, to the state system itself. These kinds of problems, therefore, do not ground reasonable objections to the legitimacy of the state system.

The relevant class of problems also excludes mere "bad apple" actors, who abuse or otherwise misuse power, and the costs they impose upon others within the larger system. These costs and risks may be unjust, but to the extent they are not inherent problems with the state system itself, but to actors working within its structures, they may not reflect illegitimacy in the larger system. Example may include certain tyrannical leaders and rogue states, which knowingly violate the obligations of responsible statecraft; the inadvertent deaths during the 2013-14 Maidan protests in Ukraine; or the misappropriation of funds during Berlusconi's administration. In such case, there is at least a case to make that the injustice is not sufficiently attributable to the structure of the state system, as opposed to objectionable individual decisions that agents make within that system (though of course one can equally argue that a more legitimate system would adopt practices that make such abuses less common than they otherwise might be).

With this fuller understanding of state system "pathologies" in hand, we are in a better position not only to understand Dworkin's examples, but enumerate further untoward

consequences of decentralized global governance in the post-war and modern eras. These include:

*Risk of Domestic Tyranny:* Because states have the right to pass and enforce laws internally, and other states are prohibited from interfering, individuals are left unprotected from domestic inequality, oppression, persecution, ethnic cleansing, genocide, and any number of other horrible things a government can do to its own citizens. Individuals are not protected against the tyranny of their own state.

*Environmental Coordination Problems:* Because states are granted exclusive control of a territory, many of the environmental problems with which we are currently faced demand coordination across borders. However, such large scale and costly cooperation is hard-won, slowly adopted, and easily undermined in a system of sovereign states at the potential risk of global ruin. Importantly, this is not simply the product of a few bad apples – a selfishly obdurate developed state or an insatiable developing state with an appetite for coal, say – but a consequence of any attempt to get any group of complex but otherwise autonomous bodies to do the same thing in a coordinated way at personal cost.

*Economic Coordination Problems:* Similarly, as domestic economies are increasingly exposed to international markets, maintained economic stability has become a matter of coordinating domestic policy. Because economic decision-making and governance is decentralized, states are effectively stuck with the problem of other minds and the need to coordinate with those others nevertheless.

*Risk of Unfair Distribution:* Because states control fiscal and economic policies, and because different policy regimes can have wildly different consequences, the state system is consistent with severe socio-economic inequality between states.

*Reduced Security Assurance:* Because states are mostly independent of one another, they are not always, or ever, certain about one another's military capabilities and ambitions. The system provides no assurance, in whatever form, that states will not aggress against one another. A state is only as safe as its own diplomats and military can keep it, and this uncertainty can lead to mutually undesired escalation and vast overinvestment in security.

*Exploitation Risk:* Similarly, the state system does not protect weak and poor states from exploitation by strong and wealthy states. A small state, whose citizens' livelihoods depend on trade with a stronger state, is at the mercy of the stronger for fair terms and compliance.

*Lack of Representation:* Finally, by granting states the right to exclude external governance regimes, the state system reduces the political power of many people, now categorized as "non-citizens" or "aliens", whose lives are deeply effected by a country's policies. American presidential elections, for example, have vast implications for the lives of individuals around the world, but the American president is only elected by and so accountable to the American citizenry.

In such cases, I suggest, certain morally salient risks and harms are evident, soluble by available means, and emerge as byproducts of the state system, even when it working as it is supposed to according to its basic purposes. In theory at least, such tendencies might arise under conditions of impeccable luck and perfect compliance.<sup>110</sup>

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<sup>110</sup> In conversation, Nicholas Onuf once tried to sum up my conception of pathology as a sort of dysfunction, when, to paraphrase his words, "institutional constraints make the mutual satisfaction of interests impossible." He was correct to invoke the idea of function, but the matter, I think, is more complicated than he made it seem. First, it seems to me to be a mistake to think that the function of the state system is the mutual satisfaction of state interests. As we have seen, I take the function of the state system to be the realization of more specific values (peace, prosperity, and pluralism). Second, I am hesitant to adopt the language of dysfunction,

The larger idea, then, is that the state system can only be regarded as legitimate when such pathologies are being addressed. Only then can states justifiably claim that their exercise of power is more than mere coercion, and is true governance. In Dworkin's terms, a state's obligation to improve its own legitimacy implies an obligation to improve the legitimacy of the state system, and that, in turn, implies an obligation to address or "mitigate" its adverse tendencies.<sup>111</sup>

*International Law, Compliance, and the Principle of Salience*

It remains to be seen how this duty translates into a duty to comply with international law. In this connection, Dworkin writes,

That duty of mitigation provides the most general structural principle and interpretive background of international law. But as it stands, it is not sufficiently determinative. In many circumstances, a number of very different regimes of international law would each serve to improve the legitimacy of the international system, were it enacted and enforced, and states may reasonably disagree about which would be best.<sup>112</sup>

So even with the duty of mitigation in hand, we are stuck with a puzzle about the obligation to comply with the law. Dworkin takes for granted that some legal system or other will be the best or perhaps only way for states to address the pathologies of the state system. But even granting that thought, Dworkin worries that multiple versions of a given international legal system will be equally well suited to the task. Given that international law can be informally legislated, as in the cases of customary and administrative law, an account of this cannot

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which, to my mind, invokes the idea of a system that breaks down. A dysfunctional car does not run. But the idea of pathology is not so dramatic, and includes references to optimality as well as mere function. A pathological system may be one that merely imposes unnecessary risks, without being wholly dysfunctional. This is one of the important points about pathologies: they count as meaningful objections to a practice because they can be the products of otherwise perfect functioning.

<sup>111</sup> Dworkin, "A New Philosophy for International Law," 19.

<sup>112</sup> Ibid.

simply invoke a procedural secondary rule of recognition. But how then are we to know which version of international law is *the* law?

Dworkin's answer is what he calls the "Principle of Salience":

If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole.<sup>113</sup>

The basic idea of salience is that if, within a population or society, there is an identifiable and predominant set of rules governing social interactions, participants have a prima facie duty to follow those rules as well. This is more than the platitude, "When in Rome, do as the Roman's do." Dworkin's "proviso" conjoins the socially relativistic idea of salience and the normatively rich principle of mitigation. States have a prima facie duty to comply with going international legal practice, but only *really* have such a duty if that legal practice in fact works to mitigate pathologies of the state system.

### *Natural Law and the New Philosophy*

In sum, then, for Dworkin, a state's duty to comply with the law stems from its duty of mitigation, which itself stems from the duty to be legitimate. But it is not obvious, on its face, what the basis of this duty is supposed to be. Since the initial circulation of the new philosophy (at least c. 2010), perhaps the most helpful contribution to the associated literature has been Matthias Kumm's essay "Constitutionalism and the Cosmopolitan State". Kumm offers us an account of not just one but two different justifications for the duty to be legitimate. Very much in the same vein as Dworkin, Kumm writes:

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<sup>113</sup> Ibid.

One of the core purposes of international law is to create and define the conditions under which a sovereign state's claim to legitimate authority is justified. States have a standing duty to help create and sustain such conditions and an international legal system that is equipped to fulfill that function.<sup>114</sup>

But Kumm immediately distinguishes his own view from Dworkin's in an attached footnote when he writes:

But whereas Dworkin's account appears to be focused on the ways in which sovereigns are structurally incapable of adequately securing the rights and public goods for their respective citizens, the argument here grounds cosmopolitan obligations in the fulfillment of duties of justice towards outsiders.<sup>115</sup>

According to Kumm, Dworkin ought to be interpreted as saying that states have an obligation to improve their own legitimacy because only by doing so will individual persons be afforded their basic rights and needs. This seems like a fair interpretation, given Dworkin's explicit concern with the treatment of individuals by their governments in statements like the following:

A coercive government is of course illegitimate if it violates the basic human rights of its own citizens. Any state, even one that has so far been just and benign, therefore improves its legitimacy when it promotes an effective international order that would prevent its own possible future degradation into tyranny.<sup>116</sup>

On this reading, individuals are the bearers of a set of natural rights, largely akin to the list we find in the UDHR or the American Bill of Rights. These rights ground correlative duties for the state. Among these duties, or perhaps taking these duties as a whole, is the state duty to be legitimate.

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<sup>114</sup> Kumm, "Constitutionalism and the Cosmopolitan State," 8.

<sup>115</sup> Kumm, "Constitutionalism and the Cosmopolitan State," 8n12.

<sup>116</sup> Dworkin, "A New Philosophy for International Law," 17. The following quote is also helpful: "People around the world believe they have—and they do have—a moral responsibility to help to protect people in other nations from war crimes, genocide, and other violations of human rights. Their government falls short of its duty to help them acquit their moral responsibilities when it accedes to definitions of sovereignty that prevent it from intervening to prevent such crimes or to ameliorate their disastrous effects." (17-18).

Kumm himself adopts a different, but closely related view about the duty to be legitimate, though it, too, is ultimately grounded in natural rights. Kumm agrees that pathologies – what he calls “justice sensitive negative externalities” – are indeed the target of international law’s corrective function. But unlike Dworkin, Kumm argues that states have an obligation to comply with international law to solve these problems, rather than solve them independently, because

Given the fact of reasonable disagreement between states about how those externalities should be taken into account, any claim by one state to be able to resolve these issues authoritatively and unilaterally amounts to a form of domination.<sup>117</sup>

Rather than the human rights enjoyed by individual persons, Kumm grounds the state’s obligation to comply with international law in other states’ rights not to be dominated. Kumm offers little argumentation in favor of his claim that states have a standing right against domination, apparently taking the view to be self-evident, or plausible enough as a point of departure. For example, he writes:

An imperial policy of domination and expansion subverting the political and territorial independence of neighbors is obviously not justified, even when such a policy enjoys widespread democratic support in the aggressor state and that state has a well-structured national constitutional system.<sup>118</sup>

Kumm’s point is intuitively attractive; there does indeed seem to be something wrong with forms of international domination. One of the great virtues of the modern state system is its institutionalized respect for pluralism and diversity. Political power, as we said at the very beginning and as Kumm emphasizes himself, is decentralized. It is distributed in the form of the right to rule to semi-autonomous political bodies associated with a territory and its people, and these bodies are allowed to exercise that right as they will. And as we see, this decentralization has produced variety, even if the scope of that variety is bounded by

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<sup>117</sup> Kumm, “Constitutionalism and the Cosmopolitan State,” 9.

<sup>118</sup> *Ibid.*, 18.

international law. Domination is the antithesis of this pluralism and diversity, so we can understand where Kumm is coming from.

More important for present purposes, Kumm's analysis provides us with a second version of the new philosophy, and one that is strictly international. Setting aside whatever rights citizens may bear, states themselves are the bearers of the right not to be dominated. This right, like Dworkin's human rights, correlates with a state's duty of mitigation, which in turn grounds the duty to comply with international law.

Yet the problem, or at least *one* problem, with both of these interpretations of the new philosophy is that neither plainly grounds an argument for the claim that international law has the characteristics of authority presumed in practice. Specifically, neither the human rights interpretation nor the non-domination interpretation can justify the claim that states have a duty to comply with legal rules *even when they contradict moral truths*. I therefore turn to a fresh approach.

#### *An Associative Obligation to Mitigate*

There is another way to interpret Dworkin's New Philosophy, one that is friendlier to the positivist in ways that make it better able to capture the characteristics of authority implicit in practice while also being (more) consistent with Dworkin's broader contributions to legal scholarship. We have assumed so far, following Kumm, that Dworkin's account of legal authority and the correlative obligation that states have to comply with law is ultimately based in a natural law conception of human rights. On such a view, humans are the bearers of certain moral protections that give others correlative duties including, importantly, the duty to mitigate. This dependence on moral truths like natural rights and duties is what gets Dworkin and Kumm in trouble with content-independence.

But in *Law's Empire*, perhaps his most definitive treatment of the normative case for compliance with the law, Dworkin offers an account of associative obligation as a ground for the authority of law. He describes associative obligations as

the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbors. Most people think that they have associative obligations just by belonging to groups defined by social practice, which is not necessarily a matter of choice or consent, but that they can lose these obligations if other members of the group do not extend them the benefits of belonging to the group. These common assumptions about associative responsibilities suggest that political obligation might be counted among them.<sup>119</sup>

The idea, it seems, is that there is a kind of obligation that agents can bear simply because they are members of a social group. For example, as a brother, I owe a certain amount of care and respect to my sister that I do not owe to strangers because of the familial relation that my sister and I share. The example of obligations between siblings is, I think, especially useful because they highlight the non-voluntariness of associative obligations. But it is important also to stress that the family and other so-called natural associations are not the only kinds that create associative obligations. We have obligations to our friends, our neighbors, and the parents of our children's classmates. And none of these are necessarily because we have consented to them (you can only choose your neighbors when *you* are the one moving) or because we have natural duties to be good neighbors (forcing people who live in rural areas to drive great lengths to lend a cup of sugar).<sup>120</sup> Rather, we bear these obligations because we find ourselves already related to others in these relevant ways, and that relation alone suffices to bind us to certain standards of conduct. So instead of interpreting Dworkin's new philosophy as based in a doctrine either of human rights or of

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<sup>119</sup> Dworkin, *Law's Empire*, 195–196.

<sup>120</sup> Dworkin explicitly presents his account of associative obligations as an alternative both to tacit consent and to natural duties.

non-domination, we might think of it as an account of the associative obligations that states bear to one another on the basis of their common membership in a global community.

Not only is this interpretation of the new philosophy consistent with Dworkin's other writings, it resonates with his remarks within the posthumous paper as well. He insists that states are part of a state system, and specifies its balkanized and decentralized character. He emphasizes a certain set of problems, those produced by the kinds of relations that exist between states, as particularly harmful to legitimacy and therefore relevant to questions of international law. He tries to incorporate the beliefs and judgments of practitioners, the traditions and practices that the subjects of the law share. These details are difficult to place within a natural law style derivation of states' duties from human rights or from rights against domination, but they make sense within an account of associative obligations.

Here, then, is a sketch of the New Philosophy as grounded in associative obligations. In our world, sovereignty is an institutionally defined right to rule. Domestic protective associations (i.e. pre-states, or nominal states, or state-like-things-prior-to-recognition) gain the sovereign right to rule only by being recognized as a state by other states. Together, these states populate the state system, a social practice that both distributes and legislates the terms of rule.

This system is presumed to be good for many reasons but importantly because it promotes shared and widely acceptable goals including human dignity, prosperity, and security. But by pursuing these goals through such a decentralized system of governance, the system creates harmful side effects. Two basic mechanisms have emerged within the state system to address these pathologies. First, the state system has developed a number of mechanisms for creating norms general compliance with which would help mitigate the state system's untoward tendencies. Among these mechanisms are the sources of law specified in

Article 38 of the UN Charter - treaties, custom, and so on. Second, the state system has - through these mechanisms - developed a number of regulatory norms presumed to bind states such that, absent special countervailing considerations, they ought to comply with those norms regardless of what they command.

When states claim the right to rule - the rights of sovereignty institutionally specified by the state system - they become members of this flawed but presumptively justifiable practice, and as members, undertake an obligation to the other members to do their part in mitigating pathologies. And in the current world context, that obligation can only be discharged by complying with international law.

I now turn, in the final chapter of this dissertation, to develop the foregoing practice approach in greater detail. We will see that it not only accounts for the presumed authority of international law in a “positivistic” way, but also that it has considerable attractions.

## CHAPTER 4: The Practice Approach

### *Introduction*

I have suggested that Dworkin's New Philosophy offers at least two important insights into the question of why states would have reason to comply with international rules. The first insight is about the functional role of international law within the state system, which may be called the

**CORRECTION THESIS:** international law as we find it, including treaty, administrative and customary law, is in fact a remedy for problematic tendencies of a politically decentralized state system (e.g. legal norms that grant diplomatic immunity help address coordination problems and miscommunications which can precipitate confusion and conflict; environmental law such as the Kyoto Protocol coordinates multi-state action in response to global climate change).

The second insight addresses what significance this might have for state conduct. It may be called the

**DUTY OF MITIGATION:** absent special justification, states have sufficient reason to adopt policies that help to remedy problematic tendencies of a politically decentralized system.

So to the extent that state compliance with established international rules in fact corrects for such tendencies, states have sufficient reason to comply with treaty, administrative, or customary law as it may apply to them, at least absent some special justification that excuses them from performance.

If my account of the authority of international law in Ch. 1 is correct, this is not yet an account of why international law is *authoritative* for states. While it does address the "doctrinal

question” of why states have reason to obey, to the extent the Duty of Mitigation is seen simply as a natural duty — as it is for both Dworkin and Kumm — reasons for state compliance with international law will be too closely linked to the morality of its content. As proposed in Ch. 1, going practice assumes that law can have a form of legal authority that, crucially, persists despite inconsistency with widely accepted moral truths. Positivist views that appeal to state consent accommodate this concern about the form of authority, but, as argued in Ch. 2, in a way that is undesirably revisionistic. In this chapter, I outline a positivistic version of Dworkin’s New Philosophy that better captures both the form and scope of going international legal practice than any view so far considered. Following the work of Aaron James, I call this the practice approach to international law.

According to the practice approach, states have an associative obligation to comply with international law. Whatever further natural duties states may or may not have, they have sufficient moral reason for compliance, absent special justification, by virtue of the specific social relationship that defines them as states in the first place. By participating and being recognized by others in the state system, states claim the rights of sovereignty but also undertake an associative obligation to mitigate untoward tendencies arising from its politically decentralized nature.

In addition to the Correction Thesis, the practice approach may be expressed as the following further three claims:

**SOVEREIGNTY THESIS:** sovereignty, or the right to rule, is not a function of domestic policy or the choices of peoples, independently of international relations, but rather a bundle of rights to rule that are institutionally specified through the complex social interactions of states and other international political agents. The international system

not only specifies the moral right to rule over a territory, it distributes those rights through mutual recognition, of and by states.

ASSOCIATIONAL DUTY OF MITIGATION: absent special justification, states have sufficient reason to adopt policies that help to remedy problematic tendencies of a politically decentralized state system, simply by virtue of presumed membership in the state system, which is to say, by virtue of credibly claiming the right to rule over a territory with the privileges the state system affords.

AUTHORITY THESIS: the associative obligations of states have the following authority characteristics: (1) they give states directed reasons for action, such that compliant actions are owed to other states in a way that is distinct from advice and requests (“reason-giving”); (2) the obligation to comply with established international legal rules is defeasible, provided sufficiently important countervailing concerns (“defeasibility”); (3) the content of such legal rules is set in part by going state practice, and so is not a direct function of the morality of its content (“content-independence”).

My claim is that these three theses suffice to account for the authority of international law as we find it in contemporary practice. Although the account is “positivistic” in some ways, it is unlike state consent views in that it applies broadly across treaty, administrative, and customary law, and so need not be excessively revisionistic.

My discussion of this account will focus on motivating and elaborating the foregoing main theses. I address objections, but do not claim to have defended a practice approach

against rival views. My main aim is to articulate the general contours of a one way a practice approach might go.<sup>121</sup>

### *A General Account of Associative Obligations*

In most general terms, associative obligations are standards for right conduct that bind agents on the basis of their membership in a group or participation in a social practice. Such obligations are very common. They include neighborly obligations to lend your neighbor a cup of sugar, filial obligations to treat a sibling with respect, and, more controversially, political obligations to pay one's taxes. But what is it about these relations that suffices to ground obligations?

Consider siblings. Brothers and sisters are generally thought to have rights and obligations against one another, which are based in their relationship. For instance, if my sister were to invite me to her wedding, I would have an obligation to attend, absent compelling extenuating circumstances. Of course, anyone who is invited is allowed to come, but not necessarily required to attend, on pain of being open to special forms of accountability seeking, including public scorn, shame, and resentment. If I were to skip the wedding, but then complain of my sister's and my family's scornful reaction, protesting "Why punish me so?," or even "Why punish *me* and not others who also missed the wedding?," her answer would almost certainly be: "I thought you were my *brother!*" Some views might take her answer to be elliptical for a longer answer about the rights of human beings or the sanctity of tradition. A theory of associative obligation treats them in a straightforward way, by taking

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<sup>121</sup> Another way one might interpret this chapter is as an attempt to give what she has referred to in conversation as an "operational definition" for non-consensual versions of Gilbert's joint commitments.

reference to the relationship between individuals as the basis for justifying this class normative claims.

The idea of associative obligations may also be applied, albeit in a more controversial way, to the practice of promising. Suppose that I promise to paint the house, and you accept my promise. Now suppose that, for no particular reason, I fail to perform. My failure puts you in a position to appropriately rebuke me or otherwise hold me accountable. Maybe I owe you an apology or even compensation. But why? Perhaps it is because there is a true moral principle, *pacta sunt servanda*, and the truth of that principle implies the wrongness of my action and the justifiability of your rebuke. Perhaps it is because I consented, thereby wrapping myself up in a contradiction when I went against my own will and did not paint the house. Perhaps it is because everyone, including me, benefits by having a working institution of promising, and keeping my promises is how I pay my fair share. At the same time, we can also take the answer to be as simple as what we would actually say: “Because you promised!” My invoking the practice of promising, that is, by having made the promise in the first place, might suffice to explain why I bear obligations of that practice.

This raises the question of when association with other agents obliges one. The foregoing examples - familial obligation and promissory obligation - might seem to have very little in common. People normally choose whether or not to make promises, whereas hardly anybody has a say in whether they will have siblings or not. While promises last only until they are discharged, familial obligations are ongoing, and cannot be fully discharged at any given time, short of a significant disruption of normal relations. Worse, many social relationships do not generate obligations at all. Living in the house next to yours may give me neighborly obligations, but the fact that I work in the skyscraper next to the one you work in doesn't, or at least this is much less obviously true.

What *is* obvious, or at least what I believe is apparent in this diversity, is that it might be too much to ask for a single set of necessary and sufficient criteria for when a relationship grounds associative obligations. I will therefore simply develop an extended analogy. By considering how associative obligations might arise in a fictional club, we can then see, by analogy, how a similar story might apply to international political practice. (I beg the reader's patience with an extended presentation of a fictional situation and what will be crucial details.)

A student group on campus is a pretty cool club - well known, respected, with some level of prestige and honor – and so the club is exclusive to some extent. Members are given special privileges, with regular social offerings and connection to a vast network of club alumni after graduation, both of which give access to exclusive opportunities. As members graduate, new members are invited to join, and with a continual flow of new and departing members, leadership is in a state of constant flux with dominant members or alliances coming and going.

But there are problems. Members disagree about who should be admitted. One member wants the group to be more inclusive, to share the bounties of membership and to grow the alumni pool. After all, he says, the point of this whole group is to meet new people and make new connections. Another member disagrees, preferring to be more exclusive to improve the quality of the alumni pool and the character of the people with whom she will associate herself. After all, she says, the point of the association is personal refinement and more secure job prospects. The quarrels about who should be kept are more fraught than the discussions about who should be accepted, especially with persistent grumblings about the slackers whose grades have fallen off or who have switched their majors from pre-med to philosophy, who therefore don't hold promise for improving the alumni pool for future

members. The slackers, it is feared, may deter promising applicants from joining the club even once they are accepted, and so, it is proposed, it may be for the best for their own privileges of membership to be revoked.

The problems are not simply disagreements. While all can agree that it makes no sense for every member to be in touch with every alumnus to keep the alumni network alive—if only because the redundancies waste time—no member prefers to work alone, or even in a small group, for fear that the others will enjoy the benefits of their labor without doing their part. So the more ready contributors devise creative ways to distribute the workload, making sure that everyone does his or her part. Here it could well have happened that, with so many competing options and a lack of sufficient support for any one, the alumni network falls apart as the club simply loses touch. But fortunately, the vision of a particular alliance of members did, in earlier years, manage to take hold. Now, in accord with the practice established, the members divide up the alumni contact lists more or less evenly, and each member stays in contact with only those few people. The lists are redistributed every year to account for the changing membership. They begin accepting only people who are willing to do this, but who also meet standards of promise with respect to the improvement of the alumni network (they have high GPAs, are ambitious, are independently well connected). They also develop standards for membership: minimum GPAs, regular participation in group activities, a good record of staying in contact with assigned alumni.

To add one final elaboration, let us also imagine that these standards change over time, sometimes subtly and sometimes abruptly. At certain times, the club weighs GPA heavily in admissions decisions, while, at other times, it seeks applicants with ambitious majors. The same is true for membership standards. When the club is doing well because applicant interest is high and the alumni are successful and closely connected, standards for

keeping members might rise, in view of greater demand. When the club is doing poorly, and the alumni are lethargic and unwilling to donate money, standards for acceptance might drop for new entrants, even while standards for continued membership might rise. In some cases, the changes are abrupt, as during the year one member called attention to the fact that what was originally a co-ed club has become dominated by men, largely due to arbitrary gender biases implicit in the application process. Not only is this exclusion immoral, the member argues, it is killing the quality of the alumni network, which, after all, is one of the main reasons for the club. While, initially, one outspoken person had charismatically called for demographic quotas, while loudly shaming all who failed to comply, the practice caught on over time, mitigating the problem of gender imbalance. Eventually, the problem was largely resolved.

We can now pose the question of obligation: Do the members have an obligation to comply with the rules of the club? Do they owe it to the other members to abide by the demographic acceptance quotas, which might themselves raise moral questions, when evaluating applications? Are they rightly sanctioned, or even expelled, by the membership when they fail to do so? Or when they fail to keep in touch with their assigned alumni, even though they cannot choose which or how many alumni they are assigned? The answer would seem to be yes. The members owe it to one another to contact their alumni, and to keep their GPAs up, and even to use the demographic quotas while evaluating applications. Why? Because, and simply because, they are members. Or so one wants to say.<sup>122</sup>

As for why membership should oblige, we might elaborate by suggesting general conditions that appear jointly sufficient to ground associative obligations, as follows.

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<sup>122</sup> As mentioned in Ch. 2, Margaret Gilbert discusses membership as the foundation for political obligations. The practice account might be helpfully thought of as the development of an “operational definition” for such membership commitments which, to my knowledge, has not been previously done. See Gilbert, *A Theory of Political Obligation*.

(1) For starters, the club is a social practice - a group of agents whose behaviors can be understood as individual activity coordinated by a set of norms.

(2) These norms are organized around generally accepted but appropriately vague purposes (e.g., as explained in terms of “full social calendars,” “job prospects,” etc.). Such norms have two basic functions: regulative and constitutive. On the regulative side, certain norms set the standards for member behavior, and are presumed by members to ground accountability seeking behaviors when they are violated. On the constitutive side, certain basic norms define the identities of the agents. If I am a member of the club, I am someone who keeps such and such GPA, who uses such and such admission guidelines, who calls these assigned alumni, who attends these events. (Many if not all of these norms may have both regulative and constitutive roles.)

(3) Adjustments to these norms also fulfill a corrective function. For reasons outside of the club’s control, leadership is persistently fragmented and in flux, and this leads to problems that most everyone recognizes. Not only do morally objectionable practices pop up, the club begins to fail to effectively pursue its own purposes, even when everyone is willing to do their part. The norms about admission, membership, and networking coordinate the activities of the membership and correct these perceived problems.

(4) Such norms provide appropriate grounds for criticism and sanction among members, simply in virtue of membership. Even if it is important that enough members act as though they owe it to the others to comply, in ways that offer general assurances of participation, and it needn’t be true that every member has consented to every norm in this organization for sanction to be appropriate. Nor is it the case that every member has consented to some decision procedure for determining rules. Nor must it be true that every constitutive rule of the club is consistent with morality. The club needn’t be rotten, and may

not be all that bad, for helping people get jobs after graduation and cultivating a sense of belonging. But it just as certainly *is* the case that if a member fails to maintain the minimum GPA, even if that standard has changed since his joining, that he is liable for sanction or expulsion. And it is the case that if he does not use the customary standards for admissions, he is liable for sanction as well.

Why should this be so? Because, I suggest, when one claims the rights of membership – the prestige on campus, permission to attend exclusive events, access to the alumni network – one at the same time undertakes an obligation to uphold and improve the legitimacy of the group or social practice that grants those rights. This view shares much in common with the fair play argument, most closely associated with Rawls and Hart.<sup>123</sup> According to this argument, roughly, when one receives the benefits of a system of social cooperation, one incurs an obligation to bear the burdens that make those benefits possible. Or in John Simmons’s version, one becomes obliged when one “accepts” a system’s benefits, even without a deliberate, knowing undertaking of an obligation. As Simmons explains:

No deliberate undertaking is necessary to become obligated under the principle of fair play. One can become bound without trying to and without knowing that one is performing an act which generates an obligation. Since mere acceptance of benefits within the right context generates the obligation, one who accepts benefits within the right context can become bound unknowingly.<sup>124</sup>

The argument that I am advancing is distinct from the fair play argument in at least three immediately relevant respects. First, the obligations member states incur are not conditions for playing fair, so as not to exploit the cooperation of others, but for legitimate rule. When political groups claim the right to rule, they enjoy that right only on terms specified by the international system, because the international system itself sets the

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<sup>123</sup> Hart, “Are There Any Natural Rights?,” 55; Rawls, “Legal Obligation and the Duty of Fair Play.”

<sup>124</sup> Simmons, *Moral Principles and Political Obligations*, 116–117.

conditions for the legitimate exercise of political power. Second, it is not necessary that agents accept *benefits* form a scheme of social cooperation to be bound. Rather, I am proposing that agents must merely claim a set of *rights*, whether or not these rights actually result in any relative or absolute gains. If an agent does benefit, what matters is not its possession of those gains, but at least its claim that those gains are *its own*.<sup>125</sup> This explains why an agent (such as a state or political community) would continue to be bound by the rules of a system of cooperation even in the presence of evidence that he or she would have done no worse (but no better) without that system. Second, the resulting obligations are not to do one's part in bearing the burdens that make cooperative benefits possible. Rather, they are to comply with the established terms and to create new terms that will further advance the legitimacy of the social system.

Here one may ask: Why wouldn't one be obliged simply to comply with some basic stated and previously established terms? Because, I suggest, a member's claim to the institutionally specified rights and privileges granted to members is only as strong as the practice's right to distribute or withhold them. And so to the extent the practice has moral problems that threaten its legitimacy, this claim to its rights and privileges is not secure. Such problems open the practice to moral objections that, if not duly resolved, threaten to turn the practice from a way of socially pursuing widely acceptable goals into a way of sustaining arbitrary inequality and discrimination. The best understanding of the practice, that is, may call its animating purpose into question, and so call its rights and privileges into question as well.

How can a member satisfy the obligations he or she incurs? In several ways. One is to defer to existing corrective norms where they exist and fulfill the corrective function. Another

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<sup>125</sup> Incidentally, this subtle alteration might offer grounds to reject Nozick's objections to the fair play argument raised in Nozick, *Anarchy, State, and Utopia*, 93–95.

is to amend existing norms in whatever legislative capacity members are granted by the practice, so that they better correct for its untoward tendencies. Still another is to help establish new corrective norms when none exist. Or to put the idea in more general terms, when agents claim rights on the grounds of their participation in a legitimate social practice, they undertake an obligation to the other members of that group to uphold norms that mitigate the pathologies of that practice in order to uphold and improve its legitimacy.

We can apply this account to familial obligations, one of the paradigmatic examples we began with. Why does the fact that two people are siblings (normally) give them special obligations to one another? The reason is that, as members of a family, siblings presume entitlement to certain privileges - care, attention, love, support. Along with these are privileges of privacy. In delicate matters, members of a family can rely on the support of co-members without publicizing their need for it, "keeping it in the family," as the saying goes. But every family is different, and each works out for itself how extensive these privileges are, and how onerous the obligations of membership will be. These standards are not (typically) worked out formally, but they are shaped through a kind of political process, as the different members each act in the ways they interpret as appropriate for their role (whether by helping with homework, doing chores, asking for money, throwing family birthday parties) and seeing which of those actions get picked up, mimicked, and ultimately adopted as family practice. This political family structure comes with its problems. Such informality invites deviance, free-riding, and simple confusion. Who will host the next holiday? Who will house the parents when they are suddenly unable to care for themselves? How will inheritance be split? For many such questions, simple customs are developed to solve the problems. Holidays are hosted on a regularly rotating basis. Ailing parents will be cared for by whichever child has the best combination of free time, available money, and living space. Other problems demand

more precise solutions. How inheritance will be divided is often explicitly negotiated in the form of a will, ultimately answerable only to the dying party. So long as a person claims a share of the inheritance, or a place at the thanksgiving table, they have an obligation to do their part in maintaining these rules and customs, and to working with the others to create new rules and customs as new problems arise. By claiming these rights, family members undertake familial obligations.

Might this account of associative obligations apply to the practice of promising as well? Possibly.<sup>126</sup> The idea would be that people often cannot satisfy their interests without coordinating behavior with others, and that promising is one of the best tools we have for arranging such coordination. There is an intrinsic tension between the need for coordinating institutions and the rational self-interest of specific agents that might tempt non-performance. Corrective norms would thus include strong prohibitions on promise-breaking, the right to publicize broken promises, the privileges that come with “trustworthiness.” So when we claim the rights of a promisee (the right to performance), or even the rights of a promisor (the privileges of trustworthiness), we undertake the institutionally specified obligations constitutive of a practice of promising that we, even in our own promise here and now, are working out.<sup>127</sup>

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<sup>126</sup> Similar “practice” accounts of promising can be found in Rawls, *A Theory of Justice*, 344–348 and more recently Kolodny and Wallace, “Promises and Practices Revisited”. For contrary views, see Scanlon, *What We Owe to Each Other*, 295–327; Shiffrin, “The Divergence of Contract and Promise.”

<sup>127</sup> This answer also illuminates the question, “Can a promise be made in the state of nature?” - a question long thought to be the final nail in the coffin of practice account of promising. If promising depends on the existence of institutions (perhaps for the sake of enforcement a la Hobbes), then promises cannot happen in the state of nature. But many theorists agree that promises *can* happen in the state of nature. The associative obligation view puts a new spin this affirmative answer. Yes, promises can happen in a state of nature, but only if it begets a larger practice of promising. If we make a “promise” in the state of nature, but nobody ever mimics our behavior, the promisor does not perform, and there are no costs for non-performance, then we have not actually made a promise. Instead, we are in the strange

*The State System as a Social Practice*

Might the foregoing picture explain how states are obliged to follow international law? The suggestion would be that, like the school club, the family, or the institution of promising, the state system is a social practice constituted in such a way that it grounds associative obligations. Among these obligations, or perhaps at their heart, is the associative version of Dworkin's duty of mitigation, what I called the Associative Duty of Mitigation above. We need only add that states would discharge this obligation by complying with international law.

To see why this might be so, the first question is whether there is a plausible interpretation of the state system that renders it the kind of social practice that grounds associative obligations. Early I outlined five features that seemed, in the fictional student club, to be jointly sufficient for such obligations. Those features might be applied to state conduct as follows. The state system is (1) a social practice, which is (2) organized around widely acceptable purposes and presumed to be the source of rights and privileges for members, (3) at least partially organized by constitutive or regulative norms that fulfill a corrective function, and, finally, (5) such norms provide appropriate grounds for criticism and sanction among members, simply in virtue of membership.

There is a considerable case to make that the state system in fact has all of these features. In *The New Sovereignty*, Chayes and Chayes argue as follows.

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situation of finding out that we never actually did what we thought we were doing. We thought we were doing a thing called promising, and had promising been taken up by others, then maybe we would have actually been doing it in that first instance. However, since nobody took up the idea of promising - it never caught on - we were not actually promising in that first instance. It is as if we were trying to start a new dance craze, "The Pilch", by gyrating frantically on the dance floor but nobody followed suit. Ever. Were we doing The Pilch? Not really. We were just gyrating frantically.

That the contemporary international system is interdependent and increasingly so is not news. Our argument goes further. It is that, for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.... Sovereignty, in the end, is status — the vindication of the state's existence as a member of the international system. In today's setting, the only way most states can realize or express their sovereignty is through participation in the various regimes that regulate and order the international system.<sup>128</sup>

Alexander Wendt has famously expanded on similar ideas, as exemplified by the following passage:

Sovereignty is an institution, and so it exists only in virtue of certain intersubjective understandings and expectations; there is no sovereignty without an other. These understandings and expectations not only constitute a particular kind of state — the "sovereign" state — but also constitute a particular form of community, since identities are relational. The essence of this community is a mutual recognition of one another's right to exercise exclusive political authority within territorial limits. These reciprocal "permissions" constitute a spatially rather than functionally differentiated world — a world in which fields of practice constitute and are organized around "domestic" and "international" spaces rather than around the performance of particular activities.<sup>129</sup>

Wendt's writing style can be unfamiliar for analytic philosophers, but his idea is the very one captured by Chayes and Chayes: States are members of a group, the society of states. They owe their rights — sovereignty, the right to rule — to that group such that without the recognition of the other members, the state would not be the bearer of those institutionally specified rights.

Practice affords us plenty of examples of states that are sovereign only because they are recognized as such by an international society of states. Israel, certainly in the earliest parts of the post-war period, is a perfect example where domestic procedures for foundation and the popular creation of a sovereign state mattered far less, if at all, than international

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<sup>128</sup> Chayes and Chayes, *The New Sovereignty*, 27.

<sup>129</sup> Wendt, "Anarchy Is What States Make of It," 412; see also Kratochwil, Mansfield, and Ruggie, "International Organization."

insistence that such state be created and respected. South Sudan and South Korea (and probably North Korea, though this case is less clear in light of its roguish behavior) are also probably examples of countries that enjoy sovereignty not because of some domestic process whereby citizens gave up their rights, and not because of a dictum from God establishing their rights, but because the international community recognized protective associations in those regions as sovereigns.

This “exogenous” view of sovereignty also explains cases of state-like agents that are not actually or clearly states. A simple example is the Principality of Sealand, a manmade island of the eastern coast of England that claims sovereignty and political autonomy. Although citizens of this principality have reached complete unanimity about their independent status, no state in the world recognizes their sovereign rights. As an interpretive matter, it would be an error to claim that Sealand is a state. A more recent and serious example is the Autonomous Republic of Crimea, who supposedly seceded from Ukraine in February 2014 after a landslide vote to do so.<sup>130</sup> At the moment, most European countries and the United States reject this vote as illegal, thus refusing to recognize Crimea’s sovereignty. Russia, on the other hand, has already treated with Crimea, thus implicitly recognizing it. Thus the exogenous view would tell us that Crimean sovereignty is unsettled, as is the case in practice.

These authors also describe the state system as a political practice — one whose terms are worked out as a matter of proposals made by peers and then instituted through a process of uptake, repetition, and mimicking. Chayes and Chayes point out that states frequently discover the boundaries of their treaty obligations by “testing” the limits of what cosigners will

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<sup>130</sup> Of course, the legitimacy of this vote can be questioned both on the basis of how the options on the ballot were phrased and also on the basis of large social group who opposed secession boycotting the elections.

tolerate.<sup>131</sup> In a more cynical state of mind, we might take this as an example of states trying to cheat on their agreements, but nothing about the case forces this interpretation on us. In fact, given that states willingly enter into agreements from a shared sense of urgency, cheating seems not to be the best interpretation of such envelope pushing. Instead, Chayes and Chayes suggest, this testing is a way of specifying the terms of membership — in this case, membership in a treaty — by seeing which actions will be tolerated and which will not. State actions, therefore, are a kind of legislative proposal about the boundaries of permissible state action, to be approved or rejected by the others as indicated through their reactions.

An example will be instructive. Consider the international legal custom of flying high orbit spy planes over other countries.<sup>132</sup> Prior to the cold war, international legal custom had been that state boundaries rose straight from the Earth's surface to the end of the atmosphere. However, when the US and USSR began flying spy planes over one another, other members of the international community generally accepted this. Gradually, as other countries developed the technology to do so, they followed suit. This was very clearly a case of presumed legal obligations changing through a political process of performative proposal, of pushing the envelope, and the subsequent development of new customs through mimicry and further boundary testing.

These are especially clear cases because they are extreme, but the image of the state system as a social practice lived by highly autonomous states but governed by norms and organized around widely acceptable purposes is apparent even in humdrum cases of international political life. As Dworkin says, and as custom assumes, states are indeed sovereign. They are politically independent units, afforded vast rights of non-interference and autonomy. But those rights have readily apparent limits. States are not supposed to engage in

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<sup>131</sup> Chayes and Chayes, *The New Sovereignty*, 12.

<sup>132</sup> Cheng, "United Nations Resolutions on Outer Space."

aggressive warfare, and, for the most part, they do not. In the event of natural catastrophes, states are expected to send aid and support, and, for the most part, they do. States respect borders, elections, trade deals, norms about the treatment of diplomats, standards about how violent conflict will be conducted, and when they do not they are open to public shame and formal sanction by the others.

And the purpose of such a system? That is an interpretive question, and different people might give different answers, but a few suggestions do not seem too controversial. We forbid aggressive war, put very high standards for the permissible use of interstate violence, and give special privileges to diplomats because we want peace, or at least security. Even if we ourselves do not care so much about this purpose, we can understand why someone reasonably might. Indeed, as Dworkin says, one of the major reasons for the creation of the balkanized Westphalian state system in the first place was to substitute “economic competition for the bloody religious conflicts that had marked the previous century.”<sup>133</sup> We allow states to extract their domestic resources and to refine and sell them abroad for the sake of amassing wealth because we care about prosperity. We expect states to respect borders and territorial integrity, to respect domestic legislative procedures, and not to dominate in joint ventures because we care about the preservation and toleration of diversity. I may be wrong about what the purposes of the state system are — maybe we care about autonomy rather than diversity, for example — but surely some such account is correct. What is important for present purposes is that something like these purposes — values that are widely acceptable from the internal perspective of the members — are a necessary part of making sense of the state system that we have.

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<sup>133</sup> Dworkin, “A New Philosophy for International Law,” 16.

As Wendt emphasizes, these norms of the state system play a double role. On one hand, they regulate the behavior of states in fact. That is why, for example, states act differently with respect to events within their borders as opposed to events without. The US sent aid to the Philippines after Haiyan, but sent the National Guard and FEMA to Louisiana after Katrina. Our government creates rules about how our elections will go, but does not in Lithuania. Why? Because there are rules about what states are allowed to do domestically, and what they are allowed to do internationally, and these rules are different.

Aside from their regulatory function, these norms also specify what it is to *be* a state. A state is the kind of thing that has the right to hold and regulate domestic elections, and to exclude foreign governing bodies from interfering in those processes. States have the right to protect citizens from natural catastrophes, and a responsibility to do so that ranges far beyond similar responsibilities to non-citizens. The rules that govern what states may and may not do also specify the rights that define what it is to be a state in the first place. In this way, the state system is not only presumed to regulate states, it is the presumptive source of those rights that set an association of persons apart *as* a state.

As was discussed in Ch. 3, the state system practice is prone to pathologies. Its decentralized structure makes problems of common concern, the solutions to which demand coordination, more difficult to solve than in a hierarchical system where subjects could simply defer to the will of a Hobbesian sovereign. The problems of the Kyoto Protocol and the recurring challenges to the legitimacy of international courts are examples. Norms of non-interference put minorities at risk of domestic oppression. Norms that make state autonomy and self-help the default presumption inhibit transparency and communication, undermining assurances of security and non-aggression.

So the final question, then, is: Is the state system at least partially constituted by norms that, if complied with, could correct for these pathologies? Again, I submit that the answer is yes. Those norms that are both constitutive and corrective are international law. Through a decentralized political practice, states have worked out a set of regulatory norms that are specially capable of addressing the negative externalities of that very practice. Many of these norms take the form of customs. Diplomats are presumed to have special rights and privileges, because they help states communicate their intentions and to give assurances for effectively. Documents that specify the boundaries of permissible treatment of individual humans (UDHR) or laborers (ILO standards) are treated as if they have a special reason-giving status for states, even though not all states got to take part in their enumeration. A modern version of the idea of the treaty emerged, whereby states could formally negotiate mutually acceptable terms for coordination on specific issues and make those terms explicit and publicly available.

What we have in the state system, therefore, is a social practice, guided by widely acceptable purposes, presumed by practitioners to be the source of rights and privileges, prone to pathology, and at least partially constituted by norms that, with general compliance, fill a corrective function. These norms also seem to be an appropriate basis for sanctioning non-compliant member states. In terms of the five criteria discussed earlier, this system is isomorphic with the school club, the family, and perhaps even the institution of promising. So, just as members of the club claim the privileges of membership or members of the family claim familial rights, when states claim the rights of sovereignty — rights institutionally specified by the political practice that is the state system — they undertake an associative obligation to do their part in mitigating the pathologies of the system that specifies and grants those rights.

### *The Obligation to Mitigate and Compliance with International Law*

It is tempting to stop here and conclude that, because states have an obligation to mitigate the pathologies of the state system, and because they can do this by conforming to international law, they therefore are obligated to comply with international law. But this argument is open to an early and simple objection. Even if we agree that states have an associative obligation to mitigate, and we agree that compliance with international law is *one way* that a state can discharge this obligation, we have yet to see why states have an obligation to comply with international law. There may be other ways, aside from acting in conformity with international law, for states to address pathologies and thereby discharge their obligation. It follows, then, that states do not have an obligation to comply with international law per se, so long as they realize one of the alternatives.

What might such an alternative be? The answer is not obvious. In theory, one route would be to work towards the dissolution of the state system itself. If states' obligations are to get rid of the problems that come with the state system, one way to do this is to get rid of the state system altogether in favor of international anarchy. Even if this needn't amount to a return to the state of nature for individual humans — they can remain within their respective protective associations (formerly states) — it *would be* a return to the state of nature among protective associations. We need not assume that this would make human life solitary, poor, nasty, brutish, or short, though it certainly would mark a dramatic change.

Even if this is conceptually coherent, it is not obvious that any such dissolution would in fact rid us of the state system's many pathologies, rather than simply obscure them. Wendt, for example, argues that what might appear to be the dissolution of the state system into anarchy is really nothing more than the assertion of stronger rights to autonomy and self-

governance *within a state system*.<sup>134</sup> If the leaders of the world come together and say, “No longer shall we coordinate our behaviors through this political practice. Instead, there are no rules about how protective agencies shall treat one another,” this would itself be an example of political legislation within the state system, if not in name, then in real practice. As agents subsequently competed for resources or whatever agents do in the state of nature, they would be living out the rights that they give one another as members of a political community. Just trying to think what it would mean to dissolve the state system is conceptually problematic, at least short of a return to all-out anarchy, in which the life of man really might be, as Hobbes suggested, solitary, poor, nasty, brutish, and short.

We can take this one step further. Let us assume that we can make conceptual sense of the dissolution of the state system into anarchy. In the first place, there are forceful moral arguments why this ought not to be done. Importantly among these is an argument on the basis of the values that constitute the purposes of the state system that we would be foregoing by dissolving it. I have suggested that the state system is organized towards the achievement of security, prosperity, and toleration. What, by comparison, would be the worthy purpose served in returning to the state of nature? To avoid legal encumbrances? To avoid burdensome duties to aid others? More charitably, one might say that the purpose of a return to anarchy is the pursuit of freedom. But what is liberty without security, even for a state? What is freedom without prosperity? For there is no reason to assume that these go hand in hand. The valuable purposes of the state system cannot be achieved in a state of nature, and the values that might motivate dissolution do not outweigh them.

The final, and perhaps most obvious response to the anarchist, is that there states have no practicable avenues to bringing about the dissolution of the state system. Even if

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<sup>134</sup> Wendt, “Anarchy Is What States Make of It,” 391.

dissolution was conceptually coherent, and even if it was not open to decisive moral objection, it still would not be practically possible. Partly this is due to political will, or the lack thereof. People and states genuinely benefit by being part of the state system. Especially in the post-war period, we, as a world, have made significant gains precisely in the areas of security, prosperity, and toleration. In many respects, the promises of the modern state system are being gradually fulfilled.

A different alternative would be for states to contribute to the establishment of a centralized world state. Most, if not all, of the pathologies that Dworkin, Beitz, Kumm, and James identify arise from the decentralized character of the modern state system. Decentralization leads to coordination problems. Excessive autonomy leads to risks of domestic oppression and unequal distributions of wealth. If the problem is not governance *per se* as the anarchist thought, but its decentralization, then perhaps a state could satisfy its obligation to mitigate by helping to bring about a centralized world state that would, almost analytically, avoid these pathologies.

This alternative seems not to suffer the conceptual shortcomings of the anarchist. While administrating a world state would surely be a herculean task, there is not, on the face of things, any conceptual incoherence in the idea of one big state. Wendt might disagree and claim, as we have seen, that there is no state without an other, but this appears to be a point about semantics.<sup>135</sup> Call it what you will, state or global protective association, it seems at least conceivable that such an organization could come to be.

Working towards a global state also at least conceptually could avoid the moral problems faced by anarchy. Surely a global state could pursue the same values that constitute the purpose of the modern state system. We might argue about whether a global state will be

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<sup>135</sup> Wendt, "Anarchy Is What States Make of It"; Wendt, *Social Theory of International Politics*.

the most efficient way to achieve certain values — toleration of diversity comes to mind as the kind of thing that might be quashed by bureaucracy — but nothing in the practice account of associative obligations says that states have an obligation to correct pathologies in the most efficient way, even if this proves to be the case. But here, as is often suggested, practicability is a serious problem. Even if the political will were present internationally to create a world state (which it is not), we lack the administrative capacity. We lack a shared history of acceptable world governance or even of acceptable governance in the first instance. What we do share is a long tradition of self-governance and autonomy, and a world state marks a dramatic break from that. Perhaps we can see a world state on the distant horizon, but it is, I believe, excessively optimistic to think that there is anything states can do now to hasten its arrival.

A third alternative, intermediate between the two extremes of international anarchy and a world state, would be a form of state exceptionalism.<sup>136</sup> Rather than depending on cooperation among juridical equals, a special set of exceptional rights and duties could be granted to especially powerful countries. With these special liberties, an exceptional state could do the work of mitigation unilaterally, while non-exceptional states are expected to simply comply with law. If such arrangements would best mitigate problematic tendencies of the larger state system, then it would seem to follow that law is not authoritative, or at least not in a fully general way. It would not simply follow that the exceptional states can often justifiably set aside or re-interpret otherwise content-independent reasons to comply with standing law. They would lack such reasons in the first instance.

This proposal is conceptually coherent and practically feasible. It is coherent in the sense that my account allows for the suggested possibility, at least in theory (perhaps much as

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<sup>136</sup> A recent version of this familiar position is advanced by Ku and Yoo, *Taming Globalization*.

in the Wild West, when the town sheriff is seen as above the law, if only to provide protection against outlaws). It is also practically feasible, in the sense that it is a practice that assigns special privileges stands a chance of being more effective than a practice in which all states normally follow the law unless engaging in performative legislation. Because most states are still expected to comply with the law, perhaps many or most of the most important coordination problems would still be solved—at least so long as public non-compliance by the powerful few did not destabilize general cooperation.

There is nevertheless reason to be very skeptical about this proposal under contemporary conditions, for moral and practical reasons. For one thing, such special privileges may be open to substantive moral objection. For example, the concentration of legal power in the hands of a single state or a small group of states may invite the marginalization of ways of life and private conceptions of the good among less powerful societies. Power concentration invites social domination, which is inconsistent with the state system's basic purpose of preserving diversity (though perhaps mainly for the sake of security). And if non-exceptional states do feel dominated, one can doubt whether they will comply with international law for very long, instead of invoking exceptions for themselves. To the extent such a system does not enjoy stable even if rough compliance, it is less likely to successfully fulfill its required corrective role.

This suggests a further, largely practical line of objection. It is highly doubtful, in real practice, that any single current state is in fact sufficiently powerful or wealthy to unilaterally resolve the pathologies of the state system, in which case no state can claim exception to the laws that generally apply. Indeed, as Chayes and Chayes explain, “effective sovereignty” under contemporary conditions, even for the most powerful states, is less a matter of taking

exceptions than of “capabilities” to facilitate cooperation, less a matter of “going it alone” than of enlisting other states in the service of common goals.<sup>137</sup>

This is still not quite to say that international law is authoritative for all states in the same way. But we can see why this is a defensible thesis by considering the difficulties of the alternatives. One possibility is that exceptions to general law be assigned to different states on an issue-by-issue basis, along with obligations to lead unilaterally and set terms of cooperation for other states. But it plainly won’t work, say, for China to be in charge of coordinating a response to climate change, for the US to be in charge of coordinating nuclear disarmament, and for Russia to be in charge of reducing the risk of bad leaders from coming to power. Not only are such pathologies all wound up with one another, such a scheme would create unworkable coordination problems, which would only erode the system’s legitimacy. Nor, it would seem, could mitigation labor be divided, not by *issue*, but *regionally* (e.g., with China in charge of mitigation in one part of the world, Russia in another, the US in another.) There is ample room for regional leadership without violating international law, and it is not clear how this would successfully manage pathologies that arise within the state system across different regions.

More generally, it does not seem that exceptional rights could be granted to any other subset of states without raising serious questions about the workability of the system, at least given the dynamics of state recognition. How would states be given these exceptional rights? Who should have them, and on what basis? If Wendt is correct, the answer to both questions is not practical but conceptual: any rights are given on the basis of recognition by other states, within the community of states that already recognize one another, on the basis of the reasons recognized by the community. But if no state is powerful enough to somehow command

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<sup>137</sup> Chayes and Chayes, *The New Sovereignty*, 197–201.

recognition as the only exceptional state (perhaps as the sole guarantor of security), which states would be permitted exceptional status would be a matter of mutual recognition. A natural arrangement is a roughly uniform system, in which no state is afforded general exceptions, except as specified by specific rules, or by a proposed re-interpretation, and it is at best unclear why any less uniform system would generally do a better job at mitigation.

One final alternative should be addressed. I say that states ought to comply with international law, and that this obligation is importantly tied to mitigation. But it is unlikely that every individual legal rule fills this function. What would be wrong, the challenge goes, with an international legal regime that allowed states to pick and choose the legal rules that they will follow on the basis of good-faith judgments about whether those rules help mitigate evident pathologies?

Such a legal regime might be justified, but again, I believe that there are pragmatic reasons to doubt this. A legal system that allows states to pick and choose the laws they want to follow, as an empirical matter, will not be able to sustainably fulfill the corrective function envisioned. Not only would such a system be prone to abuse, it puts states back in a coordination problem akin to the ones that law was meant to solve. Worse, because current legal rules are interconnected – that is, they genuinely form a legal *system* – ignoring some rules may undermine the ability of other parts of the law to correct.

The practice approach can avoid this with the following addition: So long as compliance with some subset of currently recognized laws would correct pathologies, then states have the same obligation to comply with *all* recognized laws. This way, states have a duty to comply with international law *qua* law, not because each individual rule corrects for pathologies, but because only when the entire system is treated as authoritative can it, as a whole, do so. However, as has been discussed, because international law is open to political

forms of legislation, states can amend or even discard laws that do not fulfill this function over time. This point is important to the explanation of the content-independence of (all or most of) international law as we find it.

Perhaps there are further ways that a state could contribute to the mitigation of the pathologies of the state system besides compliance with international law, dissolution into anarchy, the establishment of a world state, or the establishment of an exceptionalist system. Short of answering each possibility, let me simply suggest the following. If a state does not wish to comply with international law while at the same time claiming the rights of sovereignty, any excuse for noncompliance must be of the form: In order to satisfy my obligation to mitigate, I will do X, where X is inconsistent with compliance with international law, but also (1) contributes to the mitigation of the pathologies of the state system, (2) pursues purposes of comparable or greater value than the purposes of that system, and (3) is both conceptually and practically possible. In that case, in the apparent absence of alternative means for mitigating the pathologies of the state system, compliance with international law is, at least presumptively, the only means available to states to satisfy their obligation.

This, then, is the answer to Dworkin's doctrinal question. Why should states follow international law? When states claim the institutionally specified rights of sovereignty, they undertake obligations to mitigate the pathologies of that system. In the apparent absence of practicable and morally unobjectionable alternatives, this obligation can only be fulfilled by complying with existing corrective norms, amending existing norms so that they better fill the corrective function, and legislating new norms through the political means available to members when no corrective norms exist. At the moment, those existing corrective norms are the rules that constitute the international legal system, and the means for amending and creating new norms are what states currently recognize as the sources of international law —

custom, treaties, judicial rulings, and administrative commands. Thus states have an obligation to comply with international law.

### *Associative Obligations and Authority*

I have claimed that several different views — natural law, state consent, and Dworkin's New Philosophy — fail to capture the sense of authority presumed in contemporary international practice, which I have characterized as three characteristics. First, international law gives states particularly a specific kind of reason for action that is distinguishable from reasons given by advice and requests. Second, these reasons are normally decisive in practical deliberation, but can sometimes be overridden or defeated by countervailing considerations. Third, international law gives states such reasons for action even when specific legal rules are inconsistent with widely accepted moral truths. Together, these three conditions represent the form of international legal authority as presumed in practice. Reflections on state consent theory raised a fourth criterion for a successful account of international law as we find it: that it explains how a maximally large set of the legal rules currently recognized in practice could have the kind of authority those rules are presumed to have. This is, I suggest, the scope of authoritative international law.

Does the practice approach capture both the form and scope of international law as we find it? In part, this is an empirical question that turns on what tends to fulfill the corrective role. But there is reason to suspect that the legal rules authorized by the practice approach do correct better than any of the considered alternatives. This is particularly clear in the case of state consent. Because it would demand such vast revisions of existing international law, its narrowness likely excludes many important corrective norms such as the ILO's labor standards and possibly even human rights law. While natural law theories can avoid

problems of scope (by accepting the challenge of giving a moral justification for apparently immoral laws), they insist on thinking of legal duties as a kind of moral duties. This shuts down the ambition to find an account of law that speaks to diverse agents on grounds that each can accept from its own perspective. By grounding legal duties in associative obligations, and by linking sovereign rights to compliance, the practice approach constructs a form of political and legal address that can use a state's own reasons to justify the demand for conformity. Again, which of these forms of legal authority best fulfills the corrective function, assuming both are available, is an empirical question. But these alternatives represent the state of the art in contemporary international legal theory, so even this merely relative success for the practice approach is significant.

How does the practice approach explain the reason-giving characteristic of international law? There are two ways to answer this question, one that answers from an external perspective, and one that answers from an internal perspective. It is not obvious that both are necessary — the external suffices — but the internal can be instructive as well. The external explanation is just to say that states have an associative obligation to comply with law as a result of their claiming the institutionally specified rights of sovereignty. We have now discussed this at length. The internal explanation makes reference to a state's own reasons for claiming those rights. The strength of the state's claim to those rights is limited to the right of the institution to shape and give those rights, so if the state has reason to claim the rights, the state has reason to be concerned about the legitimacy of the system. From there we can make the now familiar arguments about the connection between legitimacy and pathologies and the corrective role of international law to explain, on the basis of the state's own reasons, why it ought to comply with international law.

But we have seen that it is not enough to show that law is reason giving, but that these reasons are somehow distinct from the kinds of reasons given by advice and requests. How does the practice approach make this differentiation? Again, there are two answers for this. First, associative obligations are the appropriate grounds for accountability seeking behaviors upon non-compliance. When one shirks one's associative obligations — as in the case of the brother who skips his sister's wedding or the promisor who reneges — one is rightly sanctioned or rebuked proportionately to the gravity of the offense. Failure to grant requests and especially to heed advice (at least when it is good advice) may result in bad consequences, but these would not be rightly interpreted as sanction or rebuke. In the normal case, it is not wrong to ignore advice or to refuse requests. It is wrong, however, to fail to fulfill associative obligations, which on the practice account explains why it is wrong to violate the law.

Second, when somebody requests that I do some action, or advises me to do some action, there is no sense in which I owe him or her my performance. According to the practice approach, conformity with associative obligation *is* owed to others. In the case of the familial obligation, I owe my conforming performance to the members of my family. In promising, the promisor owes performance to the promisee. In international law, the state owes compliance to the other states whose respective claims to sovereignty also depend on the legitimacy of the system and the mitigation of pathologies. To use Margaret Gilbert's term, legal obligations are *directed*, whereas reasons to heed advice or grant a request are not.<sup>138</sup>

Next, how does the practice approach explain the defeasibility of law? By grounding legal obligations in associative rather than moral obligations, the practice approach shows how law and morality can conflict. The analogy with promises is instructive. We are, I believe, bound by our immoral promises. If I promise you that I will drive the getaway car to help you

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<sup>138</sup> Gilbert, "Is an Agreement an Exchange of Promises?"

rob the bank, but then drive off just as you step through the front doors (perhaps because my conscience gets the better of me), then it seems that you are in a position to hold me accountable. After all, I just broke a very important promise to you! That does not mean that I should have kept the promise. All things considered, I did the right thing to drive off. Not only did I keep from doing something immoral myself, I made it much easier for the authorities to apprehend a known criminal. All of this is just to say that associative obligations, the kind of obligations at the heart of the practice approach to international law, can be defeated by sufficiently grave countervailing considerations. Law is no exception.

How does the practice approach explain the content-independence of legal authority? Given the current absence of practicable or otherwise better alternatives, the only or at least best way for states to discharge their obligation to mitigate the pathologies of the state system is to comply with international law, whatever it happens to be. This means that even if particular legal rules conflict with widely accepted moral truths, states still have an obligation to conform.

Consider again NAFTA, an example of morally problematic but presumptively authoritative international law. This trade agreement is having the double effect of exacerbating wealth inequality between Mexico and the United States while simultaneously displacing traditional Mexican farmers who now cannot compete with commodities from the US. The obvious objection to the authority of this law is that it is immoral, but the practice approach maintains that states ought to obey it despite this immorality because international law fills a corrective function. But why should this be so?

The answer shifts attention from NAFTA itself to the customary legal principle *pacta sunt servanda*. Many of the problematic tendencies of a politically decentralized practice such as the state system have to do with failures of coordination. Like promises and agreements for

individual persons, treaties are one of the most powerful, effective, and widely recognized solutions to coordination problems. But they only work when both parties have reasonable assurance that their agreement will be honored. The practice approach make sense of why international law would include a strong customary prohibition on the violation of treaties, even when they are immoral. Treaty making only solves coordination problems only when there is assurance of performance, and the strong prohibition on renegeing, even if the agreement seems to either or both parties to be inconsistent with moral truths, backed up with the force of law gives that assurance. States ought to comply with NAFTA, despite its apparent immorality, because there is a justified legal principle, of presumed compliance, that commands conformity to treaties, and that legal principle is justified by its corrective role.

Perhaps this can justify immoral treaties, but can an analogous argument be offered for immoral customary or administrative law? Yes, an analogous argument can be given. As with treaties, these source of law need to be able to give states assurance that others will comply in order to fulfill the corrective function by coordinating state action. Such assurance can only be provided by a strong prohibition on non-compliance, even when the terms of the law are deemed morally problematic by one of the parties. In fact, the above example of NAFTA actually makes this very point, since *pacta sunt servanda* is best understood as a custom that sometimes has morally problematic consequences but is nevertheless backed up by the force of law. States need, in a sense, to coordinate on a means for facilitating future coordination. That states have, in fact, settled on the customary principle *pacta sunt servanda* fulfills this coordinative need.

But the practice approach goes further: states have a duty to comply with law *qua* law because only then can the legal system as a whole fulfill its corrective function. If states were legally allowed to pick and choose which rules they would follow, the legal system could not

serve to reliably coordinate state behavior in the current decentralized state system and corrective legal rules could lose the institutional support of other non-corrective rules that they depend on. Thus international legal authority, on the practice approach, is truly content-independent – independent even of whether the content of an individual law itself corrects for some pathology. Of course, this forces the following qualification: absent other special justification, any particular international legal rule is only as authoritative as the going version of the international legal system is capable of mitigating pathologies. This sheds further light on defeasibility: the better the legal system as a whole corrects for pathologies, the more reason states have to follow it and the fewer countervailing concerns suffice to defeat that obligation.

To balance this controversial point about content-independence, the practice approach adds that the state's obligation to mitigate also includes an obligation to amend existing law to better fulfill the corrective function and an obligation to create new law when none already exists. Thus the practice approach leaves open the possibility that consistency with widely accepted moral truths might be part of how a revised version of an existing legal rule “better” fulfills its corrective function. So this approach need not be completely divorced from morality, even though legal obligation is not ultimately a moral obligation as might be found in the Kantian or Lockean traditions.

This raises the question: How revisionistic must the practice approach be? The answer, I suggest, is “not at all.” The practice approach holds that states have an obligation to comply with international law as they find it. This duty varies in how defeasible it is, depending on how well the going legal system, as a whole, corrects for the pathologies of the state system. Of course, as just mentioned, states may deviate from existing law — that is, they may act contrary to currently recognized norms — if they believe that the new norm instantiated by

their action could be accepted by others as an amended and improved version of existing norms. But in a political practice such as the state system, proposing new norms is done performatively, by acting in the way that you think members ought to act. Whether or not this performative legislative proposal is accepted or not — and so whether the action was legal or not — depends on whether other members follow suit. So deviation is risky. And when it does not manifest in sanctions for non-conformity, it is because the supposedly deviant behavior became the new norm. But because the practice account does not insist on consistency with widely accepted moral norms, we are not forced to revise immoral laws. Because it does not insist on the willed acceptance of legal rules, we do not have to exclude legal rules that states do not consent to. And because the practice approach does not favor one source of international law — treaties or customs or judicial rulings — it can accommodate all currently recognized sources. If the practice approach is revisionistic, it is only to the extent that states can identify, on publicly acceptable bases, new rules that would fill currently unaddressed corrective needs and new versions of existing rules that would better correct for pathologies. But these revisions are far less sweeping than those proposed by any of the alternative views considered.

### Concluding Remarks

What the practice approach offers, in the end, is a theory that uses a familiar and everyday kind of normativity — associative obligations — to ground an account of why states ought to comply with international law. It does not insist that practitioners change their concept of legal authority, but leaves the current conception intact. It does not insist on vast revisions of existing law, but illuminates both the conditions under which revision would be

appropriate, and how such revision might be achieved. It offers an analytically rigorous account of why states ought to comply, while also giving guidance about how to link demands for compliance with reasons that actual states otherwise have. It integrates Dworkin's highly promising New Philosophy, including much of what makes it appeal to theorists who situate themselves within the natural law tradition, with the positivist commitment to the separation between law and morals, and offer an answer to the doctrinal question of why states should obey international law. For these reasons, I believe that the practice approach represents a significant step towards understanding international law and, perhaps, law in general.

## CHAPTER 5: Conclusion

It was late in the process of writing this dissertation that I was asked what has become, to me, the most challenging question: Is the practice approach merely a *post hoc* justification for a bitterly unjust world order?<sup>139</sup> In my view it is not, and not because I disagree that the world is unjust. But given my conservative methodology and the fact that my criticisms of competing views frequently stem from what I apparently deem excessive revisionism, when a friend first asked me this question, I realized that I would need to answer it. Remarkably, reflection on a question that I initially saw as a challenge has shown me yet more reason to be attracted to this view.

Here is one way to think about this project: Traditionally, scholars have asked, is current legal practice justified? To answer, these scholars summon their preferred moral or political view, and then see how current practice matches up to that. My project asks, is current legal practice *justifiable at all*? Whatever my preferred moral and political views are, I know that there are many more out there. What I want to know is, does *any one of them* serve to justify the body of rules that constitute international as we find it? In fact, I wanted to go beyond just considering presently acknowledged moral and political views, but to ask whether such a view could even be imagined, even if it is a view that nobody, in fact, holds.

There are at least two ways to interpret such an investigation. The first, and the one that motivated my friend's question, comes from a sense of dissatisfaction with the status quo and perhaps the suspicion that I – a straight, white, male, American who has profited enormously from the unjust distribution of privilege in our world – am trying to rationalize that privilege, consciously or not. My work, on such an interpretation, is a kind of perverse

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<sup>139</sup> My thanks to Megan Zane and Amanda Trefethen.

and desperate contortion of morality in the service of subtly maintaining even the pathologies that I identify. Given the opacity of so much of our psychology, I *hope* that this is not what I am up to.

The second interpretation, thankfully, is very different from the first. It too comes from a sense of dissatisfaction with the current state of international politics, but adds to this a kind of humility about my private conception of the good and deference to other equally reasonable conceptions. I am not so secure in my moral convictions that I am prepared to prescribe the exertion of the force of law when they demand it, especially if reasonable people around me do not share my certainty. But there is no stronger condemnation of a legal rule than to say that *no* imaginable moral or political view could possibly justify it, and that is precisely the form of critique the conservative methodology of this view can ground. If a law cannot be interpreted consistently with a view whose explicit purpose is to maximize fidelity to going practice while remaining logically coherent and meaningfully connected to widely acceptable values, then practitioners will have identified a locus for agreement, for shared purpose, and for advancing the grand endeavor of international law.

In developing the practice approach, my hope has been to offer a structure for critical reflection about international law – one that connects laws with their measurable impacts on human life, and that grounds a particularly potent form of objection. Most importantly, it can serve as a roadmap for collaboration across disciplines. Too often, our experience of other fields - maybe after a talk or auditing a class – can be summed up in the following sentence: “It was interesting, but I’m not sure how I can use it for my work.” The practice approach is my suggestion how. On one hand, the practice approach depends on theorists who can make interpretive judgments about the purposes of patterned social interaction, and value judgments about which of those purposes are acceptable. On the other, it depends on

empirical investigation into the impact of legal rules, surveys about how people think about law, and technological knowledge about what kinds of alternatives are available. Such ventures outside of philosophy departments will, I think, be necessary in the near future for the perpetuation of our discipline, but promise to nothing except to enrich our work if we can learn to be humble enough to wonder again.

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