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Theorizing the International Rule of Law

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Theorizing international law at the present historical moment might seem a thankless activity, for two reasons. First, international law has been marginalized by American hegemony and unilateralism, which threaten its effectiveness, and by informal regulatory regimes and semi-public arrangements for global governance, which bring the very idea of international law into question. Second, the discipline of international public law has lost coherence in the face of challenges from economics and political science, which view law instrumentally, and from poststructuralism and cultural studies, which view it as epiphenomenal and ideological. Behind the common rhetoric of a new, post-juridical, world order lie attitudes antithetical to the international rule of law. My aim in this paper is to show that these attitudes are not novel and in fact repeat criticism advanced by an earlier generation of political and legal realists. In my view, such criticism fails to understand the character of international law and its place in the global order. To understand that character and place, we need to distinguish the idea of the rule of law from other ideas about law. The rule of law is a moral idea, if we understand the word 'moral' as implying limits on the means by which governments as well as persons pursue their goals. Theories of law that ignore this moral element cannot distinguish law as a constraint on the exercise of power from law as an instrument of power. A theory of the rule of law as positing moral limits on the exercise of power, by clarifying the noninstrumental character of genuine law, can provide a better understanding than do other theories of the character and importance of international law.

The aims of international legal theory

A theoretical understanding is one that emerges from an inquiry that problematizes its object. To theorize an idea is not to use it but to examine it. Unlike the lawyer, who 'applies' the law in particular situations, the legal theorist 'questions' the law to uncover its presuppositions. Where the lawyer asks: What law can I use to win this case? the theorist asks: What is law? What is the relationship between law and justice? Where the lawyer uses the resources of a legal system to reach a practical result, the theorist goes beyond that practical concern to offer a general theory of law.

Implicit in this stance is an answer to the question: What is the subject of a theory of law? What is that theory a theory *of*? The theorist, *qua* theorist, aims to define the idea of law in general, not to describe the incidental features of a particular legal system. 'General' and 'particular' are relative terms, but the direction of theorizing is from particular to general, not the other way around. One could articulate a 'theory of American law' but that theory would move beyond ethnographic description to discover the basic principles of the legal system it theorizes. A theory of law without qualification abstracts from the contingent features of actual legal systems to reveal the presuppositions of law itself. This conception of theorizing suggests two objects of a theory of *international* law: (1) the *actually existing* international legal system, which is, like the American legal system, a particular one whose principles are taught in courses on public international law, and (2) the *idea* of order regulating the relations of states, of which the existing international legal system is one (and no doubt an imperfect) instance. Theorists of international law cannot avoid thinking about the contingencies of the existing legal order. But at its most theoretical, international legal theory abstracts from those contingencies to uncover the presuppositions of international law as an idea. In doing so, it aims to define the character of international law as a distinguishable mode of relationship, not to describe the incidental features of an existing legal system.

This is not to say that the activity of theorizing international law, as I've defined it, is unrelated to practical concerns. Even the most detached philosopher of law—H. L. A. Hart springs to mind—can be a moralist.[1] But to moralize is use moral principles to reach moral conclusions, not to question those principles or to put them in a larger context. One cannot question a principle and use it at the same time. Theorizing and moralizing are analytically separable, and in the interest of clarity they should be separated. With that injunction in mind, I'd like to say at the outset that my concern in this paper is theoretical, not practical. It is an exercise in analytical, not normative, jurisprudence. I offer no moral defense (or criticism) of particular laws or institutions, and purport to solve no practical problems. Instead, I examine the idea of international law as a possible relationship among states, even if that relationship is far from being fully realized.

To argue that international law is *conceptually* possible is to respond to doubt that the presuppositions of law conforming to the formal criteria of the rule of law can be met at the international level and therefore that the *idea* of international law is incoherent. Such doubt is the connecting thread in theories commonly labeled "realist." The core of this realism is that circumstances make it impossible to realize the rule of law in the relations of states. But the doubt soon extends, as we shall see, to the idea of international law itself.

Between realism and postmodernism: Koskenniemi's neoformalism

The expression 'political realism' is used differently in different contexts. As a label for doubts about international law, it might be said to identify the proposition that law neither does nor should constrain foreign policy decisions. International law is weak law because law can be effective only within a state, and it should not constrain foreign policy because the stakes are too high: law must yield to prudence to ensure the safety and independence of the state. National self-preservation demands self-help, not reliance on law.

From the standpoint of political realism, the history of European politics reveals the weakness of international law, which has proved less effective than the balance of power in preserving a system of independent states against imperial consolidation. As a policy, the balance of power works through war and the threat of war, not through international law. The best we can hope to achieve is therefore a pragmatic accommodation of state interests, not a just and effective international legal order. For realists, the weakness of international law cannot be blamed on historical contingencies. It is the product of deep-seated and enduring features of the international system: above all, the absence of any superordinate authority to enact and enforce legal rules, which is not an accident but constitutive of international legal order. Under those conditions, international law serves largely to rationalize the policies of powerful states, which exploit its symbols to manage international affairs for their own purposes.

Such arguments are part of the modernist realism of Carl Schmitt, Hans Morgenthau, John Herz, and Robert W. Tucker, among others, who despite their differences articulated skepticism about international law that did much to undermine confidence in the possibility of legal order at the international level. A more radical skepticism can be found in writing on law inspired by Derrida, Foucault, and other critics of modernity—more radical because it questions not merely the application of law to politics but the very idea of law as a basis for human interaction. Like language, on which it depends, law becomes a self-referential system of signs in which meaning remains elusive and towards which the proper attitude is an irony that acknowledges its inherent indeterminacy.[2] Or it becomes a Foucauldian 'discourse' that constitutes as well as rationalizes a system of repression.[3] By reinforcing an inclination in the legal profession towards an instrumental view of law, postmodern legal skepticism assists a convergence between political realism and legal realism, lending credence to the judgment that international law is, like other kinds of law, a product of decision and an instrument of

policy and power. Whether one gives this understanding of law an optimistic or a pessimistic spin, the premise is the same. Law enables rather than constrains power.

The ways in which postmodern skepticism reinforces political realism are illuminated by Martti Koskenniemi in his study of the discipline of public international law between the late nineteenth and mid-twentieth centuries.[4] Koskenniemi's subject is the self-understanding of the international law profession in this period, as reflected in the writings of some of its most influential members. Marginalized after 1939, he argues, that profession remains to this day intellectually moribund. In analyzing its decline, Koskenniemi pays particular attention to how the arguments of Schmitt and Morgenthau destroyed its prewar self-confidence.

Schmitt begins with one of the puzzles of international law, which is how to define the community it governs. With the emergence of the territorial state, Europeans had to decide which entities were 'sovereign' and therefore capable of having relations with other such entities as equal members of an imagined society of sovereign states. And they had to decide how to understand peoples outside Europe whose institutions seemed to disqualify them as 'states' in the European sense and therefore as members of international society. This difference, which became more pronounced as Europeans found they could subjugate other peoples, generated a bifurcated international order: an egalitarian horizontal international law for relations between European states and a hierarchical imperial law for relations between European and non-European peoples. By the end of the eighteenth century the distinction had hardened to the point at which only non-European peoples who embraced European laws and institutions were entitled to membership in a community of states governed by a distinctively European law of nations. Schmitt finds this concrete and historically vindicated *jus publicum Europaeum* preferable to the abstract and utopian universal law that international lawyers, focusing on the alleged moral defects of European supremacy and anticipating its eventual disappearance, were coming to embrace as its successor.[5]

Morgenthau picked up Schmitt's theme in several books published after the Second World War, arguing that in international affairs universal principles are, when not empty of content, a mere expression of provincial ideals.[6] Similar charges are made today by those who attack the idea of human rights as a misplaced effort to universalize Western values. For Morgenthau, the faith that law can solve political problems found in the Weimar constitution or the League of Nations Covenant illustrates the defect of liberalism, which is its failure to grasp that politics is always a struggle for power. Like Schmitt, Morgenthau thought that framing political conflicts in moral or legal terms intensified those conflicts by substituting totalizing ideologies for pragmatic accommodation. Like Schmitt, he believed that the European era had ended and that the world could no longer rely on the balance of power and shared diplomatic practices. And, like Schmitt, he thought that international law, by treating power as jurisdiction, could only rationalize shifts in power; that it was foolish to think that power struggles could be depoliticized and handed over to judges or arbitrators for settlement as 'disputes'; and that legal rules could be applied constructively only by the exercise of prudence.[7] These are familiar elements of the political realism that Morgenthau propagated after he arrived in the United States, a refugee from Nazi Germany, in 1937.

Morgenthau's criticism of liberal internationalism invited international lawyers to embrace an instrumentalism already pervasive in the legal profession. In the United States, that instrumentalism drew on nineteenth-century pragmatism and twentieth-century legal realism, two home-grown movements that aimed to erase the boundaries between law and politics. It continues in their late twentieth-century descendants: 'critical legal studies' (which recycled the antiformalism of the American legal realists of the twenties and thirties), and 'law and economics' (better called 'law *as* economics' because it makes law the servant of economic policy). While these movements focused mainly on American law, it was not long before their doctrines began to affect the way international lawyers understood their subject.

An influential effort to view international law as an instrument of policy was the 'policy-oriented jurisprudence' of Myres S. McDougal, followed by the proto-globalism of Richard Falk and his colleagues in their 'world order models project'—one on the right, the other on the left, but alike in projecting American values onto the rest of the world. An instrumentalist view of law is equally evident in the proposed disciplinary union of international law and international relations theory, of which Koskenniemi is rightly skeptical. This new joint discipline is concerned with the efficacy of what it calls international regimes or networks and with the question of what motivates states to comply with international law. Some of its practitioners explain that compliance in terms of legitimacy (the acceptance of norms),[8] others in terms of rational choice (the pursuit of interests),[9] but all are concerned less with understanding law than with designing international regimes to promote liberal democratic values.[10] That agenda enables rather than constrains American imperial policy because it sees liberal democratic ideals as ends to be achieved, not as limits to be respected.[11]

Koskenniemi argues that political realism and legal realism converge in the theory of international law to destroy the object of that theory, law itself, for in a realist theory of law there is no categorical distinction between law and policy: law is policy under another name. Koskenniemi is correct that, on realist premises, there can be no theory of law as something other than a tool of policy. But he is mistaken in subsuming all noninstrumental theories of law under the label 'formalism'. Formalism (as he understands it) takes law to be a closed system of rules within which legal conclusions are reached by a process more deductive than interpretative: for him, 'indeterminacy' is simply a denial of this proposition, not a denial of law itself.[12] But the formalist dismissed by Koskenniemi and other rule-skeptics is a straw man. Though some have seen law as a closed deductive system, formalism can be understood in other ways.[13] One can understand law as a system of noninstrumental rules without the interpretative naiveté that Koskenniemi joins legal realists in rejecting. It is misleading to

argue, as he does, that legal formalism must be reinvented. It does not need to be reinvented because we already have better formalist theories with which to counter rule-skepticism. To put it differently, formalism is perfectly compatible with indeterminacy, if what we mean by the latter is that rules, like words, can have multiple contexts and diverse meanings.

For Koskenniemi, indeterminacy implies an ongoing conversation in which meanings are continually renegotiated and redefined as new interests and identities emerge and make their claims. For him, the alternative to instrumentalism is a Habermasian ethic of mutual recognition and dialogue. Legal theory cannot erase the essentially conflictual character of politics. Embracing this much of the realist critique, Koskenniemi seeks to revive a 'culture of formalism' without embracing formalist doctrine. But unlike the realist, who asserts his own rationality against the irrationality of those who see things differently, Koskenniemi's cultural formalist posits a shared universe of public discourse within which those who differ can engage one another. Everyone is included and is required to speak to everyone else. The cultural formalist does not reassert the idea of the rule of law: that idea has no place in a dialogic theory of law because it would 'fix the universal in a particular, positive space'. The culture of formalism has no essence and no determinate boundaries; its identity is defined by its opposition to what it is not. It is continually redefined because 'it must remain open for other voices, other expressions of "lack" (or injustice) that, when given standing under it, redefine the scope of its universality'.[14] With these claims Koskenniemi risks embracing the postmodernist relativism that now pervades the humanities. He concedes too much to legal skepticism when he concludes that the culture of formalism can retain from its modernist past no more than the requirement that policies be justified in public debate, for that culture (as Koskenniemi understands it) includes a belief in the moral equality of human beings that he does not wish to abandon. Such a belief is implicit in his critique of legal instrumentalism

and his view of Kantian jurisprudence as a dialogic (or 'political') idea—a regulative idea of universal community—not formalist dogma.[15]

Despite his flirtation with postmodernism, Koskenniemi remains within a modernist metanarrative in which limited views are superseded by more inclusive ones. 'Every decision process with an aspiration to inclusiveness', he writes, 'must constantly negotiate its own boundaries as it is challenged by new claims or surrounded by new silences'. Because it is inherently open and unachieved, that process can 'resist accepting as universal the claims it has done most to recognize in the past', and in doing so 'sustain (radical) democracy and political progress'.[16] But democracy is more than a conversation always open to new voices. It implies a deliberative procedure for making decisions that prescribe obligations within a legally defined and regulated community, and it can work as a procedure only by fixing at least some universals in a particular, positive space, above all the definition of who qualifies as a human being and therefore as a member of a universal moral and juridical community. It cannot reject the universal claims implied by the idea of human equality—there are limits on how far that idea can be renegotiated in a conversational model of law. And by what standard is inclusiveness a value? Where is the measure of progress if universality is rejected? The ideas of progress and inclusiveness belong to modernism, not postmodernism. Koskenniemi presents the history of international law as the rise and fall of a sensibility, but he imagines that fall as preceding the emergence of a new position, at once post-realist and post-formalist, that will reverse the decline. A story of rise and fall is a variant of the modernist narrative. The history of international law can also be read as a never-ending struggle between two opposing tendencies and the abstract ideas in which they find expression: the realist idea of law as an instrument of policy and the legalist idea of law as a noninstrumental constraint on policy.

Recovering the idea of the rule of law

To understand the force of realist criticism, we must disentangle two arguments on which that criticism rests. The first, which defines *political* realism in international relations, is that the rule of law cannot be achieved because the institutions that are contingently necessary to enact and enforce law do not exist at that level. Without an authority to make law, so-called international law is too uncertain and ineffective to merit the name. The rule of law cannot be realized under the conditions of international anarchy. The second argument, which defines *legal* realism, is that the rule of law is conceptually impossible. It is an illusion in *any* legal order because law is always an instrument of policy, never solely a constraint on policy. The problem is not that international anarchy makes legal order impossible, but that the idea of law independent of policy is incoherent. The legal realist is a more consistent rule skeptic than the political realist, for whom international law might be possible where security is not a concern: if the stakes are low enough, the absence of superordinate authority is not a decisive obstacle to legal regulation. For the legal realist, all law is policy. Law is a decision process, not a system of rules. If there are rules at all, their rationale is that adhering to them produces desired outcomes, and their authority is conditional on their effectiveness in bringing about those outcomes. The idea of law as a mode of association in which noninstrumental rules limit the application of instrumental rules is unintelligible. Framing the realist critique in this way puts noninstrumental rules at the center of debates about law. It forces us to rethink the question of how to understand the rule of law between as well as within states.

Koskenniemi's response to legal realism—that we must preserve the idea of legality while remaining open to the claims of difference and exclusion—yields a theory of law without an object. To distinguish legality from policy we must define the rule of law in a way that preserves the moral content that Koskenniemi suggests is an inherent aspect of legality. We can, in other words, retain the idea of the rule of law by defining it in a way that protects

it from his objections to formalism, and we can do that by rejecting the deductive aspect of formalism while keeping the formalist view that the rule of law presupposes noninstrumental rules. Koskenniemi can be read constructively as posing a challenge to legal theorists to understand international law in a way that responds to new ideas about 'justice' *without* trading away the idea of the rule of law for a merely discursive idea of democracy. We can defend legality against realism by defining law—including international law—in a way that distinguishes it from mere power, on the one hand, and mere conversation, on the other. An inquiry into this character would be an inquiry into the rule of law as a distinct mode of association among persons whose status as human beings is a matter of 'nature' or 'reason' rather than 'convention' or 'decision'.

Law is commonly distinguished from power in two ways. First, it is authoritative. A law is not an order or threat issued by someone possessing de facto power to harm those who ignore it. It is a rule issued by proper authority. As Hobbes famously put it, 'law, properly, is the word of him that *by right* has command over others'.[17] Secondly, laws are general rules, not specific commands. A court applies law in specific situations and may issue commands to secure the compliance of particular persons, but these judicial actions, though mandated by law and needed to secure its observance, are ancillary to law and not themselves laws. If we put these two ideas—authority and generality—together, we can say that a legal system is a system of general rules made and applied by authority. Implicit in this rudimentary definition of law is the idea that public officials are themselves constrained by law. The idea of official powers implies that officials might exceed their powers, and that in turn implies normative limits on state power—limits that officials sometimes exceed. The proposition that officials are normatively constrained by law is often said to be the essence of the rule of law. But to say that is to give the proposition unwarranted theoretical primacy because it simply restates an implication of the idea of authority itself.

These preliminary ideas about the rule of law make apparent a standard line of attack on the possibility of international law. If we define a legal system as a system of general rules enacted and enforced by sovereign authority, the international legal system lacks one of the requisites of law. In international relations, the word 'sovereign' does not designate an office that makes law but an agent whose actions are regulated by international law. To put it differently, there is at the international level no sharp distinction between sovereign and subject. International law is 'horizontal', not 'vertical', as one formula has it.[18] To speak of the international rule of law we need a definition of the rule of law that specifies how legal subjects are related to *one another*, not only how they are related to an office of authority. Such a definition must distinguish a state whose members are related on the basis of law from a state in which some use law to manage others. The subjects of a law-based state are fellows in an association whose rules constitute the association and regulate their interactions. As members of that association—'citizens'—they are associated not only with government but also with one another. The subjects of a managerial state, in contrast, are associated only with the manager, not with one another. They are resources to be managed: subjects mobilized to advance the goals that government chooses to pursue, not citizens.

In a rule-of-law state, laws are not instrumental in this way. Citizens are 'persons' pursuing ends they choose for themselves. As citizens they are equally entitled to pursue their goals without interference except when necessary to prevent them from interfering with one another's freedom. This is the familiar Kantian, 'classical liberal', understanding of a morally legitimate state. Liberal-egalitarians argue that such an understanding demands an account of how citizens can enjoy their freedom, avoid exploitation, and participate in public affairs as citizens. But the Kantian premise remains at the core of liberal egalitarianism and is evident in such formulas as Rawls's 'priority of liberty' or Michael Walzer's 'blocked exchanges'.[19] In a moral relationship people treat one another as ends, not only as resources they can

exploit to satisfy their desires. In a moral relationship, people recognize one another as free beings and treat one another accordingly, that is, 'justly'. They do not use one another coercively to achieve their ends, though they may use one another noncoercively, that is, with one another's free consent. And they are permitted, perhaps in some cases even required—to use coercion to thwart those who would coerce them or others unjustly. As Rawls affirms, the rule of law cannot be theorized without acknowledging this Kantian premise.[20]

Principles of justice are moral principles, but not all moral principles are principles of justice. From a Kantian perspective, 'justice' identifies the principles that can without moral impropriety be enforced within a legal order. Citizens must obey the law and the law can if necessary be enforced. It is in this sense that we can say, in a theory of the rule of law, that a state is a coercive association. Laws may be enforced because they are just, not just because they are enforced. A sociological definition of the state like Max Weber's—that the state is a coercive association whose members believe its coercion to be legitimate[21]—will not do in a theory that makes justice central to the rule of law because it fails to distinguish between a state that institutionalizes universal moral principles and one whose laws offend against those principles. This does not mean that the principles are fixed and unequivocal. As Koskenniemi rightly maintains, those principles, though universal, are open to interpretation and debate. They are regulative ideals, not instrumental goals.[22]

Before applying this understanding of the rule of law to international affairs we must look more closely at the understanding of law it on which it depends. Once we have a clear idea of the rule of law as a general idea we can investigate the degree to which that idea can help to resolve debates about the character and possibility of international law. If the rule of law is a mode of association, we must pay careful attention to the presuppositions of that mode.

Instrumental and noninstrumental law

The question of the limits of permissible coercion is central to political theory because a state is an association whose laws are at least potentially enforceable. The link between justice and coercion grounds the idea of the state as a nonvoluntary association whose rationale is that it can secure justice in relations among its citizens. If a state exists to turn certain basic moral prescriptions—those that fall within the sphere of justice—into legal obligations, it cannot justly enact laws that are contrary to those prescriptions. Nor can it justly make and enforce laws to advance public policies unrelated to sustaining a just legal order. A government can rightly compel some to act in ways they would otherwise not choose only when doing so is necessary to protect the moral rights of others. The relationship between law and morality is nevertheless loose, not only because moral principles can be interpreted in different ways and because it can be hard to distinguish what is morally required from what is desirable on other grounds, but also because even those who agree about the justice of a law may disagree about whether that law should be enforced. That someone has a moral duty does not always mean that he or she should be forced to perform that duty. Certain moral duties are not suitably turned into legal duties because efforts to enforce them would be unacceptably intrusive or would lead to arrangements especially vulnerable to corruption or other abuse.

This understanding of permissible coercion is a crucial presupposition of the rule of law as a relationship among citizens. It means that government cannot rightly force citizens to cooperate in promoting ends that are not their own, unless respect for the moral rights of other citizens demands it. Where law becomes an instrument for promoting ends unrelated to justice, people also become instrumental to those ends—resources to be used, not citizens. Only a noninstrumental conception of the rule of law can distinguish a liberal state from an authoritarian one. The expression ‘rule of law’ does no intellectual work if any effective system of enacted rules must be counted as law, no matter what its moral qualities.

Where people live together under the rule of law, they are related to one another as individuals who make choices of their own and are bound to respect the choices of others within the limits of (to quote Rawls again) 'like liberty for all'.[23] They are related to one another 'on the basis of' law, where that expression (or a cognate expression like 'in terms of' law) implies a noninstrumental understanding of law. If you and I are related on the basis of law, it means that no matter what goals we pursue, individually or collectively, we must do so within limits prescribed by noninstrumental rules that constitute the association. Those rules define a relationship of citizens and must be respected if that relationship of moral and legal equality is to exist. The categorical or unconditional duties they prescribe cannot be disregarded without violating that relationship. Instrumental rules, in contrast, are tools for producing desired outcomes. They are instrumental because they postulate alterable desires, which they are designed to satisfy, not the unalterable status of human personality that the moral relationship presupposes. People who are related in the pursuit of shared purposes may be governed by law but they are not related 'on the basis of' law. They are related in terms of purposes they share or are forced to support. The rationale of an instrumental rule is that its observance will produce a desired result, not that observing it is appropriate apart from that result. Instrumental laws lack the moral qualities required by a conception of law that can distinguish between just and unjust coercion. It is those qualities that we should be trying to pick out when we use the expression 'rule of law'. That expression identifies a specific kind of relationship, relationship on the basis of noninstrumental law.

So understood, the rule of law identifies an understanding of law as, at one level, a system of noninstrumental rules prescribing obligations to be observed by citizens in their transactions, and at another, a system provided with procedures for identifying, enacting, altering, and applying those rules. These may be rudimentary, as in the international system, but they must exist. They are part of the definition of law as distinct from morality or custom.

The standard criteria of the rule of law—that there can be no secret or retroactive laws, no crimes except as provided by law, no penalties except those linked to a specific offense, no arbitrary exemptions from law, and so forth—are focused on this second (procedural) level in so far as they imply constraints on public officials who might otherwise rule by arbitrary and therefore extralegal means. But those criteria presuppose a primary order of noninstrumental rules in which citizens are related to one another as moral equals. It is important to notice that these rule-of-law criteria are not themselves the outcome of an authoritative decision. They identify qualities that are inherent in the idea of enacted law, but they are not themselves enacted.[24] Unlike enacted law, they cannot be altered or annulled by authority. In this respect, they resemble moral principles, which no decision can enact or repeal, though the analogy is one of form rather than of substantive content.[25] And, like moral principles, they provide a standard by which to judge enacted law. But these rule-of-law criteria are not moral principles external to law.[26] They are themselves law because they limit the creation and application of enacted law, in that way governing both sovereign and subject. Law that fails to meet these rule-of-law criteria has not been properly enacted. It is 'law' made by a sovereign power that, in making it, declares itself to be indifferent to the rule of law. The rule of law offers a standard of justice, but it is a quite specific standard: not a general, undefined justice whose content anyone can supply, but a justice specified in conditions presupposed by the idea of law as a system of authoritative obligations governing the transactions of citizens who may in some capacities be authors as well as subjects of law. To claim this is not to reduce the idea of the rule of law to the rule of justice, for the rule-of-law criteria are not criteria of 'just' law but of law itself as the basis of a relationship among moral equals, and not solely an instrument of someone's purposes. Nor is arguing in this way to advance a moral preference. It is simply to identify a basic premise of law as a mode of relationship between persons.

In a rule-of-law state, no one is excluded from the jurisdiction of law. There are no officials who are above the law, and no citizens outside the law. The status of noncitizens will always pose difficulties, but to the degree that a legal system achieves the rule of law, no visitors, even illegal ones, are treated as persons without legal rights. Contra Schmitt, it is not inherent in law that the sovereign can exclude anyone from its domain. Schmitt argued that if sovereign power is the power to decide exceptions, who is and who is not included within the realm of law is a matter of legally unconstrained sovereign decision. At the center of every legal order is an arbitrary choice about which laws constitute that order and to whom those laws apply. This suggests that the rule of law understood as a set of principles constraining law making is incoherent because law is ultimately determined by an extralegal decision, such as occurs at a moment of founding or in a state of emergency. From this perspective, the rule of law is an illusion cherished by those cannot bear to admit that all law is an expression of power. The fallacy of this Schmittian view is that law cannot control the conditions for its own creation. Like other realist theories of the state, Schmitt's 'decisionism' misunderstands sovereignty, which is not de facto power but rather the authority to enact law that is itself constituted and regulated by law.[27] Misunderstanding sovereignty, it misunderstands law, which is not simply coercion by another name but a distinct kind of association, association in terms of noninstrumental rules, in which coercion is justified only to secure observance of the rules that are the basis of association, and whose ultimate ground is that they prevent one person from interfering arbitrarily with the choices of another. Decisionism assumes that human beings are included within the realm of law by convention, not by nature. In defining sovereign power as including the discretion to decide who counts as human, it ignores the moral rationale of law as an alternative to de facto power as a basis for relations between human beings. If law is a mode of human relationship, it cannot allow arbitrary decisions about who is and is not human.[28]

Is this understanding of the rule of law no more than liberal ideology? I agree with those who argue that we should not confuse the rule of law with other putatively desirable qualities of a state such as a market economy, democracy, or social justice. But the moral element that I identify in the idea of the rule of law is not a set of substantive qualities like these. I reject the claim that *either* we work with a minimalist ('thin") concept of the rule of law *or* accept whatever substantive values someone wishes to pack into it. I agree that the expression 'rule of law' is often used as a political slogan, carelessly or disingenuously, and that this has done much to devalue it. Often it means little more than that the positive laws of a given community are obeyed and enforced, no matter what the form or substance of those laws.[29] By this standard there is no discernable distinction between the rule of law and just plain law. The solution to this difficulty is to add as much moral content as is needed to make that distinction, but to avoid stuffing the expression with substantive values.[30] And the moral content we put in must be dictated by the logic of the concept, not by a wish to accommodate external beliefs or preferences. The result may exclude some legal systems from the category of rule-of-law systems, but if the concept is coherent that exclusion is defensible: the defect is in the system, not in the concept. Scholars of comparative law may find the definition of the rule of law defended here parochial, on the grounds that it relies on Western conceptions of human rights and civil liberties that those living in non-Western societies do not share. To avoid that alleged parochialism, they would include any legal system that imposes significant constraints on government. Or they may identify different conceptions of the rule of law to reflect the values of societies with different economies, forms of government, or ideas about justice.[31] But this 'inclusive' approach to defining the rule of law enables the comparativist to find evidence of the rule of law in different societies only by draining the idea of much of its meaning. That approach may help in comparing legal systems, but it makes no contribution to legal theory because it fails to grapple with the question of how to understand the rule of

law as a mode of association. To say, for example, that in some countries the rule of law is 'appreciated in instrumental terms' and 'dictated by efficiency and stability imperatives' is to use the expression 'rule of law' where it does not belong and where 'law' would suffice.[32]

The expression 'rule of law' should not be used as a synonym for 'law'. It should be used only to designate a kind of legal order in which law both constrains decision-making and protects the moral rights of those who come within its jurisdiction. Such a legal order is also moral in the sense that the obligations it prescribes are not prudential: they concern the legality of an action, not its desirability. Neither an understanding of the rule of law as the principle that governments should obey their own laws, without specifying the character of those laws, nor one that makes it compatible with a wide range of regimes, can distinguish a rule-of-law state from one in which some use law to dominate or exploit others. Only the idea of the state as an association of moral equals within a system of general and noninstrumental laws, where that system is understood to protect the moral rights of all, can make the required distinction. This does not mean that a rule-of-law state is unconcerned with the public good: governing according to the rule of law *is that good*. Nor does it exclude policies needed to secure the rule of law in an actual state. The rule of law is an abstraction, not a description of existing institutions. Every state is an ambiguous mixture of purposive and nonpurposive elements, its legal system a mixture of instrumental and noninstrumental laws. Authoritarian rulers sometimes respect the laws they make to promote the purposes they think desirable. And even a rule-of-law state becomes a managerial enterprise when dealing with internal or external enemies because citizens are mobilized to defend the state and arguments advanced for violating laws that seem to stand in the way of that imperative. One might evaluate legal systems according to how well they match the definition of a rule-of-law state, but little is gained by saying that any system short of a tyranny meets that standard.

A rule of law between states?

Like any other really existing legal order, the international legal system is an ambiguous mixture of instrumental and noninstrumental rules. The theorist faces two challenges in dealing with this ambiguity. One is to distinguish the *idea* of international law as a mode of association on the basis of noninstrumental laws from the contingent *features* of the existing international legal system, which include instrumental as well as noninstrumental laws. The other is to distinguish the presuppositions of that idea from the contingent *conditions* for realizing the rule of noninstrumental law within that system. But it is within certain limits a matter of theoretical choice where the line between concept and contingency should be drawn. Some might choose to include the existence of courts (for example) in the *definition* of a legal system, other to regard courts as a contingent condition for its being an *effective* system. The idea of adjudication seems to be part of law itself because law presupposes a way to settle disagreements over the meaning of its rules. But adjudication is not the only way to settle disagreements. So from one point of view, adjudication can be seen as a condition for the effectiveness of law rather than as an inherent aspect of the rule of law.

To speak of the international rule of law, we must make several assumptions. We must assume, as just suggested, that law can be effective without legislation, adjudication, and centralized enforcement—that laws can be created, their meanings in particular cases authoritatively determined, and observance secured in other ways. We must also assume that states can be subjects of law—'legal persons' with rights and duties under international law. International law makes that assumption by treating states as artificial persons who associate, like citizens, on the basis of law. But international law is not enacted law, for its source is not the decisions of a superordinate authority but the agreements and practice of states, who are at once its authors and subjects. So we must assume that those who make law are also bound by it. From the standpoint of the modern state, the absence of a central authority to make and

apply law is a sign not only of difference but also of deficiency. This defect of international law is the subject of a vast literature and I will simply pass over it here.[33] I want instead to discuss the noninstrumental character of international law, which remains under-theorized.

The statement that the rule of law presupposes a noninstrumental relationship among legal subjects is easier to grasp at the international level than at the level of the state precisely because the international system is a horizontal one. In the context of international relations, the rule of law means that states treat *one another* justly, that is, as members of an association constituted by their recognition of the authority of its rules. To the extent that the rule of law is realized, it is among states understood to be fellow subjects of a common international law. In a secondary sense we may speak of the international rule of law as operating in institutions constituted by states, such as the United Nations. The UN Charter provides a legal framework that binds the organization itself as well as member states, though the extent to which it or its various organs are regulated by law remains contested and unclear.[34] At the regional level, the rule of law is realized to some degree in the European Union. And one might speak of a global rule of law in a possibly nascent legal system in which individual human beings have rights and duties unmediated by national institutions. Even in the existing system, individuals as well as corporate entities other than states have international legal personality. But the core meaning of the international rule of law lies in its application to relations between states, not regionally but universally, as the primary subjects of international law.[35]

One must avoid claiming too much for the international rule of law, so understood. If the rule of law is a mode of association among free persons, natural or artificial, the rule of law among states is compatible with authoritarian or managerial rule within each state. That is why, since Kant, theorists of the international rule of law have imagined a federation of republics—that is to say, a system in which rule-of-law states are related on the basis of the rule of law—as the most promising route towards a global rule of law. Instead of depending

on the arrival of a single system of world law binding individuals, the rule of law might be realized within a federal system binding states that are themselves rule-of-law states. That federation might then gradually expand to include all states. The model here is something like the European Union—a union of rule-of-law states—not the United Nations—a union of states that more or less ignores the internal constitution of its members. The idea of human rights has emerged in contemporary international law as the mediator between the rule of law at the international and national levels, though whether it is the proper mediator and how it should it mediate are matters of unresolved disagreement.[36] Short of the ideal implicit in the European model, the international rule of law can mean no more than that states conduct their relations within a framework of noninstrumental law.

The international legal system includes instrumental rules found in treaties and in the regulations issued by international agencies to further substantive goals. From the standpoint of legal theory, such rules are better understood as contractual obligations or administrative policies within the law than as international law proper. Because they obligate only those that have accepted them, treaties do not establish general law—law that prescribes obligations for every state. General international law is largely customary law, which obligates states as members of international society without their explicit consent. States can terminate their agreements but they cannot escape the jurisdiction of general international law, which, because it both constitutes and regulates the relationship of states as legal subjects, is the ultimate basis of their association. The rule of law demands that international agreements must not contravene certain basic rules of general international law. Agreement cannot legalize actions, like waging aggressive war, that are contrary to the noninstrumental rules of general international law. That law limits the policies that states can pursue collectively as well as unilaterally. The instrumental rules they adopt must conform to the noninstrumental rules of general international law and, at a deeper level, the principles of legality underlying

those rules. The international rule of law exists to the extent that states conduct their relations on the basis of laws that limit and not simply enable policy.

Focusing on the noninstrumental character of law reveals the character of genuine legality at the international level. Genuine law exists only when two conditions are met. First, it must be authoritative; at the very least, those governed by law must know what the law is and they must acknowledge its authority. Second, it must be compatible with acknowledged rule-of-law criteria, and these criteria are noninstrumental. Political realism fails to grasp how law can be the outcome of authority at the international level. It assumes a simplistic view of authority that does not allow for the possibility that certainty and efficacy, which centralized institutions are supposed to supply, might be achieved differently in a decentralized legal order. Legal realism fails to grasp that legal order is ultimately noninstrumental, that the rule of law can tolerate some instrumental laws but not a legal system in which all laws are instrumental. International legal theory today is preoccupied with ideas that are peripheral and even antithetical to the rule of law, such as regimes, networks, governance, compliance, and legitimacy. Theoretical inquiry into the presuppositions of international law is rare. We assume that we know what law is and focus on its moral legitimacy or practical efficacy, neglecting the thing itself, which is in fact not well understood. I have suggested that certain Kantian themes—the moral character of legal order, the distinction between law and morality, the autonomy of politics as concerned with legislating moral prescriptions that are reasonably enforceable, and the dependence of the international rule of law on the rule of law within states—offer a more promising path towards understanding the true character and potential of international law.

Implicit in the question of the rule of law, and defining its boundaries, is a concern to identify the kinds of obligations that may properly be prescribed by law. And implicit in that concern is a recognition that some obligations cannot properly be prescribed because they

infringe not only the procedural principles in terms of which the idea of the rule of law is typically expressed but also the moral rights that those procedural principles protect. At the international level, many of those moral rights are the rights of states. But such rights are connected with the rights of the individuals who compose those states, which means (as Kantian theory implies) that the international rule of law cannot be more than an incomplete realization of the rule of law universally. This incompleteness returns us to the open-ended conversation postulated by Koskennemi, but with a difference. For we can now see that this conversation about the character of international law, like all conversations, has a context that constrains what can be said. As a conversation about the *international* rule of law, it concerns a system of noninstrumental obligations binding on states. As a conversation about the rule of law as a *universal* mode of association, it concerns law within as well as between states. Rule-of-law principles at either level leave room for interpretation and disagreement: to that extent, both realism and postmodernism are correct. But critics of the rule of law claim more: they claim that law is essentially indeterminate, and that it is an illusion to argue that the idea of the rule of law can fix the limits of indeterminacy. They can sustain those claims only by destroying the idea of law as distinct from policy. For if law is not a relationship between independent agents, collective or individual, if its presupposition is not the independence—the freedom from unwarranted coercive interference—of those agents, there is nothing to distinguish law from power. The idea of the rule of law can be seen, then, as a necessary part of law itself if that distinction is to be maintained. The view that law is both indeterminate and policy-driven erases law as a distinct mode of human relationship. It must be admitted that circumstances lend credibility to that erasure: what international lawyer has not flirted with realist doubts in moments of despair? A clearer view of what law might be, even in the circumstances of international affairs, might help them resist the temptation to throw in the towel.

Notes

[1] See Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004).

[2] The ironic voice in international law is illustrated in the writings of David Kennedy, such as *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004). Many of those styled 'postmodernist' believe in law but insist on historicizing its political meaning—less so, however, after 9/11 than before, as is evident in Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago: University of Chicago Press, 2003).

[3] Repression is the theme of much feminist writing on international law, though feminists are ambivalent about law, which most understand as enabling *and* obstructing women's rights. Hilary Charlesworth, 'Feminist Ambivalence about International Law', *International Legal Theory* 11 (2005), pp. 1–8.

[4] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001).

[5] Schmitt's major work on international law was written during the war and completed in 1950. It is now available in English as *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen (New York: Telos Press, 2003).

[6] Koskenniemi, *Gentle Civilizer of Nations*, p. 438. See also William E. Scheuerman, *Carl Schmitt: The End of Law* (Oxford: Rowman and Littlefield, 1999), pp. 225–251.

[7] Koskenniemi, *Gentle Civilizer of Nations*, pp. 460–64. For more on Morgenthau's debt to Schmitt, see Michael Williams, ed., *Realism Reconsidered: Hans J. Morgenthau and International Relations* (Oxford University Press, 2007).

[8] Thomas M. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', *American Journal of International Law* 100 (2006), pp. 88–106.

[9] Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005).

[10] The movement now has a textbook that includes 'norm-based' and 'interest-based' theories of state behavior: *Foundations of International Law and Politics*, ed. Oona A. Hathaway and Harold Hongju Koh (New York: Foundation Press, 2005).

[11] The argument that these recent movements in international legal theory are ideologies of American hegemony is developed by Jean L. Cohen, 'Whose Sovereignty: Empire versus International Law', *Ethics and International Affairs* 18 (2004), 1–24.

[12] Koskenniemi articulates his understanding of indeterminacy in an epilogue to the reissue of his *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), pp. 590–596.

[13] As Ernest J. Weinrib illustrates in a series of writings beginning with 'Legal Formalism and the Immanent Rationality of Law', *Yale Law Journal* 97 (1988), 949–1016.

[14] Koskenniemi, *Gentle Civilizer of Nations*, p. 507.

[15] Koskenniemi explores the Kantian aspects of his own neoformalism in 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', *Theoretical Inquiries in Law* 8 (2007), pp. 9–36.

[16] Koskenniemi, *Gentle Civilizer of Nations*, p. 508.

[17] *Leviathan*, chap. 15. Emphasis added.

[18] On this distinction and its limitations, see Lea Brilmayer, *Justifying International Acts* (Ithaca: Cornell University Press, 1989).

[19] John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), pp. 243–51; Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), pp. 100–103.

[20] Rawls, *Theory of Justice*, pp. 235–243. That premise is the foundation of humanitarian intervention.

[21] Max Weber, *The Theory of Social and Economic Organization* (New York: Free Press, 1964), p. 154.

[22] Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review* 70 (2007), p. 30.

[23] Rawls, *Theory of Justice*, p. 60.

[24] Michael Oakeshott, 'The Rule of Law', in Oakeshott, *On History and Other Essays* (Oxford: Basil Blackwell, 1983), pp. 140–141.

[25] Weinrib, 'Legal Formalism', p. 996.

[26] Lon Fuller famously argued that authentic law has a moral element (the 'inner morality of law') that is reflected in familiar rule-of-law criteria, but his understanding of morality is not the noninstrumental understanding I defend here. Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), pp. 42–43.

[27] On Schmitt's misreading of Hobbes to support decisionism, see William E. Scheuerman, "International Law as Historical Myth," *Constellations* 11 (2004), p. 541.

[28] This is true even in emergencies. I investigate whether emergency powers are conceptually consistent with the rule of law in "Emergency Logic: Prudence, Morality, and the Rule of Law," in Victor V. Ramraj, ed., *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008).

[29] 'The judge's *only* obligation, and it's a solemn obligation, is to the rule of law. And what that means is that in every single case the judge has to do what the law requires'. Opening statement by Judge Samuel J. Alito Jr., President Bush's nominee to the Supreme Court, at his confirmation hearing before the Senate Judiciary Committee, January 9, 2006. *The New York Times*, January 10, 2006, national edition, p. A18.

[30] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), p. 113. For efforts for distinguish different conceptions of the rule of law internationally, and to steer a middle way between the anorexic and the obese, see Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', in David M. Trubeck and Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), pp. 253–300, and Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge: Cambridge University Press, 2006), pp. 56–84.

[31] Randall Peerenboom, 'Varieties of Rule of Law', in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.*, ed. Randall Peerenboom (London: Routledge, 2004), p. 4.

[32] Li-ann Thio, 'Rule of Law within a Non-Liberal "Communitarian" Democracy: The Singapore Experience', in Peerenboom, *Asian Discourses of Rule of Law*, pp. 184, 208.

[33] A classic discussion is H. L. A. Hart's chapter on international law in *The Concept of Law* (Oxford: Oxford University Press, 1961). I consider Hart's views along with those of Kelsen, Lauterpacht, and others in *Law, Morality, and the Relations of States* (Princeton: Princeton University Press, 1983), pp. 115–186, and in 'Legal Positivism as a Theory of International Society', in Cecelia Lynch and Michael Loriaux, eds., *Law and Moral Action in World Politics* (Minneapolis: University of Minnesota Press, 2000), pp. 3–23.

[34] For discussion of the rule of law within the UN and other international organizations, see Simon Chesterman, 'An International Rule of Law?' *American Journal of Comparative Law*, 56 (2008), forthcoming.

[35] My argument is that the rule of law implies that all states are subjects of international law. This conceptual argument should be distinguished from an argument for the idea of universal international law in pragmatic, instrumental terms as a necessary response to environmental or other global problems, such as that made by Jonathan Charney, 'Universal International Law', *American Journal of International Law* 87 (1993), pp. 521–551.

[36] The tension between the rule of law internally and internationally appears in many forms. These include the tension between 'pluralism' and 'solidarism' debated within the English School or between the 'Charter liberalism' and 'liberal anti-pluralism' in international law distinguished by Gerry Simpson, 'Two Liberalisms', *European Journal of International Law* 12 (2001), pp. 537–571.