The Authority of International Law

by Anthony R. Reeves, Ph.D.

I. *Introduction: The Problem of the Moral Authority of International Law*

How should international law figure into the practical reasoning of agents who fall under its jurisdiction? How should the existence of an international legal norm regulating some activity affect a subject's decision-making about that activity? This is a question concerning the general moral authority of international law. It concerns not simply the kind of authority international law claims, but the character of the authority it actually has. An authority, as I will use the term, is moral obligation producing: if x (e.g., a person, institution, or law) has authority over an agent, then the directives of x produce a significant reason for the agent to comply with the terms of the directive. This paper concerns the sense in which international law, and the law of nascent legal systems generally, generate obligations for their subjects, i.e., for those who fall under their claimed jurisdiction.

A perhaps tempting initial answer to the question is that international law generates moral obligations in the same way as the laws of municipal legal systems. Of course, as the extensive literature on political obligation makes clear, even defending a general authority on the part of domestic law in reasonably just states is a difficult matter. In any case, whatever the success of existing theories of political obligation, accounting for the authority of international law is especially challenging. Two features of international law make the case for an ability to generate general moral obligations for subjects more difficult. First, standard accounts of political obligation (even if viable) are either irrelevant or apply weakly. I will say more concerning this below, but it seems unlikely that political obligations to international law will find firm ground in

the traditional terrain of such theories, e.g., in consent, fairness, or natural duties of justice. Second, international law, at least in much of its current manifestation, is a *nascent* legal system. By that I mean that international law does not fully possess some central characteristics of well-developed and flourishing legal systems (though, it resembles flourishing systems in a variety of respects and may come to possess these central characteristics eventually). More specifically, it lacks features that normally assist or facilitate a municipal legal system's performance of morally valuable functions associated with the rule of law.

Accounting for the moral authority of international law, then, is likely a somewhat different matter than substantiating the authority of municipal law. Nonetheless, consideration of the former may shed light on the latter. Addressing the question of the authority of international law is interesting in its own right, but it may also go some way towards illuminating the general question in normative jurisprudence of how law can give rise to reasons for action. If we can explain the continued attractiveness of the rule of law in circumstances where a legal system cannot lay claim to traditional grounds of political obligation, and show that such a legal system is still capable of some kind of moral authority, then we will probably have characterized one general way in which legal standards generate reasons for acting. In other words, it may offer insight into responsible practical reasoning under legal systems generally. This will remain a suggestion here - though hopefully, by the paper's completion, a well-motivated one. A full consideration would be its own undertaking.

The paper proceeds as follows. In the first two sections, I further develop the points made above concerning the special challenges an account of the moral authority of international law faces. I then argue that, although international law is currently unable to generate general, content-independent obligations, that it nonetheless deserves a significant role in its subjects'

practical reasoning. International law is in a unique position to produce morally desirable, and perhaps morally mandatory, goods of legal governance, and thus subjects ought comply with international law in a way that makes it likely to produce those goods. A prospective, rule-sensitive particularism with regards to international legal norms is thus appropriate. The existence of international law does change the moral situation of its subjects. However, given its status, subjects must be considerate of issues of good governance not simply at the point of legislation, but also at the point of compliance.

II. *Political Obligation and International Law*

A. Consent

One reason substantiating a general, content-independent obligation for subjects of international law to comply with its demands is unpromising is because traditional theories of political obligation are either irrelevant or apply weakly. In one sense, this might seem surprising given the role of state consent in the production of international law. One major strand of political obligation theory is based in the consent of subjects, and much international law (e.g., treaties and governance regimes based in treaties) is apparently consensual in a way residence in a state is not.[1] However, state consent is unpromising ground for the general moral authority of international law. Apart from the fact that it would be difficult to construe *customary* international law as consensual, state consent is insufficient for such authority in several ways. First, the consent of many states is not terribly morally significant. As Keohane and Buchanan put it:

[1] For worries about consent as a basis for the authority of domestic law, see A. John Simmons, *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton University Press, 1979), 57-100.

> [I]t is hard to see how state consent could render global governance institutions legitimate, given that many states are non-democratic and systematically violate the human rights of their citizens and are for that reason themselves illegitimate. State consent in these cases cannot transfer legitimacy for the simple reason that there is no legitimacy to transfer. To assert that state consent, regardless of the character of the state, is sufficient for the legitimacy of global governance institutions is to regress to a conception of international order that fails to impose even the most minimal normative requirements on states.[2]

If an illegitimate regime consents to international rules that are not in the interests of its people, then it is hard to see how that consent generates an obligation to obey those rules for members of the regime or anyone else. Second, even if all consenting states are legitimate and adequately represent the interests of their people, consent can still be objectionably involuntary. Stronger states can impose costs on non-consent to proposals that make it unreasonable for weak states to not assent.[3] If a weaker state's consent was partly motivated by fear of coercion, then it lacks the voluntariness required to generate obligations.[4] Finally, there is the problem of bureaucratic distance. A significant amount of international law is produced by international institutions that are far-removed from the popular will of democratic states. As Buchanan explains, "[e]ven though these institutions are created by state consent and cannot function without state support, they engage in *ongoing* governance activities, including the generation of laws and/or law-like rules, that are not controlled by the 'specific consent' of states."[5]

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[2] Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20, no. 4 (2006): 413.

[3] Allen Buchanan, "The Legitimacy of International Law," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010), 91.

[4] David Lefkowitz may be correct that genuine consent does not require the ability to do otherwise, but only that the consent not be motivated by fear of morally unjustifiable coercion by another. See David Lefkowitz, "The Sources of International Law: Some Philosophical Reflections," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010). Nonetheless, much of the actual consent to international arrangements by weaker states surely involves this motive. For example, many states likely objected to the specific terms of the WTO, yet consented given the serious costs of non-participation. See Richard H. Steinberg, "In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the Gatt/Wto," *International Organization* 56, no. 2 (2002)., cited in Buchanan and Keohane, "The Legitimacy of Global Governance Institutions," 414.

[5] Buchanan, "The Legitimacy of International Law," 91.

B. *Fairness*

Fairness seems to demand that if one benefits from the sacrifices of others in some cooperative scheme that one reciprocate with like or equal sacrifices.[6] At least, that is, so long as one consented to the cooperative scheme and its benefits. One of the central challenges for understanding fairness as a source of political authority has been to account for its ability to produce obligations to contribute to a political scheme when the scheme and its benefits are unavoidably foisted onto citizens – one has little choice but to accept the benefits and their source.[7] One well-received response to this challenge is George Klosko's suggestion that certain *cooperative* benefits are essential to any life plan, and thus capable of generating obligations of fairness even when one cannot opt out of the specific scheme of cooperation.

> I will argue that the principle of fairness is able to generate powerful obligations to contribute to nonexcludable schemes if three main conditions are met. Goods supplied must be (i) worth the recipients' effort in providing them; (ii) "presumptively beneficial"; and (iii) have benefits and burdens that are fairly distributed...Basically, what characterizes [presumptively beneficial goods] is indispensability: they are necessary for an acceptable life for all members of the community.[8]

Whatever the success of Klosko's approach for municipal law,[9] it cannot ground a general authority for international law since international law fails to, as things stand, meet these conditions. I will not say anything here about (i), though perhaps there is reason for doubt there as well, but it seems clear that international law fails to meet conditions (ii) and (iii). First, it does not provide presumptively beneficial goods for the citizens of most states. International law does not remove citizens from the state of nature, provide basic personal security, ensure access to goods required for biological functioning, or (in most cases) freedom from aggression. These

[6] For a classic statement of the principle, see H. L. A. Hart, "Are There Any Natural Rights?," *Philosophical Review* 64, no. 2 (1955): 185.
[7] See Simmons, *Moral Principles and Political Obligations*, 101-42.
[8] George Klosko, *The Principle of Fairness and Political Obligation*, New ed. (Lanham, MD: Rowman & Littlefield 2004), 39.
[9] For a general criticism, see A. John Simmons, "Fair Play and Political Obligation: Twenty Years Later," in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001).

goods, rather, are usually supplied by states. Perhaps there are exceptions, e.g., where the international law facilitates the provision of basic security to a particular people. But this circumstance is unusual and certainly not general. In fact, it is probably the case that the states whose actions we are most interested in constraining through international law, i.e., powerful states, are least in need of international law's assistance in providing presumptively beneficial goods to their citizens.[10]

Regarding condition (iii), that benefits and burdens be fairly distributed, Klosko demands that the procedures be *both* fairly constituted, such that the provide significant popular control over political power, and that they have minimally substantively just outcomes.[11] Procedural fairness, in this sense, is not likely to be had for international law for reasons already canvassed. Given the dearth of popular sovereignty in much of the world, even law produced by state participation or consent does not appropriately represent the citizens of states. Moreover, international legislative procedures do not give states roughly equal control over legislation.[12] International law, then, is likely to reflect the interests of the powerful, both within states and between states.

Speaking to the substantive issue of fair distribution of benefits and burdens is made moderately difficult given that the lack of consensus on what counts as a fair distribution of

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[10] A similar point can be made concerning Wellman's innovative "samaritan account," though slightly reframed. On Wellman's account, we owe presumptively beneficial goods to others, as a matter of natural duty. Thus, powerful states might be obligated to support international institutions that are providing these benefits to others. Again, though, international institutions are rarely involved in keeping *citizens* from the state of nature. Christopher Heath Wellman and A. John Simmons, *Is There a Duty to Obey the Law?* (New York: Cambridge University Press, 2005).
[11] Klosko, *The Principle of Fairness and Political Obligation*, 63-84.
[12] This is partly what motivates Buchanan and Keohane's weakening of the conditions of legitimacy for international governance. International democracy, in any sense, is not forthcoming and may, in any case, be undesirable. However, given the type of governance international institutions actually engage in (e.g., little of it employing coercive enforcement), weaker standards involving alternative and less demanding methods of accountability are appropriate. See Buchanan and Keohane, "The Legitimacy of Global Governance Institutions." However, even this weaker, "complex" standard of legitimacy goes unmet in practice.

benefits and burdens, or what just international arrangements would involve. We need not disagree with Klosko that "[t]o break this impasse, a tolerably fair decision procedure should be employed to select a particular principle of fair distribution from the class of defensible principles"[13] to notice international law's incompatibility with the requirement. Setting aside the lack of a fair decision-procedure, it is hard to conceive of a defensible theory of justice that endorses the international status quo as satisfactory. One need not be a cosmopolitan or endorse the Rawlsian difference principle as a basis for global justice[14] to regard the current international law as seriously iniquitous,[15] particularly if international arrangements are *implicated* in the violation of basic human rights.[16] Perhaps the point that international law is seriously unjust is more controversial than I suggest, and it certainly depends on empirical assumptions. So, I will instead make the somewhat weaker claim that the procedural problems identified above, as well as the vast inequality in wealth and access to basic resources, indicate that the burden of proof falls on the person claiming that the global status quo is minimally just.

C. Natural Duty of Justice

It is perhaps clear, then, what I will say about a natural duty of justice as a basis for political obligations to international law. A natural duty of justice "requires us to support and to comply with just institutions that exist and apply to us."[17] International legal institutions may, in the relevant sense, apply to us, but they are not just. Nonetheless, one additional point worth making here is that if such a duty can be construed to engender obligations to bring about just institutions

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[13] Klosko, *The Principle of Fairness and Political Obligation*.
[14] Though, that is one possibility. See, e.g., Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), 127-76.
[15]See, e.g., Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), 123-57, Richard W. Miller, *Globalizing Justice: The Ethics of Poverty and Power* (New York: Oxford University Press, 2010).
[16] See, e.g., Thomas Pogge, *World Poverty and Human Rights*, Second ed. (Malden, MA: Polity Press, 2008), ———, *Politics as Usual: What Lies Behind the Pro-Poor Rhetoric* (Malden, MA: Polity Press, 2010).
[17] John Rawls, *A Theory of Justice*, Revised ed. (Cambridge, MA: Harvard University Press, 1999).

when they are feasibly attainable, then the duty is relevant to decision-making under international law. It could not support a general, content-independent obligation to comply (since much about the institutions are unjust), but it would demand that international actors be responsive to such institutions *in a way* that would improve their justice. If an important doctrine might be reinterpreted so as to be more equitable, and the reinterpretation is likely to serve as a basis for common, coordinated activity in the future, then a prospective natural duty of justice would require such reinterpretation. The existence of the unjust institution, i.e., of the specific doctrine, changes the moral situation of the international actor (compared to what it would be without the doctrine) because it may be transformed into an instrument of justice. Assuming, that is, that effective reinterpretation is possible.

D. Associative Accounts

Given what has been said above, the inapplicability of associative accounts is relatively easy to see. Although such accounts do not typically demand that the institutions be fully just, they must treat subjects with roughly equal concern to generate obligations.[18] If institutions are not even minimally just, then this condition is unlikely to be met. Also, it is even more difficult to construe the global human population as a kind of community or association than it is a large, multi-cultural state.

III. International Law as a Nascent Legal System

The traditional grounds of political obligation, then, look unpromising as a basis for international law's moral authority. Such authority, though, faces additional challenges given that

[18] See, e.g., Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 195-224.

international law is currently a nascent legal system. It resembles flourishing municipal legal systems in a variety of respects (it has, for example, legislative and adjudicative institutions), but still lacks important qualities that permit modern legal systems to perform their characteristic and morally valuable functions. This should leave us less-inclined to accord international law authority.

Here is the basic line of thought. Part of the reason we are interested in establishing the moral authority of law in general is that the rule of law is capable of performing worthwhile (and perhaps practically necessary) services in the circumstances of human social life. It seems important to secure compliance with the law because law is, or at least can be, a valuable social institution. Law's value is based on its ability to perform a variety of functions in human society, e.g., provide coordination, facilitate democratic governance, resolve disagreements for practical purposes, etc. Law's ability to perform these functions resides in its possession of certain characteristics: settled secondary rules, formal excellence, and perhaps certain procedural mechanisms (all explained below). International legal institutions substantially lack these. Thus, since our allegiance to the rule of law is based partly in its possession of these characteristics, we have less reason to be concerned about straightforward compliance with international law. (As a note, none of this is to challenge legal positivism. It is perfectly consistent with what I have said here that these important features can also be used for great iniquity.[19] The point is simply that these features are regular contributors to, though by themselves insufficient for, the achievement of various goods of governance.)

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[19] As Kramer insists. See Matthew H. Kramer, "On the Moral Status of the Rule of Law," *Cambridge Law Journal* 63, no. 1 (2004).

A. The Problem of Unsettled and Indeterminate Secondary Rules

As Hart recognized, one way that law can serve as a valuable tool for human society is by providing authoritative criteria for the identification, modification, and adjudication of the primary rules that are to regulate common social life. It provides an official basis for settling which rules count (and how they count) concerning communal matters. Primary rules are rules requiring or forbidding certain conduct. A society governed merely by unofficial primary rules would face a number of problems in a social setting marked by any divergence of belief, moral sentiment, or interest – problems the institution of law would help resolve. These problems include: (1) Uncertainty about which rules are to actually regulate social affairs; (2) An inability to modify rules to reflect changing circumstances, concerns, or beliefs; (3) An inefficiency in the application and enforcement of primary rules in particular circumstances. Law addresses these problems through the introduction of secondary rules, power-conferring rules that concern, in the following ways, primary rules. First, law addresses the problem of uncertainty through a *rule of recognition*, a rule that stipulates the characteristics other rules must possess in order to count as regulating. Second, law provides for rules of change, which identify the conditions under which official rules might be modified, introduced, or eliminated. Third, law provides rules of adjudication, indicating who is to authoritatively determine the application of the rules to circumstances.[20]

Determinate and settled secondary rules, then, facilitate law's coordination of people's affairs in a complex and diverse social setting. As Samantha Besson notes, however, there is significant disagreement and indeterminacy in the secondary rules of international law.[21] Taking

[20] H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 91-99.
[21] Samantha Besson, "Theorizing the Sources of International Law," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010).

the international rule of recognition, even if we agree that there is a single, unitary international rule of recognition, it is nonetheless the case that there is no consensus about the precise sources of international law, or about the hierarchy of the sources about which there is consensus (e.g. whether customary, treaty-based, or institutionally-legislated law is superior in cases of conflict). Relatedly, and of special concern to customary international law, it is not always clear how to modify international legal standards, or when exactly they have been modified. A UN General Assembly declaration, for example, may or may not come to be commonly regarded as legally binding, and whether it achieves recognized legal status may depend in part on the extent to which its demands are actually complied with by states (and the requisite extent is normally unclear).[22] Finally, despite the recent development of international courts, there is no single, superior authoritative institution to settle disputes about the meaning or application of international law.[23] In fact, much international law is seen to be self-applying.[24]

In many ways, then, the international order resembles a social circumstance governed merely by primary rules of obligation. Insofar as it has failed to make the transition from the pre-legal to the legal world, it will be restricted in terms of its ability to coordinate common conduct in the presence of disagreement and changing circumstances (things I think we can safely predicate of the global situation). Its inability to serve this role limits its ability to provide valuables often associated with the rule of law: prospective use of political power, procedural equality, coordination, disagreement resolution, governance by desirable institutional procedures, and the like. It is sensible to speak in terms of degree here. It is appropriate to call international law a *nascent legal system* because it has gone some way to developing secondary rules. In fact,

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[22] For an extended discussion, see Alan Boyle and Christine Chinkin, *The Making of International Law* (New York: Oxford University Press, 2007), 210-62.
[23] Ibid., 263-311.
[24] Antonio Cassese, *International Law*, Second ed. (New York: Oxford University Press, 2005), 5-6.

the reality that it occupies this intermediate, transitional stage goes some way, I will argue, to accounting for its moral authority. Nonetheless, its systemic defects prevent it from securing our moral allegiance on the same footing as a fully developed municipal legal system. The latter can claim our allegiance on the basis of the goods it extensively and reliably facilitates (so long as it is using legal mechanisms to secure *goods*). International law cannot.

B. The Problem of International Law's Formal Defectiveness

A similar point will be made more briefly in this section, though here I will discussing the character of the *norms* that constitute much international law rather than the international legal *order*. Fuller's famous parable of Rex, the well-intentioned but failed ruler, brings into relief desirable qualities of governance norms: generality, prospectivity, clarity, consistency, achievability, publicity, stability, and actual constraint of political power within the terms of the norms.[25] Irrespective of whether Fuller succeeds in establishing a conceptual connection between law and morality, a system of norms possessing these qualities do seem to be facilitators of good governance. Although it is unlikely that even the best of legal systems realize these qualities as much as would be desirable, for much international law, they seem markedly lacking. Doctrines are developed and applied after the fact, there are inconsistencies between various governance regimes, there is a lack of clarity concerning the content of many norms (e.g., in human rights), and general compliance for much international law is not to be had. The situation varies by the department of international law in question (and again, it is a matter of degree), but international law's formal defectiveness compromises its ability to secure goods associated with

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[25] Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), 33-44. See also N. E. Simmonds, "Law as a Moral Ideal," *University of Toronto Law Journal* 55, no. 1 (2005).

the rule of law. This limits the extent, I suggest, to which we should be concerned with establishing its moral authority.

C. The Problem of International Law's Procedural

Perhaps, as Jeremy Waldron argues, the rule of law as an ideal encompasses procedural values such that what we appropriately expect from a system governed by law are institutions like courts offering procedural due process, systematicity and consistency amongst its requirements, orientation to the public good, and the existence of public law-producing processes.[26] I will not comment on whether Waldron succeeds in showing that these procedural aspects expected of legal systems are conceptually connected to the idea of law. Nonetheless, we often doubt regard these qualities as aspirational in a system governance, and it is easy to see how the above discussed defects prevent their realization. Ambiguity about how to modify international law implies, e.g., that there is no public law-producing process.

IV. The Moral Authority of Nascent Legal Systems

International law's moral authority can rest neither on the traditional grounds of political obligation, nor on its general and reliable performance of morally valuable functions often associated with more fully developed legal systems. How, then, is international law capable of generating reasons for compliance? In what sense are subjects of international law obligated to respect its norms? Of course, one way of addressing the question is to say that it does not generate compliance reasons – reasons to act, in some sense, in accordance with its demands. In fact, I think this skepticism is correct with regards to the notion that international law gives rise

[26] Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43, no. 1 (2008).

to obligations to treat it *opaquely* in practical reason. To treat a rule opaquely is to treat it as somewhat insensitive to its underlying justifications, as producing a reason to comply even when the justification for having the rule is not being served. This is contrasted with treating a rule transparently, "modifying it when and as it is unfaithful to the rule's underlying justifications."[27] When it comes to international law, content-independent obligations, which could justify opaque treatment, are not to be found in the terrain of political obligations, and straightforward compliance does not have a reliable relationship to the generation of rule of law valuables.

However, general skepticism about the moral authority of international law is mistaken. The existence of international law does change the moral situation of its subjects in the sense of giving them reason to have regard for the norms of international law *because* they are norms of international law. International law ought to figure into the practical reasoning of its subjects because it is law. The reason I offer here is related to my suggestion in the last section that our allegiance to the rule of law is based in its (contingent) ability to secure valuables of good governance. A nascent legal system is less able to do this than a well-developed one, but it still may, on particular occasions, have a special role in the production of these goods. It is out of consideration of these goods that agents falling under a nascent legal system's claimed jurisdiction have a reason to be responsive to its norms – though only insofar as, and only in a way in which, the norms are related to the production of these goods. In other words, international law is an authority when compliance with its norms have a special relationship to valuables of international governance.

An illustration will be useful here. International law with regards to armed intervention for humanitarian purposes is more or less settled. Such intervention is legally permissible only

[27] Frederick F. Schauer, *Playing by the Rules* (Oxford: Oxford University Press, 1991), 51.

with the prior authorization of the United Nations Security Council (SC). I say "more or less settled" because of complex cases like the 1999 NATO intervention in Kosovo, which proceeded without prior SC authorization. In that case, many states contended intervention was legally permissible because of the impending humanitarian catastrophe.[28] What non-prudential reasons do states have for complying with a restriction on humanitarian intervention requiring SC approval? Such a rule is far from morally optimal. SC membership is unrepresentative (globally speaking), veto prone, and relatively indifferent to humanitarian crises unrelated to its member's interests. A more representative and impartial multi-lateral process is desirable. When a state's own judgment about the propriety of humanitarian intervention departs from that of the SC, then, what moral reason does it have to abide by the legal rule (*or*, to help establish the rule via compliance)? The compliance reasons, I take it, have to do with the value of having such a rule recognized in international legal practice. It is valuable to have forceful intervention constrained by *some* determinate, multi-lateral process.[29] The fact that alternative procedures would be morally preferable is, in one sense, irrelevant to the decision-maker.[30] The choice-situation is one of whether to help sustain or abandon certain specified institutional rules, and that choice has to do with the value of those rules in international governance *compared to* other moral matters at stake. Were there no specified institutional rules, or customary practices to select amongst, the description of the choice situation of the international agent would look much different.

Prospective, rule-sensitive particularism, then, is the appropriate model of practical-reasoning under international law. Rule-sensitive particularism is, as Schauer puts it, a "form of

[28] Cassese, *International Law*, 373-74.
[29] For familiar reasons having to do with the history of the use and abuse of humanitarian justifications. See Thomas M. Franck, "Humanitarian Intervention," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010).
[30] Of course, on certain occasions, non-compliance may be related to establishing more desirable rules of governance. If well-grounded, such considerations may argue in favor of abandoning accepted international practice.

decision-making treats rules as rules of thumb in the sense of being transparent to their substantive justifications, but allows their very existence and effect *as* rules of thumb to become a factor in determining whether rules should be set aside when the results they indicate diverge from the results indicated by direct application of their substantive justifications."[31] Agents must countenance the justifications for having the rules in determining whether and how to comply with international law, including justifications for having settled rules in the first place. In determining the compliance reasons that apply to them, subjects of international law must not only consider its justice, but its ability to generate rule-related goods characteristic of developed legal systems and its ability to facilitate desirable global governance (including governance by desirable procedures). This particularism is prospective in that it demands consideration of future goods. Compliance *now* may help establish a rule that will secure good (though, perhaps not optimal) governance *later*.

The authority of international law, on this view, depends on its ability to secure valuables of international governance. It is obligation-producing only when, and insofar as, it is in a special position to realize these goods, and these goods are at stake on particular occasions of acting. I argued in previous sections that there are no other moral requirements that could bind subjects to international law in a way that would require them to treat it opaquely. The existence of international law does not absolve actors, *in the least*, of the responsibility for considering the justice of their actions and the justice of the norms they comply with. Considerations that normally ought figure in at the moment of legislation in domestic legal systems ought to have a regular role in the reasoning of subjects of international law at the point of compliance. This is even clearer once we recognize, and as we have above, that international agents develop legal

[31] Schauer, *Playing by the Rules*, 97.

doctrine through actual practice. As Waldron puts the point in terms of states, “it must be understood that the state is not *just* a subject of international law; it is additionally both a *source* and an *official* of international law...it is horizontal law...that depends largely on treaties between states or the emergence of customs among states for the generation of new norms.”[32] The central argument of this paper is that the authority of international law for its subjects resides in their responsibility to govern well.

[32] Jeremy Waldron, "The Rule of International Law," *Harvard Journal of Law & Public Policy* 30, no. 1 (2006): 23.

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