

The London School of Economics and Political Science

*From Faith in Rules to the Rule of Law: Constitutional Responsibilities
in International Society*

Andrew D. Jillions

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Declaration

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Abstract

This thesis examines the constitutional politics of international law, locating this as part of a wider debate over the nature of responsibility in conditions of uncertainty. Despite a general commitment to international legality operating in international society, international law's claim to rule is limited by competing beliefs about the institutional practices generated and legitimated by this commitment. This thesis argues that there is a critical divide between "pragmatic" and "constitutionalist" ethics of legality. The account of legality developed here suggests that faith is itself a necessary and useful strategy for responding to social uncertainty and, to the extent that the institution of international law can generate this faith, a constitutional ethic cannot be dismissed as quickly or easily as pragmatists suppose. This claim is further developed through illustrating how this constitutional ethic of legality has begun to shape the politics surrounding the prohibition on torture, the governance of the global commons, the legitimacy of peacebuilding, and the regulation of the use of force.

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Introduction

*You dare your yes—and experience a meaning.
You repeat your yes—and all things acquire a meaning.
When everything has a meaning, how can you live anything but a yes.*

Dag Hammarskjöld¹

States are, as a general matter, committed to the *idea* of international legality, to the idea of the rule of international law. This is because international law is fundamentally useful: it provides states with a practical means to regulate and stabilize their international relations, a way to solidify expectations and manage global collective action, and a guide to the normative framework or ethic governing international society. States adopt a posture of legality because in circumscribing the authority to act, international law makes an ordered and stable international society possible allowing states to pursue more specific policy agendas.²

The challenge for international law is that international practice belies any *one* conception of the responsibilities entailed by this commitment to legality.³ This is a problem because international actors are continuously granted the responsibility of judging *how* to apply international law. When new issues arise, states use the existing rules of international law to guide their decisions on whether to intervene to stop a humanitarian catastrophe, or to craft counter-terrorism policy, or to frame a response to drug smuggling, piracy or immigration, or to define the circumstances in which new weapons like drones, blinding lasers or computer viruses can legitimately be used, or as a guide to legitimate action on any number of other issues, state practice implies both a commitment to international legality *and* an understanding of what this commitment entails in practice. Without a determinate sense of the requirements of legality both the motivation for using international law to guide decision-making and, ultimately, the capacity of international law to order international society must suffer.

As this thesis argues, there are in fact two fundamentally competing normative practices or ethics of legality governing the use of international law: the pragmatic and the constitutional. The constitutional perspective claims that states and other actors are increasingly being guided

¹ Dag Hammarskjöld, *Markings* (New York, Vintage: 2006), p. 125.

² Michael Ignatieff, 'Reimagining a global ethic', *Ethics & International Affairs*, 26 (2) March 2012, p. 2

³ See generally Anthony F. Lang, Jr. and Amanda Russell Beattie (eds.), *War, Torture and Terrorism: rethinking the rules of international security*, 2009; Guglielmo Verdirame, "'The Divided West': International Lawyers in Europe and America", *European Journal of International Law* 18 (3) July 2007; Chris Brown, 'Conceptions of a Rule-Governed International Order: Europe vs. America?', *International Relations*, 20(3) September 2006, pp. 309-14

by a constitutionalist mindset in their approach to international law, by a belief that the international legal order has the necessary coherence, objectivity, legitimacy and authority needed to specify what the commitment to legality entails in practice. On the pragmatic account, the uncertain structure, content and application of international law justifies an *ad hoc* and *sui generis* approach to legality. The rule of international law is something that is in the process of being constructed and, until it has an unambiguous foundation for its claim to authority, the most responsible posture is to define the commitment to international legality in light of extra-legal moral and political concerns. Pretending that international law is able to generate an independent claim to authority is a dangerous and, potentially, highly irresponsible practice – a dereliction of genuine responsibility.⁴

While almost all states almost all of the time espouse a deep commitment to act from legality, the tension between these two ethics of legality, these two conceptions of the sense of responsibility generated by legality, serves to condition, limit and, ultimately, has the potential to erode international law's capacity to order international society in any meaningful way. The challenge to international law's capacity to contribute to international society's constitutional order comes from the belief that for the law to rule, in Friedrich Hayek's classic statement, entails that 'government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge'.⁵ Now this is not the only conception of what it means for the law to rule, but it does express the crucial idea that the legal order must be capable of claiming a degree of supremacy over the political order. This highlights the problem caused by ambiguity in the practice of legality: a degree of certainty about the terms of law's rule is necessary in order to justify law's continued capacity to limit and structure political decision-making. The question – and quest⁶ – for international law becomes whether it can prevent the ambiguity surrounding the practice of legality from undermining its claim to institutional authority, its claim to 'rule'.

Ambiguity about how to act out a commitment to legality is not an arid, abstract philosophical issue – these competing perspectives on the practices required by legality have been at the heart of some of the most hotly contested international politics issues of recent times. Issues which require states or the international community to act with authority triggers

⁴ Michael J. Glennon, *The Fog of Law: Pragmatism, Security and International Law* (Washington, D.C. Stanford, Calif.: Woodrow Wilson Center Press; Stanford University Press: 2009); David Kennedy, *Of War and Law* Princeton, Princeton University Press: 2006)

⁵ Friedrich Hayek *The Road to Serfdom* (London, Routledge: 2001, first published 1944), p. 54

⁶ see Lon L. Fuller, *The Law in Quest of Itself* (Boston, Beacon Books: 1966).

the use of law to generate legitimacy, but the fact that international law can simultaneously be used to challenge legitimacy pushes the coherence of international legality to centre stage. As Christian Reus-Smit puts it, it is increasingly the ‘the complex entanglement of politics and law that stands out’ in understanding international practice.⁷ Take an example from the “war on terror”. One of the many worries surrounding US conduct over the last decade has been the presentation of a single-minded pursuit of security objectives as an ordinary and justifiable outgrowth of a commitment to international legality. The US has not only denied the applicability of specific rules on detention, fair trial standards, deportation, interrogation or torture in specific instances, but has called into question the very idea the international law as a whole could generate the objective, superior authority needed to “rule” in international society – and implied that the practice of international legality should be conceptualise accordingly. The US (and others) interpret their commitments to uphold and advance international law in light of the idea so bluntly expressed by John Bolton that ‘International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law’.⁸ It is in this way that a pragmatic approach to international law embeds a scepticism about the range and depth of the ethic implied by the value of legality. It is this underlying scepticism that the constitutional approach must counter in order to justify international law’s constitutional authority.

This thesis is an attempt to explain how the constitutionalist approach functions to advance international legality in these ambiguous, contested circumstances. The central argument of this thesis is that it is the division between pragmatic and constitutionalist ethics of legality – the competing ideas about the nature of the responsibility triggered by the commitment to legality – which best explains the politics surrounding international law’s claim to govern international society. These two approaches embed fundamentally different visions of both the authority of international law in international society and, in an extension of this, of the responsibilities appropriate to advancing the rule of international law. In establishing the terms of the relationship – the terms of the battle – between these competing approaches to international law, the hope is to better understand how international law can both protect and project its claim to rule, its claim to define the terms of international society’s constitutional order.

⁷ Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge, Cambridge University Press: 2004), p. 2

⁸ John Bolton, ‘Is there really “law” in international affairs?’, *Transnational Law and Contemporary Problems* 10 (2000), pp. 1-47

This project requires an immediate caveat, however: concepts are tricky, slippery things. More than anything, the coherence of a given concept relies on the assumption that there is a single object of analysis, something essential and fundamental that is captured by the range of conceptions; that those discussing a concept like sovereignty, or obligation, or legality are referring to the same thing, addressing similar questions, to similar ends. One danger, then, of conceptual analysis is that we end up not finding anything fundamental to capture, we end up finding ‘turtles all the way down’, as Chris Brown puts it.⁹ The alternative danger is that we end up finding that our conceptions are essentially contested; that we have no valid *method* for choosing between competing conceptions. In this case it is not the lack but the overabundance of plausible conceptual foundations that cause the problem. This is Martti Koskenniemi’s point, that our arguments about international law and politics end up being (post-)structurally stuck between apology and utopia, with no way out.¹⁰

Those concepts used to endow a legal order with public, constitutional authority – the authority to limit and structure political decisions – have an even more pressing need for conceptual coherence because they get used to justify and inform wide-ranging and potentially coercive practices.¹¹ The establishment of a constitutional order and political authority is insuperable from the idea of legality and the commitment to law’s authority, but that doesn’t mean that the terms of this relationship or the underlying conception of law are clear.¹² This is to say that the practice of legality serves an important function in establishing the terms of constitutional order despite the fact that legality is ‘an exceedingly elusive notion’,¹³ an ‘essentially contested concept’,¹⁴ or that it has the capacity to function as ‘a bit of ruling-class chatter’.¹⁵ In this regard legality functions as a constitutional concept because it structures

⁹ Chris Brown, “‘Turtles all the way down’: Anti-foundationalism, critical theory and international relations’, *Millennium* 23 (2) 1994

¹⁰ Martti Koskenniemi, *Koskenniemi M, From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press: 2006)

¹¹ See e.g. Ball, Farr and Hanson (eds.), *Political innovation and Conceptual Change* (Cambridge, Cambridge University Press: 1989), p. 1 [‘It is by virtue of possessing a common stock of concepts that we constitute the communities in which we live. And yet the common tie of language is apt to become worn and frayed. There is a real and recurrent fear that our conceptually constituted communities are, after all, among the most fragile and least durable of all human creations’]

¹² See for example Friedrich V. Kratochwil, *Rules, Norms and Decisions*, 1991, p. 4 [‘precisely because the concept of law is ambiguous, I propose to investigate the situation of rule and norms in choice-situations *in general*’]

¹³ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Oxford, Oxford University Press: 2004)

¹⁴ Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’, *Law and Philosophy*, 21 (2) 2002, 137-64.

¹⁵ Judith Shklar, ‘Political theory and the rule of law’, in J Shklar, *Political Thought and Political thinkers*, 1998, p. 21

constructive, “constitutional”, social ordering practices even in conditions of uncertainty about the nature of this principle. In a constitutional order, the governing institutions – particularly the legal order – endows a set of normative claims – particularly the legal rules – with the *practical* authority needed to justify political decisions about how best to act.

This practical authority is connected, as Anthony F. Lang, Jr. puts it, to the central idea that ‘a constitutional order provides legitimacy by ensuring that law rules . . . and that the most powerful can be constrained by both the rules and structures of the system’.¹⁶ What this means is that understanding *how* legality functions to justify, establish or limit public authority is necessarily a question about the constitutional authority of the legal order. Legality and constitutionalism are fundamentally overlapping practices; working out how they are related is an essential part of the politics of constitutionalism.¹⁷ This is to say that constitutionality – and the specific idea of legality it advances – is both vital and ‘mysterious’.¹⁸ But where this mysteriousness might be managed at the domestic level, where the conceptual politics of constitutional rule are contained by the settled institutional form of the state, international society lacks this settled basis. It is international law’s practical authority that is in question. The task in establishing the terms of the battle between the competing approaches to international law’s constitutional authority is not simply to assess how international law *does* rule, but how it can protect and promote its normative claim to rule while recognizing the background uncertainty surrounding the operative conception of legality.

As the inaugural editorial of *Global Constitutionalism* suggests, there are a number of cases and issues where core constitutional concepts like human rights, democracy and the rule of law drive international social practice. More pointedly, constitutionalism provides a language through which to engage ‘the coming challenges to fundamental norms that are held as central constitutional principles in most contemporary societies around the globe. Constitutionalism as an idea sits precisely at the intersection of law and politics, and it is for this reason that when issues emerge at a global level in the interstices of law and politics, the idea of global

¹⁶ Anthony F. Lang, Jr., *Punishment, Justice and International Relations: Ethics and Order after the Cold War*, 2008 p. 23; see also Jeffrey Jowell, ‘The rule of law and its underlying values’, in Jowell and Oliver (eds.), *The Changing Constitution*, 2011, p. 2

¹⁷ J Jowell, *ibid.*; see however Ian Clark, *Legitimacy in International Society*, 2004, p. 209 [Clark argues that defining constitutionality in terms of legality is nonsensical because it makes the idea of constitutionality redundant; he suggests that constitutionality instead identifies an inherently political process of constructing social – rather than legal – norms.]

¹⁸ David Kennedy, ‘The Mystery of Global Constitutionalism’, in Jeffrey L. Dunoff and Joel P. Trachtmann (eds.), *Ruling the World?: Constitutionalism, International Law, and Global Governance*, 2009

constitutionalism becomes relevant.¹⁹ In practical terms, the fact that the terms of this relationship between law and politics is a core and open-ended question for legal and political theory merits the emphasis on the type of mindset that typifies constitutional practice in the international order. As Jan Klabbers, Anne Peters and Geir Ulfstein argue, constitutionalism ‘signifies not so much a social or political process, but rather an attitude, a frame of mind. Constitutionalism is the philosophy of striving towards some form of political legitimacy, typified by respect for, well, a constitution’.²⁰ There is another more pressing need to focus on the constitutionalist mindset rather than hypothesizing, at least in the first instance, about the constitutional form of the institutional orders – for example the UN Charter.²¹ As Andreas Paulus puts it, ‘rather than asking whether the constitutional structure of the Charter organs are sufficiently similar to that of the state, we [must] reflect on whether and how the international legal order fulfils the background principles for a constitutional order worthy of that name in the constitutional tradition. If not, the resistance to international regulation will likely – and justifiably – grow, and the accommodation needed for international order will not be forthcoming’.²²

At the core of this state of mind is the idea that there are rules and principles which have the potential to claim a constitutional-type authority – and generate a constitutional effect – even if the rules were not originally conceived in this way or do not presently function this way. Understanding the claim to constitutional authority propagated by various actors in international society – including claims that institutions like the UN establish a constitution for international society²³ – requires, first, understanding how the ambiguous ideas, concepts and beliefs driving and sustaining the constitutionalist mindset function in practice.²⁴ These beliefs might be

¹⁹ Antje Wiener, Anthony F. Lang, Jr., James Tully, Miguel Poiras Maduro and Mattias Kumm, ‘Editorial: Global constitutionalism: Human rights, democracy and the rule of law’, *Global Constitutionalism* 1 (1) March 2012, p. 3

²⁰ Jan Klabbers, ‘Setting the Scene’, in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford, Oxford University Press: 2009), p. 10

²¹ See for example Michael Doyle, ‘The UN Charter – a global constitution?’ in Dunoff and Trachtmann (eds.), *Ruling the World?* 2009; this fits into the broader functional approach favoured by Jeffrey Dunoff and Joel Trachtmann, ‘A functional approach to international constitutionalization’ in Dunoff and Trachtmann (eds.), *Ruling the World?*, 2009

²² Andreas L. Paulus, ‘The International Legal System as a Constitution’, in Dunoff and Trachtmann (eds.), *Ruling the World?*, 2009, p. 71

²³ See especially Bardo Fassbender, ‘Rediscovering a Forgotten Constitution: Notes on the place of the UN Charter in the international legal order’, in Dunoff and Trachtmann (eds.), *Ruling the World?*, 2009

²⁴ See especially Michael Freedon, *Ideologies and Political Theory: A Conceptual Approach*, OUP: 1996; Freedon nicely captures the wider rationale for focusing on the mindset of constitutionalism. As he argues, the fact that contested concepts structure political practice means that ideology is an inescapable feature of conceptual analysis. He argues that the analytic frameworks operating in political theory have traditionally tended to want to depoliticize what is an inherently political practice of *decontesting* essentially contested concepts – and in the process inflates the expectations for theory. As he puts it, ‘the nature of political thinking is such that any of its instances invokes,

reinforced and reified by existing institutional structures, but the fact a given set of rules – such as the UN Charter – can be understood as a constitution is because those acting on the rules regard it as appropriate to fight for the constitutional status of these rules.²⁵ The nature of the global constitutional order is not something that is waiting to be discovered, but an idea, an ideology, that can motivate constructive, constitutional practice in international society.²⁶ But it is also, as Paulus implies, something that can trigger a backlash against the existing rules of law.²⁷

The red thread running through this thesis is that justifying constitutionalism as a mindset with practical relevance in international society requires specifying how constitutionalism can respond to attempts to undermine the validity of constitutional practice. The problem that needs to be confronted in this regard is as much a consequence of treating constitutionalism as a mindset; constitutionalism as a practice presents an idea of legality as a virtuous practice and this has the capacity to entrench an ideological opposition to constitutionalism on the part of those who reject or question this normative standing of legality in the ambiguous circumstances of international society. From a conceptual point of view, it is necessary to accept that constitutional practices are necessarily located ‘somewhere in-between the strictly normative (“this is what things should be like”) and the strictly descriptive (“this is what things are like”)²⁸. But this middle-ground perspective also carries the danger of institutionalising conflict about the core practical values of international society.²⁹ This is to say that constitutionalism requires a strategy for avoiding or managing the backlash to the

intentionally or otherwise, a very large number of the most common political concepts. Thus configurations of necessarily decontested concepts are the *sine qua non* of thinking rationally about politics—that is, in a minimally organized and purposive way—with a view to political action.’ (p. 5), What this gives us, however, is not a platform from which to claim objective knowledge, but an ideology, a political point of view. Freedén’s point isn’t to diminish the purpose or endeavour of theory, simply to humble it. Packaging up essentially contested concepts into a theoretical tradition is a useful, and necessary, part of ordering and justifying our normative commitments. But this doesn’t strip away the political nature of this process.

²⁵ See e.g. Nicholas Onuf, *World of Our Making*, 1989 [arguing that how the rules are treated will determine their capacity to structure society; the capacity to “rule” is not an inherent characteristic of rules, but something rules are endowed with in and through social practice.]

²⁶ For a related argument see especially Shirley V. Scott, ‘International Law as Ideology: Theorizing the Relationship between International Law and International Politics’, 5 *European Journal of International Law*, 313-325 (1994); Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*, OUP: 2003; Beate Jahn, ‘Liberal internationalism: from ideology to empirical theory – and back again’, *International Theory*, 1(3) November 2009, 409-438

²⁷ Andreas Paulus, ‘The International Legal System as a Constitution’, in Dunoff and Trachtmann (eds.), *Ruling the World?*, 2009

²⁸ Klabbers, Peters and Ulfstein, *The Constitutionalization of International Law*, 2009, p. 4; see also Martti Koskenniemi, ‘Constitutionalism as mindset: Reflections on Kantian themes about international law and globalization’, *Theoretical Inquiries in Law* 8 (1) January 2007.

²⁹ On the wider nature of middle-ground theorising in international society, see Molly Cochran, ‘Charting the Ethics of the English School: What ‘Good’ is there in a Middle-Ground Ethics?’, *International Studies Quarterly* 53 (2009), 204; Terry Nardin, ‘Middle-Ground Ethics: Can One Be Politically Realistic Without Being a Political Realist?’, *Ethics & International Affairs* 25 (1) Spring 2011

conceptions of international law's rule in international society, of the nature of international law and politics, and of the relationship between law and politics which it embeds as part of the constitutionalist mindset.³⁰ Constitutionalism might be both 'mysterious' to its core,³¹ but this has an effect on the capacity for constitutionalism to establish concrete practices – including the respect for legality as the core principle of global constitutionalism.

Deepening the Mystery: Method and Methodology

What does this mean in practical terms for the scope of this thesis? How do you discern a mindset? One way to illustrate the challenge this presents to the academic study of constitutionalism is to look at the form that the backlash to 'traditionalism' as a frame of reference in International Relations.³² The relevance of this is that these were the debates which helped sustain the disciplinary divide between international law and international relations, a divide which both threatens to engulf global constitutionalism and politicizes the choice of method.³³

The central claim that Hedley Bull and others in favour of a traditional approach advanced was that understanding international politics demanded a methodology able to capture what was a messy, ideologically charged reality – like any other political domain.³⁴ To do justice to this, the best approach was to develop a rounded sense for the 'play of international politics', drawing from philosophy, history and law, understanding the practices and personalities taking part and only then offering an observation about the meaning behind a particular action or a normative judgement about the action which should have been taken.³⁵ Explaining social action was grounded in a process of 'penetrating the minds of the key actors and uncovering not only their motives but also the common premises and presuppositions that prevail among them

³⁰ Christian Reus-Smit, 'Introduction', in Christian Reus-Smit (ed.), *The Politics of International Law*, p. 4

³¹ See especially David Kennedy, 'The Mystery of Global Governance', in Dunoff and Trachtman (eds.), *Ruling the World?: Constitutionalism, International Law, and Global Governance*, CUP: 2009; and Gerry Simpson, 'Duelling Agendas: International Law and International Relations (Again)', 1 *Journal of International Law and International Relations* 61, 2004-2005, p. 72.

³² See Friedrich Kratochwil, 'History, Action and Identity: Revisiting the "Second" Great Debate and Assessing its Importance for Social Theory', EJIR 2006; Patrick Thaddeus Jackson, *The Conduct of Inquiry in International Relations*, 2011

³³ For an excellent analysis of this see Oliver Jütersonke, *Morgenthau, Law and Realism*, 2010

³⁴ Hedley Bull, 'International Theory: The Case for the Classical Approach', *World Politics* 3 (1966), 361-377; see also Andrew Hurrell, 'Keeping history, law and political philosophy firmly within the English school', *Review of International Studies*, 27 (3) 2001, 489-94.

³⁵ Andrew Linklater and Hidemi Suganami, *The English School of International Relations: A Contemporary Reassessment* (Cambridge: Cambridge University Press, 2006), p. 33

about the nature of the game they are supposed to be playing'³⁶ – the same process that grounds the constitutionalist approach today. This places the onus on the scholar's capacity to judge, their expertise, their experience of the field of practice. Understanding international politics, in other words, required first appreciating that the outcome of an analysis was, essentially, an *interpretation* about the normative practices governing a social order. Challenging this claim was 'an attempt to secure the supposed objectivity of the natural sciences' by importing their methodological tools.³⁷ By testing assumptions against the available evidence, the theorist could move beyond simply offering an interpretation about the world, into the realm of scientific fact. Armed with scientific methods, the scholar's classical judgment derived from a knowledge of law, political theory and history, was largely redundant; understanding international politics became a matter of mastering the technical apparatus of the field.³⁸

Bull didn't do himself any favours by failing to elaborate on *what* the traditional approach entailed, beyond blandishments about the importance of scholarly judgement and detachment.³⁹ Patrick Thaddeus Jackson has recently suggested that one of the effects of failing to refine the nature of the claim – and the type of knowledge the traditional approach was concerned with – was that it allowed critics of this approach to shift the burden of proof onto the traditionalists, allowing those favouring a scientific approach to demand a type of evidence (about causality in particular) which the traditionalist couldn't provide and, more to the point, didn't believe to be the best route to knowledge about the political domain.⁴⁰ This, in a rather neat way, echoes the challenge facing a dispositional account of global constitutionalism,

³⁶ Linklater and Suganami, *The English School of International Relations*, p. 33

³⁷ Simon Curtis and Marjo Koivisto, 'Towards a Second "Second Debate"? Rethinking the Relationship between Science and History in International Theory', *International Relations*, 2010 24 (4) 433-455, p. 434

³⁸ Stanley Hoffmann, 'An American Social Science: International Relations', *Daedalus* 106 (1977), p 54. [characterizing this as a battle between 'the literates' and 'the numerates'].

³⁹ Hedley Bull, 'New Directions in the Theory of International Relations', *International Studies*, 14 (1975), 280-290 [As he enigmatically explains, 'The tradition of detached and disinterested study of politics is, I believe, a very delicate plant . . . Its survival depends on a form of commitment that is not political, but intellectual and academic: a commitment to inquiry as a distinct human activity, with its own morality and its own hierarchy of priorities, that is necessarily brought into conflict with the prevailing values in any society']; for a useful recent effort to refine this traditional approach, however, see Robert Jackson 'International Relations as a Craft Discipline', in Cornelia Navari (ed.), *Theorising International Society: English School Methods*, Routledge: 2009

⁴⁰ Patrick Thaddeus Jackson, *The Conduct of Inquiry in International Relations*, 2011 [Jackson's wider project is to share the burden of proof more equitably, arguing that if a claim is going to be labelled as "scientific", there had better be a sense of what the nature of "science" as a distinct endeavour entails. *Certainly* if the claim to scientific knowledge is going to be used to evaluate – and discredit – competing types of knowledge and practices, including political or normative practices. As he suggests, the eventual impact is that in producing *genuine* knowledge, 'The trick is to set up hard conversations, and not to paper over significant differences' (p. 191). In this regard he draws an analogy with an ecumenical theology, which tries to cultivate a dialogue between adherents of different faiths in a way that respects 'differences without seeking to dissolve them in some kind of nebulous synthesis, but that simultaneously refuses to let the differences between them overwhelm the discussion to the point where the interlocutors go their separate ways' (p. 190).]

because these same power-dynamics are echoed, without any great refinement, in the interdisciplinary debates between international law and international relations. Global constitutionalism does not easily allow for an “ecumenical approach” because developing the normative commitments needed to make global constitutionalism a viable institutional project requires a mindset that appreciates law is a *superior* source for knowledge about the constitutional rules of international society.

The reason carving out a common ground was so tricky was because international lawyers were so reluctant to leave behind their normative presumption – their *disciplinary* mindset – that regarded international law as having an independent normative standing in international society, regardless of the evidence arraigned against this belief. International lawyers were taken to task for operating under a wholly unscientific belief in international law, for refusing to evaluate international law’s normative standing in light of some appreciation of how the rules actually affected state behaviour.⁴¹ The problem with this demand was that it refused to recognise how positivist international lawyers conceived of law’s normativity: legal obligations established a claim protected from the need to continuously “prove” the normative validity of a rule by engaging in causal analysis.⁴² What the attempt by international relations theorists to generate a *better* standard of evidence for the authority of international law did was to superimpose the methodological commitments of the international relations theorist over and above those of the positivist international lawyer. This had three effects. First, it privileged those conceptions of international law which found themselves able to take part in this interdisciplinary conversation, on these onerous terms, in particular the process school, which regarded law’s authority as an outgrowth of public policy concerns.⁴³ Second, however, was that it undermined the debate within international law about the nature of international law; it asked – told – the international lawyer to ‘accept the self-image of an under-labourer to the policy-agendas of international relations orthodoxy’.⁴⁴ There was a third problem here which was that

⁴¹ Robert Keohane, ‘International Relations and International Law: Two Optics’, (1997) 38 *Harvard International Law Journal* 487

⁴² Benedict Kingsbury, ‘Positivism as normative politics Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law’, *European Journal of International Law*, 13 (2) 2002: 401-437.

⁴³ For a comprehensive account, see Harold Koh, ‘Why do nations obey international law?’, *Yale Law Journal* 106(8) 1997, pp. 2599–659

⁴⁴ Martti Koskenniemi, ‘Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations’, in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford, Oxford University Press, 2000), p. 33

acquiescing to this helped establish the dominant preconception in international relations that, in the international domain, international law was subservient to the political ordering process.⁴⁵

Constructivism helped provide a *détente* of sorts which allowed a more civilized conversation about the terms of the divide between international law and politics to emerge, and has to a certain extent protected global constitutionalism from this kind of methodological divisiveness. This reconciliation between these two ‘bickering spouses in a paradigmatic dysfunctional family’,⁴⁶ was characterized by the idea that disciplinary bickering was itself a natural and interesting part of the politics of international law.⁴⁷ The challenge was not to resolve the disciplinary contest but to study it, to catalogue it, because these scholarly debates – and the very real political conflict they helped sustain – reflected deeper debates about how the relationship between law and politics functioned to construct the international social order.⁴⁸ This constructivist approach, however, has its own limits including, crucially, the inability to make sense of international law’s authority when presented with a ‘hard case’, where there is no conventional or customary way to resolve the competition between the legal and political domains.⁴⁹ The impulse for constructivism is, again, to catalogue the various actors in the battle, to give an account of, for instance, how the existing rules on the use of force have structured the debates on the legitimacy of drone warfare. What this perspective struggles to account for is the underlying normative question that follows from privileging the authority of the legal order: how *should* the rules on the use of force be applied to the debates on drone warfare. The difference here is a fine one, but an important one, because it is the difference between accepting international law’s capacity to guide action as an institutional fact and continuing to regard this capacity as a site for legitimate political contest.

This is where the constitutionalist project to ‘make visible how one could reasonably think about the various elements of a global constitutional order’⁵⁰ re-centres the debate surrounding international law’s authority from the question of *whether* international law has such

⁴⁵ Jan Klabbers, ‘The bridge crack’d: a critical look at interdisciplinary relations’, *International Relations* 23 (1) 2009, 120-121 [argues that the international relations theorists ‘smugly [took] this in their stride without bothering to figure out whether the international lawyers should be doing so’]; see also Martha Finnemore, ‘New Directions, new collaborations for IR and IL’, in Bierstaker, Spiro, Sririam and Raffo (eds.), *International Law and International Relations: Bridging Theory and Practice* (London, Routledge: 2007)

⁴⁶ J. David Bederman, ‘Constructivism, Positivism and Empiricism in International Law’, 89 *Georgia L. J* 2000-2001, p. 469

⁴⁷ Christian Reus-Smit ‘The politics of international law’, in Reus-Smit (ed.), *The Politics of International Law*, 2004

⁴⁸ Robert H. Jackson, *Classical and Modern Thought on International Relations: From Anarchy to Cosmopolis* (Basingstoke, Palgrave Macmillan: 2005), 101-122 [characterises the problem as one of making sense of ‘the knots and tangles of international obligation’]

⁴⁹ Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach*, (Cambridge, Cambridge University Press: 2010) [arguing that these limitations are built into the structure of constructivist approaches]

⁵⁰ Klabbers, Peters and Ulfstein, *The Constitutionalization of International Law*, 2010, p 4-5

authority to a question about *how* international law both expresses and justifies the expansion of this constitutional authority. But in order to understand this it is also necessary to understand how this constitutionalist mindset, how a ‘reasonable’ account of constitutionalism could be drawn back in to the unproductive kind of interdisciplinary debates it aims to displace. Explaining international law’s constitutional authority requires making space for a set of normative presumptions, and explaining why the constitutional mindset protected and advanced from within the legal order should be allowed to dictate the terms of social order and social practice. At some point the practical effects of contested assumptions about the normative authority embedded in international law become impossible to ignore or to bookend because it is in this normative conversation, in the constitutional mindset justified by the commitment to legality, that determines the practical, constitutive effect of international legality. What effect does this have, in concrete terms, on the approach taken in this thesis? It means that understanding the nature of the evidence appropriate to establishing the “fact” of constitutional authority is itself a central part of the challenge, part of international law’s constitutional politics.

Structure

This thesis has two parts. Part I develops an understanding of the conceptual problems facing attempts to justify constitutionalist accounts of international law. Chapter 1 puts the debate about international law’s constitutional authority in the context of wider debates about the constitutional rules of international society. This centres the politics of constitutional authority around the conditions required for constitutional *rule* in international society and this in turn generates the tension over the appropriate ethic to adopt in these circumstances of institutional uncertainty. This begins to establish the terms of the battle between pragmatic and constitutional ethics of legality. For the pragmatist, international law is too uncertain to be able to generate any strong, independent, or coherent sense of responsibility. Responsibility is located outside of the legal order. For the constitutionalist, international law is able to generate a distinctive set of commitments, a sense of responsibility able to remedy uncertainty about both the legal order and the practice of legality. Chapter 2 argues that the perception of international legality as an institutional commitment defined by ambiguity and uncertainty powers the pragmatic account, feeding the perception that the inability of international law to resolve hard cases decisively undermines the possibility for constitutionalism to function as a responsible ethic in the ambiguous circumstances of international society. Chapter 3 argues that making sense of the constitutionalist mindset as an ethic appropriate to conditions of uncertainty

requires engaging with the role of faith in protecting and privileging the function of legality in a constitutional order. I argue an Augustinian tradition of republican thought can help to make sense of law's constitutional authority as justified through and protected by a sense of actor's sense of faith that comes from their public responsibilities.

Part II attempts to show where and how these different conceptions of the constitutional responsibilities appropriate to international law structure more specific debates about the international law's capacity to respond to challenges to the practices of enforcement, rule of law promotion, interpretation and coherence, all of which to one degree or another challenge the justification for locating constitutional responsibility as internal to the legal order. These issues set up hard cases that the pragmatist is able to use as evidence for their position. In each case, however, I argue that international law is better able to remedy threats or challenges to its constitutional authority than the pragmatist has been willing to admit because it embeds a sense of trusteeship over international legality.

I flesh out both the constitutional politics of international law and the potential justification for constitutionalism through four domains where these conceptual issues have gone "live", shaping the nature of political debate. Chapter 4 uses the law of the sea – a domain where enforcement has traditionally been lacking – as a way to show that international law generates and protects constitutional authority not through police action but by attributing responsibilities. Chapter 5 uses debates about peacebuilding and rule of law promotion as a way to answer the pragmatic claim that international law lacks the democratic legitimacy needed to claim supremacy over states. On the contrary, I argue, international law functions as a trustee of the international order; in this sense the commitment to international law is part of a more general commitment to the public, constitutional rules. Chapter 6 uses the torture debates – in which the constitutional prohibition against torture was presented as uncertain and open to interpretation – as a way to show that international law was able to defend the constitutional rule because it has an implicit conception of responsible interpretive practice. Finally, chapter 7 challenges the claim that the rules on the use of force are too inchoate to guide state practice, arguing that although the rules have become uncertain, this uncertainty has not touched the clear idea practitioners have of what an ethic of legality requires in this arena.

The rationale for dividing the thesis up in this way is that it helps to both show how the conceptual issues surrounding international law's constitutional politics are deepened through the practice of legality, and how the ambiguity of international legality might be resolved through adopting a constitutionalist mindset. To this end, chapters 4 – 7 should not be thought of as traditional case studies, in which I test the theoretical hypotheses developed in earlier

chapters. Rather, they provide a way to deepen our understanding of *how* the contrasting practices of legality function to generate the constitutional politics of international law. The competing ethic or mindsets of pragmatism and constitutionalism are *both* theoretical and practical; the terms of the divide here on conceptual issues like the role of enforcement in international law, or the democratic legitimacy of international law, or the status of the prohibition on torture, or the effect of uncertainty in the rule on the use of force, is both reflected and reinforced through the resolution of practical problems.

What I hope will come out of this analysis is that that constitutionalism does provide a viable avenue for countering the pragmatic ethic of legality. The institutional development of international law – and the constitutionalist practice which this gives rise to – offers a partial route to countering the existing scepticism surrounding the capacity of international law to generate a distinctive claim to authority. What is needed to make the best use of this, however, is a better sense, or sensibility, of the nature of the constitutional disposition *as a responsible practice*. In all of these cases, in all of these arenas – the global commons, peacebuilding, torture, and intervention – a claim to constitutional authority emerges through a practical ethic of constitutional responsibility.

Part I

The Politics of Constitutional Authority

Chapter 1

The politics of constitutional authority: legalism at the limits

This chapter provides an account of the politics of constitutional authority. I argue that the value of legality, or the belief that international society should be guided by the rules of international law, is at the core of international law's constitutional politics. In contrast to existing conceptions of the constitutional rules – conceptions which collapse into an unproductive battle between pluralist and solidarist *descriptions* of international society's institutional order – I argue that the issue driving these debates in practice is the competing normative perspectives on the nature of the responsibilities appropriate to institutional uncertainty in international society. Understanding the tensions here generates a much clearer picture of why international law's attempt to develop the constitutional rules of international society has struggled to resolve questions about international law's constitutional authority. Rather than resolving questions about how to act in international society, the elaboration of constitutional rules *through* international law has given rise to a politics of constitutional authority, a contest over how – and where – to locate constitutional authority in the uncertain circumstances of international society. This chapter concludes that, at its core, international law's constitutional politics presents a question about the ethic, the conception of responsibility, appropriate to conditions of institutional uncertainty.

Constitutional rules in international society

Constitutional rules are a society's standards for the exercise of public authority. These are the rules or principles which have a special significance in ordering international society. Constitutional rules set the limits for expressions of *public* authority and, because of this, they function as the medium through which the idea of constitutional order – the existence of a governing framework – is conveyed. Another way to put this is to say that constitutional rules are centrally concerned with setting the terms of institutional authority, both empowering and limiting the capacity of governing institutions to act.¹

¹ See especially Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford, Oxford University Press: 2009), p. 9; see also Anthony F. Lang, Jr., 'Introduction: Rules and International Security: Dilemmas of a New World Order', in Lang and Beattie (eds.), *War, Torture and Terrorism: Rethinking the Rules of International Security* (London, Routledge: 2009)

Constitutional rules have two core features. First they are both principled and practical; they need to be conceptually coherent, and they need to be capable of guiding action in the real world. These are often called the requirements of *integrity* and *fit*.² Second they are both backwards and forward looking; constitutional rules at once describe an existing state of affairs – a society’s existing normative order – and proscribe the rules governing future actions, issues and policy problems. The result of this feature is that to attempt to describe the constitutional rules is always *also* a normative exercise and to establish the normative force of constitutional rules is always *also* a descriptive exercise. In this regard, constitutional rules do not only reflect the state of an existing social order but also must be seen to have the authority to *determine* social order by teasing out the implications of constitutional rules. Constitutional rules in this sense establish a particular form of constructive international authority, providing an institutionalised means ‘whereby international society moves from vague perception of a common interest to a clear conception of the kind of conduct it requires’.³ This is to say, constitutional rules establish constitutional order.

Although the explicit focus on global constitutionalism is relatively recent, the idea that international society is governed by constitutional rules is not.⁴ International lawyers – and the institution of international law – establish a distinct perspective on the constitutional rules governing international society, although in its basic features can be seen to reflect both the English School’s ‘institutionalism’ and liberal internationalist bias.⁵ Hedley Bull

² See especially Ronald Dworkin, *Law’s Empire* (Oxford, Hart Publishing: 1986), p. 76

³ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London, Palgrave Macmillan; 3rd edition 2002), p. 68

⁴ For one comprehensive survey of the recent literature global constitutionalism, see Antje Wiener, ‘Global Constitutionalism: Mapping an Emerging field’. See also the bibliography of the Global Administrative Law Project, available at: <http://www.iilj.org/GAL/>

⁵ Hidemi Suganami and Andrew Linklater, *The English School of International Relations: A Contemporary Reassessment* (Cambridge, Cambridge University Press: 2006), p. 36; Tim Dunne and Marjo Koivisto, ‘Crisis, What Crisis? Liberal Order Building and World Order Conventions’, *Millennium* 38 (3) May 2010, 615-640; It should be noted that there are other perspectives on the nature of international society’s constitutional rules besides the English School account. The fact that constitutional rules establish which core commitments have the power to structure international society means that all IR theories have at least an implied account of the constitutional rules. For example, realists tend to understand the rational calculation of state interest as the “rule” constituting international society, with the balances and imbalances of power setting the standards of legitimate authority. Liberals also emphasise the pre-eminence of sovereignty but suggest that sovereign power is mediated by the facts of global interdependence. Constitutional rules are those that have authority by virtue of this interdependence and all the threats, challenges and possibilities which follow. These are the rules necessary to “tame” interdependence. Both constructivists and the English School argue that constitutional rules are to be discovered in the normative dynamics of social practice. The contrast between the two is a matter of emphasis: for the constructivist the emphasis is on answering the question ‘how are rules formed?’, while for the ES the emphasis is on the question, ‘how do rules work?’. For constructivists, constitutional rules are the normative conventions and processes which end up structuring argument and practice. There are no

captures the basic idea in observing that states ‘form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions’.⁶ This perspective suggests that constitutional rules are those arising as a result of a special category of practices, namely international society’s *institutional* practices. International society is defined by a relatively limited set of social practices – such as diplomacy, law, war, and trade. Constitutional rules are those essential to establishing defining and maintaining the existence of these larger bundles of customary practices and processes which ‘provide the means whereby international society moves from vague perception of a common interest to a clear conception of the kind of conduct it requires’.⁷

For international lawyers the result of thinking that the commitment to the rule of law is fundamental to the existence of international society is that the authoritative account of the constitutional rules of international society must be derived through the institution of international law.⁸ This connection between international society and the existence of international law serves a crucial purpose in responding to the more extreme sceptical arguments that seek to deny the existence of international law as law. But it also establishes a problem for the attempt to justify international law as a constitutional authority, it sets the context for international law’s constitutional politics.

The nature of international law’s claim to define the constitutional rules of international society is embedded in the contest between pluralist and solidarist accounts of international society. This highlights the fact that the existence of an institution – the existence of a bundle of commitments – is only the start of the attempt, as Will Bain puts it, to ‘make sense of obligation in international life’, to make sense of the nature of the rules of governing international society, and of the sense of responsibility which follows.⁹ As Robert

rules here, not really, only the game. In contrast to this, the English School is focused on the effect of already well-established norms, contained in the idea of an institution of international society. To engage in any protracted discussion about these different accounts, or the relative merits of the ES account, would turn this thesis into a debate about IR theory, which I don’t want. Having said that, the ES’ “methodological pluralism” does suggest a more developed capacity to mediate between these different accounts. But this is not the place to develop this argument.

⁶ Bull, *The Anarchical Society*, p. 13

⁷ Bull, *The Anarchical Society*, p. 68; see also Reus-Smit, *The Moral Purpose of the State*, 1999 [arguing that international society is shaped by constitutional structures, by which he means basic institutional practices, particularly those associated with sovereignty]

⁸ See for example Terry Nardin, ‘Rule of Law Positivism’, in Mapel and Nardin, *International Society: Diverse Ethical Perspectives*, 1999; Peter Wilson, ‘The English school’s approach to international law’, in Navari (ed.), *Theorising International Society: English School Methods*, 2009

⁹ Bain, ‘One order, two laws: Recovering the “normative” in English School theory’. *Review of International Studies* 2007, p. 575.

Jackson argues, claims about international obligation are always accompanied by ‘knots and tangles’, because the practice of obliging states to do anything is at the heart of efforts to change international society.¹⁰ This is to say that the debate over the nature of the constitutional rules is an extension of a debate over the institutional *character* of international society, in particular the extent to which the institutions of international society have the normative capacity to determine social practice in any independent sense.

In this conversation about the terms of the institutional order governing international society, pluralists maintain that there are essential limits on what the society of states can hope to achieve; so long as international society is ordered around and through the authority of the sovereign state there will be hard limits on institutional progress. Given this, if international rules are to be practically useful, they need to be created and maintained with a view to these limitations. For rules to be authoritative in this context means that they need to maintain their effectiveness as a guide to state action. Rules that fail to reflect or enact the norms which states are in fact willing to obey creates only the appearance of authority, an appearance at odds with the underlying structures of authority. More importantly, it minimizes the normative justification for a world ordered around a respect for state sovereignty.¹¹ The danger that pluralists flag is that by exaggerating a claim to binding authority the broader possibilities for institutional, constitutional order through the respect for sovereignty can be undermined. Those rules that are able to claim genuine authority and which function to provide international peace and stability, such as norms of territorial integrity, are unsettled in the attempt to import opaque standards of authority based on natural right or humanity. As Alex Bellamy summarizes it, the guiding concern for pluralists is that ‘policy programmes based on misplaced ideas about universal ethics only serve to undermine international society’s unwritten constitution, leading to higher levels of disorder in world politics’.¹²

The solidarist counter to this is twofold. First, pluralists are said to start from an inaccurate and overly conservative characterization of the background, unwritten rules of international society. There is a descriptive failure to account for how international society’s unwritten constitution has developed to encompass rules which protect universalist ideals which challenge the pre-eminence of the state as the determinant of international order. To

¹⁰ Robert Jackson, *Classical and Modern Thought*, 2005, Ch. 7; see also Bain, *Ibid*.

¹¹ Jennifer M. Welsh, ‘A Normative Case for Pluralism: reassessing Vincent’s views on humanitarian intervention’, *International Affairs* 87 (5) September 2011, 1193–1204

¹² Alex J. Bellamy (ed.), *International Society and Its Critics* (Oxford, OUP: 2005), p. 10

the extent that international society has bought into the language and practice of human rights, for example, there is no reason to suppose that these rules don't or can't displace the sovereign state as the locus for constitutional or foundational authority in international society.¹³ The second claim that solidarists make is that pluralists fail to understand the process through which progress happens, in which an initially vague or uncertain norm provides the basis for solidarist practices. Nicholas Wheeler, for example, uses the history and practice of humanitarian intervention to suggest that the limitations implied by a norm of state sovereignty are not as entrenched or insurmountable as pluralists assume.¹⁴ Judging by the historical legitimacy that has been given to humanitarian intervention, he argues, practitioners must be operating within a more substantive ethical framework than they have previously been willing to admit. They have been guided by an understanding of the rules that goes beyond the conservative assumption that constitutional rules of international society must be based on a conservative ethic of co-existence and non-intervention. In his view, the consistency of state practice provides a basis for thinking that a norm of humanitarian intervention can claim the constitutional-type authority needed to guide future state actions.

To put this another way, the divide between solidarism and pluralism emerged as part of an attempt to make sense of the principles which could realistically be taken as generating constitutional commitments, commitments which could generate the legitimate authority needed to direct inform states' judgement about the appropriate *constitutional*, world-ordering practice. This suggests that, at base, these two images of international society posit different views about whether the existing framework can sustain public, constitutional-type responsibilities or whether the institution is too 'deformed' to justify this type of practice.¹⁵ As Bain argues, the idea that these two perspectives are incommensurable misses the fact that competing solidarist and pluralist characterisations of world order are part of the background of constructing international society's normative order. These are images of international order that are fundamentally in conversation with one another and

¹³ R.J. Vincent, *Human Rights and International Relations*, CUP: 1987; see however Christian Reus-Smit, *The Moral Purpose of the State*, 1999 [arguing that it is the idea of the state that has changed to encompass the pursuit of human rights, rather than it being the pre-eminent position of the state in international society that has changed]

¹⁴ Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, Oxford University Press: 2000), p. 309-10

¹⁵ Posing a similar question, see Dunne and Koivisto, 'Crisis, What Crisis?', p. 615-617

which, as part of this conversation, continue to refine the nature of the international order.¹⁶ At one level this is exactly right: these categories are important because they establish two fundamentally competing ideas about the sense of responsibility appropriate to international society's institutional normative order. These categories function to define competing ideas about the responsible posture, two competing images of the responsibilities appropriate to the international order. There will always be both solidarist and pluralist elements in international society for the simple reason that these categories reflect competing dispositions on how best to react to the uncertainties of the international institutional order.¹⁷

In another sense, however, the problem represented by these competing ethics is that there is no immediate resolution to their conversation, to the constitutional politics they suggests. The danger for international law is that in the clash between these competing ethics the prospects for international law to determine the constitutional rules of international society – its capacity to project its claim to constitutional authority – must battle not only against contingent state interests but against a pluralist disposition which regards the responsibility to advance international law as a question of political motivation rather than institutional necessity. The problem, in other words, is the ease with which a pluralist approach is able to co-opt and undermine the solidarist ethic of legality, the idea of legality as *the* constitutional practice of international society. This is the problem that international law faces in claiming the authority to generate, to define, the constitutional rules of international society.

Constitutional Rules in International Law

Before getting to the point, however, where it is possible to see the depth of the challenge posed to constitutionalist accounts of international law, is important to understand how the underlying solidarist ethic of legality has inserted itself into international society. The use of international law as the authoritative guide to the constitutional rules of international society was, perhaps unsurprisingly, spearheaded by international lawyers anxious to make sense of their role in international affairs. Constitutionalism in this sense emerges as a response specific to international law's attempt to respond to the international obligation problem,

¹⁶ See also John Williams, 'Pluralism, Solidarism and the Emergence of World Society in English School Theory', *International Relations* 19 (1) 2005, 19-38.

¹⁷ Bain, 'One order, two laws', 2007, 567.

the common stumping ground, in one guise or another, for attempts to establish the “really existing” capacity of international law to bind states. As J.L. Brierly classically put it, the crucial challenge for anyone appealing to or practicing international law is a belief ‘that many of the postulates which traditionally pass for international law are unrealities, from which their system must be freed, if it is to be kept in touch with the facts of international life.’¹⁸ The central fact of international life for Brierly was the concentration of international authority in sovereign hands: how could international law realistically bind states if states ultimately had the power to determine the limits of international law’s authority? This sense of international law’s “unreality” gets its foothold due to the perception that states, in addition to being the authors of international law, are also its ultimate subjects and arbiters. The fact that states hold all of the roles that are determinative of the practical binding force of international law means that the inevitable answer to the question of why international law rules is: because states allow it.

International law’s constitutional project emerged as a solidarist response to this perception of sovereign state “ownership” of international law, as an attempt to establish international law as a ‘unifying element amidst the perplexing social reality of the relations of states’.¹⁹ There is a danger of essentializing both international law and the constitutional project here, but in many respects this is precisely the point: for international law’s practitioners, there is no escape from the progressive politics of international law. So long as the nature and extent of international law’s “rule” is unsettled and contested, the politics of international law will always be centred on how competing stakeholders attempt to settle these questions in one way or another, in line with competing sets of assumptions and values. The attempt to establish international law as a constitutive force in international society is necessarily a progressive project, because it challenges prevailing presumptions about the authority of the state in setting the terms of international society’s constitutional order. The question this poses is: how has international law managed to establish this

¹⁸ Brierly, ‘The Basis of Obligation in International Law’, in Brierly, Lauterpacht and Waldock (eds.) *The Basis of Obligation in International Law and other papers*, 1958, 1.

¹⁹ On Brierly’s contribution, Lauterpacht writes: ‘Brierly’s most significant – and perhaps most lasting – contribution to international law lies in the fact that during a period of transition and reassessment of values he threw the weight of his writing and teaching in the scales of what may properly be regarded as a progressive conception of international law . . . there are few writers on modern international law who have exhibited a greater capacity for searching painstakingly, at the risk of inconclusiveness and of creating occasionally the impression of contradiction, for some unifying element amidst the perplexing social reality of the relations of states’, p. xv, ‘Brierly’s contribution to international law’, in Brierly (author) , Lauterpacht and Waldock (eds.), *The Basis of Obligation in International Law and other papers*, 1958

progressive, constitutionalist narrative as a *necessary* part of the responsible practice of international law?

For one influential band of international lawyers, it was the conceptual uncertainty of the international legal order combined with a more certain sense of what a good legal order should look like – law should be able to claim supremacy, it should be capable of both protecting and restraining sovereign authority, treat its subjects equally, applied to all subjects equally, be clear, capable of being followed, coherent in itself and able to resolve disputes – that determined the scope of their responsibilities towards the legal order. In a narrow sense it was the uncertainty that seemed to proliferate around *how* to apply international law that threatened the rule of international law and, in turn, justified the scope of the response. But underlying this narrow motivation was also a wider belief that that international legality was the driver (or, at least, marker) of social progress. This ‘neo-Victorian sensibility’, as Martti Koskenniemi terms it, advances a belief in the virtue of social progress through law.²⁰ This is to say that the practice of legality becomes a constitutional practice in the attempt to institutionalise the belief that states were both burdened by the anarchical nature of the international system and that the rule of law could allow a more progressive, peaceful and stable international order to emerge. In this way constituting international order became necessarily tied to advancing both the value and the institution of the rule of law because this was seen as the best hope for limiting states’ capacity to act on their subjective desires.

The reason this mattered in practice – the reason this couldn’t be dismissed as a utopian wish – was that this band of progressively minded lawyers were in a position to embed this view in the international order, as part of a professional commitment to strengthening the rule of international law.²¹ In contrast to earlier accounts of international law that could be bracketed as advancing a “view from nowhere”, this approach understood the justifying international law’s authority to be not merely as a philosophical problem to be pondered during the professional off-hours, but a *practical* challenge to be addressed as part of the institutional practice of international law. Oscar Schachter would later use the idea of an invisible college of international lawyers to express this source of international legal authority; David Bederman would amend this to the ‘visible college of lawyers’, pointing to

²⁰ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960*, 2001, 353-411

²¹ To address the ‘structural anomalies which, for decades, troubled the minds of at least the more intellectually rigorous of international lawyers’, Philip Allot, *Eunomia: New order for a New World*, 2004, xv

the public consensus to emerge.²² What is important is that these early constitutionalists advancing this ‘progressive account’ of international law took seriously the idea that the legal order could represent ‘the juridical conscience of the world’, and viewed their professional, personal responsibilities towards constructing international law through this lens.²³ It was through the focus on the fundamental and essential principles that emerged from this more basic commitment to legality that international law began to establish its claim to constitutional authority, a claim based on community values rather than state interest.

The first issue that needed to be confronted in justifying this constitutionalist mindset was that the international legal order itself was complicit in capitulating to state interest, limiting its own authority by artificially restricting the range of “justiciable” issues. As Hersch Lauterpacht argued, the problem of state-subjectivity wasn’t only that states would abuse their overlapping roles, failing to comply with international law when it served their interests, it was that international lawyers accepted this as a structural fact of life, as part of the essential difference between international and domestic law. The limits on international law’s authority were set, he argued, ‘by international lawyers anxious to give legal expression to the State’s claim to be independent of law’.²⁴ From his perspective, this meant that international law’s limits were being artificially set as a result of a misconceived mindset, a misconstrued conservatism about the place of international law in international society. To guard against the false glorification of state sovereignty as intrinsic to international law, Lauterpacht argues that international law’s authority needs to be approached, above all else, in light of the requirements of conceptual integrity. Whatever international law is or does, it needs to exhibit the basic characteristics of the rule of law including, crucially, establishing a claim to supreme authority within the legal order. His reasoning is that ‘From the rule that obligations of international law owe their origin to the will of States, it follows that new obligations cannot be imposed upon an unwilling State by an international legislature. But from the principle that a State is objectively bound by an obligation once undertaken there follows, with inescapable logic, the juridical postulate of the obligatory rule of law.’²⁵ International lawyers, he argued, should be motivated not by the

²² Oscar Schachter, ‘Invisible College of International Lawyers’, *Northwestern University Law Review*, 72 (1977) 217; David J. Bederman and Lucy Reed, ‘The visible college of international law: an introduction’, *Proceedings of the Annual Meeting (American Society of International Law)* 95 (April 4-7, 2001) ix-xi.

²³ Koskenniemi, *Gentle Civilizer*, p 41

²⁴ Hersch Lauterpacht, *The Function of Law in the International Community*, 2011 (1933) p 6

²⁵ *Ibid.*, p 420; see also Alexander Orakhelashvili, *Peremptory norms in international law*, 2008 [arguing that the great contribution made by Brierly and Lauterpacht was that: ‘Under their approach, international law is no longer conceived of as an incidence of international power and political relations, or a mere generalisation of practice.

sovereigntist agenda of states but by the social need for the sort of progressive judgement promoted by international law against the ‘irrational, egoistic, short-sighted and certainly “unscientific”’ nature of politics.²⁶ The important thing for the emergence of a constitutional project is that this approach was neither a utopian progressivism or a status quo conservatism. It was instead an institutional conservatism which aimed at preserving and promoting the integrity of a fundamentally progressive international legal order. On the surface, this was simply a project to unknot international legal authority from sovereign authority, not to remake the world order. The constitutional project comes out of the fact that to conceptually untangle international obligation *is* to remake the world order.

Before this grand constitutional project could fully take hold, however, outstanding questions about the structure of international legal obligations needed to be addressed. For constitutional authority to make sense, there needed to be an understanding of international law as public law, rather than a private, contractual exchange between independent states. The problem was that this was exactly the model that most of the international lawyers assumed was appropriate to the internal structure of international legal obligations. Within treaty law at least, the binding force of international legal obligations looked to be based on the ‘mutual and reciprocal exchange of benefits or concessions between the parties’.²⁷ The emphasis on reciprocity bolstered the perception that in determining the scope of state responsibilities under international law the crucial consideration was the level and extent of state consent in their bilateral (or bilateralizable) dealings, rather than as common members of international society. In this sense the sceptical claim is one of anachronism; the idea that international law could “discover” an alternative model hidden within the existing institutional structure was based on the unrealistic premise that there was a viable alternative to sovereign ownership of international law, to the privileged role given to state consent as the source of international legal authority. If the binding force of a rule was necessarily discovered by reference to the consensual sources of international law, then how could the basis of obligation be anything other than state consent? But Gerald Fitzmaurice pointed out the obvious gap in this reasoning: treaties are not the only source of international law; custom and general principles matter too, and the nature of consent in these sources is rather different. Customary international law emerges from a judgement that existing state

The nature of international law must be identified not merely by reference to the absence of international government, but to the basic parameters due to which law operates as law.’ p 11]

²⁶ Koskenniemi, *Gentle Civilizer*, p. 359

²⁷ Quoted in Christian Tams, *Enforcing Obligations Erga Omnes in International Law*, 2005, p. 55

practice together with evidence of a widespread belief in the legal bindingness of a norm - *opinio juris* – defines the threshold at which a customary social norm attains the added feature of legal bindingness. The conception of consent here is not that of contract or treaty making but the public commitment of the social contract tradition. Customary international law suggests that it is the existence of a social practice of legality that matters for determining consent, rather than consent which matters for determining the practice of legality.

More than that, Fitzmaurice pointed out that the reason treaties – and acts of state consent – have any traction at all as a source of law is because of the *non-reciprocal* structure of the underlying customary obligations. These are obligations have force because they are held by states as members of the international community, rather than because of their bilateral relationships with one another. Finally, looking at the structure of treaty obligations to discover the binding force of international law makes the most basic of category errors, because treaties do not themselves define the law. The problem isn't the analogy with private law *per se* but that the analogy is incomplete. The obligations created by contract are not definitive of the law – an agreement to sell 250 pallets of bananas in exchange for market value does not create a law that 250 pallets of bananas ought to be sold for fair market value. Instead it creates a precedent that may or may not become part of law. Moreover, the bilateral relationship here has no direct bearing on the relevant law. As Fitzmaurice writes, "The only "law" that enters into these [treaty obligations] is derived, not from the treaty creating them – or from any treaty – but from the principle *pacta sunt servanda* – an antecedent general principle of law. The law is that the obligation must be carried out, but the obligation is not, in itself, law".²⁸ The implication which follows is that while a treaty might inspire the content of the law it does not itself give binding force to the rule.

The relevance of this thought to the development of constitutional authority in international society is that it begins to break down the hold that 'reciprocity' has as an explanation for the *contingent* force of international law.²⁹ Rather than having to explain international law as an exchange of rights and responsibilities between states, the emphasis on the binding force of these obligations in customary international law suggests that the crucial relationship is not between individually contracting states, but between states in their

²⁸ Gerald Fitzmaurice, 'Some Problems regarding the formal sources of international law', *Symbolae Verzijl* 153 (1958), p. 157

²⁹ See for example, PM Dupuy, 'A General Stocktaking of the Connections between the Multilateral dimension of obligations and a codification of the law of state responsibility', *European Journal of International Law* 13 (5) 2002, p. 1054 ['The codification of the law of treaties was the first codification project to grapple with the general multilateral dimension of an obligation as a barrier to the specific bilateral freedom of contract.']

shared role as members of international society, as common stakeholders in the fundamental principles of international law. Membership of the international community superseded reciprocity as an explanation for international law's public authority. This is not to say that reciprocity has no place in a constitutional order. Reciprocity itself is a principle of customary international law. As Mark Osiel argues, it serves an important function in the laws of war, helping to create a sense of shared ownership of the legal framework.³⁰ Kenneth Anderson similarly argues that reciprocity is an important remedial mechanism; the principle allows states to 'hold each other hostage, as it were, to their compliance with international law. The failure of one side to hold to the law of war releases the other to respond in kind'.³¹ But he also suggests that the far more fundamental function of reciprocity is that, particularly for the soldiers engaged in war fighting, it provides a socially authoritative reason for adopting a posture of legality, accepting international law's rules as binding beyond a narrow bilateral calculus. This is the sense in which Fitzmaurice's arguments bolster the constitutional project. It's not reciprocity per se that provided the obstacle to the emergence of constitutional authority. It was the elevation of the contractual, bilateral appearance of international legal obligations into a principled, hence socially authoritative, reason for the limits of international legality. In other words, the fact that most international legal rules were directed at regulating bilateral, private, contractual-type relationships between states didn't preclude either the need for or presence of rules with a more sweeping public function.

With this in mind, international lawyers could begin to think seriously about the constitutional character of public international law, particularly the manner in which international law spoke for the international community at large, as opposed to merely protecting states' privileged, private domain.³² The practical challenge facing international lawyers in this context was to bring together the agglomerated customary legal rules with the aim of bringing coherence and determinacy to the institution of international law as an independent entity: to build international law's institutional capacity to deliver on the

³⁰ Mark Osiel, *The End of Reciprocity? Terror, Torture and the Law of War*, CUP: 2009; see also Kenneth Anderson, 'The Rise of International Criminal Law: Intended and Unintended consequences', *European Journal of International Law* 20 (2) 2009, 331-358

³¹ Anderson, 'The Rise of International Criminal Law', p. 340

³² Andreas Paulus and Bruno Simma, 'The "International Community": Facing the Challenge of Globalization', *European Journal of International Law* 9 (2) 1998, 266-277 [suggesting that the Lotus principle is giving way to a more communitarian, if aspirational, notion of international law; equates the English School's (Bull's) Grotian tradition with the communitarian idea of international law]; see generally Ulrich Fastenrath et al (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, 2011

conceptual claim to objectivity.³³ As Humphrey Waldock puts the challenge: ‘International law bears a certain resemblance to the common law legal system in that many of its most fundamental traits are “unwritten”, deriving their authority from custom or general concepts of law rather than from a written code . . . the great difference between them is that, whereas centuries of judicial action have crystallized the common law into a body of well-defined principles, the judicial process is so recent a process in international law and its operation so intermittent that the unwritten element in the international legal system is still, much of it undefined’.³⁴ By bringing together these unwritten elements, international law could begin, finally, to claim the same essential powers as a domestic legal order.

The story up to this point has centred on how principled responses to the conceptual challenges of international legality framed the constitutionalist process. But this narrative could equally be framed as one in which Brierly, Lauterpacht, Fitzmaurice and Waldock were trying to make sense of their own shared roles in international law, as the International Law Commission’s Special Rapporteurs on treaty interpretation. Theirs’ was no idle philosophizing about the nature of international law’s authority. The international community expected determinate, actionable answers on how to interpret international treaty law, and that required both establishing a conceptually rigorous and socially authoritative understanding of the existing nature of international legal obligations, if only to make clear the mechanics of international legal interpretation for the future lawyers. It was in response to the need to specify the categories of international legal obligation that we get international law’s first direct claim to establish a category of constitutional rules in international society, legal rules claiming authority as an objective and non-reciprocal standard of community interest.

By the time the Vienna Convention on the Law of Treaties is adopted in 1969 the conceptual debates about the authority of international law had been sufficiently developed to allow the inclusion of the category of jus cogens norms, a category of legal obligations that claimed authority entirely independently of acts of state. More than that, jus cogens norms further institutionalized the customary international law claim to bind states even where the process of state consent might have suggested otherwise. For example, where

³³ As Alexander Orakhelashvili puts this, ‘Determinacy of rules is crucial in terms of how the relationship between obligation and sovereign freedom must be construed, because indeterminacy of rules may create the impression that a presumption in favour of sovereign freedom of action exists.’, *The Interpretation of Acts and Rules in Public International Law*, OUP: 2008, p. 18

³⁴ Humphrey Waldock, ‘The “common law” of the international community – international custom’, *Oppenheim’s International Law*, Ch. 3, p. 39

states had traditionally enjoyed an absolute right to attach reservations to treaties, limiting their obligations, jus cogens norms established limits to this right – the fact these are non-derogable norms entails that no reservations are permitted to rules of this sort.³⁵ The effect of this is that peremptory norms functioned as a direct, albeit not extensive, strategy for responding to the state’s ownership of international law, a strategy for developing the idea that international law rules in international society. They created a distinctive category of absolute obligations with the capacity to claim the independent, ‘higher’ authority that had previously limited the constitutional horizons of international law.³⁶

If the absence of any practical means of enacting these rights in international society – of using jus cogens norms to justify constitutional practice – heralded call of a new utopianism, there wasn’t long to wait for such measures. Jus cogens norms, as Maurizio Ragazzi argues, led directly to the articulation of the broader, and more explicitly constitutional category of obligations *erga omnes*.³⁷ Whereas jus cogens norms are essentially cosmopolitan standards appealing to the international community’s universal values, *erga omnes* obligations develop the constitutional standard in bringing out the distinctive responsibilities that attach to states’ constitutional role, namely their common membership of and trusteeship for international society. In the *Barcelona Traction* case of 1970, the International Court of Justice included a now notorious two paragraphs – largely unrelated to the case they were supposed to be deciding – detailing the distinction between ordinary obligations and another higher category of obligations held towards the international community as a whole. As they reasoned:

‘an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection

³⁵ See especially Human Rights Committee, General Comment 24 (52), ‘Reservations to the ICCPR’. U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).1

³⁶ Weil P (1983) Towards Relative Normativity in International Law. *American Journal of International Law* 77: 413-442

³⁷ Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, 2000, p. 15

have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character.’³⁸

This category of obligations can be understood as part of international law’s natural law tradition, with legality a function of a ‘belief in higher things’ that the practice of international law has always implied.³⁹ But this doesn’t quite capture the full effect of institutionalising *erga omnes* obligations. The important thing for the genesis of international law’s claim to constitutional authority was that whatever the rules might say about universal values, they also established a protected communal standard for the exercise of state responsibility, which is to say a public, constitutional standard.⁴⁰ As Michael Byers argues, *jus cogens* and *erga omnes* rules together consolidate a shift to the ‘common interests of states’ as an authoritative standard to be employed in the development, defence and change of the international legal order. Because of this these should be understood as ‘constitutional rules which help define the fundamental characteristics of the system’.⁴¹ Byers is primarily concerned with the internal constitution of the legal system, its ability to function effectively as a closed order, rather than how this category of obligations develops international law’s broader claim to constitute international society. Anne Peters is more explicit about the fact that ‘the constitutionalist paradigm explains the existence of *erga omnes* norms’ because these rules develop international law’s claim to function as the locus for constitutional

³⁸ Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ 5 Feb 1970, paragraphs 33-34, judgement available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=br2&case=50&k=1a>

³⁹ Mary Ellen O’Connell, *The Power and Purpose of International Law: Insights from the theory and practice of enforcement*, 2008, p. 5

⁴⁰ Note that although there are points of overlap, this is a different conversation about the scope of state responsibility than that contained in the Draft Articles on State responsibility. Although the ASR raises broader questions about the scope of states’ constitutional responsibility – see especially Articles 40-41 – the focus is on the narrower question of liability for wrongful acts. Apart from a general acknowledgement that breaches of *erga omnes* obligations and peremptory norms generates a responsibility to ‘cooperate to bring to an end through lawful means any serious breach’ (Article 41(1)), the nature or extent of the states’ trusteeship for these legal rules are not considered at any depth.

⁴¹ Michael Byers, ‘Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules’, *Nordic J of International Law* 66 (1997), p. 239 [‘Jus cogens rules and erga omnes rules seek to protect and promote the common interests of States to a much more obvious degree than most rules of international law. They are constitutional rules which help define the fundamental characteristics of the international legal system: they play an important role in determining how rules of international law are developed, maintained and changed, and in protecting those human rights or civil liberties which are considered essential to the self-identity of the international legal system, and the international society it serves.’]; see also Anne Peters and Klaus Armingeon ‘Introduction—Global Constitutionalism from an Interdisciplinary Perspective’, *Indiana Journal of Global Legal Studies*, 16 (2) 2009, 385-95, 387 [distinguishing global constitutional law from global constitutionalism [‘Global constitutional law is a subset of international rules and principles which are so important that they deserve the label “constitutional”’]]

development in international society.⁴² It is in this light that Bardo Fassbender argues that: ‘In principle every constitutional rule has an *erga omnes* effect in the sense that it is directed towards, and binding on, all members of the community. But the specific obligations that are currently recognized as obligations *erga omnes* represent a subset of international constitutional law’.⁴³ Obligations *erga omnes* open the door to international law’s claim to constitutional authority, heralding a shift to a public, world order building concern with the interests of the international community over and above the more limited concern with state (or “systemic”) consent. This doesn’t only define international law’s constitutional rules – it establishes international law as an institution of constitutional *rule*, as the locus of constitutional authority in international society.

The crucial point is that the effect of this category of obligations was not only to consolidate existing international law but, by establishing a “higher” category of obligations, to institutionalise international law’s essentially constitutional claim to order international society. This higher category of obligations was marked out by an entirely different *constitutional* structure, where states responsibilities were held towards the international community as a whole.⁴⁴

Constitutionalism, not legalism

This lawyerly story about constitutional rules can seem rather devious, however, and this sets the terms for the present challenge facing attempts to use the rules and roles of international law as a basis for the constitutional rules of international society. The problem with using this internal logic, this culture of formalism, as the basis for international law’s institutional authority is, as Kenneth Anderson notes, that it is based on a circular process of self-legitimation which ‘lies in adopting an important preference for listening to oneself as a source of authority – and discovering, pleasantly, that over time screening out other contending voices of authority actually works to confirm one’s legal authority’.⁴⁵ The charge

⁴² Klabbers, Peters and Ulfstein, *Constitutionalization*, p. 154

⁴³ Bardo Fassbender, ‘The United Nations Charter as the Constitution of the International Community’, 1998, p. 591

⁴⁴ See also Tams, *Enforcing Obligations Erga Omnes*, 2005 [arguing that whereas the traditional structure of international legal obligations established reciprocal relationships of responsibility, *jus cogens* and *erga omnes* obligations established a non-reciprocal relationship of responsibility]

⁴⁵ Kenneth Anderson, ‘Fragmenting communities of interpretation and authority’, 25 May 2010, <http://www.ejiltalk.org/fragmenting-communities-of-interpretation-and-authority/>; see also Kenneth

laid against the image of international legality as the locus of constitutional authority in international society is that of “interiority”. International lawyers might be able to use their privileged position to progressively develop international law into a coherent and comprehensive legal order, but this doesn’t have any necessary impact on international law’s *constitutional* authority, its capacity to establish the terms of international society’s normative order. It’s no good using what E.H. Carr called ‘intellectual trickery’ to smuggle in an account of the operative constitutional rules; any law based on such empty promises will struggle to generate a culture of legality in political practice.⁴⁶ There needs to be a clear acceptance by the international community that the formal rules arising under the auspices of international law – including the commitment to legality itself – represents a valid representation of the ‘deeper, truer’ constitutional rules of international society. International law only rules to the extent that it reflects the unwritten customary norms of international society. As a result of this the commitment to legality plays at most a supplementary role in generating or identifying the authority embedded in constitutional rules.

This marginalization of international law’s constitutional role is connected to the idea that there needs to be what Carr called a ‘harmony of interests’ operating in international society before international law could genuinely function as an independent, objectively valid social institution. That is to say, there needed to be a discernible sense among states that international law does in fact have a legitimate claim to embody the public, communal standards. There needed to be a widespread understanding that a commitment to legality was in fact more than a belief in the procedural, functional usefulness of international law in international affairs. In this view, so long as power and self-interest were the currency of international relations, the independent authority of international law, its capacity to rule with all the supremacy this implied, was a necessarily utopian idea. Taking the world as it is, the responsible statesman should recognize the supremacy of politics and diplomacy, rather than getting miring their strategic decisions in a wrong-headed, unrealistic assessment of the practice required by a commitment to legality.⁴⁷

Carr’s realism provides the background for Hedley Bull’s caution about the independent constitutive effect of international law and the dangers of acting on a solidarist

Anderson, ‘The Rise of International Criminal Law: Intended and Unintended Consequences’, EJIL 20 (2009) pp. 349-353.

⁴⁶ E H Carr, Michael Cox ed., *The Twenty Years Crisis: 1919-1939: An Introduction to the Study of International Relations*, 2001

⁴⁷ *Ibid.*, p. xxv

ethic in an essentially pluralistic institutional order. He argues that the authority of international law is determined, and hence limited, by the pluralist circumstances of international society. Taking aim at Lauterpacht's use of legality to ground his liberal internationalism, Bull argues that the progressive picture of international law undercuts the attempt to establish a realistic basis for international legal authority, including establishing a genuine role for international law in ordering international society. The major difficulty is that international law lacks the determinacy, the clarity, needed to resolve conflicts on its own terms, as a matter of law. The attempt to regulate aggression through the rules on the use of force, for instance, rests on the idea that one or another of the belligerent parties can claim to have had 'just cause' in using force. Bull argues that the fact that there might be 'deep disagreement among states as to which side represents the community and which the law breakers' or, alternatively, a 'general concurrence in treating war as purely political in nature', undermines the claim that international law has an independent authority to regulate or mediate social practice.⁴⁸

The progressive vision of legality Lauterpacht imagines, Bull argued, suffers because it posits a solidarist world order where none exists. Where Lauterpacht thought that international lawyers could resolve law's indeterminacy by promoting the integrity of the rules, refining the terms of the relationship between various rules – for example, introducing hierarchy into the rules so that in case of a conflict of obligations, at least there is an understanding that protecting jus cogens norms takes priority – Bull argues that the indeterminacy isn't a result of some gap in the rules, but a deeper reflection of the limits on international legality as an ordering principle in international society. This isn't so much a question of indeterminacy as it is the open structure of legal rules allowing states to act *as if* international law is fundamentally indeterminate.⁴⁹ That states take this option, and that the institution of international doesn't have the material capacity to respond to this (for example, by establishing responsibility for breaches of international law), highlights a more general unwillingness to cede constitutional authority to international law. Bull suggests that states may accept international law for four core reasons: out of habit or inertia, a coincidental alignment of state preferences and legal obligations, if coerced by more powerful states, or as a result of reciprocity.⁵⁰ Crucially, however, he did not think that

⁴⁸ Wilson P 'The English school's approach to international law', in Navari (ed.), *Theorising International Society*, 2009, p. 174

⁴⁹ See especially Koskenniemi, *From Apology to Utopia*, 2006

⁵⁰ Bull, *The Anarchical Society*, p. 133-134

simply because there was a commitment to the practice of legality among the members of international society provided sufficient evidence for thinking that international law was in itself capable of commanding authority in international society. As he puts it, ‘the denigrators of international law . . . while they are wrong when they claim that international law is without efficacy, are right to insist that respect for the law is not in itself the principle motive that accounts for conformity to law. International law is a social reality to the extent that there is a very substantial degree of conformity to its rules; but it does not follow from this that international law is a powerful agent or motive force in world politics’.⁵¹

This is Bull’s point in suggesting that there needs to be a degree of moral unanimity among the various members of international society in order for international law to be able to deliver on its constitutional claims. The threshold for international legal authority here isn’t that there is some essential and far reaching harmony of interests, but that states have a common disposition towards international law’s capacity to ‘resolve the moral dilemmas of international politics’.⁵² The problem, Bull argues, is the evidence arraigned against such a common disposition. The practice of legality doesn’t reflect Lauterpacht’s expectations, or aspirations, for international law. Bull’s narrow argument at this point centres on the descriptive claim about the nature of international society. He argues that there is a role to be played by international law, but this role is to uphold, to strengthen and to solidify those background political structures – such as the balance of power and sovereignty – which enable international law to have any ordering function at all. International law can rule to the extent that it protects and promotes the sovereign state’s central role in international society’s constitutional order.⁵³

The wider argument, and the argument on which the justification of international law’s constitutional authority centres, is that generating a legitimate claim to constitutional authority requires a degree of certainty about the capacity of international law to accurately reflect international society’s sense of the constitutional rules. International law *can* claim constitutional authority, but only if it emphasises the correct, socially sticky customary norms – the norms that states are already predisposed to obey as part their membership of international society. This premises international law’s authority on its practical capacity to, as Brunnée and Toope have recently expressed it, ‘inspire legality’ among its subjects by reflecting the existing constitutional sensibility – not by seeking to impose its own

⁵¹ Ibid.

⁵² Aldershot and Hurrell (eds.), *Hedley Bull on International Society*, p. 125

⁵³ Terry Nardin, ‘Theorising the International Rule of Law’, *Review of International Studies*, 34 (3) 2008

conception of the constitutional rules. The problem is that if the capacity to inspire is found in the capacity to accurately reflect the constitutional norms, where the rules codified by and advanced within international law fail to genuinely reflect the norms of international society, this suggests that it is entirely reasonable to reject international law's authority.

In fact Bull goes even further than this; he regards it as not only inherently reasonable to reject the international law's binding authority but irresponsible not to. If international law fails to reflect a really existing background consensus, it becomes part of 'a system which it may be dangerous even to try to put into practice'.⁵⁴ International law's institutional weaknesses – its contingent, uncertain authority – undermines the justification for giving priority, supremacy to international law's image of the constitutional rules of international society. What Bull does in advocating a pluralist framework for judging the action appropriate to the circumstances of international society – and this mindset feeds "pragmatic" accounts of international law – is to acknowledge that international law has a central role to play in understanding the constitution of international society, but at the very same time to express scepticism about the capacity of international law to function as a constitutional authority in its own right. In practice this amounts to a rejection of the idea that international law has an *independent* constitutional role in the international normative order. As Terry Nardin expressed this, the legitimacy of international law – its capacity to rule – is based on international law's expression of a procedural rather than purposive conception of international order; international law reflects international order, but it does not have the power to generate its own vision of that order.⁵⁵ This serves to establish a particular perspective on constitutionalism as divorced from legalism, a perspective which directly clashes with the lawyerly practice of constitutionalism. Constitutionality, as Ian Clark argues, 'is not to be construed in a narrow sense as the legal foundations of the political order, as this would simply return us to legality by another route. Instead it refers to the mutual political expectations on which international society is from time to time founded, and which are not fixed in legal rules'.⁵⁶

From pluralism to pragmatism

⁵⁴ Aldershot and Hurrell (eds.), *Hedley Bull on International Society*, p. 119

⁵⁵ Terry Nardin, *Law, Morality and the Relations of States* (Princeton, Princeton University Press: 1983)

⁵⁶ Ian Clark, *Legitimacy in International Society*, p. 209

This scepticism regarding the constitutional authority of international law has been expressed most baldly by Jack Goldsmith and Eric Posner in *The Limits of International Law*. Whatever this book's demerits – Kratochwil captures the tenor of the many criticisms in his acerbic suggestion that their argument is 'only noteworthy for giving the concept of "shallowness" a new depth'⁵⁷ – they did define a perspective that has significant traction both among scholars and policy-makers, and helps define the contours of international law's constitutional politics. The basic premise of their argument reflects the pluralist worry: *international law claims too much*. International legal rules do not on their own represent 'true' obligations, but only a reflection of the contingent interests of cooperating states. The motivating idea is that the limits of international law are set by the circumstances of international politics, namely the willingness of states to cooperate with one another, for specific purposes. The problem with their account is that, in contrast to the pluralist, they end up limiting international law out of existence, on the dubious and outdated premise that the only source for international authority is coercive authority. Their more interesting – and potentially problematic – line of attack is as regards the practice of legality. They warn that 'stricter international law could lead to greater international lawlessness' if creating law is used as a shortcut for greater international cooperation.⁵⁸ Although the idea that a logic of state interest and state power wholly defines the terms of state cooperation doesn't offer much of a challenge to international law, it is more difficult to dismiss the more general warning that 'states cannot bootstrap cooperation by creating rules and calling them "law"'.⁵⁹ This gets to back to Bull's charge that international law is in danger of over-claiming, of representing an unrealistic picture of international society and as a result weakening its ability to *demand* legality.⁶⁰

Goldsmith and Posner explore this idea separately in subsequent work, which tends to grant international law a far greater *potential* capacity for authority than their arguments in *Limits* would suggest. Goldsmith (writing with Daryl Levinson) is led to accept that international law does have a legitimate claim to public authority, a claim to authority of the

⁵⁷ Friedrich Kratochwil, 'International Law and International Sociology', *International Political Sociology* 4 (3) September 2010, p. 313

⁵⁸ Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford, Oxford University Press: 2006), p. 202

⁵⁹ *Limits*, p. 203

⁶⁰ See also Nico Krisch, 'Global Administrative Law and the Constitutional Ambition', in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?*, Oxford, Oxford University Press: 2010)

same order generated by domestic constitutional law.⁶¹ Customary international law provides evidence that international law creates and sustains certain claims about the public interest of states as members of the international community, claims that can't be accounted for purely in terms of states' essentially private interests in the gains from cooperation. But the result of the analogy between constitutional law and international law – under the umbrella of public law – is a denial of the authority of *all* public law, international and domestic. International law suffers from the unreality of all public law, namely the lack of an enforcement mechanism and a necessary reliance on the willingness of the executive to act within the public law rules.

Eric Posner's tack is less circumspect, more directly in line with the position in *Limits*. He warns against 'the perils of global legalism', which he defines as 'an excessive faith in the efficacy of international law'.⁶² This efficacy is drawn from a familiarly narrow view of the function of international law, defined as an ability to 'keep order and solve policy disputes'.⁶³ His underlying argument is that the practice of legality is premised on the general viability of international law to provide order, to make good on its promises. The conclusion he reaches is that if international law can't back up its legal rules with the same coercive government institutions that grant domestic legal orders practical authority, the only possible conclusion to draw is that international law possesses no such thing as binding authority. Crucially, these circumstances create the conditions where for a state or statesperson to continue to act *as if* international law does have binding authority is to act irresponsibly, to fail to act realistically, with the prudence expected of political leaders. Legalism isn't some benign liberal practice; it is an actively harmful practice, hamstringing the willingness and capacity of those in power to act from a realistic judgement of necessity.

What emerges from these sceptical accounts is the essentially pluralist claim that the problem with international law's claim to constitutional-type authority is not that it aims to limit state practice, but that it underplays the weaknesses of the international legal order and creates an illegitimate and unsustainable expectation that international law *should* limit state practice. This isn't to say that international law doesn't matter, that the commitment to international legality doesn't serve an essential function in regulating the international order or enabling state's pursuit of strategic aims. But it does mean that believing in the capacity of

⁶¹ Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law', 122 *Harvard Law Review* 1791 (2009)

⁶² Eric Posner, *The Perils of Global Legalism* (Chicago, University of Chicago Press: 2009), p. 2

⁶³ *Ibid*, p. 4

international law to rule, to set the terms of international society's constitutional order, is a fundamentally irresponsible practice.

It is this idea – that legality is a valuable but ambiguous commitment – which motivates the ‘pragmatic’ approach to international law. This is an attempt to square a practice of belief in the authority of international rules with scepticism about the *institutional* authority of international law, with the perception that international law is at base a defective institution of constitutional order. Michael Glennon's erudite arguments for adopting a pragmatic approach goes furthest both in arguing for pragmatism as a *principled* response to international law's tendency to overpromise and the strategic implications of a pragmatic ethic for the practice of legality. He draws on a number of diverse sources but at its core pragmatism is conceptualized as a belief that as long as international legal rules inhabit a ‘fog of uncertainty’, as long as international law is in the process of being constructed, there is a principled reason to define the commitment to legality on a case-by-case basis. National interest can provide one of these pragmatic reasons, but, crucially, so does respect for the rule of international law. For Glennon, one of the detrimental effects of over-exaggerating the independent authority of international law is that this feeds the perception that legalizing a norm is sufficient to create an obligation. The proliferation of international rules which exaggerate their capacity to actually bind states, and state's inevitable decision to disregard these rules, threatens the commitment to the rule of law. International law has invited uncertainty as a result of endowing its rules with a constitutional authority they don't possess. This gap between the obedience law claims and the obedience it can actually inspire has the potential to undermine the entire edifice, to eat away at those more conservative and limited legal rules that are actually able to claim authority. Because of this, he argues, the responsible posture for states is a willingness to obey international law when there is a determinate obligation with a clear basis in social practice, and a right to disregard international law where there is not. It is this sceptical position – scepticism about the capacity of international law to generate a claim to authority independent from states' political, policy preferences – that is the hallmark of the pragmatic approach.

It is important to stress that this pragmatic approach to international law is not *necessarily* conservative about the scope of the norms established under the auspices of international law. Moral action, such as humanitarian intervention, can be justified on a pragmatic account where international society has either developed a clear and unambiguous sense of the legal rules governing humanitarian action *or* where competing prudential reasons justify acting outside of international law. This is the argument that understanding

the appropriate practice of responsibility in international society is not something that can be found *purely* through knowledge of the legal rules. For example, as part of calling for an ethic of ‘practical judgement’ in international decision-making Chris Brown argues that the best way of dealing with morally and politically complex situations is to use ‘a form of moral reasoning that involves a judgement that takes into account the totality of the circumstances, rather than seeks for a rule to apply.’⁶⁴ Legalism, rule-following, on this account restricts the consideration of the full range of options, and where a too narrow, too limited or too ideological a frame of judgment is adopted, bad choices get made. We may hope that international law could guide judgement in a virtuous way but this ignores law’s capacity to armour, as David Kennedy puts it, ‘the most heinous human suffering in legal privilege’.⁶⁵ International law can and should *guide* decision-making, but it should not be allowed to *rule* decision-making. The responsibilities of political leadership require those in power to be capable of knitting together a sense of their fundamental moral commitments with prudential, political judgement, with a realistic appreciation of both the risks and rewards of pursuing a particular course of action. In the same way, fostering a prudential ethic will not emerge through either a slavish obedience to the law or from a law that demands slavish obedience. The point is that in understanding the responsibilities appropriate to international law, legalism, the belief in the rule of law, is not an adequate guide in the uncertainty circumstances of international society.

Conclusion

Pragmatists can in theory admit that at its core international law expresses legal authority – for instance in codifying the rules on the use of force, the rules protecting state’s territorial integrity and right to self-determination, or in establishing norms prohibiting, for example, piracy, genocide and slavery. But at the same time this acceptance of the legal form taken by some of international society’s constitutional rules is not the same thing as an acceptance of international law’s constitutional authority, its capacity to dictate the terms of international society’s normative order. The idea that the constitutional rules must accurately reflect deeper social and political norms governing international society – including changes in these customary norms – and the prudential concerns of political leaders and policy-

⁶⁴ Chris Brown, *Practical Judgement in International Political Theory: Selected Essays* (London, Routledge: 2010), p. 248

⁶⁵ David Kennedy, *Of War and Law* (Princeton, Princeton University Press: 2006), p. 167

makers generates, from the pragmatic perspective, a fixed obstacle to regarding the uncertain and ambiguous practice of international legality as a necessary part of a responsible constitutional practice. On the one hand this hold out the possibility that international law can in theory claim constitutional authority, but denies this as a practical possibility given the reliance on state's judgement in order to decide whether international law is accurately representing the constitutional rules of international society and effectively guiding decision-makers.

This is a strange state of affairs for those international lawyers who had thought this authority was a core part of the commitment to legality: what is customary international law if not a method for determining which social and political practices have reached the threshold necessary to authoritatively determine the scope of state practice? What is the constitutional role of international law if legality is only a guiding, but not a binding, 'global ethic'? The straightforward answer generated by the pragmatist's scepticism about the rule of international law is that international law is only a guide. This is not to reject international law's authority, but to assert the *conditionality* of that authority, especially in shaping international society's constitutional order. In this respect pragmatism is not an argument against the commitment to legality as such, but against the capacity for this commitment to generate constitutional order without additional input from the political or moral domains. This positions the pragmatic approach to international law as, at base, an argument against using states' *general* commitment to international law as a justification for attributing the deeper and more expansive range of constitutional commitments and responsibilities to states that constitutionalism has tended to rely on in order to justify international law's constitutional function.

International law's claim to constitutional authority centres on whether the international legal order is developed enough to justify a practice of constitutional legalism, which is to say a policy of treating international law's fundamental rules as the authoritative guide to international society's constitutional rules. While constitutionalism treats the prospect of lawlessness, together with the conceptual uncertainty of the legal order, as generating the practical authority necessary to advance the constitutional authority of international law, pragmatic accounts do the opposite. Pragmatic accounts use the prospect of lawlessness and the uncertainties of international law as a practical reason for rejecting constitutionalism. In the following chapter I show how these competing ethics embed competing practices of legality in international society, and how this structures international law's constitutional politics in a way that institutionalises disagreement about the

responsibilities appropriate to the institutional “facts” of international society. The challenge for constitutionalism is, ultimately, to elaborate a strategy for using the commitment to international legality as a way to overcome the entrenched nature of the pragmatic challenge.

Chapter 2

Uncertainty and the ethics of legality

The previous chapter showed how background assumptions regarding the nature of international society foster competing conceptions of the role of legality in establishing the terms of international society's constitutional rules. This chapter looks in more detail at how the competing *practices* of legality have institutionalised the competition between pragmatic and constitutional ethics of legality, and how the resulting picture of international law's constitutional politics as essentially contested serves to 'lock in' the pragmatic account. Crucially, this chapter argues that international law's constitutional politics resolve around different ideas about the responsibilities appropriate to responding to the ambiguities surrounding law's role in a constitutional order, particularly where that order is seen as "in crisis". The challenge is about the capacity for legality to structure a response uncertainty where the legal order itself can be regarded as itself a source of uncertainty.

In order to develop this argument I use the idea of a 'hard case'. A legal order faces a potential crisis – or a 'crisis of legitimacy'¹ – every time it attempts to resolve a hard case. A hard case tests a legal order's capacity to set the constitutional rules, because resolving a hard case requires either showing how the existing rules of law can be applied to judge the appropriate action in a complex case where legality clashes with other frames of moral and political judgement, or it requires a positive admission that the existing rules of law are unable to guide action in a comprehensive way and so judgement outside of the legal domain is justified and not in tension with the rule of law. It is in this sense that *resolving* hard cases require not only appealing to knowledge of the existing practice of legality but elaborating on the underlying ethic of legality governing a constitutional order. This chapter uses the practice of lawfare as a way to show that the problem facing constitutionalist accounts of international law is that rather than a hard case functioning as an invitation to

¹ See especially Reus-Smit, 'International crises of legitimacy', *International Politics*, 44 (2), 157-74. [There are some differences within the IR literature on the nature of a crisis of legitimacy, differences which map onto confusions about the nature of global constitutionalism. For some, such as G. John Ikenberry and Ian Clark, the crisis comes when the existing international order is forced to change. Changes in relative state power – in international society's hierarchies – create constitutional moments in which states are forced to reconsider the substance of the constitutional rules of international society. For others crisis comes from a divergence in normative expectations among international society's political actors. As Christian Reus-Smit argues, it's not that the political order is in flux but that the normative order – the constitutional order – is unsettled at the same time. There is no one actor or institution able to command or channel legitimate constitutional authority. The basic charge here is that the constitutional order(s) of international society have failed or lapsed as a source of practical international authority: a crisis of legitimacy signals the need to remedy the terms of the social contract.]

remedy uncertainty, the pragmatist used the very existence of a hard case as evidence against international law's capacity to resolve questions about the nature of legality. A hard case functions as evidence of an *essential* uncertainty, rather than as an invitation to remedy uncertainty.

This frames the debate over the responsibilities required by a commitment to international legality. Any legal order has a degree of uncertainty surrounding its rule and the essential – and absolute – nature of the responsibility to protect the constitutional order will always come under pressure as a result of attempting to impose order on a hard case. The relevant question for international law is whether it can effectively respond to a hard case, or whether it should be regarded as an institution “in crisis”, unable to respond to challenges to its authority. As John Gardner has characterised it this is ‘the \$64,000 question about every constitution’: when constitutional authority is challenged, ‘whose loyalties will lie where (and who has the weapons and who has the numbers on their side)?’² And yet constitutionalism at the domestic level can rely on an expectation that crisis is both an exceptional state of affairs, and that the value of legality will reassert itself as part of resolving a constitutional crisis or, if not then, after the crisis has passed. The problem facing international law is that the exceptional problems created by crisis for the domestic constitutional order generate, as Ian Hurd argues, ‘the normal condition of international law’ because ‘the strategic manipulation of law is inherent in international law’.³ By focusing on the hard case of “lawfare” this chapter aims to reveal why it is so difficult for the constitutionalist ethic to get traction against the pragmatist, in the contested circumstances of international society.

Lawfare and legalities

There are a number of international practices which challenge a constitutional ethic, practices which the pragmatist is able to exploit as evidence for the weakness of international law's claim to constitutional authority, practices which can and are used to advocate for the inherently political nature of the responsibilities arising from a commitment to international legality. “Lawfare” is one such practice. Lawfare has emerged, relatively recently, as part of a concerted attempt to circumscribe the authority of international law, and to interpose political limits – or at least conditions – on the practice of legality. As Jens

² John Gardner, 'Can There Be a Written Constitution?', *Oxford Legal Studies Research Paper No. 17/2009*.

³ Ian Hurd, 'Is Humanitarian Intervention legal? The rule of law in an incoherent world', *Ethics & International Affairs* 25 (3) 2011, p. 309; see also M Koskenniemi, *From Apology to Utopia*, 2006

Meierhenrich puts it, lawfare ‘has become a fighting term, deployed to discredit the expanding reach of international law into domestic politics’.⁴ At the core of lawfare is a move to redefine the responsibilities that follow from international legality in pragmatic terms. As such, it provides a useful way to understand why debates about international law’s constitutional role are so difficult to resolve in practice. In the attempt to justify ‘law as a weapon, law as a tactical ally, law as a strategic asset, an instrument of war’, lawfare is but one salvo in the larger attempt to institutionalise a pragmatic ethic of legality in international society.⁵

How does lawfare, the idea that international law can, should and has been weaponized, institutionalise a pragmatic ethic of legality? The first step is that law is presented as both a battleground for security concerns and a tool for advancing national security, and should be treated as such. The point that proponents of lawfare make is that “enemies”, of one kind or another, are able to use a state’s commitment to the laws of war and to human rights obligations as a way to stymie necessary and legitimate efforts to advance national and international security. To refuse to respond in kind, to refuse to get into the trenches and adopt the same tactics with respect to international law is a failure both of the state’s political responsibility to make borders and citizens secure, of a legal responsibility to end impunity for international crimes, including terrorism, and of a broader constitutional responsibility to protect and preserve the rule of law – to defend the legal order from misuse.

This negative conception of lawfare – as something to be guarded against – reflects the suspicion that the rights and protection afforded under international law provide the tools for a form of asymmetric warfare. Lacking traditional means to fight (and win) their battles, terrorists and insurgents were using the individual rights and state responsibilities established in international law – such as the right to a fair trial, or the prohibition on indefinite detention, or the principle of *non-refoulement* – as a way ‘to threaten, manipulate and disrupt’ counter-terrorism and counter-insurgency efforts.⁶ This initial focus on terrorist organisations, however, quickly expanded to include NGOs engaged in similar efforts. This, at any rate, was the conclusion of the US Supreme Court in *Holder vs. Humanitarian Law*

⁴ ‘Lawfare in the International System’, forthcoming in EJIL, p. 2

⁵ David Kennedy, ‘Lawfare and warfare’, in James Crawford and Martti Koskenniemi (eds.), *Cambridge Companion to International Law* (Cambridge, Cambridge University Press: 2012) 2012, p. 160

⁶ US Supreme Court judgement in *Holder vs. Humanitarian Law Project*

Project. The Court held in this case that training a terrorist designated organisation in their international legal rights and obligations was akin to providing material support to terrorism, because the terrorist organisation could go on to use their new information about the structures of international law against the US and her allies.⁷ In a similar vein, the conclusion from a Council on Foreign Relations roundtable on the concept notes that ‘lawfare is often conducted during peacetime by international groups and service organizations . . . to restrict the use of certain types of weapons, many of which are used by the U.S. military. Examples include efforts to ban landmines, cluster munitions, space weapons, blinding lasers, testing of nuclear weapons, and even certain types of ammunition. These campaigns impose increased costs on the American military and can affect its wartime performance’.⁸ This broadening out of the concept of lawfare leads Anne Herzberg – to take one particularly extreme perspective – to opine the rise of ‘NGO lawfare’ and arguing that ‘legal actions, ostensibly [taken] to provide “justice” to “victims”, are a form of “lawfare” . . . intended to punish Israel for anti-terror operations, as well as to block future actions.’⁹ Lawfare in this sense is seen as *any* action that undermines or challenges national security.¹⁰

Such an application of the term is relatively easy to dismiss, or at least to bookend as bad legal scholarship. Any understanding that reduces law purely to the practical demands of national security or strategic necessity misses the point that law is there, *inter alia*, to protect against the excesses of the state, including – especially – in security practices.¹¹ Given this function, it is strange indeed to take evidence that the law has successfully restricted the state’s capacity to act in a particular way – for example, by banning landmines, or protecting detention and fair trial standards – as evidence of law’s failure, rather than law’s success. More than this, it ignores the fact that lawfare has been used in much the same way, to disrupt and block international action, by those with preponderant military power. This leads Charles Dunlap to argue that in order to make sense, in order to be able to guide decision-makers in their use of international law, lawfare must be understood as ‘a strategy of using—or misusing—law as a substitute for traditional military means to achieve an

⁷ In this case, it was the Kurdistan Workers Party (PKK)

⁸ ‘Lawfare, the latest in Asymmetries: Part Two’, *Council on Foreign Relations*, 22 May 2003

⁹ Anne Herzberg, ‘NGO ‘Lawfare’: Exploitation of Courts in the Arab-Israeli Conflict’, *NGO Monitor*, September 2008

¹⁰ See for example the US National Defense Strategy, 2005: ‘Our Strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.’; see also David Miliband’s claim, as UK Foreign Secretary, that releasing the interrogation guidelines ‘could give succour to the country’s enemies’, *Telegraph*, 16 June 2009

¹¹ David Luban, ‘Lawfare and Legal Ethics in Guantanamo’, *Stanford Law Review* 60 (6) April 2008

operational objective.¹² In order to craft lawfare into an objectively useful concept, a concept that can guide decision-makers, Dunlap attempts to distinguish between legitimate and illegitimate applications of lawfare, on the premise that in order for law to be used legitimately to advance military objectives there has to be something recognizable as law involved. To legitimately practice lawfare involves at least a *prima facie* commitment to legality. It follows from this idea that lawfare can be both a responsible and irresponsible practice that ‘lawfare is more than just something adversaries seek to use against law-abiding societies; it is a resource that democratic militaries can—and should—employ *affirmatively*.’¹³ In this way lawfare becomes more than a critique of practice, it becomes a positive strategy, a *responsible* strategy for states committed to legality to deploy.

What is crucial for understanding lawfare’s impact on international law is that in order to justify lawfare as a responsible practice one *first* needs to accept that the commitment to legality is itself a battleground, both endangered by and structured around competing perceptions of the nature of legality. Lawfare is simply a strategy, an attempt to hold the high ground, in this larger battle over the what Kenneth Anderson has called the ‘ownership’ of international law.¹⁴ The problem with a state’s enemies practicing lawfare – or being given the tools by well-meaning NGOs to practice lawfare – is that they can’t be trusted to engage with the rules in a way that doesn’t undermine the broader purpose of legality which, for proponents of lawfare as a legitimate practice, must reflect considerations of order and security. The claim implied by the practice of lawfare is that there is first a conception of the responsible practice implied by the commitment of legality in operation and, more fundamentally, that there is a settled idea of the responsible agents of international legality, or the trustees of the international legal order. In a reflection of the confusion this generates, some commentators have begun to talk about ‘ICC lawfare’, in order to refer to the idea that the International Criminal Court must engage in this battle explicitly against states aiming to define legality in terms of the pursuit of order rather than considerations of justice.¹⁵ It is in the act of presenting lawfare as a potentially responsible

¹² Charles Dunlap, ‘Lawfare today: A perspective’, 2008 p. 146

¹³ Major General Charles J. Dunlap, Jr., ‘Lawfare: A Decisive Element in 21st-Century Conflicts?’, *Joint Forces Quarterly*, 53 (3) 2009, p. 35

¹⁴ Kenneth Anderson, ‘The rise of international criminal law: intended and unintended consequences’, *European Journal of International Law*, 2009 20 (2): 331-358.

¹⁵ Alana Tiemessen, ‘The Paradox of Lawfare’, 10 May 2012, available at <http://www.opencanada.org/features/the-think-tank/the-paradox-of-lawfare/>

practice that Dunlap raises the causal importance of the underlying ethic of legality, and of who has ultimate responsibility for determining the content of this ethic.

In this regard, lawfare is not a special case. It is not even an ‘exceptional’ use of law, a heightened form of ‘adversarial legalism’ aimed at the defeat of enemies rather than the resolution of disputes.¹⁶ Lawfare is, instead, a “hard case”, in the sense that it marks out on the one hand, as David Kennedy puts it, ‘the experience of irresolvable debate, or of debate that can only be resolved by reference outside law to the political or ethical’, and on the other hand, the contrary belief that international law *can* and *should* be able to use the principles of legality to resolve the uncertainty that allows lawfare to seem like a necessary and responsible practice.¹⁷ Lawfare marks out an increasingly common feature of the institutional life of international law; lawfare attempts to institutionalise a pragmatic ethic of legality in international society.

Pragmatism and the hard cases of international law

A hard case arises against three defining features. First, no single rule or obligation is able to claim overriding authority; there is a lack of normative hierarchy in the rules. Second, there is no consensus about how to resolve the resulting indeterminacy. Third, action is necessary; a hard case is always *both* a practical and a conceptual dilemma, there is no hiding away from the need to make a judgement about the appropriate course of action. This third feature is most critical.¹⁸ A hard case is not “tragic” because there is hope for – even an expectation of – a practical resolution.¹⁹ It is hard because it demands a judgement, a resolution, a ‘decontesting’ of an essentially contested conceptual terrain.²⁰ This is to say that a hard case emerges from the challenge of resolving and reconciling fundamentally different but equally

¹⁶ In this vein Meierhenrich conceives of lawfare as ‘a revolutionary strategy that centrally revolves around the systematic use of legal norms and institutions and which is aimed at the defeat of an enemy, real or imagined.’, forthcoming *European Journal of International Law*, p. 29; see also Robert Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press: 2003)

¹⁷ David Kennedy, ‘Lawfare and Warfare’, p. 161

¹⁸ This is also the crucial difference between a hard case and a tragic choice; key to the concept of tragedy is that there is no good or just resolution. There is a tragic *outcome* to the decision making process. With a hard case, sure the process of deciding is fraught with difficulty, as incommensurable values are weighted against each other, but there is a resolution at the end. It may not be a resolution accepted by all parties, but it is good enough. Resolving a hard case puts a plaster over moral indeterminacy; those concerned with a tragic choice wallow in the gory details.

¹⁹ On the concept of tragedy see Erskine and Lebow (eds), *Tragedy and International Relations*, 2012

²⁰ Michael Freedman explains the problem as being that ‘making a decision relates crucially to bestowing a *decontested* meaning on a political term’, Michael Freedman, *Ideologies and Political Theory: A Conceptual Approach*, 1996, p 5

legitimate ideas about the appropriate course of action; in a legal order, a hard case presents itself as a problem about the actions required by the commitment to “legality”. A hard case in this regard presents a way to see the terms of the crisis facing international law because it shows how competing perspectives and values can make *resolving* a hard case impossible. This is to say that to arrive at a resolution of a hard case requires an assertion of superior legitimate authority, of constitutional authority, and that the failure to resolve a hard case can be taken as evidence of the lack of constitutional authority. What I want to show is how a hard case of international law can *become* tragic where the assumption that the institutional order is uncertain is allowed to guide the decision-making process, and that this can justify locating the responsibilities which arise from legality outside of the legal order.

It is in this sense that lawfare represents a test for international law’s capacity to resolve the type of hard cases legality is supposed to be able to resolve in a constitutional order, at least if legalism is to be regarded as a justified expectation. Gerry Simpson characterisation of international law as ‘the victim of a community without a leader’ helps to show why lawfare represents a hard case.²¹ The traditional image of international legality is that those constitutional rules which ‘concretise community operate largely in the sphere of the everyday and not the realm of the exceptional’.²² International law might make international postage possible, but this is hardly to govern war and peace. In order to upset this limited picture of international law, there needs to be an acceptance not just of the complex entanglement between law and politics, but of the fact that ‘international law works in mysterious ways’, and in modest ways, to reconstruct the terms of this relationship in a way that makes operating in the realm of the exceptional – or, in other words, ruling on hard cases – possible.²³ International law’s rules establish formal claim to regulate war and peace, but in practice states have either regarded international law as an irrelevance in resolving these high political questions, or more critically as an obstacle to resolving disputes, because the ambiguity of the rules allows both parties to a dispute to claim the mantle of legality. Putting law on a firmer footing therefore requires understanding how international law is able to empower certain actors over others. This might be ‘mysterious’, but it is real.

²¹ Gerry Simpson, ‘Duelling Agendas: International Relations and International Law (Again)’, 1 J. Int’l L. & Int’l Rel. 61 2004-2005, p. 61

²² Ibid, p. 62

²³ Ibid, p. 72; see also David Kennedy, ‘The Mystery of Global Governance’, in Dunoff and Trachtmann (eds.), *Ruling the World*, 2009.

The problem with this, however, isn't only that international law has tended to function badly in resolving hard cases – for example, collapsing into essentially contested apologetic or utopian registers – but that this process of trying *and failing* to resolve hard cases has shaped the dominant perceptions about the function that can be attributed to international legality. This is to say that the very recognition that international law works in mysterious ways can institutionalise the pragmatic ethic of legality: the worry is that in the mysterious reconstruction of the relationship between law and politics, legality loses out. As Hilary Charlesworth puts this point, crisis has tended to function as the 'engine of progressive development' in international law, to the extent that international law often appears to be, by its very nature, a discipline and practice in crisis.²⁴ This doesn't *necessarily* mean that there is no scope for a progressive, constitutionalist narrative, but the more firmly this belief is institutionalised the more likely it is that any progressive narrative will be co-opted, hijacked by both the narrative of crisis and the pragmatic ethic this justifies. The challenge, to quote Charlesworth again, is that 'a concern with crisis skews the discipline of international law. Through regarding "crisis" as its bread and butter and the engine of progressive development of international law, international law becomes simply a source of justification for the status quo.'²⁵ The problem that needs to be confronted here is that the narrative of crisis comes both to define the perception of the responsibilities appropriate to the institution of international law *and* to undermine the scope for a constitutionalist response.

The practice of lawfare attacks this idea that international law – more specifically the rules on the use of force, human rights and humanitarian law – have the capacity to govern the hard cases represented by terrorism. Lawfare in this respect is about reasserting the political, policy domain into an already settled sphere of legal practice. There will be occasions where law "runs out" and where the political domain can legitimately assert itself. Lawfare represents an assertion of the legitimacy of political authority or trusteeship for the legal order, a practice based around the claim to responsibility to protect the ideal of legality.²⁶ For proponents of lawfare, recognizing that international law's authority is connected to its capacity to advance political or military values and judgement merits responsible states using their political power to protect the idea of law from being

²⁴ Hilary Charlesworth, 'International Law: A Discipline of Crisis', *Modern Law Review* 65:3 May 2002

²⁵ *Ibid*, p. 391

²⁶ See for example Tim Dunne, "'The rules of the game are changing': Fundamental Human Rights in Crisis after 9/11", *International Politics* 44 (2007) 269–286 [arguing that this creates a two-tier standard of international legitimacy, with the US claim based on their exceptional Great Power standing in international society, p. 279]

corrupted. For lawfare's critics, to apply the rules of law in this way is to reject the essential elements of the rule of law, to institutionalise a mistaken belief that international law lacks, crucially, the superior authority needed to check political power.

In order to understand how pragmatism entrenches a scepticism about the capacity of international law to rule in the uncertain circumstances of international society, consider Judith Shklar's critique of rule-following as a responsible practice. As she argues, legalism is 'the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules'.²⁷ Her point of attack is that legal positivism has the tendency to elevate obedience to the legal rules into the only legitimate course of action. The danger of this is that where a legal subject is being asked by the law to do something contradictory to their ordinary moral intuitions – or political judgment – they unthinkingly oblige the law at the expense of these broader considerations. As a result of the legalist mindset, politics is denigrated, 'regarded not only as something apart from the law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies'.²⁸ This denigration of politics is especially problematic for Shklar because, she argues, it is the political sphere that endows formally enacted legal rules with meaning, and ensures the possibility of change when the rules come to reflect immoral or unjust or merely unsuitable ends.²⁹ For the rule of law to mean something there needs to be some palpable sense of what the legal order stands *for*. In this way acting from a concern for legality, without any consideration for the substance or purpose behind a practice of legality, endangers the entire constitutional order because it pushes forward a technocratic idea of political responsibility. Shklar's point is that, far from providing a challenge to legality, the political domain provides the space where the obligations of legality can be reconciled with the range of competing moral and political obligations.

This basic idea motivates the pragmatist account of legality. Pragmatism is rooted in the belief that the ideal of law is, at its core, *essentially indeterminate*, and therefore in need of

²⁷ Judith Shklar, *Legalism: Law, Morals and Political Trials*, p. 1

²⁸ *Ibid*, p. 111

²⁹ This is connected to her argument that the widespread appeal to the concept of the "rule of law" can be explained by virtue of the fact that it offers a refuge for 'the chattering classes', part of an attempt to bookend the difficult conceptions questions that arise from considering the nature of legal order; see Judith Shklar, 'The rule of law in political theory', in *Political Thought and Political Thinkers*, University of Chicago Press, 1998; for similar arguments see Joseph Raz, "The Rule of Law and its Virtue", *The Authority of Law: Essays on Law and Morality*, 1983, Ch. 11; Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?", *Law and Philosophy* 21 (2) 2002, p. 137-164; and Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, 2004 [distinguishes between thick and thin conceptions, calls the rule of law "an exceedingly elusive notion"]

elaboration or ‘filling out’ in and through social and political practice. For some pragmatists, the impossibility of decontesting the law resolved into an argument that legal rules were simply ‘pretty playthings’ that could help predict how a judge would rule, but not define in absolute terms how a judge – or indeed, political official – would act.³⁰ For the pragmatist, the point of a hard case is that its effective resolution requires elaborating on and adding to the action suggested by the rules, with reference to the wider social and political context in which the law functions. In a constitutional order a judge is empowered to do this, within clearly defined limits. Even a constitutional court judge cannot claim absolute authority in this regard; their imperfect knowledge about the proper terms of political rule is why Shklar regards a degree of scepticism as necessary for the long-term health of the constitutional order. When the source of this remedial authority is uncertain, the indeterminacy of the law becomes even more evident. This is what happens in when there is a crisis in the political or social order. From the pragmatic perspective this is the normal state of affairs in international society; institutional uncertainty is the governing principle.

In these circumstance, for states to be committed to legality is not to engage in a practice of blind obedience. Instead, the responsibility of those with an interest in the system is to fill out the law, to construct its meaning and purpose by exercising their discretionary powers.³¹ As Ian Hurd argues, ‘The political use of international law is not an aberration or a misuse of the law; it is the normal and inevitable result of striving for rules-based international politics’.³² There will always be gaps in a legal order; a legal order will always require “filling out”. The crucial point for the pragmatist is that this filler must be located outside of the legal order, in the domains of politics and morality. As Michael Glennon puts this: ‘The law’s indeterminacy requires that the filler comes from something other than law; there is no alternative. Thus, confronted with the accusation that the pragmatist approach is merely politics masquerading as law, the pragmatist might respond: *Compared to what?*’.³³ From this perspective, playing games with the law – using law to advance strategic goals – is not a challenge to the law; it is the *essence of law*. The fact that international law can’t respond to the effect this has on the conception of legality simply highlights the weakness of the international legal order in the first place.

³⁰ Karl Llewellyn, *The Bramble Bush*, p. 3, 1930

³¹ Jowell, ‘The rule of law and its virtue’, in Jowell and Oliver (eds.), *The Changing Constitution*, p. 8-9

³² Ian Hurd, ‘Is Humanitarian Intervention legal? The rule of law in an incoherent world’, *Ethics & International Affairs* 25 (3) 2011, p. 309

³³ Glennon, *Fog of Law: pragmatism, security, and international law*, 2010, p 20-21

This leads to an account of international law's binding authority that focuses on its normative capacity, its efficacy, in identifying the rules that have the force of *genuine* customary practice, the rules where the perception of the line between legality and illegality is so crystal clear that the rule can't be unsettled or watered down by an adversarial practice of "game playing". International law can foster an idea of the constitutional rules of international society, but only once the battles for the perception of legality have been decisively won or lost – once the binding authority of a legal rule can't be easily dismissed in the attempt to resolve a hard case.³⁴ Pragmatism is in this regard concerned with the fringes of legal authority, with the constructivist practices legitimated by law's 'penumbral uncertainty'. On this logic a practice such as lawfare – a practice that a constitutionalist might want to bookend as illegitimate, or at least demanding a development of the legal rules, rather than as functioning as an excuse for operating outside of the rules – can be justified as the responsible practice of legality. Presenting lawfare as a legitimate practice to be used against those who would abuse international law implies that lawfare has the potential to function as a constitutionally responsible practice. The problem isn't that lawfare is a battle for the perception of legality; the problem is that this battle for the perception of legality constitutes legality in a particular way, as a pragmatic response to a constitutional order defined by crisis and uncertainty.³⁵

It is in this respect that the 'darkly alluring figure'³⁶ of Carl Schmitt has become a foil for both the critique and advancement of the liberal commitment to the rule of law, in both the international³⁷ and domestic context.³⁸ One explanation for Schmitt's influence is the lack of alternative accounts within liberalism of the effect of uncertainty or crisis on constitutional authority in uncertainty (in the next chapter I explore a possible Augustinian alternative). Another explanation is that the rule of law is itself a fundamentally limited constitutional virtue, and that any effective constitutional order must be able to manage the

³⁴ One way to illustrate this is with respect to the Nuclear Weapons Advisory Opinion. The court reached a decision that international law was not developed enough in this area to make a judgement, that the use or threat of use of nuclear weapons was in effect a legislative matter. As Vaughn Lowe argues in criticizing this judgement, the court's reasoning – and the clarity in the rules on the use of force – didn't justify a judgment *non-liquet* but rather a judgment that this was a non-justiciable issue, i.e. that this was not a domain in which considerations of legality should have priority.

³⁵ For similar worries focused on the 'punitive practices' of international law, see Anthony F. Lang, Jr., *Punishment, Justice and International Relations: Ethics and Order after the Cold War*, 2008

³⁶ Thomas Poole 'Constitutional Exceptionalism and the Common Law', *International Journal of Constitutional Law* 7 (2) 2009, 247-274, p. 249

³⁷ See especially Beate Jahn, 'Liberal internationalism: from ideology to empirical theory – and back again', *International Theory*, 1(3) November 2009, 409-438

³⁸ Poole, 'Constitutional Exceptionalism', 2009

exception in order to function effectively. It is in this respect that pragmatism can be thought to share essential features of the Schmittian response to crisis, namely that a crisis exposes the hollowness of constitutional legalism as a responsible practice. As he puts it:

“There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists. All law is “situational law.” The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state’s sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state’s authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law.”³⁹

Not all pragmatists would accept this sweeping apologia for political power, but they do share the underlying scepticism about the capacity for the legal order to justify a claim to rule in conditions of fundamental, constitutional uncertainty. As Giorgio Agamben expresses this more basic idea, it is that the background uncertainty about the terms of legality embeds uncertainty into the institutional order about who has the legitimacy to define both the nature of the exception and the terms of its resolution: “The state of exception is neither internal nor external to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other”.⁴⁰ The problem with the pragmatic ethic – as with lawfare – is that it blurs the sense of what legality requires in a constitutional order.

What this implies is that acting on the commitment to legality requires a particular disposition, a disposition appropriate to these ambiguities. If international law requires a healthy scepticism in order to identify those rules capable of claiming a genuine constitutional authority, if part of a state’s responsibility is to discern the real legal obligations from the nominal obligations, if international law is to function to provide order in international society, there needs to be a recognition that legality is constructed concept, constructed out of the war-footing of states and other actors. The scope of the responsibilities implied by the commitment to legality need to be matched to this

³⁹ Schmitt, *Political Theology*, 2006

⁴⁰ Giorgio Agamben, *States of Exception*, 2005, p. 23

uncertainty, able to reflect how crisis undermines the space for legality to constitute international society except as a site for political dialogue and contest. Rule-following, from the pragmatic perspective, is the irresponsible ethic where legality is itself a socially constructed practice.

A constitutionalist resolution?

If the practice of lawfare can be justified as an expression of states' constructive commitment to legality in circumstances of uncertainty, what basis is there for the claim that lawfare-like practices are constructing, to use Philippe Sands' phrase, a 'lawless world'?⁴¹ For Sands, the flourishing of lawfare and other practices linked to the "war on terror" have eroded the authority of international law in recent years by attempting to confound the objectivity of international law, by creating a "legal black hole". Painting these practices as "responsible" – justified by a prior moral or political duty – feeds the idea that international law tolerates, and even enables hypocrisy, that it ultimately fails to restrain the most powerful members of international society. It seems to provide evidence of a privileged authority claimed by the US and other powerful actors, a superior claim to ownership of the international legal order. The reason that lawfare appears responsible when the US engages in it and irresponsible when Palestinian activists do it is because, to US eyes, they can be trusted to develop the practice and concept of legality in a way that advances and strengthens the legal order, to a degree that Palestinian activists cannot. Apart from the critique of American neo-imperialism this triggers, apart from the justification of American exceptionalism it implies, the problem is that this attitude – the institutionalisation of privilege – runs against the most basic principles of legality, including the protection of an equality of arms and the limitation on arbitrary exercise of power. It dismisses what Jeremy Waldron characterises as the 'original habitat' of the rule of law – constraining the abuse of power.⁴² As Brian Tamanaha argues, the instrumental use of law threatens the constitutional ordering function of law, because it leads to 'a Hobbesian conflict of all against all carried on within and through the legal order . . . law will thus generate disputes as much as resolve them. Even where one side prevails, victory will mark a momentary respite before battle is

⁴¹ Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Penguin: London: 2004)

⁴² Jeremy Waldron, 'Benefit from the rule of law', *European Journal of International Law*, 2011, p. 317

resumed.⁴³ Far from remedying the legal order, lawfare and the pragmatic approach of which it is symptomatic *embeds* a degree of uncertainty into the system and, in the process, undercuts law's institutional authority to effect a practical resolution of the terms of legality, deepening a picture of international law as a contested, unconstitutional order.

To avoid this pragmatist creep, the constitutionalist counter-move is to emphasise the *essential* features of law in a constitutional order. The point of this is to show that international law is not as indeterminate as pragmatists have supposed, that there is a fixed core to the legitimate practice of legality and therefore that a commitment to the idea of legality carries with it a clear sense of the actions or responsibilities required. Law – including international law – has an essential core that scepticism can't diminish, that pragmatist arguments can't touch. The very existence of a valid legal order entails a particular conception of legality, with a determinate sense of what constitutes the responsible practice of law. As an institution, the law entails that the commitment to legality will take a particular form, and that this form will give rise to particular responsibilities able to guide decision-making even – especially – where the social order is in crisis.⁴⁴ This is to say that international law *can* establish an authoritative account of the constitutional rules without relying on either political intervention or social solidarity.

In general, there have been two methods aimed at establishing the legal order as fixed around certain essential characteristics, characteristics able to guide decision-makers in a hard case: these are the natural law and legal positivist accounts of the legal order. Identifying what it was about the concept of law that allowed legal institutions to 'rule' was key for H. L. A. Hart. Understanding these types of challenges to law's supremacy involved, first and foremost, understanding what it was that was distinctive about a legal obligation, and how legal rules maintained their authority in light of the pressures from the political sphere. Departing from earlier positivists, Hart argues that the source of obligations to the law cannot simply lie in the existence of a coercive authority or command; the ability to punish cannot be the sole reason for obedience. The legal system is not 'the gunman situation writ large'.⁴⁵ Because legal authority isn't to be found in its coercive power, there needs to be something about the law that makes it *deserving of* obedience. Hart argues that any

⁴³ Brian Tamanaha, *Law as Means to an End: Threat to the Rule of Law*, 2006, p.

⁴⁴ This is to say that a legal order generates a claim constitutional authority as it shows a capacity to 'absorb the need for change', as Thomas Franck has expressed it, see Thomas Franck, 'Preface: International Institutions: Why Constitutionalize?', in Dunoff and Trachtmann (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, p. xi

⁴⁵ HLA Hart, *Concept of Law*, 1997, p. 20 -25

description of the nature of legal obligation must be able to account for the fact that legal rules are generally followed because actors believe they ought to, rather than out of a fear of punishment or harm. In other words, these legal rules have force for the simple reason that the legal order claims legitimate authority.

Hart is not primarily concerned with making a claim about the standing or force or importance of a legal obligation relative to competing moral obligations. This is important for heading off the pragmatic criticism of rule-following, which presents legality as value in tension with standards of moral legitimacy. As Hart argues, however, one of the differences between legal and moral rules is that while legal rules may be trivial or non-vital, moral rules are always of the utmost importance. Rather than claiming that legality always has the superior claim to authority, the claim advanced by Hart is that *within the legal system* we should presume the primacy of legal obligations. As Raz would later put this positivist point, one of the necessary characteristics of law is that it claims exclusive authority within its domain.⁴⁶ This is not to say that a legal obligation cannot be set aside in certain circumstances of sufficient seriousness by competing moral obligations, but it is to say that there is a presumption in favour of the bindingness of legal obligations.⁴⁷ Hart would have no problem with Antigone's decision to disobey Creon, for example, given that burying the dead was a morally weight reason for disobedience and – even more importantly – she accepted the illegality of the action. The most that can be said on this topic, Hart thought, is that 'if the system is fair and caters genuinely for vital interests of all those from whom it demands obedience, it may gain and retain the allegiance of most for most of the time, and will accordingly be stable'.⁴⁸

For Hart, the authority of a legal system will be determined by whether the legal rules can give sustain a culture of legality, independent of the presence of coercive force. This doesn't mean that the legal order must be "just" in any thick sense in order to claim normative authority *as law*, but Hart understood that if a legal order couldn't claim a degree of justice it was unlikely to generate the kind of culture of legality needed to sustain its authority in the long term. In these circumstances, as Hart puts it, 'All that can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law, that this

⁴⁶ Joseph Raz, *Authority of Law*, 1979, pp. 22-27 [This position is known as exclusive positivism and is to be contrasted with inclusive positivism, which allows that certain moral considerations may be operative within a legal system when an existing social-fact sourced rule allows. In later works – especially in the postscript to *CL* – Hart seems to acknowledge his is an inclusive version.]

⁴⁷ See Raz on constitutional authority, *Authority of Law*

⁴⁸ Hart, *Concept of Law*, p. 201

offers no disguise for the choice between evils which, in extreme circumstances, may have to be made'.⁴⁹ A legal order lacks loses its authority when it ceases to have a decisive significance in decision making. This suggests the need to consider the authority of a legal rule in light of the character of the legal system – the criteria for a legal system's validity – because it is this institutional character of law which will determine whether a legal rule can claim a legitimate type of authority.

But Hart avoided elaborating on the conditions under which illegality could become the responsible option for the subjects of law. This was connected to his assumption that as key part of establishing a valid legal order was the development of mechanisms for resolving and heading off challenges to the legitimate authority of the law. These are remedial responsibilities provided the flexibility needed to prevent 'penumbral uncertainty' from becoming evidence of a wider crisis of legitimacy. As he explains it, the 'primary rules' of a legal order – the substantive rules detailing the type of action required – will tend to be backed up by 'secondary rules', able to remedy the defects or gaps in the legal order:

'Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine or control their operations. Rules of the first type impose duties; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations'.⁵⁰

In this regard, the secondary rules of recognition, change and adjudication function as a remedy for the defects of primary rules. This includes the possibility that the primary rules might be abused or misapplied. For Hart, 'all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system'.⁵¹ There is another function, however, and that is to establish the responsibilities of legality, among those charged with enacting the law; 'rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public

⁴⁹ Ibid, p. 212

⁵⁰ Ibid, p. 81

⁵¹ Ibid, p. 94

standards of official behaviour by its officials'.⁵² This leads to the argument, crucial for international law, that a legal order may be customary, with none of the remedies you find in a domestic legal order, yet still claim authority. This is because there are certain primary rules 'distinguished from others by the serious social pressure by which they are supported, and by the considerable sacrifice of individual interest or inclination which compliance with them involves'.⁵³

This raises the question, however, of what happens when neither the willingness of sacrifice or the serious social pressure exists? To put this another way, this is where the emphasis on the closed aspects of the legal order can be seen to generate its own limits, in the inability to resolve a hard case where it is the legitimacy of legality that is itself at question.⁵⁴ It is helpful to realise that this is not a problem specific to the practice of international legality but rather a challenge that all constitutional orders espousing a commitment to the rule of law have had to confront. Where protecting some constitutional values, such as the security of government institutions, seem to require a willingness to set aside what had been regarded as absolute constitutional values, such as the right to a fair trial, it begins to look like resolving the commitment to legality as a constitutional principle is not as fixed or absolute as liberal constitutionalist rhetoric might have supposed. This creates a potentially paradoxical situation – a situation into which the pragmatic ethic is able to assert itself as the responsible ethic – where acting on the commitment to legality requires either the suspension on legality as a governing principle or the introduction of exceptions to the operation of legality. As David Dyzenhaus argues, the central question posed by this is not when the rules are set aside due to a genuine emergency, but when the exception becomes the norm, and, crucially, 'how such a trend might be resisted'.⁵⁵ This is not a question that can easily be bookended as a penumbral concern; as he argues, this challenge to the limits of legality raises 'the central question of jurisprudence'.⁵⁶ This is a question about whether introducing exceptions to the rule of law are a product of or a challenge to the capacity of the legal order to rule – whether a crisis in the social order must seep into the legal order, or whether the legal order offers the means to resolve the ambiguity of legality in

⁵² Ibid, p. 113

⁵³ Ibid, p. 169.

⁵⁴ David Dyzenhaus, 'The Puzzle of Martial Law', 59 *University of Toronto Law Journal* (2009) 1-64

⁵⁵ David Dyzenhaus, *The Constitution of Law: Legality in a time of emergency*, 2006, p. 2

⁵⁶ Ibid, p. 7

a crisis situation.⁵⁷ To put this another way, it becomes a question about law's role in resolving this crisis, in particular the control a legal order has over legal meaning in a constitutional order, and a clash between 'jurisgeneration and extralegal action'.⁵⁸

Dyzenhaus posits that the natural law tradition might contain the solution to this problem, in offering a justification for retrenching around legality as a particular kind of 'wishful thinking'.⁵⁹ Natural law accounts have been the traditional alternative to positivism, and it will be useful – especially for arguments developed later in this thesis – to have a bit of a sense about where the core differences between these traditions of thinking about the law are – and their shared understanding of the importance of maintaining an *essential* idea of the nature of legality. In the traditional gloss – summed up in the slogan 'unjust laws are not law' – the authority of a legal rule is conditional on, and limited by, its moral character and whether it fits with the broader requirements of justice. The tension between legality and morality as guides to action are rectified through the argument that the rules themselves do not possess any distinctive form of authority; claims to legal authority are conditioned by the priority of our moral commitments. And yet, as John Finnis argues, this reading of the natural law tradition is in many respects a straw man invented by classical legal positivism.⁶⁰ In placing value on "the rule of law, not men", the natural law tradition entails that a legal system be put in place which would allow those moral principles part of the common law of all reasonable peoples to be 'shaped' or codified by the legal order. No matter how good or just a moral rule might seem, until it has been codified by the legal system it is not law. And, contrary to the straw man built by legal positivists, if a legal rule was unjust it does not cease to be a legal rule; rather, it is the moral obligation to follow such a legal rule that lapses. Legal rules, and indeed legal orders, can be deprived of authority by virtue of a clash with 'the higher and perennial laws of humanity', but not of its status as law. The authority of a legal order, on this account, is not contained in the *form* of law, but in the *purpose* of law.

Lon Fuller pressed this point in his battles with Hart, and it is this respect that Dyzenhaus find him useful. Fuller argued that there are moral principles, characterised as aspirations, that are specific to a legal order rather than part of a general commitment to

⁵⁷ David Dyzenhaus, 'Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?' (2006) 27 *Cardozo L. Rev.* 2005.

⁵⁸ 'The Puzzle of Martial Law', 59 *University of Toronto Law Journal* (2009) 1-64

⁵⁹ *Ibid* p. 12

⁶⁰ e.g. Hart, *Concept of Law*, p. 185-186: core of positivism is "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so"

morality. Fuller starts from the idea that we need to have a clear idea of the purpose, not just the formal characteristics, of the legal system. The legal rules fixated on by legal positivists as descriptive of the nature of the law only seem so because they express and are aimed at furthering what he calls the internal morality or purpose of a legal system, our ideas about what the law ought to be. Laws and legal obligations are not primarily attached to power or authority, but rather arise from the constitutional purpose of law, characterised as ‘the enterprise of subjecting human conduct to the governance of rules’.⁶¹ Fuller’s criticism of Hart is that in fixating on the normative essence of the rules of law he fails to appreciate the central role played by the *ideal* of law, and, as a result of this oversight, his effort to explain the separation of law from morality is motivated by an overly substantive idea of the nature of the moral claim that attaches to legality. When Fuller talks about the law ‘in quest of itself’, what he means is that the authority of law must be understood in principled terms, as a combination of the law that is and the aspiration purpose that the existing rules are intended to serve.⁶²

Law is at its core, for Fuller, a procedural ideal – a commitment to govern society in accordance with certain fundamental principles, principles that allow a legal order to advance this procedural justice. In his narrative this ideal is contained in the 8 criteria he argues a legal system must aim at if it is to be called law. As Fuller puts it: ‘What distinguishes law from other types of social ordering is not form, but adherence to specific criteria of legality: generality, promulgation, non-retroactivity, clarity, and congruence between rules and official action.’ Importantly, a legal system does not need to achieve, only to aim at this ideal state in order to have legal validity; we can ‘know what is plainly unjust without committing ourselves to declare with finality what perfect justice would be like’.⁶³ He goes even further than this, however, arguing that perfect justice is an impossible aim, since the conflict of legal rules is inevitable in *any* legal system, even in an imagined perfectly just system. For this reason, Fuller argues, the rule of law must be regarded as primarily aspirational. Good law is about the effective and just administrative purpose of government, not the specific justice or morality of each legal rule or obligation. In this regard Fuller argues that ‘fidelity’ does a lot of work in allowing a legal order to manage its imperfections,

⁶¹ Lon L. Fuller, *The Morality of Law*, 1964, p. 96

⁶² Lon L. Fuller, *The law in quest of itself*, 1966

⁶³ Fuller, *The Morality of Law*, 1964, p. 12

including the threats to the rule of law.⁶⁴ As Dyzenhaus puts it, this expresses the idea that in order for law to rule, there need to be ‘believers in the rule of law’.

The difficulty of using this to respond to the pragmatic challenge, however, can be seen in the common ground between Hart and Fuller. Despite in many ways defining the terms of the opposition between positivism and natural law, the differences between Hart and Fuller are not as deep as they first seem, or as either man initially felt.⁶⁵ Hart argued, for instance, that the procedural form of the ‘inner morality of law’ espoused a redundant, hollowed out conception of morality. To glorify the rule of law criteria – which Fuller justified as necessary for the ‘efficacy’ of the legal order – as an inner morality was, Hart argued, akin to justifying a list of the eight most efficient way to poison someone as the inner morality of poisoning.⁶⁶ Nevertheless, both Hart and Fuller shared the more fundamental idea that law’s authority is tied to its institutional form. For both, the authority of law – the “rule of law” – entails a legal order that embodies, at its core, a set of essential principles. Hart acknowledges as much in accepting that there must be a ‘minimum content of natural law’ in any legal system dictated by the requirements of social order: ‘The union of primary and secondary rules is at the centre of a legal system; but it is not the whole, and as we move away from the centre we shall have to accommodate . . . elements of a different type’.⁶⁷ These are rules necessitated by the facts of living in society, or ‘social-fact rules’. The important implication of this is that the function of the secondary rules, for Hart, is not merely to establish the commitment to legality as a general practice, but to provide a mechanism to sustain a society’s commitment to legality.⁶⁸

This reconciliation is perhaps most fully expressed in Neil MacCormick’s institutional theory of law. There are many different forms that a legal order can take, but whatever form it takes, there are institutional requirements to be met if a legal order is to claim the binding authority which characterises a legal obligation. MacCormick argues that law’s social function – and its claim to constitutional authority – is determined by the

⁶⁴ See Brunnée and Toope, *Legitimacy and Legality*, p. 26-27; note, however, that their understanding of fidelity is different from mine. Where they see fidelity as a faith in particular rules, my reading of Fuller is that it refers to a faith in the capacity of the legal order as a whole to rule. This becomes crucial to determining whether the constitutionalist can effectively answer the pragmatist charge.

⁶⁵ For an excellent account of the Hart-Fuller debate, see Nicola Lacey, *The Nightmare and the Noble Dream*, ; see also Peter Cane (ed.), *The Hart-Fuller debate in the 21st Century: 50 years on*, Hart Publishing: 2010.

⁶⁶ H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, 1983, essay 16

⁶⁷ Hart, *The Concept of Law*, p. 99

⁶⁸ It was for this reason, it could be argued, that Hart found Dworkin’s “challenge” so perplexing. As he argued in his postscript to the *Concept of Law*, to him it appeared that there was no necessary clash between them.

capacity to provide ‘institutional normative order’.⁶⁹ Whether the legal order has this capacity to claim constitutional authority will be determined by the degree to which it is ‘a genuinely observed source of the genuinely observed norms followed by those carrying out official public roles specified in or under it’.⁷⁰ At one level this could be taken to say simply that law needs to be able to ‘inspire legality’, as Fuller puts it.⁷¹ But MacCormick goes into more detail about who he regards as having the authority to ‘fill out’ the conception of legality *not* with those subject to a legal or constitutional order, but with reference to those charged with enacting the legal order. The responsibilities created by the general commitment to legality fell on those required to enact the law, on ‘officialdom’. What this means is that there is far less scope for political actors to change the terms of legality to fit their policy preferences. Law’s essential principles need to be capable of motivating a set of essential practices designed around preserving the institutional function of the legal order, but these are practices designated to particular actors in a constitutional order. At one level this could be seen simply as an argument for the importance of the separation of powers to making sense of the rule of law in practice, but he goes further than this, in focusing on how this separation of powers becomes virtuous by sustaining a culture of legality among those charged with enacting and protecting the rule of law in a constitutional order.

Nevertheless, this seems to close the loop on attempts to use the value, and virtue, of legality to resolve hard cases. Because it assumes a relatively settled institutional form to the constitutional order, a constitutional order that has both institutionalized a commitment to the rule of law *and* that has cultivated a coherent sense of responsibility among those charged with pursuing and maintaining the coherence of legality. At least on the first of these pillars, this raises the nature of the pragmatist challenge to international law’s constitutional authority – in particular the perception that before international law can rule – before international law can resolve the hard cases of international society – *and before a constitutionalist mindset can be justified* there needs to be evidence that the international legal order fits the form appropriate to constitutional order.

⁶⁹ Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, Oxford, 2007), especially 45-60.

⁷⁰ Ibid, p 46; see also Hart, *Concept of Law*, p 113: ‘The rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials’.

⁷¹ L Fuller, *The Morality of Law*, 1964, p. 39-41; see also J Brunnée and S Toope, *Legitimacy and Legality in International Law: An Interactional Account*, (Cambridge University Press, Cambridge, 2010).

Following the institutionalization of rules protecting ‘communal interests’, following the development of *erga omnes* obligations, rules with a constitutional form, it would have been reasonable to expect international legality to be increasingly tightly defined in and through the mindset of constitutionalism, through the idea that international legality generated an essential set of responsibilities. But, with some limited exceptions, it is only recently that international law’s claim to define the constitutional rules has begun to shape the politics of international law. Why is this? At least part of the explanation is that the debate about the constitutional authority of international law was co-opted by uncertainty about which of international law’s rules could claim this kind of higher authority and the contradictory ethics of legality this gave rise to.⁷² From the pragmatist perspective the fundamental charge is that the ambiguous and contested practice of international legality in international society entail that the responsibilities towards legality should be treated as essentially a matter of perspective.

Efforts to counter this charge in the domestic context have centred on establishing that legality has a determinate core which entails a clear sense of the responsibilities owed to a legal order. This basic strategy has also structured efforts to prove international law’s authority, first in the idea that international law has a clear customary force even in the absence of a clear idea of the “remedial” responsibilities it requires, second in the idea that these responsibilities can be derived from international law’s capacity to reflect parallel, socially prevalent senses of obligation, and most recently in the idea that the practice of international legality and the common understandings embedded in the legal rules has internalized a sense of responsibility. What I want to show in this section is that all of these efforts at some level admit that legality is, at base, a constructed idea and that this has the effect of endorsing the pragmatic claim that international law lacks the constitutional authority needed to remedy hard cases.

Before getting to that point, what are the existing strategies for responding to the claim that international law is fundamentally indeterminate? One influential perspective is that justifying international law’s authority is a question that can be resolved by analysing compliance with the rules. Compliance can function as a key indication that there is some

⁷² Prosper Weil, Towards Relative Normativity in International Law. *American Journal of International Law* 77 (1983): 413-442

essential form to the practice of international legality. A state's decision to comply with international law can function as a strategy to reconstruct the nature and extent of the commitment to international legality, as a starting point from which to understand the nature of the rule of international law. For many focusing on compliance, the lesson from Louis Henkin's observation that 'It is probably the case that almost all nations observe almost all principles of international law and almost all of the obligations almost all of the time'⁷³ was that that substantiating international law's authority meant getting rid of the conditional 'probably'. If it could be shown that international law was *certainly* obeyed the majority of the time, this would be enough to convince the sceptics about the capacity of international law to rule. Rules that generated a particularly high level of compliance – a customary, habitual sort of compliance – could begin to be understood as constitutional-type rules.

Of course this poses a problem when it comes to understanding those rules that do not generate a particularly high level of compliance but are regarded as fundamental and binding nonetheless – most obviously human rights obligations. The fact that states have signed up to so many onerous human rights commitments which, in practice, don't seem to be particularly well respected or implemented challenges the idea that the authority of international law could be explained simply by reference to the existence of determinate obligations. In order to make sense of why these rules could be regarded as establishing a commitment to international law even in the absence of widespread compliance, the fact of compliance needs to be placed in the wider law-making context.⁷⁴ Compliance is not only a way to establish a fixed fact about international legality; it also functions as a tool and a process for developing and expanding legality. This was Thomas Franck's great insight, that isolated instance of compliance by responsible states could generate a "compliance pull", a social pressure on other members of international society which, in turn, could justify the authority generated by an initially vague legal rule. This is to say that international law

⁷³ Louis Henkin, *How Nations Behave*, p. 47, Second Edition 1979].

⁷⁴ see Alan Boyle and Christine Chinkin, *The Making of International Law*, OUP:2007 [arguing that: 'Every society perceives the need to differentiate between its legal norms and other norms controlling social, economic and political behaviour. But unlike domestic legal systems where this distinction is typically determined by constitutional provisions, the decentralised nature of the international legal system makes this a complex and contested issue. Moreover, contemporary international law is often the product of a subtle and evolving interplay of law-making instruments, both binding and non-binding, and of customary law and general principles. Only in this broader context can the significance of so-called 'soft law' and multilateral treaties be fully appreciated']; see also Dinah Shelton (ed.), *Commitment and Compliance: The role of non-binding norms in the international legal system*, OUP: 2003 [arguing that soft law poses a challenge to this traditional use of compliance as evidence for an obligation of legality]

functions, as Martha Finnemore and Kathryn Sikkink put it, to instigate a ratchet-like ‘norm cascade’ which eventually ends with law’s subjects internalising a habitual commitment to the legal norm.⁷⁵ There is more to compliance, in other words, than simple rule-following; it is evidence of a sense of obligation that all legal orders require. As Finnemore puts it, ‘Effective law generates a sense of obligation, not just in a formal sense but also in a felt sense’.⁷⁶

And yet compliance can also be used to highlight the lack of commitment too, to show how the commitment to certain rules dies off and falls into desuetude.⁷⁷ In assessing states’ commitment to international law, *non-compliance* can be as potent a signal as compliance.⁷⁸ From the constitutionalist perspective, this makes the use of compliance as a base from which to substantiate the constitutional effect of compliance with international law a tricky proposition. If non-compliance is a legitimate way of signalling a lack of commitment, the idea that international law has a normative authority independent of the political order becomes rather difficult to sustain because any incident of non-compliance becomes potential evidence for international law’s need to change. This is to say that an excessive focus on compliance creates a situation where understanding the nature of states’ commitment to international legality becomes a fundamentally descriptive task of determining which rules are emerging, which rules are settled and which rules are in the process of changing. This in turn raises questions about the appropriate method for determining what constitutes really binding international law.⁷⁹ It was for similar reasons that Hart thought the focus on enforcement was both mistaken and dangerous. It gives the impression that commitment is something that rests on the fact of compliance with the law, whereas in actual fact compliance follows from a commitment to the normative principles embodied by the law.

Maintaining the sense that the force of international legal obligations were derived from their status as normative claims rather than a capacity to generate compliance meant,

⁷⁵ Martha Finnemore and Kathryn Sikkink, ‘International norm dynamics and political change’. *International Organization* 52 (autumn) 887-917, p. 902; for an excellent analysis of this see also Adriana Sinclair, *International Relations Theory and International Law*, 2010, 143-154; also Harold Koh, ‘Why do nations obey international law?’, *Yale Law Journal* 106 (8) June 1997, 2599; Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 2009; see also Kathryn Sikkink’s recent suggestion that human rights norms have generated a broader commitment to the idea of justice, *The Justice Cascade*, 2011

⁷⁶ Martha Finnemore, ‘New Directions, New Collaborations for IR and IL’, in Bierstaker et al, 2007, ch. 17.

⁷⁷ See also Glennon, *The Fog of Law*, 2010.

⁷⁸ See especially A Sinclair, *International Relations Theory and International Law*, Cambridge, Cambridge University Press: 2010), 156

⁷⁹ See Robert Howse and Ruti Teitel, ‘Beyond Compliance: Rethinking Why International Law Really Matters’, *Global Policy*, 1 (2) 7 May 2011

as Christian Reus-Smit argued, developing an understanding of international law that starts from an appreciation of the essentially ‘interstitial’ nature of international legal obligations.⁸⁰ This constructivist account of international law locates the binding force of a legal obligation in its capacity to reflect the parallel social, political and ethical obligations operating in international society. International legal obligations get their force by reflecting state’s judgement about the appropriate rules, a judgement that holds constant across the variety of types of obligation to which an actor might be subjected. Once we begin the process of ‘discovering deeper, truer sources of obligation’, once we understand that international law generates a claim to authority by virtue of its ‘milieu-contingency’, that it emerges out of the overlap between socially prevalent normative ideas about appropriate action, it becomes possible to justify the occasional gap between compliance and commitment. The authority of international law at base the result of a common conversation about the social norms which *should* govern international society. The practical application of this can be seen in his argument that human rights norms, rather than functioning as a challenge to the norm of state sovereignty, actually emerges as an inherent part of a discourse of legitimate state action. Rather than accepting the existing implication that international law’s capacity to govern is torn by the need to choose between fundamentally opposed norms of protecting state’s right to self-determination or individual human rights, by locating human rights as an essential part of modern state, the problem lies in the ‘inherently contradictory nature of the modern discourse of legitimate statehood’.⁸¹ Because the protection of human rights were regarded as integral to the moral purpose of the state they could play an essential justificatory role in the constitution of the sovereign order, providing the crucial grounds for claims to self-determination in the wake of colonialism. This is not centrally about the nature of international law’s authority but it does reflect an important claim about international law fosters the constitution of international society. Legal norms function as a language of legitimacy, and in the process structure a political conversation about the nature of states’ fundamental commitments that constitutes the international order.

And yet this highlights the danger of failing to specify an essential core to the practice of legality – or a potential route for establishing this. In taking Robert Jackson to task for thinking of human rights as a way to curb sovereign rights, he highlights the effect

⁸⁰ Christian Reus-Smit, ‘Politics and International Legal Obligation’, *European Journal of International Relations*, 9 (4) December 2003, 591-625

⁸¹ Christian Reus-Smit, ‘Human Rights and the social construction of sovereignty’, *Review of International Studies* 27 (2001) 519–538

of constructivist lens. He is able to make sense of international law as a constitutional force, but only at the expense of the coherence of international law's claim to rule as an independent normative order. What matters is how international law's rules are taken up and used by states to justify sweeping changes in the international order. It matters far less whether these legal norms are used in *the correct way*. International law becomes another species of social norms, with law's normative authority tied to – and ultimately limited by – the reliance on how states use international law to generate their claims to legitimacy. There is no conception here of how international law could function to *impose* meaning on the world where fundamental norms have been misused, where international law faces a hard case. Instead we get a call to 'recalibrate' the existing normative framework.⁸² Hard cases can be reconciled, but only by giving up on the absolute status of the existing norm.

It was in an effort to hold on to a more coherent, more fixed idea of the value of legality that Jutta Brunnée and Stephen Toope argue for an 'interactional' approach. This constructivist account puts a greater focus on how the institutional values and processes embedded in the practice of international law justify the commitment to international legality. This approach draws on Fuller's insight that a valid legal order gets its legitimate authority from its capacity to inspire a practice of legality among the subjects of law by ensuring that the legal obligations reflect the key criteria of legality: rules must be of general application, publically promulgated, non-retroactive, clear and unambiguous, realistic, relatively constant and reflected in the actions of officials operating under the law.⁸³ The way this works to generate law's authority is that where the legal rules are appropriately clear, for instance, states will consistently recognise an obligation to obey; where rules are confusing, states will be more likely to use alternative standards to guide their decision-making. This in turn is used as the basis for the argument that 'only when law is produced through the interactional framework can it be said that law is "legitimate"'.⁸⁴ Legal obligations have force because in a virtuous legal order where the rules protect these values the subjects will want to obey the law.. For Brunnée and Toope, 'when norm creation meets these criteria and is matched with norm application that also satisfies the legality requirements – when there exists what we call a "practice of legality" – actors will be able to pursue their purposes and

⁸² See also Reus-Smit, 'International Crises of Legitimacies' *International Politics*, 44 (2007) 157-174, however Onuf, *Rules for the World*; for the more general critique of constructivism, see especially Sinclair, *International Relations Theory and International Law*, 2010

⁸³ Jutta Brunnée and Stephen J. Toope, *Legitimacy and legality in international law : an interactional account* (Cambridge, Cambridge University Press: 2010), p. 26

⁸⁴ *Ibid*, p. 53

organise their interactions through law. These features of legality are crucial to generating a distinctive legal legitimacy and a sense of commitment – what Fuller calls “fidelity” – among those to whom the law is addressed.⁸⁵

This emphasis on the practice of legality generates law’s legal legitimacy as it fosters shared understandings between actors about the purpose and the norms of law, as it establishes a community of practice motivated by ensuring that the criteria of legality are met, and as both the sense of commitment to the rules and the coherence of the rules themselves are reinforced.⁸⁶ On the face of it this is an incredibly comprehensive account of how international law generates and maintains a sense of obligation, an account that goes well beyond existing conceptions of international law by focusing on the authority reified by the idea and practice of international legality. But there are some problems here which only emerge in attempting to justify international law’s constitutional role in international society, and in the attempt to remedy the hard cases without recourse to the political domain.

Crucially, they can’t avoid a degree of subjectivity in how they define the way that Fuller’s criteria of legality ought to apply to the international legal order and, as a result, despite positioning their criteria of legality as an account of the inner morality of law, they build in a bias for how states have understood this inner morality. The second issue is a more general issue to do with perspective, namely the thought that an objective list of the hallmarks of legality could function as an objective standard for evaluating the justification for international law’s normative authority. As Thomas Poole expresses this, there is a tendency of constitutionalist scholars to downplay the political import of their arguments, and this comes out in the exaggeration of ‘the normal nature of the normal’ as well as ‘the exceptional nature of the exceptional’.⁸⁷ But this tendency is more pronounced in Brunnée and Toope’s account, in that they conjure their own definition of the normal, over-running international law’s own institutional methods for establishing and developing the criteria of legality.⁸⁸ The effect of this is that their approach seems to concede to the pragmatist idea that international law’s capacity to generate its own sense of legality – and the responsibilities which follow – is somehow defunct. This leads them to engage in the same sort of ground-clearing exercise that pragmatists call for – to attempt to differentiate

⁸⁵ Ibid

⁸⁶ Ibid, p. 55

⁸⁷ Thomas Poole, Constitutional Exceptionalism and the Common Law, *International Journal of Constitutional Law* 7 (2) 2009, 247-274.

⁸⁸ To be fair, one of the reasons for this is that nuance has not tended to be a feature either characteristic of or rewarded by the IR/IL interdisciplinary debate they are contributing to.

genuine international law from norms that don't generate the necessary commitment, that don't reflect the practice of legality.

Despite the attempt to write, as Robert Beck puts it, 'outside the rationalist idiom',⁸⁹ constructivist accounts end up implying that before international law can rule in a constitutional way there must be a determinate sense of states' commitment to international law's claim to rule. But in the process of justifying this commitment the specifically *constitutional* practice of legality in which international law is seen to generate the terms of its rule – and in the process establish limits on the policy domain – fades from view. This highlights how entrenched the pragmatist ethic is, because both the interstitial and interactional accounts described above started with a strong sense of the importance and depth of states commitment to legality. The reason these accounts end up shading into pragmatism is that they lack a sense of how international law can maintain the value of legality while at the same time sufficiently reflecting the social context. The authority of international law becomes something to be constructed through international (or scholarly) practice, rather than something that emerges as a result of the commitment to legality itself. Legality is itself a practice of knowledge generation; it generates knowledge about the responsible practice of legality. Law admits and tests evidence against established principles, principles of interpretation, of fair trial, of necessity and proportionality. But the nature and function of these principles, their character and scope, and, most importantly, 'the sense of trusteeship and the pride of the craftsman'⁹⁰ that are acknowledged as crucial for the maintaining the authority of international law needs to be revealed in and through the jurisprudential practice of law, not as outside variables that can be swayed through either the policy or social scientific imposition of a judgement about which rules can *genuinely* claim authority – however elegantly conceived that analysis might be.⁹¹ In a context where this is possible and/or necessary, the legal order must lack the capacity to generate the superior claim to authority needed to remedy a constitutional order's hard cases, in particular to

⁸⁹ Robert J. Beck 'International Law and International Relations Scholarship'. *Routledge Handbook of International Law* (London, Routledge: 2009) p13-43,

⁹⁰ Judith Shklar, *Political Thought and Political thinkers*, edited by Stanley Hoffman, University of Chicago Press: 1998, p. 33

⁹¹ For one good example of this, see especially Mary Ellen O'Connell, 'The Choice of Law Against Terrorism', *Journal of National Security Law and Policy*, Vol. 4, p. 343, 2010 [She argues that it is a crucial problem that international law seems to allow states to choose between applying peacetime law or the law of armed conflict in structuring their counter-terrorism practices. But she also argues that the fact that states use their authority to choose the easier option shouldn't be taken to mean that international law is itself weak, because international law has developed guidelines governing the circumstances in which one or the other regime applies. The fact that there are problems in the practice of international law should not be taken on itself to mean that international law can't establish a coherent, constitutional-type sense of the practice it requires.]

counter attempts to define the ethic of legality in line with the ambiguity and uncertain of the international institutional order. The challenge of responding to hard cases highlights that law “rules” – at least in a constitutional context – to the extent that it gets taken seriously as a closed order capable of protecting the core constitutional rules, even in a hard case. Law rules to the extent that it is able to claim the prerogative to objectively determine which of its rules are ‘genuinely’ binding, where there might be a legitimate exception to the rules, which rules have fallen into *desuetude*, without policy-driven political interference in this process. But for the pragmatist, acting on, and believing in, the fact that international law’s rules and institutions enjoy this level of authority is not the solution but the core problem, the core peril.

From Commitment to Responsibility

Returning to Judith Shklar’s arguments against legalism will help to highlight why these efforts to establish the force of the commitment to international legality have struggled to generate a constitutionalist ethic, and at the same time served to further entrench a pragmatic ethic. The problem, at base, is that these various attempts to shore up international law’s claim to authority in international society fail to fully engage with the need to justify – and hold on to – a liberal faith in the rule of law in circumstances of uncertainty. This is important for justifying law’s authority in a constitutional order at all times, but it becomes especially crucial – and paradoxically most difficult – in establishing law’s authority to rule where a constitutional order is characterised by crisis.

Nevertheless, despite Shklar’s deep worries about the dangers legalism poses to maintaining a just social order, she is equally worried about a healthy scepticism shading into a dangerous cynicism about the *possibility* of constitutional order. There is, she argues, a crucial role to be played by the general belief in the authority of a society’s legal institutions: ‘if one begins with the fear of violence, the insecurity of arbitrary government, and the discriminations of injustice, one may work one’s way up to finding a place for the rule of law.’ The rule of law, for all the conceptual confusion it can generate (and sustain), establishes ‘institutional restraints that prevent government agents from repressing the rest of society’.⁹² It provides a standard of legitimacy that guards against the arbitrary exercise of political power. This ‘liberalism of fear’ as she puts it seems on the surface to leave a

⁹² Judith Shklar, ‘Political Theory and the Rule of Law’, in *Political Thought and Political Thinkers*, p. 36

difficult line to hold, between a virtuous scepticism (a rejection of legalism) and a rejection of cynicism, a rejection of the inevitability of institutional corruption, and a belief in the good of legality as a governing principle.⁹³

What is interesting in terms of understanding the requirements for instantiating a broader constitutionalist ethic in international society is Shklar's argument that, in fact, the only reason this looks like such a difficult line to hold is because of the rationalist drive to systematize the tricky, slippery concepts of legality, authority, and obligation. Legality in particular entails both concepts and practical responsibilities which defy such easy simplification. There is no one right answer to the nature of the commitment implied by legality not because there is no essential core but because legality is, at its core, a fundamentally *dispositional* ethic.⁹⁴ Law's subjects, authors and enactors need to *feel* committed to the legal order if it is generate an effective claim to authority. The nature of this dispositional ethic comes out in one particularly revealing essay, as Shklar attempts to flesh out the requirements of obligation as opposed to the bonds of loyalty. To focus on the obligation, we're told, is to understand authority as premised on the prevalence of rule-governed conduct.⁹⁵ But instead of focusing on the claim to obligation, she argues, the real work gets done by the concept, the practice, of *loyalty*. As Shklar puts it, 'what distinguishes loyalty is that it is deeply affective and not primarily rational.'⁹⁶

This reflects Fuller's emphasis on the need for a 'sense of trusteeship', or as Dicey – and Dyzenhaus – have put it a 'culture of legality', or as Hart (perhaps misleadingly) put it, a 'rule of recognition', or as David Kennedy has put it, a 'sense of responsibility'. All of these calls relate to the need – and the difficulty – of holding on to the motivation to act in pursuit

⁹³ This is one of the central differences between Shklar and Arendt. For Shklar, the dangers of legalism cannot be resolved simply by appealing to the political domain. Arendt, in contrast, gives the political domain far greater scope to resolve the tensions connected with legal authority. The dangers of legalism justify a political constitutionalism. Nevertheless, as Michael C. Williams argues, Arendt's work never shakes off its 'tone of despair' because of its underlying scepticism about genuine progress; Williams, 'Arendt and the international space in-between', p. 201, in Lang and Williams (eds.), *Hannah Arendt and International Relations: Readings Across the Lines*, 2005

⁹⁴ For Shklar this emerged from her reading of Rousseau; here is a thinker whose justification of the state's authority – that there are public institutions able to track the general will – seems, on the surface, to challenge individual liberty by putting the community first. But Shklar rejects the communitarian reading of Rousseau, arguing that his scheme for advancing the common good relied on the presence of a virtuous public – and virtuous practitioners, servants of the public good – ready and willing to ensure that the institutions continue to rule for the common good. The signal for this is not in some imagined institutional criteria, but in the continued willingness to work for and through these institutions for the common good, a willingness to maintain and improve the capacity of these governing institutions to institutionalise their commitment to govern in the best interests of their citizens.

⁹⁵ 'Obligation, loyalty, exile', in *Political Thought and Political Thinkers*, p. 40-41

⁹⁶ 'Obligation, loyalty, exile', in *Political Thought and Political Thinkers*, p. 41

of the value of legality in circumstances of uncertainty. This dispositional element is an important aspect of resolving challenges to the capacity of legality to govern a constitutional order, but it is in many respects not clear how faith functions to justify a responsible practice of legality in a way that doesn't simply replicate or double-down on the ambiguity surrounding legality, introducing an even more ambiguous and contested practice. This is to say that these various nods towards the importance of a dispositional ethic struggles to establish faith in the rule of law as an adequate, appropriate and justified response to the pragmatic concerns. This reliance on an uncertain and contested faith in law creates, as Dyzenhaus puts it, a reason for thinking that 'those who value the rule of law and human rights should be greatly depressed.'⁹⁷ Faith functions as an internal justification, something that can sustain 'believers in the rule of law' during times of crisis; but this kind of closed reasoning – this appeal to an inner morality – seems, at first glance, wholly unsuited as a response to the ethical framework motivating those who would challenge the constitutional ethic of legality.

Despite the acknowledgment among those writing on global constitutionalism that constitutionalism is at its core a mindset, there is no very great sense of how this mindset functions in practice to advance international law's constitutional authority – and how it is able to sustain and institutionalize an alternative to the pragmatists contrasting mindset. This is not a problem specific to international law, but it is felt more keenly by international law where the 'constitutional furniture' is less than fully developed.⁹⁸ The impact of this is felt most when international law is forced to confront its hard cases. In these circumstances, where the correct course of action is uncertain, where the practice of legality begs complex questions about the essential responsibilities attached to international legality, the fact there are *competing* mindsets, competing ethics of legality – and the fact that constitutionality requires a demanding faith in law – dictates both the limits and the possibility of international law governing international society. But it is not only the fact that there are competing ethics of legality which impacts international law's capacity to rule, its capacity to resolve international society's hard cases. Returning to the example of lawfare, it becomes possible to see how the problem this represents isn't only that it gives political actors the power to determine what constitutes the responsible practice of legality, but that it feeds the

⁹⁷ Dyzenhaus, *The Constitution of Law*, p. 230

⁹⁸ Ibid, p. 233: 'The more constitutional furniture there is in place, the more judges and politicians look hypocritical if they try to derail the rule of law project...And as long as the furniture is there, it stands not only in rebuke of the judges and politicians – legality's rebuke to those who wish to govern arbitrarily. It also stands in wait of a time when we will come back to our rule of law senses.'

perception that the authority of international law is fundamentally a matter of perspective, rather than something that can be settled by elaborating on the existing principles of international law. To put this another way, this is an exercise in circularity which regards a practice like lawfare as both the evidence for an existing pragmatic perception of legality driving state practice *and* a practical argument for continuing to act from a pragmatic ethic. This is the ‘downward spiral’ that a constitutionalist ethic must find the resources to break, at least if it is to be regarded as a justified practice.

Conclusion: Faith and the institution of responsibility

The battle between the constitutional and pragmatic practices coalesces around competing conceptions of the *essential* responsibilities embedded in the institutional practices of a legal order. The problem structuring these two approaches to international legality is, at base, that they are motivated by very different conceptions of international law’s capacity to generate a coherent ethic of legality appropriate to decision-making in international society.

In this regard, uncertainty – or, to use a more loaded term, *crisis* – is at the heart of international law’s constitutional politics. International law’s inability to resolve hard cases becomes in the first instance a challenge for the legal order to amend the governing conception of legality and, in the final instance, evidence for the ‘tragic’ limits of international legality and a justification for supplementing legality with principles and perspectives from outside of international law. In this way, pragmatism dismantles international law’s claim to constitutional authority by feeding the perception that, in order to ‘prove’ its constitutional authority, international law must first show a capacity to respond to ingrained pragmatic practices. This reflects Dyzenhaus’ observation that the real effect of lawfare like practices was not, as Sands has argued, the creation of a legal black hole, but in the creation of a ‘grey hole’, in the institutionalisation of uncertainty and ambiguity about the terms of law’s rule.⁹⁹ At least the void left by a black hole can be readily observed. Its capacity to determine the institutional normative order for international society is undermined by its institutional weaknesses. Without actors with the authority to remedy or redress the crisis narrative, international society institutionalises an ethical disposition which understands international legality as fundamentally a matter of perspective, rather than as implying a necessary practice of responsibility.

⁹⁹ Ibid, p. 39

In the next chapter I build on the idea that a practice of fidelity, or faith, or loyalty or whatever you want to call it flags a *particular* sense of responsibility essential to the commitment to legality. When this is understood as a motivated by the knowledge of the ambiguity and uncertainty of the institutional order, it becomes possible to see a practical basis for advancing a constitutionalist ethic of legality able to withstand the charge that the international order is fundamental, constitutionally, uncertainty.

Chapter 3

Discovering faith in the rule of law

Have faith and pursue the unknown end.

Oliver Wendell Holmes, Jr.¹

Michael Glennon concludes his call for a pragmatic approach to international law by arguing that:

“The first task of international lawyers in this new global era, before they try to repopulate the new legal order with fresh rules and institutions, is to *desacralize* international law. They must disenthral themselves of the remnants of the moralistic medievalist culture from which international law emerged and examine sceptically the basis of the rules and institutions that international law comprises. They must insist upon a foundation of empirical data, not deontological fantasy as a basis for new ones . . . The new rules and institutions, if they are to work better than the old ones, have to be grounded solidly on such research.”²

The previous chapter showed, on the contrary, that the sequencing of evidence *then* a commitment to legality serves to reinforce the perception that the only responsible ethic is a pragmatic ethic, and in the process undermines the scope for international law to rule, to establish a fixed sense of the legitimate practice of international legality. As a result of premising the scope of the responsibility owed to international law on the need for rules to reflect the policy context, the idea of international legality is co-opted under the belief that the rule of international law is tainted by uncertainty, contingency and crisis.

Countering this narrative is the central challenge facing attempts to justify the appropriateness of a constitutional ethic to international society. This chapter suggests that the core issue facing attempts to justify constitutionalism is one of ‘faith’ versus reason, and that constitutionalism can benefit from re-engaging with the “medievalist” culture of legality Glennon dismisses. The constitutionalist mindset, if it is to effectively challenges the pragmatic approach to international law, needs to better understand the role that a practice of faith has played in institutionalising the constitutionalist mindset.

¹ Letter to Jingxiong Wu (1924), published in Harry Clair Shriver, *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers*, 1936, p. 175.

² Glennon, *The Fog of Law*, p. 222-223

The argument is that there are three key reasons for focusing on the idea of “faith” in justifying constitutionalism. First, it highlights the importance of the *aspiration* for legality in justifying constitutionalist practice, as opposed the pragmatist focus on the empirical evidence limiting legality. Second, it highlights the idea that legality is itself a strategy for limiting the uncertainties surrounding the exercise of constitutional authority, of holding on to the commitment to legality as an ordering principle in spite of the practical challenges or limits this imposes on political decision-makers. Finally, a practice of faith results in an image of legality as justified through the virtuous pursuit of the core principles of constitutional order, through the exercise of public responsibilities. I conclude that, in contrast to pragmatist claims that a constitutional faith in legal rules is undermined by the political exercise of public responsibility, a degree of self-legitimation, of interiority, is – and historically has been – justified as a result of the underlying values being developed and protected through constitutionalism. I conclude that it is only by *resacralizing* international law, by rehabilitating the idea that international law expresses institutional values which should be protected even in conditions of uncertainty, that the constitutionalist image of international law make headway against the pragmatist.

My aim here is not to resolve the competing claims of pragmatism and constitutionalism, but to show how the foothold that international law already has in the institutions of international society can be thought to carry practical normative weight, even in those circumstances of uncertainty where a pragmatist conception of legality might appear to be the only responsible option.

The tragedy of faith

Faith in international law is not an easy sell. The obvious problem with appealing to faith in law as the justification for legal authority, as Martti Koskenniemi argues, is that the profession of faith has both a heroic and tragic register. Koskenniemi uses the Old Testament story of Abraham’s willingness to sacrifice his son to God as analogous to ‘the situation of the international lawyer in the face of the god of law.’³ In the traditional telling,

³ Martti Koskenniemi, ‘Faith, Identity and the Killing of the Innocent: Nuclear Weapons and International Lawyers’, *Leiden J of International Law* 10 (1997) 137-162, p. 158; see also Koskenniemi, ‘Constitutionalism as mindset: Reflections on Kantian themes about international law and globalization’, *Theoretical Inquiries in Law* 8 (1) January 2007; compare Thomas Smith’s argument that Augustine’s point is precisely that ‘politics requires a Christian wisdom that the world sees as foolishness’, ‘The Glory and the Tragedy of Politics’, in *Augustine and Politics*, p. 202.

his willingness to act on his belief with no regard to the personal cost of his actions renders it a heroic act. And he was rewarded precisely *because* of his willingness to suffer the consequences of his faith. The heroic lesson is in his willingness to set aside personal, subjective values – even conventional social and moral values that would have condemned killing an innocent child as wrong – to trust to the superior judgement of an outside agency, and to construct his sense of responsibility from a belief in the *superior* judgement possessed by this outside agency. The more critical gloss, however, sees the willingness to sacrifice his son, the readiness to kill an innocent, as ‘the height of foolishness or dogmatic insanity’, both sad and dangerous, a tragic reminder of ‘the ease with which any of us might be led to complicity with cruelty induced by passive faith in authority and the bracketing of personal responsibility under an explanation of “just following the rules”’.⁴ Abraham is, to use the vernacular, a sucker.

Resolving the tension between these two images of legality, for Koskenniemi, revolves around the certainty in the source of the command. Abraham had it, but from an outside perspective scepticism – and a pragmatic ethic of rule-following – looks like the far sounder proposition. This is doubly true for international law where there is plenty of available evidence for law’s human and institutional fallibility, of those occasions where a willingness to sacrifice in order to further the rule of international law, a willingness to set aside subjective interests for the common good of the international order, has generated hypocrisy and disappointment as the costs of obeying rises, as law is used to cloak power, and as other states fail to adopt the same level of commitment. Faith might have traction as a motivation and a justification at the personal level, but where it is presented as a publically authoritative reason for action, it is not unreasonable to require a better standard of proof that international law establishes a superior form of judgement to that established through the political life of sovereign states. In fact, as Koskenniemi argues, international lawyers tend to recognize the flaws in blindly believing in the virtue of international law, professing a *strategic* faith in the certainty and objectivity of international law while at the same time espousing a contrary belief that to play with the rules, to disagree about the rules, is a legitimate practice, a responsible practice because the nature of international legality is fundamentally contested. Once these tensions are cashed out, it becomes clear, he thinks,

⁴ M Koskenniemi, ‘Faith, Identity and the Killing of the Innocent’, p. 158

that the institution of international law is a paper castle, the seat of a puppet authority.⁵ The problem this leaves for international law – and the entry point for a pragmatic ethic wanting to substitute a more complete, less defunct form of political judgement – is that ‘a purposeful determination to avoid being a sucker, we now know, if generalized to the human race, would subvert human sociality more or less in its entirety’.⁶

This difficulty of using faith as a justification for the constitutional practice of international legality is compounded by the possible side-effects effects of faith. One of the dangers of acting from a sense of faith – in the law, or in other institutional actors – is that this entails adopting a sacrificial disposition – a willingness to suffer for your beliefs. The danger of this, of course, is that you get sacrificed as a result of your beliefs.⁷ There has been a recent effort within International Relations to try and accommodate these doubts, in arguing that *trust* can make sense in certain circumstances. The depth of social cooperation that can be justified through an appeal to trust has historically been limited by the tendency to conceptualise trust as a rational choice, based on an understanding of how a prospective partner is likely to act, and the likelihood that trust will be not result in harm.⁸ In explaining institutional cooperation, as Brian Rathbun argues, international relations theory has tended to over-emphasise the degree to which cooperation is premised on rational calculations, and as a result has missed alternative ways to respond to social uncertainty.⁹ Rathbun suggests instead that the role of trust in establishing social cooperation through treaty agreements and organizational formation is far better explained by the initial *dispositions* of the relevant actors – whether they regard their prospective partners as trustworthy. This is a decision based on an assessment of a partner’s integrity.¹⁰ There is a broader constitutional logic to trust as well: there can be ‘spirals of trust’ as well as ‘spirals of fear’, as a result of the fact that trust is a largely self-referential.¹¹ So what might begin as a strategic decision to trust based on

⁵ M Koskenniemi, ‘Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons’, (1997) 10 LJIL 137 [‘Portraying ourselves as faithful servants of the law, we in fact buttress [the ICJ] as a puppet authority, and we are ready to reject it the moment it oversteps the moral walls around its paper castle’, p. 160]; see also Anne Charlotte-Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’, *Leiden Journal of International Law*, 22 (2009) p. 1-28

⁶ John Dunn, ‘Trust and Political Agency’, 2000, p. 86

⁷ There is some scope for this kind of attitude with the sovereign state – this willingness to sacrifice is a crucial part of the state’s capacity to go to war; Patricia Owens, *War and Politics: International Relations in the thought of Hannah Arendt*, OUP: 2007

⁸ Andrew H. Kydd, *Trust and Mistrust in International Relations*, 2007

⁹ Brian Rathbun, ‘It Takes all Types: social psychology, trust, and the international relations paradigm in our minds’, *International Theory* 1(3) 2009, p. 345-380

¹⁰ *Ibid*, p. 345-248

¹¹ *Ibid*, p. 376, see also Niklass Luhmann, ‘Familiarity, Confidence, Trust: Problems and Alternatives’, in Diego Gambetta (ed.) *Trust: Making and Breaking Cooperative Relations*, 2000, chapter 6, pp. 94-107

perceptions of how a state will act and located within well-defined parameters can, over time, develop into a more generalized moral trust.

Some of the implication here for institutions such as international law or diplomacy – institutions in the English School sense, institutions as constitutional order – are fleshed out by Vincent Pouliot who, in addition to emphasising the dispositional element of trust points to the importance of the institutional culture in which trust is fostered as ‘the commonsensical way to go’ to become, eventually, a habitual practice.¹² In his analysis a practice is simultaneously a description of a special type of knowledge (practical knowledge), often grounded through insider or professional experience (practitioner expertise), leading to a particular type of action (a practice) which is or is likely to become customary or conventional (the practice). As Pouliot argues, in order for a constitutional practice to emerge – and here he is focused on diplomacy rather than international law – a degree of social trust is necessary: there must be a practice of ‘believing despite uncertainty’. As he explains:

‘As a background feeling, trust does not derive from instrumental calculations, norm compliance, or reasoned consensus: it is informed by the logic of practicality. The reasons why an agent trusts another are not readily verbalizable; they derive from tacit experience and an embodied history of social relations. Trust is practical sense.’¹³

To adopt Koskenniemi’s terms, can this justify the ‘heroic’ vision of the rule of international law? It is difficult to see how the re-emphasis of international legality could function in this way, not if you take seriously the ambiguity surrounding the practice of legality in international society. This is to say that explaining the habitual persistence of social orders, as IR theory has sought to do, entrenches around the easy case rather than the hard case, or in Niklas Luhmann’s terms around an analysis of the basis of trust rather than the more tenuous issue of confidence in the object of trust.¹⁴ This can be seen, for example, in the different attitudes that can be taken to the fragmentation of international law: this can either provide evidence of international law’s dynamism, its capacity to govern different domains

¹² Vincent Pouliot, ‘The Logic of Practicality: A theory of Practice of Security Communities’. *International Organization* 62 (2) 2008: 257-288, p. 258

¹³ Pouliot, ‘The Logic of Practicality’, 2008, p. 278

¹⁴ Luhmann, ‘Familiarity, Confidence, Trust’, p. 100 [‘Mobilizing trust means mobilizing engagements and activities, extending the range and degree of participation. But what does this mean, if people do not perceive a condition of trust or distrust but a condition of unavoidable confidence?’]

and manage any conflicts that arise, or it can be taken as evidence of the structural weakness of international law as law.¹⁵ The more interesting question this poses, at least where international law's constitutional authority is concerned, is how to motivate, to generate, and to sustain this sense that trust in international law is not only a legitimate practice but the *responsible* practice in conditions of uncertainty.

The more substantive reason for pointing to these limited attempts to make sense of trust as a reasonable disposition to adopt in international society is to flag, first, that this type of disposition is not *necessarily* irresponsible. State leaders and their agents can and have acted from a sense of the trustworthiness of their partners, from a generalized trust in the value of a cooperative organisation, and from a habituated sense of trust as the common-sense practice. But at the core of these accounts is an assumption that this trust is generated through customary practices or dispositions. Trust is the result of a clear and unambiguous sense of the *way* to act or the 'modality of action'.¹⁶ The definition of trust in this regard needs to be qualified. Trust is, first, believing despite uncertainty *about the motives of other actors*. Second, trust is believing from certainty *about the norms guiding practice*.¹⁷

As the previous chapter argued, this certainty, this sense of confidence in international law's constitutional authority, is undermined through the ethic of pragmatism that presents international law's constitutional authority as fundamentally ambiguous. In this regard, lawfare and the hard case is represents for international law's claim to constitutional authority backs up Koskenniemi's claim that the institution of international law is too weak to reconcile the heroic and tragic registers. Faith may be a conceptually viable option for grounding the commitment to international law but, in practice, sacrifice is not likely to be a persuasive option (i.e. austerity measures don't win votes). A strategy of "bringing the unbelievers on board", as Kirsten Ainley has put it to me, is unlikely to be persuasive, at least not without some degree of violence.

What I want to suggest in this chapter, however, is that this perspective on the irrationality of faith in law in conditions of uncertainty (or, to put it in Schmittian terms, the requirement of retrenching around a faith in the political order in circumstances of uncertainty)¹⁸ is the product of a modern idea of constitutional authority, as the product of

¹⁵ Anne Charlotte-Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', *Leiden Journal of International Law*, 22 (2009) p. 1-28

¹⁶ Dunn, 'Trust and Political Agency', 2000 p. 73

¹⁷ See Luhmann, 'Familiarity, Confidence, Trust', 2000 p. 100 [characterises this as the distinction between trust and *confidence*.]

¹⁸ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 2006

natural rights, consent and rationality, in which fidelity to the law as sustained and justified by its protection of the popular right to revolution. I want to argue that this displaced an earlier and potentially richer conception of faith in the law, as the product of natural order and as an explicit strategy protecting against uncertainty. Rehabilitating this earlier republican strand of thinking about the commitments required to make sense of the responsibilities entailed by uncertainty can begin to justify the idea of faith in international law as a responsible practice, despite the pragmatists' attempts to close down the space for such a disposition. This is to argue that maintaining an aspirational faith in the rule of law as a part of virtuous leadership was, in this tradition, part of the entry requirement for engaging in the legitimate exercise of public responsibility. More simply, faith was not a tragic practice, neither was it a heroic practice; it was instead a virtuous practice.

Reason, rationalism and consensualism: faith as trust

International law's efforts to generate a clear sense of the responsibilities it requires from those committed to the ideal of legality is not a new phenomenon, but it is a modern phenomenon. This is to say that the current anxiety surrounding international law is a consequence of the rise of the modern liberal state and the effect this had on the law of nations as a coherent source of international authority.¹⁹ My claim in this section is that it was in trying to explain the rational basis for the authority of the law of nations – and the law of nature, because this division itself was a product of liberal modernity – that international law first lost its constitutional authority. To put this another way, the reason the idea of faith in international law causes such anxiety is the same reason faith in the rule of law caused such anxiety: both are the product of a liberal framing of the nature and limits of political authority. The difference is one of constitutional form, or 'furniture':²⁰ whereas states were able to evolve their existing domestic institutional orders²¹ to fit the new ideological context that culminated in the Enlightenment, no such institutional architecture existed for the law of nations. The emphasis on custom as the source of the law of nations

¹⁹ Note however that the slipperiness of both liberalism and its relationship to the emergence of the modern state gives rise to inevitable differences over both the crucial moment and the key conceptual shift; nevertheless, see Giorgio Agamben, *State of Exception*, 2005, p. 5 [he ties the emergence of an exceptionalist narrative to 'the creation of the democratic revolutionary tradition and not the absolutist one']

²⁰ Dyzenhaus, *The Constitution of Law*, p. 233

²¹ Giving an excellent sense of the continuity in these institutions, at least in the British common law context, see Bingham, *The Rule of Law*, p. 5-18

emerged as, in effect, an accidental result of having gotten rid of the basis of authority granted by the natural law and not really having had any available institutions or *ideas* capable of filling the double gap created by the genesis of nation-states as a protected form of political authority and a concurrent idea of the international as a distinct domain requiring a new form of authority equally capable of reflecting an ideological vision centred on the image of the rational, autonomous individual providing the source for their own political freedom.²² Where no coherent alternative was forthcoming, empire and, eventually, nation-states adopted this image of the rational individual as the justification for their own practical authority to this domain. It was in this guise that customary practice filled the void left by the demise of a medieval constitutionalist mindset, an imperfect fit that would be frame the positivistic conception of legality that was eventually institutionalised in the late 19th century.²³

This argument is in danger of running ahead of itself however. In order to understand how international society came to internalise this conception of legality, with all the ambiguities it fosters in the practice of international legality, it is important to understand the context for the shift to liberal ideas of the rule of law. There is no bright line between the ancient world and “liberal modernity”, just as there is no definitive starting date for international law. Indeed, some have argued that the concept of international law – as a form of extraterritorial authority – tracks back to the earliest written records. But there is a clear sense that the modern idea of international law emerged at some point during the ideological shifts during the 16th, 17th and 18th centuries, as the solidarism wrought by the Roman empire and continued through the Christian world fragmented into competing claims to political authority before eventually resolving into the territorial nation-state.²⁴ Hugo Grotius stands in as someone who inherited earlier changes in the law of nations, in particular those ushered in by the Salamanca School under the pressure of having to update the conception of the natural law in order to meet the questions posed by colonial expansionism – in particular the ‘novel problem of the Indians’.²⁵ These changes opened up questions about the nature of the sovereign, and the scope of ‘dominium’ or sovereign

²² Immanuel Kant, What is Enlightenment?, 1784, available at: <http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html>

²³ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*. (Cambridge: Cambridge University Press, 2001)

²⁴ Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge, Cambridge University Press: 2002)

²⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press: 2007)

authority.²⁶ But his ideas can also be regarded as a kind of tipping point for the natural law tradition. This is in part why Grotius is charged with being a ‘sorry comforter’ of sovereign power undermining the resources available to challenge the status quo, blurring together the customary practices embodied in the law of nations with the moral obligations inherent in the law of nature and, at the same time, confounding the existing understanding of how the natural law worked to limit the extent of sovereign authority.²⁷

What was this existing understanding of the natural law, this strong justification for international authority, that was displaced? For some, the natural law tradition provided an essentially cosmopolitan framework, establishing rules that could claim to be universally valuable without reference to any particular social context.²⁸ As Robert Jackson argues, this is necessary connected to ‘the notion that humans are social creatures who must live together but in order to do that in a morally defensible way they must recognise and respect each other as equal members of the community of humankind’.²⁹ The danger of this gloss is that it gives the mistaken impression that natural law was at its core concerned with protecting humanity, where in reality the primary concern was preserving social order. A better way to explain natural law – and to understand what was lost during this epochal transition – is as setting out a particular conception *right reason* – or an idea about what it meant to reason rightly – in the process of exercising public authority. In the natural law tradition this did not refer to getting it right absolutely, or a capacity to know some objective truth. Objective truth really was a matter for God or the gods, something impossible to achieve constrained by a fundamentally imperfect human nature. The claim instead was that pursuing the value of good order required that the person (or institution) in authority had a capacity to reason their way to an understanding of the universal and essential; principles of natural law. This builds on the Aristotelian idea of the rule of law as bringing the political order into line with the natural order, with the constitutional law functioning to ensure rule by ‘reason unaffected by desire’.³⁰ Similarly, for Cicero, natural law was ‘right reason in

²⁶ Martti Koskenniemi, ‘Empire and International Law: The real Spanish contribution’, 2011, available at www.helsinki.fi/eci/Publications/MkToronto.pdf

²⁷ Amanda Perreau-Saussine, ‘Immanuel Kant on International Law’, in Amanda Perreau-Saussine and John Tasioulas (eds.), *The Philosophy of International Law* (Cambridge, Cambridge University Press: 2010)

²⁸ Hedley Bull, ‘Natural law and International Relations’, *British journal of International Studies* 5 (1979), p. 171

²⁹ Robert Jackson, ‘Jurisprudence for a Solidarist World: Richard Falk’s Grotian Moment’, in Jackson, *Classical and Modern Thought on International Relations*, Palgrave Macmillan: 2005, p. 127

³⁰ Aristotle, *Politics*, bk, III, ch.16, 1287a; this doesn’t do justice to the full idea: ‘[T]he arbitrary rule of a sovereign over all citizens in a city which consists of equals, is thought by some to be quite contrary to nature; . . . That is why it is thought to be just that among equals everyone be ruled as well as rule, and therefore that all should have their turn. And the rule of law, it is argued, is preferable to that of any individual. On the same

agreement with nature', where the justification for law stemmed from a natural, human instinct towards justice.³¹ These ideas shaped natural law thinking which, at least for those thinkers concerned with the law of nations, took its cue from the thinking of St. Thomas Aquinas.³² One way of looking at Aquinas' thought is to see it as offering, as Fuller suggests, its own idea of the inner morality of law, and generating a claim to authority on the back of this.³³ A state's positive laws must reflect the principles of good order contained in our understanding of the natural law. It is here that the injunction to preserve good order required a particular type of institutional order: a corrupt human nature diminishes the capacity to choose wisely, to understand and pursue the best course of action. It because realising the natural order relied on a ruler being able to interpret the natural law in the right way that he put such focus on the need for those in power to cultivate personal *virtue*, or a virtuous form of reasoning. This is to say that the natural law tradition wasn't defined by its appeal to, as it has been put, some 'brooding omnipresence in the skies', as Oliver Wendell Holmes once put it, but by the responsibility of a ruler to act in the pursuit of good order. The natural law emerges from the understanding that among right thinking individuals there will be a degree of coherence in those actions understood to be both necessary and justified in the pursuit of a good, stable order. This coherence comes from a common 'habit of virtue' among those applying the natural law.³⁴

It is in this respect that Richard Tuck's characterisation of Grotius as providing 'a manifesto for a new science of morality' become important.³⁵ Tuck argues that Grotius is the turning point for the justification of political authority because, although speaking in the medieval language of natural law, under the influence of rationalism and the drive to codify right *reasons* his emphasis shifted from a concern with the right way to interpret the natural law so as to preserve and protect natural order to a concern with the natural *rights* that an

principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law . . . Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast, for desire is a wild beast and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire'.

³¹ Cicero, *On the Commonwealth*, III.33

³² Koskeniemi, 'Empire and International Law' 2011; see also John Finnis, *Natural Law and Natural Rights*, Oxford University Press, Oxford: 2011 (1980)

³³ Lon L. Fuller, *The Morality of Law*, 1968, p. 261

³⁴ Much attention has been paid to Aquinas' cardinal virtues – those of prudence, temperance, courage and justice – and the type of ethical judgement or ethical discourse this entails. And yet, for Aquinas, it was the theological virtues that took priority. These theological virtues of faith, hope and charity sustain and fill out the 'cardinal virtues' of prudence, temperance, courage and justice, the virtues that govern our day to day actions and decisions. The theological virtues cultivates a habit of virtue.

³⁵ Richard Tuck, *Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, Oxford University Press: 2000)

actor could claim as a result of their interpretation of the natural law.³⁶ Although he approaches natural law in much the same way as his predecessors, as a dictate of right reason, Tuck argues that Grotius detached the natural law assumption that right reason provided the authority to act from the institution of the state, and away from a commitment to political rule. Grotius instead presents a right to claim the authority provided by natural law as a property of all moral persons, a moral quality, a faculty or an aptitude that allowed an individual to act with justice. Similarly, Adam Roberts and Benedict Kingsbury characterise Grotius as representing a move within natural law theorizing from objective right to subjective right, from seeing natural law as concerned with the general conditions necessary for the exercise of political authority, to a concern with articulating the rights or capabilities that the individual could legitimately claim *against* the state, and indeed independently of the state.³⁷ This comes out of Grotius' attempt to justify the actions of the Dutch privateers. Grotius argued that individuals had a right to make war and punish others for breaches of the natural law. They didn't need to have the cover of state authority, they didn't need to be able to claim a right to rule in order to be able to use force legitimately. All that was required is that there had been a breach of the natural law, in particular the natural right of self-preservation. This right to punish breaches of the natural law was, not the preserve of the ruler but rather the right of all human beings. The central conclusion he draws from this is that our actions should in no way need to be justified with reference to the state; actions are moral and hence justified simply by virtue of being directed to self-preservation or to redress some violation of the natural law.

The effect of this is that despite holding out a commitment to law's capacity to order international society, Grotius undermines the existing basis for certainty about the normative justification for the ordering function.³⁸ But again, the anxiety this generates and the shift it unleashes in the established bases of international legal order is not immediately clear, or immediately attributable to Grotius. For example, Hersch Lauterpacht argues that Grotius appeals as a source for a progressive liberal internationalism because of his 'faith in

³⁶ See however Brian Tierney, *The Idea of Natural Rights*, (Scholars Press: 1997) [arguing that Grotius was far less bothered by the challenge of epistemological scepticism, had far more religion in his thought, and was covering the same tropes about the universal impulse to self-preservation as his natural law predecessors and contemporaries than Tuck's interpretation admits.]

³⁷ Benedict Kingsbury and Adam Roberts, 'Introduction: Grotian Thought in International Relations,' in Bull et al (eds.), *Hugo Grotius and International Relations*, 1990, p. 1–64; see also Knud Haakonssen, 'Hugo Grotius and the History of Political Thought,' *Political Theory*, 1985 vol. 13, p. 240

³⁸ On a similar note, see Benedict Kingsbury, 'A Grotian Tradition of Theory and Practice? Grotius, Law and Moral Scepticism in the thought of Hedley Bull', QLR 17 (1997)

the rational constitution of man and his capacity to see reason and learn from experience'.³⁹ It is this liberal faith in the 'power of man as a rational social being' which allows a sense of moral obligation to triumph 'over unbridled selfishness and passion, both within the state and in the relations of states'.⁴⁰ Grotius in other words is seen to package an image of the international as ordered through the conjunction of the *reasonableness* of states with authority of the natural law.⁴¹ States are governed by the law of nations *both* by virtue of their customary consent to the law of nations and by the law of nature.⁴² This was the context that Grotius regards the moral commitment to preserve the binding force of treaties as the basis for international law, as indeed for municipal law, and sees the obligations of promise-keeping, good-faith and *pacta sunt servanda* as principal tenets of the law of nature to be upheld by any ruler, in all circumstances.⁴³

But this appeal to and reliance on the power of rationality would reverberate to institutionalise a belief that constitutional authority must ultimately be generated through those processes governed by individual rationality, namely consent, custom and contract.⁴⁴ Whereas the idea of international law had traditionally been buttressed by a certainty about the acceptance of some form of authority being a necessary requirement for ruling - a fundamental part of a ruler's commitment to the natural law - the introduction of a subjective right, authority divorced from the responsibilities of political rule, in effect politicized the form of authority generated by the natural law. If anyone can apply the natural law, how could it provide order? And if the answer is that order comes from custom, where does the normative imperative lie? How does custom generate the deep practical

³⁹ Lauterpacht, 'The Grotian Tradition in International Law', 23 *British Yearbook of International Law* 1 (1946) p. 25.

⁴⁰ Ibid, p. 26; see also Christoph A. Stumpf, *The Grotian Theology of International Law: Hugo Grotius and the moral basis of international relations*, 2006 [arguing that Grotius is better presented as locating progressivism in man's nature as a rational social and *Christian* being, because it was through common Christian beliefs that the objectivity of a decision could be justified. The argument is that Grotius was far more connected in this regard to his predecessors in the Salamanca School, who also used - much more forthrightly - the idea of a Christian community in order to ground a coherent and obligatory law of nations. Suárez, for example, was able to bookend concerns about the objective authority claimed by the law of nations on the ground that because it 'is assumed by all authorities as an established fact' (Suárez 1944, Bk. II, Chapter XVII, §1, p. 325). This didn't resolve the content of the *jus gentium*, specifically the question of whether the obligatory content was determined by the customary basis of the law of nations or by the link to natural law. But the capacity to think in these terms about the substantive basis of international obligation stands in stark contrast to later international thought that retreated to questions about the mere possibility of an objective standard of international obligation.]

⁴¹ Lauterpacht, 'The Grotian Tradition', p. 19 - 21

⁴² Charles Covell *The Law of Nations in political Thought: A Critical Survey from Vitoria to Hegel*, 2009, p. 60 [arguing that it is in this respect that the law of nations emerges as a form of positive or voluntary law distinct from the law of nature.]

⁴³ Lauterpacht, 'The Grotian Tradition', p. 42

⁴⁴ See Koskeniemi's most recent work on international law's three "deaths", forthcoming.

commitment needed to ensure adherence to the rules?⁴⁵ As Mary Ellen O’Connell puts it, ‘The fact that natural law is derived from revelation and/or reason presents a problem about reaching consensus as to what the law is once the authority of the priest or the pope was lost.’⁴⁶

If Grotius had turned the handle, Hobbes kicked down the door for the idea that individual rationality and natural right could generate the necessary commitment to political authority. Hobbes consolidated the shift from natural law to natural right, although here again his arguments are more complex and nuanced than they are often credited with, and their effect on reframing the terms of the conceptual challenge represented by the justification of political authority owes as much to the way he has been read as to the arguments he actually makes.⁴⁷ Nevertheless, the reason Hobbes’ arguments are important for understanding how faith in the authority of law came to be regarded as a threat to political order, rather than a solution, was that the crucial challenge motivating Hobbes was that that England’s singular political order had collapsed in the face of divided loyalties. The inability to reconcile the competing faiths of Catholic and Protestants through reason had led to a breakdown of political order and security, to ‘the miseries, and horrible calamities, that accompany a Civill Warre’.

This led Hobbes to argue that there was a reciprocal relationship between obedience and stability: an unconditional acceptance of a sovereign’s absolute authority provided security; its absence entailed insecurity. For Hobbes the good of order and certainty covered a multitude of sins on the part of the sovereign. In his famous analogy, if a highway robber asks you for your money or your life, you are free to choose which you would like to give up. The rational individual will choose to part with their money rather than their life. Likewise, when the state asks whether you wish to part with your natural liberty in exchange

⁴⁵ Recognizing the danger here, Gentili, writing in the 16th Century, had tried to reject the use of custom as the basis for international authority out of a fear that this would make the law of nations changeable and indefinite, subject to the variation and vagaries of international relations, arguing that custom as a source of international law could supplement but not replace the force of the underlying norm. For Gentili, custom functioned as the evidence for binding authority, rather a basis for authority; custom is the expression of faith in rules, not the source of this faith.

⁴⁶ O’Connell, *Power and Purpose*, p. 137

⁴⁷ Brian Tierney, for example, argues that to use Hobbes as a marker for the transition from natural law to natural right – and from there, the development of liberalism – gives Hobbes too much credit. On the contrary, Hobbes was ‘an aberration from the mainstream of natural rights thinking’ simply because for whatever fragments of medieval natural law doctrine he displays, his overarching theory is riddled with inconsistencies: ‘Hobbes great gift was for rhetoric, not for logic . . . Everyone notes that Hobbes intended to argue like a mathematician, but it is seldom observed that he was very bad at mathematics’; Brian Tierney, *The Idea of Natural Rights*, Scholars Press, 1997, p. 341; see also Jon Parkin, ‘Straw Men and Political Philosophy: The Case of Hobbes’, *Political Studies* 59:3, 2011

for political security, you have a free choice to make, but the degree to which the benefits from contracting into and committing to the state outweigh the costs of retaining your natural liberty makes choosing the liberty of the state of nature the fools choice.⁴⁸ In contrast to the classical tradition which regarded the political and social order as an extension of the natural order, for Hobbes the point of contracting in to the sovereign's authority was to provide a fix, a patch, a remedy to the otherwise 'solitary, poor, nasty, brutish and short' experience in the state of nature, to the state of war, conflict and uncertainty. It was only by granting individuals the space to recognize this that a crisis of legitimacies could be avoided.

But there is another image of Hobbes that speaks to the ambiguities created by the emphasis on the rational justification of political authority, in some measure of consent, real or implied. Whereas in the natural law tradition it had been enough that political institutions act *for* the people, the effort of avoiding a clash of legitimacies entrenched around the idea that ruling institutions also had to be legitimated *by* the people. At one level, Hobbes' conception of public authority rests on an understanding of the principles of legality – non-arbitrary rule in particular – establishing the terms of the relationship between the sovereign and the people. It protects and institutionalises the reciprocal basis on which an individual gives up their natural rights. As Evan Fox-Decent argues, the operation of legality in this relationship is premised on a presumption of *trust* rather than consent, and that this establishes the constitutional function of legality, as a protection against the sovereign violating the terms of the social contract. If a sovereign violates these principles of legality, he is in effect subverting the basis for his both own authority and the people's obligation to obey, because he violates the terms on which the people have decided to trust the sovereign's capacity to provide order.⁴⁹ This tempers the degree to which Hobbes can be seen as an apologist for absolutism, instead suggesting a degree to which sovereign authority had to be, ultimately, owned by the people, even if exercising by an absolutist government. This, as Hobbes contemporary Bishop Bramhall would put it, suggests that an image of Hobbes' *Leviathan* as a 'rebel's catechism'.⁵⁰

These two pictures of Hobbes as an absolutist and as revolutionary set the tone for subsequent liberal anxieties about the right to revolution, about the legitimate form of civil

⁴⁸ See the fools argument, Hobbes, *Leviathan*, chapter XV

⁴⁹ Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary*, OUP: 2011; see also John Dunn, 'Trust and Political Agency', p. 73-93,

⁵⁰ Quoted in Jon Parkin, 'Straw Men and Political Philosophy: The Case of Hobbes', *Political Studies* 59:3, 2011

disobedience, about the justified limits on civil liberties, about the effect of law on individual liberty, about the limits and excesses of sovereign power and the general scope and nature of political obligation became sources of practical anxiety and dispute, rather than questions that could be bookended under the more fundamental responsibility to provide good order. But these anxieties were largely managed by the existence of a sovereign order, with a disposition to trust and a practical sense of political obligation sustained through the institutions and practices of the state.⁵¹ There were occasional breakdowns, revolutions, civil wars and civil disobedience, but these were able to be excised as the exception, not the norm.⁵² This is to say that the language of exceptionalism – if not the underlying practice, which is tied to the much older tradition of martial law⁵³ – was necessarily tied to the modern state, for the simple reason that trust was habituated through a social practice of believing the law to be legitimate⁵⁴ and a general certainty about the nature of both the norm and the exception guiding the conditions under which citizens could legitimately give or withhold their consent.⁵⁵

But this conception of trust, or faith as trust, has important knock-in consequences for the law of nations and the forms of authority that were regarded as appropriate to the international order, because the traditional source for certainty about the essence of this commitment to the natural order no longer existed. As Michael Williams argues, this was the consequence of Hobbes' 'engagement with scepticism [about political knowledge] and the limits of political order, and his attempt to provide a renewed understanding (and cultural practice) of subjectivity and sovereignty that would allow a maximum degree of autonomy . . . both within and between states', and it was this idea that would ring the changes to the international order.⁵⁶ But the forces mediating and limiting this claim to autonomy at the domestic level, namely trust, did not function in the same way at the international level, shading far more readily into mistrust and a lack of confidence in the international order, to be replaced by an strategy of trusting oneself, self-belief. This is to say that motivational force of trust in the international context resolved into a commitment to customary law, which in turn reinforced the idea that there was no superior authority and no superior

⁵¹ See especially Dunn, 'Trust and Political Agency', p. 86-87

⁵² Agamben, *State of Exception*, p. 5

⁵³ David Dyzenhaus, 'The Puzzle of Martial Law', 59 *University of Toronto Law Journal* (2009) 1-64, 1

⁵⁴ See especially Tom R Tyler, *Why people obey the law* (Princeton, Princeton University Press: 2006)

⁵⁵ Niklas Luhmann, 'Familiarity, Confidence, Trust', p. 96 ['we know in a familiar way about the unfamiliar. Familiarity breeds unfamiliarity.']

⁵⁶ Michael C. Williams, *The Realist Tradition and the Limits of International Relations*, CUP: 2005, p. 7

responsibility than that possessed and defined by the sovereign through their habitual practices, even if those practices generated ambiguity and uncertainty. The prior natural law assumption justifying the authority of the law of nations that international decisions were made from a common perception about the nature of good order were displaced by a pseudo-science of reason of state,⁵⁷ which in turn bolstered the perception that political authority was the only type of constitutional authority appropriate to the international order. In stark contrast to the domestic realm, state practice did not *entail* trust in international forms of authority, and in the space left behind inserted a pragmatic ethic of international law that constructed the constitutional politics of international law as, to use John Dunn's phrase, 'a sorry blend of immediate impotence and protracted disappointment.'⁵⁸

Republican virtues and natural orders: faith as responsibility

By now this story in which pragmatism attacks the constitutionalist ethic should be familiar. What I want to argue in this section is that there is a more robust understanding of trust – trust as *faith* – that can establish a sense of certainty able to respond to the pragmatic scepticism about the level of responsibility that can be generated by a commitment to legality in circumstances of constitutional uncertainty.⁵⁹ To put this another way, this is to say that behind the story traditionally told in international relations and international law about the demise of natural law and the rise of natural right, this effected a parallel and potentially more fundamental transition from a republican conception of trust as a *public* response to uncertainty to a liberal conception of trust as a *private* response to uncertainty.

The republican influence on international law and the law of nations has been noted many times before. Mortimer Sellers, for example, has argued that republican principles both lie at the foundation of modern international law and can best explain the conceptual framework through which modern international law justifies its claims to bind sovereign states.⁶⁰ He regards the core of the republican idea as the premise that 'international society exists for the common good of its subjects'.⁶¹ Nicholas Onuf has drawn similar inferences

⁵⁷ Ibid, p. 8; see also Jonathan Haslam, *No Virtue Like Necessity: realist thought in international relations since Machiavelli* (New Haven, Yale University Press: 2002)

⁵⁸ Dunn, 'Trust and Political Agency', p. 86

⁵⁹ Dunn argues that there are other theoretical traditions which reconcile the problem of trust, namely anarchism, Marxism and realism, Ibid, p. 76-80

⁶⁰ Mortimer Sellers, 'The Republican Foundations of International Law', in Samantha Besson and José Luis Martí (eds.), *Legal republicanism: National and International Perspectives*, OUP: 2009, p. 187

⁶¹ Ibid, p. 191

from the existence of a republican tradition of international thought, emphasizing how the basic values of republicanism – the rule of law, political participation, constitutional government, a particular conception of liberty as non-domination – created a standard of political authority premised on the value of being part of a common community, values which sustained forms of authority that didn't rely on the institution of the state.⁶² Samantha Besson has recently gone even further, explicitly positioning republicanism as a tradition capable of strengthening the conceptual framework for the constitutionalization of international law which, she suggests, revolves around the idea that there exists 'an international community with shared objectives and universal interests and institutions to promote those interests' yet has suffered from vagueness and indeterminacy when it comes to specifying the nature of these shared understandings.⁶³ In this regard she argues that republicanism can sustain a call for the democratization of international law, as part of an attempt to resolve 'the legitimacy chain of international law-making' and in turn help the subjects of international law to appreciate the full extent of their common interests and how best to protect these interests.⁶⁴

Missing from these accounts, however, is an idea of how the broad scope of republican commitments, including the rule of law, have been constituted to as a reaction to the indeterminacy of the social order.⁶⁵ This has been a key feature of, for example, republican interpretations of how Machiavelli's injunction that a leader must have virtù establishes a basis for republican institutions as the uncertainty of fickleness of *fortuna* forces the virtuous leader to look outside of his own virtù to broader forms of civic virtue as providing a more resilient source of order, security and certainty. But I want to look to different source, partly because Machiavelli's ideas carry a lot of baggage in international thought, but partly because the earlier republican ideas of St. Augustine were even more

⁶² Nicholas G. Onuf, *The Republican Legacy in International Thought*, (Cambridge, Cambridge University Press: 1998)

⁶³ Samantha Besson, 'Ubi Ius, Ibi Civitas: A Republican Account of the International Community', in Samantha Besson and José Luis Martí (eds.), *Legal republicanism: National and International Perspectives*, OUP: 2009 p. 208

⁶⁴ Ibid, p. 237

⁶⁵ Note in this respect that Quentin Skinner's preferred framing of the republican conception of liberty was as the absence of *arbitrary* power, not of power such. In this regard it was the exercise of power arbitrarily – i.e. outside of the rule of law – that created the conditions for domination; there is a contrast, however, with the view that holds the mere possibility that an actor could exert arbitrary power as being an instance of domination (see Philip Pettit, 'Keeping republican freedom simple: On a difference with Quentin Skinner', *Political Theory* 30 (3) 2002, 339-356)

closely structured around the problem of the ethic appropriate to circumstance of uncertainty.⁶⁶

The root conception of faith here, faith as a responsible rather than tragic practice, can be seen in Augustine's approach to the pluralistic circumstances of politics, and his argument that in spite of a full appreciation of pluralism as an essential and inescapable social fact, a solidarist ethic could be justified. For Augustine our confidence in reality – and with this the possibility of a progressive politics – was conditioned by 'our restless heart'.⁶⁷ Constitutional authority – the capacity to create the institutional order anew, the capacity of the existing order to react to the need to change – was locked in a battle framed by the human incapacity to perceive an *objective* account of the good, one that could be fully shared by all members of a political community. When aggregated as part of a society, our individual failures to perceive a common truth generate a lack of social objectivity, establishing a pessimistic view of politics as continual and inevitable conflict over the values which ought to be pursued as part of a community. To explain why this realisation doesn't justify nihilism, however, Augustine appeals to faith.

Augustine, in full Aristotelian mode, contrasts the justification of dominium in two sorts of household: those living by faith and those not. Both households act from a degree of necessity – to put food on the table and the like – but the ends for which these households are constituted are fundamentally different. The household living by faith is driven by hope for a future happiness, a peace that far exceeds anything that could be gotten from their present circumstances. The other type of household is satisfied with the contingent, temporal good that is set before them. (Pared down, this is Aesop's fable of the ant and the grasshopper). Augustine argues that this provides an analogy for understanding the difference between the earthly city and the City of God: the earthly city 'does not live by faith but desires earthly peace' and therefore takes 'the ordered harmony of commanding and obeying among citizens' as the source of the unity needed to provide for earthly goods of security and well-being.⁶⁸ The City of God provides for a unity, a genuine community, where there is no difference - and hence no possibility for conflict or strife – between

⁶⁶ Although not often integrated into the republican tradition, there have been some recent efforts in this regard, and there don't seem to be any good reasons for this oversight. See especially Paul J. Cornish, 'Augustine's Contribution to the Republican Tradition', *European Journal of Political Theory* 9(2) 133–148; it is also worth noting that he has been a key influence on modern republicans like Hannah Arendt, Judith Shklar and, more recently, Jean Bethke Elshtain.

⁶⁷ Augustine, *Confessions*, 1.1.1

⁶⁸ Augustine, *City of God*, 19.17

individual human wills and desires: ‘the perfection of our unity . . . will be that everyone’s thoughts will not be hidden from one another nor in conflict among themselves on any point’.⁶⁹ At one level this was a call to live a good Christian life, in the hope of gaining entry to the City of God where there would be genuine community. This can be read as evidence of Augustine’s unyielding pessimism about the good of politics in this life. And yet, as Phillip Cary argues, to leave it at this misses the more crucial point: the interesting thing about Augustine is that his recognition of pluralism didn’t resolve into a justification for cynicism and passivity; it served as a call to arms.⁷⁰

Augustine’s response to pluralism was a call to *impose* a contingent form of good order on a pluralistic world, because, human nature being what it was, good order would not naturally, organically emerge. It was for this reason that Hannah Arendt characterised Augustine as ‘the first philosopher of the will’.⁷¹ As Jean Bethke Elshtain argues, a large of the appeal of Augustine is his unwillingness to hide behind impossible hopes or utopian dreams. Augustine, as she puts it, ‘is second to none in cataloguing the discontents of the “earthly city”. No elegant theory of justice; no morally edifying paean to discourse theory; no high-minded appeal to cosmopolitanism over and above ‘lesser’ or ‘lower’ loyalties is going to blanket the globe with a warm layering of normativity. The effort to make more sturdy a regime of international human rights tells this tale, surely.’⁷² What is crucial as far as the attitude appropriate to international law is concerned, is that the act of struggling against pluralism carries normative weight; battling to craft a point of solidarity, being willing to accept the “taint of contingency”⁷³ is a virtuous alternative to the cynicism that results from

⁶⁹ Augustine, *On the Good of Marriage*, 21

⁷⁰ Phillip Cary, ‘United Inwardly by Love: Augustine’s social ontology’, in *Augustine and Politics*, 2005, p. 23-24

⁷¹ Hannah Arendt, *The life of the mind*, vol. 2: Willing, p, 84-110.

⁷² Jean Bethke Elshtain, ‘Really existing communities’ *Review of International Studies* 25 (1999), 141–146, p. 141 [Elshtain’s reading of Augustine, it should be noted, is at odds with e.g. Shklar, who argues that Augustine introduces a homogenizing, moralistic politics and monistic politics) or Arendt (who thinks he undermines the development of civic virtue and political participation). Elshtain’s focus is how Augustine “saves politics”, providing a ‘rehabilitative’ ethic (Thomas, p. 188). This follows, among other Reinhold Niebuhr, who regarded Augustine’s ‘political realism’ as a counter to the reality of evil ‘which threatens the human community on every level’. Within this Augustinian tradition, the point of noting the messy limitations on a progressive politics is to generate a practical wisdom, rather than to hide behind an easy and ultimately destructive utopian ideology. See also Herbert Deane, *The political and social ideas of St. Thomas Augustine*, 1963, describing politics as, for Augustine, a ‘remedial institution’, p. 78; see also R.W. Dyson, *The Pilgrim City: Social and Political Ideas in the writings of St. Augustine of Hippo* 2001, p. 46-61; and Elshtain, *Augustine and the Limits of Politics*, 1998

⁷³ Hegel, quoted in Nicholas Onuf, “‘Tainted by contingency’: retelling the story of international law’, in Richard Falk, Lester Edwin J. Ruiz and R.B.J. Walker, *Reframing the International: Law, Culture, Politics*, Routledge: 2002

the enlightenment hope in rationalism's power to resolve all questions of legal and political authority.

Although Augustine, in stark contrast to Aristotle (and Aquinas), saw 'all politics as unnatural, pervaded as it is with servitude and domination', he did not exclude the possibility of those with faith from making a positive contribution to the promotion of peace in this life.⁷⁴ For Cary, an Augustinian politics revolves around 'the promotion of the peace of the earthly city'.⁷⁵ This is not to say that the promotion of peace and order and harmony is a natural thing – Augustine is far too pessimistic about the venality of human nature to admit that – but it is a good thing. As Robert Markus characterises Augustine's idea, it is that the institutional order offers hope for containing 'the disorder and the tensions inevitably present in any society of sinful men'.⁷⁶

Rather than providing a scientific understanding of the nature of legal and political authority, Augustine provides an insight into the 'art of the possible' in circumstances where a truly decontested meaning is impossible.⁷⁷ In this process of carving out a point of solidarity, reasoning about the uncertain nature of the social order and faith become complementary forces, pushing and pulling us towards an understanding of the good.⁷⁸ In this way, Augustine also points towards an ethical attitude appropriate to "discerning the mystery" of global constitutionalism. This is not the passive faith that Koskenniemi criticizes, but an active faith informed by the need to protect, preserve and advance the value of legality as a check on the 'downward spiral' generated by the pressures of political rule, by the difficulty of holding on to the value of legality in a realm beset by the competing conceptions of the appropriate response to uncertainty. This provides a strategy for justifying legality as a responsible practice, the outgrowth of a particular type of faith, a faith premised on a commitment to privilege public responsibilities over private desires, a commitment to sacrifice for the good of the community. At the core of this is an idea that faith is a strategy for making peace with the inbuilt uncertainty of the natural order; for developing a point of solidarity in a world where pluralism is an established fact. As Aquinas would later put this, belief is 'giving assent to something one is still thinking about'. Faith is

⁷⁴ Cary, 'United Inwardly by Love', p. 24

⁷⁵ Ibid, p. 25

⁷⁶ Robert A. Markus, *Saeculum*, xvii

⁷⁷ Dodaro and Atkins, 'Introduction', in *Augustine: Political Writings*, Cambridge texts in history of political thought, 2001, xxvi

⁷⁸ Jean Bethke Elshtain, *Augustine and the Limits of Politics* (Notre Dame, University of Notre Dame Press: 1995); see also Michael Loriaux, 'The Realists and Saint Augustine: Skepticism, Psychology, and Moral Action in International Relations Thought', *International Studies Quarterly* 36 (1992) 401-420

something that follows from asking questions about the nature of reality; faith is the act of coming to terms with the uncertainty of the answers. It is only once ontological uncertainty has been accepted as a background fact that a prudential attitude, for one, will lead to an appreciation of the virtuous course of action.⁷⁹

What does this mean in practice? It suggests that justifying faith in law is connected to the *public* responsibilities actors have in establishing a constitutional order. Augustine expresses this in his argument that faith, when combined with spirituality, can bring a practical unity to a community of believers.⁸⁰ In this, Augustine connects the good of institutional authority to the capacity to both act from a commitment to the public good and to be enlarged through the practice of ruling.⁸¹ Leadership comes from a love for the community, rather than from a desire for power, from a paternalistic desire to care for and exercise responsibility over the community. This, as Thomas Martin argues, has two effects: the exercise of authority becomes legitimated both through sacrifice, a sacrifice made out of a love for the community and, second, the exercise of authority becomes a form of mercy, because in taking on authority the leader is accepting responsibility for the consequences of that leadership. This establishes an ethic of responsibility centred on the idea that, as Thomas Smith argues, ‘political authority serves rather than is served; it exists to coordinate the practices of a whole community in a way that fosters genuine flourishing of every part rather than the aggrandizement of the ruling part. This requires an extraordinarily difficult degree of spirituality because it requires turning away from the temptation of using one’s office as an opportunity to pile up power and glory for oneself and one’s cronies.’⁸² But it is in this act of turning away from the easy option that leadership becomes virtuous.

⁷⁹ It needs to be noted that Augustine is also highly critical of the Roman – and particularly the Ciceronian – appeal to virtue. There was a place for genuine virtue but he thought that its connection to “honour” in the Roman context hollowed out the normative implications of virtue; the concepts of honour and glory didn’t generate the depth of responsibility provided by a communal practice of spirituality. As Thomas Smith explains it, ‘the appeal to virtue in a social context defined by the pursuit of glory can block an honest assessment of virtue in as much as it implies an appeal to conventionally respectable standards of success. If so, then fostering virtue in such a context merely preserves the moral hegemony of the dominant culture, rendering personal, social, or political reform more difficult’ (p. 194). For Augustine, the connection of virtue to honour or glory leads to frustration and, ultimately, insecurity and anxiety. Roman virtue leads to a politics of fear, because it introduces a degree of competition – you must be more virtuous than your neighbour – that feeds dissatisfaction, suspicion, envy and, eventually, domination. It leads away from genuine community; see Thomas W. Smith, ‘The glory and Tragedy of politics’, in *Augustine and Politics*, 2005

⁸⁰ In particular a monastic community – see Thomas F. Martin, ‘Augustine and the politics of monasticism’, in *Augustine and Politics*, 2005, p. 171-173.

⁸¹ *Ibid.*, p. 178-181; Cornish, ‘Augustine’s Contribution to the Republican Tradition’

⁸² Smith, ‘The glory and Tragedy of politics’, p. 205

This concept of faith as responsibility is important to the constitutionalist approach not because it justifies ‘bringing the unbelievers on board’ but for the far more basic reason that it makes sense of the constitutionalist practice as a responsible practice. It establishes a justificatory framework for a belief in international law’s constitutional authority that doesn’t immediately collapse in the face of evidence for the weakness or failures or ambiguities of international law. This Augustinian tradition provides a starting point for thinking about the uncertainty surrounding the practice of international law as itself a justification for constitutionalism, rather as a consideration serving to institutionalise international law’s limitations. The idea of faith in law denotes a practice of belief that is *strengthened* through rather than eroded by the pressure of uncertainty.

From the pre-modern to the present day

This tradition has parallels in the development of the pluralist and solidarist ethics, which will help to bring this medieval conception of faith to bear on the current challenges facing the constitutionalist perspective. Indeed, according to one commentator, there a distinct ‘Augustinian moment’ that helped distinguish this approach to international politics.⁸³ This Augustinian tradition can be used to explain – or, better, make peace with – the uncertainty and ambiguity surrounding the constitutionalist approach to international law.

There is a sense here that the crucial opposition for the constitutionalist to overcome isn’t between faith in international law and scepticism about international law but between faith and fear, fear in the consequences of believing in international law’s authority.⁸⁴ This in fact is the line that Herbert Butterfield advances, warning against the debilitating impact of fear. In a wonderfully florid argument he flags his particular concern as the impact of ‘a generalized fear that is no longer conscious of being fear, and hangs about in the form of oppressive dullness or a heavy cloud, as though the snail had retreated into its shell and forgotten the reason, but had not the spirit to put out its feelers any

⁸³ Roger Epp, ‘The “Augustinian Moment” in International Politics: Niebuhr, Butterfield, Wight and the Reclaiming of a Tradition’, International Politics Research Occasional Paper No.10, Aberystwyth, Department of International Politics, 1991.

⁸⁴ See similarly Anne Charlotte-Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’, *Leiden Journal of International Law*, 22 (2009) p. 1-28

more'.⁸⁵ This fear, and the anxiety it generates, stifles the possibility of positive, productive change. He doesn't go so far as to herald faith as a magic bullet – he regards fear as far too entrenched, and far too institutionalised, an emotion for that. But even so, he writes that 'there comes a moment when it is a healthy thing to pull every cord tight and make an affirmation of the higher human will. When we seem caught in a relentless historical process, our machines enslaving us, and our weapons turning against us, we must certainly not expect to escape save by an unusual assertion of the human spirit.'⁸⁶ Where the challenge is to find a way to get a purchase on establishing productive directions for international relations, Butterfield finds comfort in his personal experience of faith. Faith is part of a strategy for exercising responsible judgement in a hard case, for owning the responsibility to judge where the decision has severe consequences.

Martin Wight, one early member of the English School, was also heavily influenced by both his personal faith and the Augustinian tradition.⁸⁷ Scott Thomas argues that his mature scepticism regarding the possibility of human progress in international relations reflected the sense that his early liberal faith had been betrayed and shown to be false with the failure of the League of Nations. His realism was grounded in his analysis that the kind of prophetic attitudes he and other liberals had bought into hadn't given sufficient weight to the hollowness of obligation in international relations.⁸⁸ In this regard Wight's pluralism was premised on the belief that a realistic assessment of the scope of political progress needed to come *before* the institutions of international society could generate the sense of commitment needed to claim authority. While not impossible, faith in a progressive politics needed to be grounded in a realistic assessment of the available avenues and institutions that could instantiation such a progressive politics. With all the evidence that international society lacked any widespread sense of a moral obligation to obey international law, a politics of scepticism was the only reasonable, realistic disposition.⁸⁹

⁸⁵ Herbert Butterfield, 'Human Nature and the Dominion of Fear', 1960, pamphlet published by the Christian Group of the Campaign for Nuclear Disarmament, P. 2

⁸⁶ Ibid, p. 4

⁸⁷ Robert Jackson 'Martin Wight's Thought on Diplomacy', *Diplomacy & Statecraft*, 13: 4 (2002) 1 — 28, p. 6, 8; Hedley Bull, 'Introduction: Martin Wight and the study of international relations', in Martin Wight, *Systems of States* (Leicester University Press: 1977); Scott Thomas, 'Faith, history and Martin Wight: the role of religion in the historical sociology of the English school of International Relations', *International Affairs*, 77, 4 (2001), pp. 561-583

⁸⁸ Scott Thomas, 'Faith, history and Martin Wight: the role of religion in the historical sociology of the English school of International Relations, *International Affairs*', 77, 4 (2001), pp. 561-583

⁸⁹ See especially Will Bain, 'One Order, Two Laws: Recovering the 'normative' in English School theory', *Review of International Studies* 33 (2007) 557–575 [argues that 'problems of obligation' and the binding authority of international norms are at the heart of ES thinking, but that the failure to systematically develop a theory of

One of the effects of this anxiety about a betrayal of faith is that Wight and others writing in this Augustinian vein tended to regard hope in progress as a private, theological virtue.⁹⁰ The exercise of responsible decision-making in the public realm required a more hard-headed, evidence-driven practice. Bookending this hope in progress was, however, easier for Wight, as an academic. He was not in a position of having to decide on hard cases, having to decide whether to act from hope or scepticism. I have already discussed the way that Hersch Lauterpacht and others were motivated by their practical, institutional roles as much as by the conceptual challenge of making sense of international law's capacity to rule in international society. Dag Hammarskjöld provides another practitioner perspective, grounded even more explicitly on the constitutional function of faith, a perspective shaped with his direct engagement with medieval Christian thought. Although extremely protective of the personal nature of his religious faith, he was drawn to defend the relevance of international law and role of the international civil servant as grounded in a faith in the possibility of progress. He argued that it wasn't the fact of progress but the possibility, and the act of striving for progress, that mattered. There was an *essentially* aspirational quality about the international institutional order, and this made him, paradoxically perhaps, more willing to bear the disappointments, failures and intransigence of international politics. The role of international institutions and of international law was not to achieve, but to *strive*, to *aspire*.⁹¹ It was to provide a home for what he called a 'fighting optimism'. As he argued, 'we have learned [this fighting optimism] the hard way, and we will certainly have to learn it again and again and again'.⁹²

What Hammarskjöld's example highlights is faith generates an ethic of constitutionalism capable of standing up against the pragmatic reaction to international law's uncertainty. This ethic is reflected in C.S. Lewis's influential – and almost certainly read by Hammarskjöld – explanation of the practice of faith. He argues that there are two components to faith. In the first instance, "Faith . . . is the art of holding on to things your

obligation has undermined the normative conversations within and contributions of the English School. Emblematic of this confusion, he argues, is the hard division that has grown up between solidarism and pluralism.]

⁹⁰ Jackson, Robert (2002) 'Martin Wight's Thought on Diplomacy', *Diplomacy & Statecraft*, 13: 4, 1 — 28, p. 6, 8; for a similar presentation of Wight as a personal believer but political sceptic, see Tim Dunne, *Inventing International Society*, p. 47; also Hedley Bull, 'Introduction: Martin Wight and the study of international relations', in Wight, *Systems of States*, p. 11-14; Brian Porter, 'The International Political Thought of Martin Wight', *International Affairs*, 83 (4) July 2007, p. 783-789

⁹¹ See for example Oscar Schachter, 'Dag Hammarskjöld and the Relation of Law to Politics', 56 *American Journal of International Law* 1962, p 2-5; see also Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge, Cambridge University Press: 2011), p. 9-13

⁹² Dag Hammarskjöld, 'Interview with UN Press Corps', 1958

reason has once accepted, in spite of your changing moods”.⁹³ In the second instance, faith refers to a type of practical orientation, “trying [to obey] in a new way, a less worried way”.⁹⁴ Lewis argues that faith in this second sense only arises after man has “discovered his bankruptcy” through trying – and failing – to act virtuously. This is to see faith as a habitual and continuous practice of believing, a willingness to set aside doubt and act from a sense of certainty, even while acknowledging the intellectual lack of certainty. Within the Augustinian tradition this cashes out in an attempt to redefine the public domain. As Rowan Williams argues, the crucial opposition here ‘is not between public and private, church and world, but between political virtue and political vice.’⁹⁵

A number of recent arguments have pointed towards the need to rehabilitate the concept of faith in order to respond to a sceptical, pragmatic disposition institutionalised in modern life. Terry Eagleton provides one recent argument for rehabilitating this concept of faith. He argues that the Christian account of faith is rooted in a larger belief that ‘the very frailty of the human can become a redemptive power’.⁹⁶ In this sense faith speaks to a disposition that goes beyond the institution of the Church; it speaks to a more fundamental force in human social and political life. The specific idea of faith in the law, or faith in the Rule of Law, is evocatively described by Cameron Stewart as ‘the Tinkerbelle effect’. According to Barrie’s tale, fairies cannot exist unless we both believe in them, and act on this belief (“‘If you believe in fairies’ he shouted to them, ‘clap your hands; don’t let Tink die’”), and continue to believe. Stewart argues that something similar is going on with the rule of law, which is in many respects an imaginary idea, derived from a liberal conception of law. But this doesn’t undermine the rule of law’s importance; instead, the ideological foundations of the rule of law suggest that it is vitally important to continually express belief in this ideal, to act on this belief in spite of any scepticism we might have about the foundations for this belief. Stephen Hopgood similarly argues that a sense of the ‘sacred’ can justify a claim to authority – a claim capable of mobilizing international action even where ‘there is simply no prior agreement on what the “good” constitutes.’⁹⁷ Making sense of human rights practice as a non-utopia idea requires connecting with this sense of the sacred.

⁹³ C.S. Lewis, *Mere Christianity* (New York, Harper Collins: 2001), p. 140

⁹⁴ Ibid.

⁹⁵ Rowan Williams, ‘Politics and the Soul: A Reading of the City of God’, *Milntown Studies* 19 (20) 1987, 55-72, at 58, quoted in Smith, ‘The glory and Tragedy of politics’, p. 204

⁹⁶ Terry Eagleton, *Reason, Faith, and Revolution: Reflections on the God Debate*, 2009, p. 48; see also Steven D. Smith, *The Disenchantment of Secular Discourse*, Harvard University Press: 2010

⁹⁷ Stephen Hopgood, ‘Moral Authority, Modernity and the Politics of the Sacred’, *European Journal of International Relations*, 15 (2), June 2009, p. 230

Michael Barnett ends his history of humanitarianism with the observation about the crucial willingness of actors to keep faith with the value of humanitarianism despite the ambiguity of humanitarian practice.⁹⁸ Jeremy Waldron has also recently pointed to the relevance of the theological ethic for international law,⁹⁹ while Mary Ellen O’Connell has pointed to the importance of a ‘belief in higher things’¹⁰⁰ in order to justify international law’s authority.

What I have tried to do here is to provide a way to think of faith in international legality as a responsible practice, a practice which could justify the decision to ignore pragmatic efforts to paint a posture of legality in conditions of uncertainty as a fundamentally mistaken practice, part of a tragic narrative, part of a refusal to respond realistically, prudentially, *politically* to the ambiguity occasioned by the commitment to legality.

Conclusion: Faith and the practice of constitutional responsibility

This chapter has attempted to show how the terms of legality have traditionally demanded a much wider dialogue about the basis for faith in the institutional order. I argued that making sense of the constitutionalist perspective as a reasonable, responsible ethic to adopt in the circumstances of international society requires understanding the justificatory function that faith plays. Most importantly, locating constitutionalism as a practice of faith in the legal order establishes a means by which to answer the pragmatist scepticism about acting in the absence of evidence for international law’s constitutional authority. In the remainder of this thesis I argue that this faithful disposition – and the constructive, constitutional potential it presents – has provided the degree of institutional certainty needed to justify international practices designed to advance international law’s constitutional authority, and to counter pragmatic attempts to limit international law’s authority by appealing to the uncertainty surrounding the application of international law. In this I hope to show that constitutionalism should not be judged on whether it can successfully bring the unbelievers

⁹⁸ Michael Barnett, *Empire of Humanity: A history of humanitarianism*, Cornell University Press: 2011, p. 238; see also Michael Barnett, ‘Building a republican peace: stabilizing states after war’, *International Security* 30 (4) Spring 2006, 87–112

⁹⁹ Jeremy Waldron, ‘A Religious View of the Foundations of International Law’, 2011, available at: web.princeton.edu/sites/jmadison/.../2011%200323%20Waldron.pdf [it is interesting to note that his arguments here were formed as part of a working group at the Centre for Theological Inquiry, paralleling the genesis of Butterfield’s ideas, and motivated by the questions or concerns to emerge during the torture debates (again paralleling how the debates about the use of nuclear weapons motivated Butterfield)]

¹⁰⁰ Mary Ellen O’Connell, *The Power and Purpose of International Law: Insights from the theory and practice of enforcement* (Oxford University Press, New York, 2008), 5

on board, but on whether it can establish a degree of certainty among the actors with the responsibility to develop international law to meet new threats, new challenges, new changes.

The focus up to this point has been on the theoretical debate surrounding international law's claim to constitutional authority. In the next section, I show how these debates have begun to structure the practice and politics of international law. But I also highlight how constitutional authority has begun to emerge as a result of institutionalising an ethic of public, communal responsibility, itself guided by a commitment to remedy the conceptual uncertainty surrounding the terms of international law's rule.

Part II

Constitutional Responsibility in Practice

Up to this point the focus of this thesis has been on showing how the pragmatic and constitutional mindsets establish competing understandings of the ethic of responsibility which follows from the commitment to international legality. I have argued that the precise terms of the ethic of responsibility generated by a commitment to international legality relies on the normative effect granted to institutional uncertainty.

In the chapters which follow, I develop this account of the constitutional politics of international law using four domains in which the authority of international law can be seen as uncertain. The following chapters are tied to four challenges the pragmatist makes to the possibility that constitutionalism could function as a responsible practice in the uncertain circumstances of international society. First, enforcement has been a traditional point of scepticism about international law. This in itself doesn't disable the possibility that enforcement could develop into a constitutional practice. The challenge comes from the pragmatic argument that enforcement is a necessarily political act, and that this establishes international law as necessarily contingent on state power. Second, international law's capacity to claim constitutional authority is, the pragmatist argues, undermined by the uncertain basis for its claim to legitimacy. Promoting the rule of international law over the rule of domestic constitutional law is an irresponsible practice given that it unsettles the state's traditional claim to constitutional independence and that this mindset can be used to foster an imperialistic politics. Third, even where international law establishes a formally absolute obligation – an obligation that, from the constitutionalist perspective, should clearly function as a constitutional rule – the uncertain interpretive rules and roles of international law gives states the authority to challenge the absolute status of these rules. Finally, where international law is ambiguous the pragmatist argues that this undermines the coherence of the responsibility owed to international law and justifies introducing alternative political and ethical frames to the interpretive process. By showing how practitioners have in practice been able to meet these challenges by adopting a constitutionalist mindset, the aim is to show that constitutionalism can give rise to the sense of responsibility needed to respond to the pragmatic perspective.

Chapter 4

Commanding the Commons: Constitutional Enforcement and the Law of the Sea

The UN Convention on the Law of the Sea (UNCLOS) has, since before its inception, been widely regarded as a ‘constitution for the oceans’.¹ The obligations the treaty sets out are structured by the challenge of effecting genuine oversight over activities in the ocean domain, the challenge of governing the global commons. Most importantly, it implies a change to the free seas principle which establishes a presumption in favour of open and unrestricted rights of access and limits on enforcement jurisdiction. But at the same time as heralding a potential revolution in the law of the sea, its claim to constitutional authority is far from settled. The practical difficulty of enforcing the rules in this geographically expansive domain gives one especially forceful reason for rejecting the claim that the oceans are now constitutionally governed. The weakness of enforcement becomes part of the pragmatic arguments for understanding the rules as, in practice, reliant on political persuasion in order to claim authority.²

The pragmatic position is that international law’s ‘hard’ ability to effect compliance as a key determinant of – and limitation on – its ability to claim constitutional authority in international society. International law may set out the rules for what is expected of actors, but it lacks a sufficiently rigorous mechanism for sanctioning those failing to live up to their responsibilities. This lack of a law-enforcing capacity is enough to introduce serious doubts about the independent, constitutional force of international law.³ Debates about the constitutional nature of the law of the sea provide a useful touchstone for evaluating the broader issue of enforcement as a specific practice of global constitutionalism because of the strong customary presumption about the limits on enforcement embedded in the free seas principle.⁴ Understanding how UNCLOS, a particularly comprehensive legal regime, struggled to generate the constitutional authority necessary to challenge this traditional,

¹ Shirley V Scott, ‘The LOS Convention as a Constitutional Regime for the Oceans’ in AG Oude Elferink (ed), *Stability and Change in the Law of the Sea: the role of the LOS Convention* (Martinus Nijhoff Publishers, 2005) 12; UNCLOS was the product of 9 years of negotiation, concluded in 1982, with the treaty taking effect in November 1994 (once the required 60 ratifications were reached). It is worth noting that the US has not yet ratified it, but does recognise a majority of the obligations as part of customary international law.

² See especially John Vogler, ‘Global Commons Revisited’ (2012) 3 *Global Policy* 1, 69.

³ See especially Eric Posner, *The Perils of Global Legalism* (University of Chicago Press, Chicago, 2009).

⁴ These issues have also been explored in relation to a number of other legal regimes; see especially Dunoff and Trachtmann (eds), *Ruling the World? Constitutionalization, International Law and Global Governance* (Cambridge University Press, Cambridge, 2009).

pragmatist presumption – and how adopting a principled approach to constitutionalism has finally begun to establish a basis for constitutional rule – will help to show how constitutionalism can get traction against an established pragmatist ethic.

The argument advanced here is, ultimately, that the pragmatic conception of enforcement fails to account for the special nature of enforcement in a constitutional order, which is to both reflect, determine and delegate *public* responsibilities. Analysed in these terms, the law of the sea framework is able to exert a much greater – although by no means perfect – claim to “command the commons” than the pragmatic account implies. International law in this domain helps to structure the delegation of responsibilities by and to a wide range of actors, and in so doing provides institutional support for the constitutionalist ethic of legality. The first section sets out the pragmatic conception of enforcement, which uses the weakness of the current enforcement regime as a reason to doubt international law’s capacity to claim constitutional-type authority. The second section challenges this perception, arguing that focusing on the weakness of the enforcement regime – especially the measures available to effect compliance – is a mistake. This is because the practice of constitutional enforcement isn’t concerned with compliance as much as with the institutional capacity to delegate special responsibilities. The final sections apply this to the constitutional rules contained in the law of the sea. The practice of constitutional responsibility in this domain has traditionally been tied to a presumption in favour of the free seas, which undermines international law’s claim to constitutional authority. But the principled shift which has seen the law of the sea increasingly framed as an aspect of global commons law has enabled and expanded the institutional scope for constitutional enforcement.

Anti-Constitutional Enforcement

There are a wider range of enforcement mechanisms available to international law than have traditionally been recognised by the pragmatist. But on the face of it, they do seem to have a point about the role these practices play in constructing or reflecting international law’s constitutional authority. The traditional pragmatic argument for denying the constitutional authority of international law is that so many international legal obligations seem so patently

unenforced and unenforceable.⁵ The suspicion is that lacking a credible enforcement regime international law can only have a formal type of authority, certainly not the kind of overweening social authority typically associated with a constitutional legal order.⁶ As Thomas Franck classically put it, ‘the international system is organized in a voluntarist fashion, supported by so little coercive authority.’⁷ Scepticism about the structural lack of coercive authority undergirds an assumption that the limited enforcement mechanisms available in the international order which do exist are of limited use in explaining international law’s authority. This cashes out in the belief that the authority of international law can only be persuasive, certainly not anything like the binding commands typically associated with obligations in a domestic constitutional order.

This essentially persuasive character of international law becomes the source for a more general assertion that ‘ownership’ of the international legal order rests with political actors. These circumstances limit the constitutional effect enforcement practices can have on the authority of international law.⁸ The basis of this claim is that enforcement powers do exist, but they are either not used, or are used in a way that undermines international law’s claim to constitutional authority. For instance, universal jurisdiction provides states with the most sweeping of enforcement powers. But in one study looking at those clear cases of piracy over which states could have exercised universal jurisdiction to enforce the law shows that between 1998 and 2009 only 1.47% of cases were prosecuted.⁹ A marginal figure by any measure. Other more highly institutionalized attempts at enforcement attract the same sort of concerns. The raft of institutional mechanisms now dedicated to enforcing international criminal law suggests the difficulty with attributing a constitutional effect to international enforcement practices. Critical voices point to the various ways in which, despite the degree of institutionalisation, the actual process of enforcing international criminal law and successfully bringing individuals to justice remains contingent on the exercise of political

⁵ See Posner, *Perils*, 2009; also Michael J. Glennon, *The Fog of Law: Pragmatism, Security and International Law* (Woodrow Wilson Centre Press, Washington, D.C. and Stanford University Press, Stanford, 2010); for a detailed overview of the sceptical arguments, see O’Connell, *Power and Purpose*

⁶ Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (5th edn, Oxford University Press, Oxford, 2004)

⁷ Thomas Franck, ‘Legitimacy in the International System’ 82 *American Journal of International Law* (1988) 705; for a different starting point see J Goldsmith and D Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’ (2009) 122 *Harvard Law Review* 1791

⁸ On the link between international authority and the claims to ‘ownership’ of international law, see especially Kenneth Anderson, ‘The Rise of International Criminal Law: intended and unintended consequences’, (2011) 20 *European Journal of International Law* 331-358

⁹ Steven Art and Eugene Kontorovich, ‘Agora: Piracy Prosecutions: An Empirical Examination of Universal Jurisdiction for Piracy’ (July 2010) 104 *American Journal of International Law* 436.

power.¹⁰ This contingency feeds doubts about whether the existence of an institutional mechanism for enforcement should be accepted as evidence of genuine advance in the structures of international enforcement, or simply old wine in new bottles. The sceptical claim, in other words, is that even highly institutionalized enforcement practices shouldn't be taken as evidence of constitutional authority, merely as evidence of a context-limited political will for enforcement.

This grounds a much broader reason to be sceptical about the constitutional effect of international enforcement practices. One of the central challenges to claims that international represents a constitutional type of authority is that enforcement practices seemingly justified by international law are so easily co-opted to serve subjective interests. As Anthony F. Lang, Jr. argues, enforcement practices are almost always validated by those undertaking them with reference to international legal rules.¹¹ On the surface this can create the perception that more enforcement equates to a deeper constitutional order. The catch is that the international order lacks a body capable of establishing whether international legal rules are being legitimately enforced or whether the authority of international legal rules is being used as a nefarious cloak for the advancement of subjective political interests. From this perspective, for a practice of enforcement to be justified it needs to be first located as part of a wider constitutional order able to regularise and legitimate a punitive regime. What state practice shows is the gaps in such an order, and as such international law's lack of an independent, institutional power dictate the terms of constitutional order in international society.

The pragmatic worry goes even further than this, however. Because current punitive practices are of an *ad hoc* and *sui generis* character, and not the practice of a genuine constitutional order, international practices to enforce international law creates a situation where, rather than enforcement practices building up a constitutional world order characterised by the rule of law, enforcement instead retrenches a world order defined by power and power politics. Whatever the formal authority claimed by the institution of international law, the fact that the architecture of international law can't provide definitive guidance or oversight about the legitimate means, mechanisms or agents empowered to enforce its strictures attacks the idea that international law has the normative authority to

¹⁰ Gerry Simpson, *Law, War and Crime: The Politics of War Crimes Tribunals* (Polity, London, 2007); Kirsten Ainley, 'The International Criminal Court on trial' (2011) 24 *Cambridge Review of International Affairs* 309-333.

¹¹ Anthony F Lang, Jr., *Punishment, Justice and International Relations: Ethics and Order after the Cold War* (Routledge, London, 2008).

order international society. This includes validating enforcement practices as constitutional practices because, for the pragmatist, without clarity about the constitutional rules there is no basis for thinking of international law enforcement as a legitimate *constitutional* practice.

This suggestion that we might be required to discount the constitutional effect of international law enforcement even where it looks *as if* international law is being effectively enforced – because this is in reality an expression of political power, or a function of the a lack of genuine constitutionality – creates real problems for any attempt to use improvements in enforcement practices as evidence of international law’s expanded constitutional authority. It doesn’t seem to leave any room for an authoritative form of enforcement which doesn’t collapse back into a flawed or facile constitutionalism. The pragmatist’s scepticism about enforcement in this sense challenges the constitutional possibilities of international law, particularly the claim that disparate international law enforcement practices might be seen as part of a constitution building process.

Constitutional Enforcement

The constitutionalist approach generates a different conception of the responsible practice of enforcement. This is in line with the idea that institutional roles are instrumental in constructing the necessary ethic of constitutional responsibility. In this section I set out an alternative to the pragmatic conception of the link between enforcement and the justification of constitutional authority.

H.L.A. Hart provides the clearest support for conceptualizing enforcement as a process of delegating the roles and responsibilities necessary for validating the institutional authority of a legal order. This includes, importantly, an understanding of enforcement as a practice that can be constitutional even in the absence of empirical certainty regarding the constitution effect of the underlying rules. This isn’t a great surprise given Hart’s claim that the normative force of a legal order is something entirely distinct and prior to the question of whether or not the law is backed by a sanction or command. Sanctions, he argued, are necessarily the result of a normatively authoritative system of rules, not the basis for such a system.¹² The crucial reason he gives for law’s normativity being protected in practice even in the absence of a hard sanctioning mechanism is the presence of what he classically terms

¹² See especially HLA Hart (n 12) 20-25; N MacCormick (n 17) 51-52; critiquing the scholarly preoccupation with compliance with international law, see R Howse and R Teitel, ‘Beyond Compliance: Rethinking Why International Law Really Matters’ (May 2010) 1:2 *Global Policy* 127-136.

the ‘secondary rules’ of a legal order.¹³ Secondary rules of recognition, change and adjudication function as a *remedy* for the authority of the legal order, such that ‘all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system’.¹⁴ Importantly, however, secondary rules – including those enabling enforcement – are only a part of justifying the authority of the legal order. These rules are not *essential* to the concept of law on which a legal order’s claim to authority is premised. This is why Hart regards the customary basis of international law as sufficient to establish valid legal order, but as lacking the ‘full-blown’ practical authority law tends to have in the domestic context.

The answer to the pragmatic claims about the anti-constitutional effect of enforcement comes from the manner in which Hart endows primary and secondary rules with the additional function of linking the formal, internal validity of the legal order to the broader constitutional role of the legal order. The reason the union of primary and secondary rules provides evidence of the authority of the legal order is because they arise as part of a complex and deeply embedded socio-theoretical conversation about the appropriate relationship between the different normative standards available in a social order, namely the competing standards operating in law, politics and morality. As such, the division between primary and secondary rules is not only a prescriptive picture of what any valid legal system needs, but also a way of understanding how, in practice, a legal order fits into and claims authority within the wider constitutional order. This suggests that the secondary rules – or, better, *responsibilities* – play an important constitutional role in conferring, assigning or entailing rights and responsibilities of enforcement as enactors of a legal order.¹⁵

The important thing to note for purposes of understanding the institutional dimension of the practice of constitutional enforcement is that a legal order’s constitutional authority is intimately tied to the presence of “officialdom”, actors with public roles and public responsibilities to enact the law. The actual capacity of these actors to effect compliance is not the immediate point. In order to establish a claim to authority law needs to be able to inspire legality – a sense of commitment – in law’s officials. Crucially, this is not a general appeal to law’s social acceptance, but a far more targeted appeal to those

¹³ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press, Oxford, 1997).

¹⁴ *Ibid* 94.

¹⁵ See for example, H.L.A. Hart, John Gardner (introduction), *Punishment and Responsibility: Essays in the Philosophy of Law* (Second Edition, OUP, Oxford: 2008)

charged with enacting the law. Taking these actors as the target results in an institutional middle ground in which enforcement has a central role in determining constitutional authority, but at the same time has a limited role in determining the normative content of the legal order. This presents what is in effect a ratchet-like, one-directional concept of enforcement within the constitutional order: enforcement can strengthen constitutional authority but it can't weaken or undermine it, either in its absence or because of problems in its application. Constitutional law doesn't have to inspire obedience or compliance among its subjects; more important is that it a culture of legality among those charged with enacting the law.¹⁶

Analysing enforcement through the lens of the responsibilities generated by the institutional practice of legality helps answer the pragmatist's scepticism in three ways. First, focusing on institutional practice of legality highlights the fact that enforcement in the context of constitutional law is a fundamentally normative practice. Contrary to the scepticism of, for example, Jack Goldsmith and Daryl Levinson, constitutional law is not inherently divorced from sanctions and therefore lacking in authority.¹⁷ It is simply prior to sanctions in setting who has the responsibility – and can claim the authority – to enforce the law, in what circumstances, and within what limits. Second, this shifts the emphasis onto the question of whether the existing institutional mechanisms are capable of effectively delegating responsibility for enforcement. Finally, this entails that evidence for the constitutional (or anti-constitutional) quality of enforcement practices becomes a question to be answered with reference to institutional actors' perception of the authority of the constitutional principles or rules, rather than something that can be dismissed by reference to either a general scepticism about the possibility of constitutional authority or a structural claim about the incompleteness or illegitimacy of set of the existence mechanisms for enforcement. Instead of remaining mired in the *general* inadequacy or illegitimacy of existing enforcement practices, the principal emphasis rests on the functionality of a far more targeted range of institutionally allocated special responsibilities.

At the root of the pragmatist claim is the denial of constitutional agency to actors other than states. The traditional obstacle to extending this picture of constitutional enforcement to international law is that states are regarded as inhabiting the remedial roles available in the international legal order. The pragmatist can plausibly argue that because of

¹⁶ Hart talks about this in the context of the 'internal aspect' of legal conduct, *Concept of Law*, p. 56-57.

¹⁷ Goldsmith and Levinson, 'Law for States'

the prevailing pluralist structure of international law there is no pay-off from reconceptualising enforcement as a remedial practice. If states are international society's best hope for responsible agents, there is not much cause for optimism: establishing that states hold remedial responsibilities will still result in the same lack of constitutional enforcement, so long as the impact of these responsibilities is defined through a sovereigntist lens. This is to see any remedial responsibilities as ultimately failing to give effect to the supremacy required of a constitutional order. It is too strong to say that states' agency in enforcement necessarily runs against an idea of the constitutional authority of international law. Some international and regional courts or tribunals are in fact recognized as exercising quite a thick standard of authority over states. But because this enforcement still tends to be channelled through – and limited by – both the domestic constitutional order and the pressures to advance subjective state interests, it is difficult to attribute pre-eminent or supreme type of authority to the international legal order, of the sort that marks out constitutional law.¹⁸

One way of broadening out this question of agency is simply to deny that the involvement of states in the enforcement of international law does serve to undermine the constitutional authority of international law. Mary Ellen O'Connell suggests exactly this in showing how international law has developed an extensive institutional capacity for enforcement independent of state practice.¹⁹ International law's enforcement mechanisms are evidenced by the way international law been used by states to justify and structure the application of armed measures, countermeasures and judicial measures where there has been a failure to comply with international law. These have both unilateral and collective roots in the international order but, crucially, are governed and ultimately legitimated by the strength and coherence of the underlying customary principles and an overarching commitment to the law's authority. O'Connell argues that this commitment is justified by the fact that 'we fundamentally accept the binding power of international law for the same reason we accept all law as binding. Our acceptance of law is part of a tradition of belief in higher things.'²⁰ This isn't to suggest that these enforcement mechanisms are always used correctly, or are used as systematically as they could be, but it provides an answer to the sceptical claim that international law suffers from a structural lack of enforcement authority.

¹⁸ See for example Anne Peters, 'Supremacy Lost: International Law meets domestic Constitutional Law' (2009) 3 *Vienna Online Journal on International Constitutional Law* 170-198.

¹⁹ See O'Connell, *Power and Purpose*.

²⁰ *Ibid*, p. 16.

These are not isolated arguments. In a different conceptual key but to similar ends, Robert Scott and Paul Stephan point to how what they call a ‘modern view’ of enforcement opens up the field of those who could and should be considered responsible agents of international law enforcement, independent holders of remedial obligations.²¹ They argue that enforcement in international law encompasses both formal and informal mechanisms, and that there is nothing to prevent this potentially disparate set of enforcement practices being regarded as a comprehensive enforcement regime for international law. As they put it, once the pre-conception of what an enforcement mechanism looks like is broadened out it ‘allows private enforcement, employs independent tribunals and courts to do the enforcing, and empowers those tribunals and courts to wield the same array of tools that domestic courts traditionally use to compel compliance with their decisions.’²² Writing to explain the specific nature of the enforcement of erga omnes obligations, Christian Tams similarly focuses attention away from the regime-specific mechanisms of enforcement, arguing that the informal, decentralized processes of enforcement are crucial to the protecting and development of the authority claimed by these rules.²³ At risk of labouring the point, Alan Boyle and Christine Chinkin also make similar claims, bundling the remedial practices of international law into the notion of ‘soft law’.²⁴ The point is that a wide range of the literature on international law in recent years – see for instance the various arguments for “new international institutional law”, “soft law”, and “global administrative law” – understands there to be remedial processes or mechanisms supplementing the formal architecture of international law. It is no longer a justified presumption that international law’s enforcement capacity revolves solely around a state’s structurally privileged position in the international legal order.

Understanding enforcement as an institutional capacity to exercise remedial powers challenges the notion of international enforcement having an anti-constitutional effect. In contrast to the sceptical conception of enforcement, my suggestion in this section was that the currency of enforcement is the institutional capacity of the legal order to delegate responsibilities rather than to effect compliance with specific rules. It follows that the type of evidence to look for in assessing constitutional authority isn’t the practical mechanisms

²¹ Robert E Scott and Paul B Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (Cambridge University Press, Cambridge, 2006).

²² Ibid, p 3.

²³ Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, Cambridge, 2005).

²⁴ Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, Oxford, 2007).

for policing compliance with international legal rules but the institutional mechanisms for allocating special responsibilities to enact international law. The crucial measure of enforcement is the institutional capacity to effectively delegate responsibilities, and by doing so to shape the normative order governing international society.

Constitutional Enforcement in the Free Seas

The ‘high seas’ is a legal term describing an area covering roughly 50% of the planet.²⁵ The high seas are a transit to profit, carrying an estimated 90% of global commerce,²⁶ and a source of profit in their own right, with natural resources to be exploited on, in and under the sea. The term has historically been synonymous with the idea of the ‘free seas’, the designation of an open-access area immune from appropriation or legitimate command by any one state. This principle and accompanying customary international law establishes constitutional obligations but of limited scope, essentially protecting open access and freedom of movement; with remedial obligations limited to those of *self*-policing. As Hugo Grotius argued, any thicker rules of enforcement aren’t appropriate to this jurisdiction because no effective oversight could possibly be exercised. The high seas, he thought, are simply too big a domain for there to be any realistic hope of positive legal obligations being enforced. The only possibility left by the scale of the governance challenge is to embrace this as a domain of subjective right rather than objective duty. On this conception, freedom of the seas does not designate either a lack of constitutionality or a lack of enforcement, simply a self-policing governance regime characterized by negative responsibilities and freedoms – obligations not to act or to refrain from acting in a certain way – rather than positive responsibilities or freedoms – obligations to actively protect or promote the rules.²⁷ The constitutional rules are set here by reference to this presumption in favour of the free seas.

Although the concept of the free seas and the associated laissez-faire governance regime is now firmly entrenched in customary international law, it has not always been uncontested. In particular it needs to be remembered that the context for Grotius’ argument

²⁵ See Global Governance Monitor: Oceans, Council on Foreign Relations, 9 December 2010, available at <<http://www.cfr.org/climate-change/global-governance-monitor/p18985#/Oceans/Issue%20Brief/>> accessed 10 January 2012.

²⁶ See <www.marisec.org/shippingfacts/keyfacts>, accessed 10 January 2012.

²⁷ In this regard, see Robert Keohane and Joseph Nye, *Power and Interdependence: World Politics in Transition* (3rd edn, Longman, New York, 2001); [they argue that the essential freedoms on which law of the sea is built provides a perfect analogy with the ordinary anarchical structure of international society, in which the essentially freedoms of sovereign statehood drive all other efforts at global governance].

that the seas were essentially free, a *mare liberum*, was to provide a legal justification for the hotly contested practice of Dutch privateerism, notably Jacob van Heemskerck's 1603 seizure of the Portuguese ship the *Santa Catarina*. In other words, Grotius wrote to provide a legal justification for fighting Spanish, Portuguese and, later, British claims to ownership - and by extension the rights of trade and access - of certain maritime domains by arguing that no-one could own the sea and, therefore, private actors were well within their rights to seize whatever they could. William Welwod and, later, John Selden opposed this, in support of British naval and colonial ambitions. As the title to Selden's work suggested, the nub of the argument was that the seas were subject to the same appropriation as land-based territory was, and that as a result the ocean space was a *mare clausum*, a closed sea which could be and historically had been effectively appropriated and occupied through naval power.

The scale of these issues has been resolved to some extent by slimming the legal area designated as 'high seas' and extending the reach of state's sovereign jurisdiction. Originally this was determined by the three mile rule - the high seas began at the limits of cannon shot; certainly a visible manifestation of the how freedom of the seas began at the limits of states' enforcement ability. This became a 12 mile rule. And this in turn has been expanded through the UN Convention on the Law of the Sea (UNCLOS), which introduces an Exclusive Economic Zone (EEZ) which extends 200 nautical miles beyond a state's territorial sea and creates thicker rights and responsibilities than those within the high seas domain. Although states don't have legal 'ownership' of this area, they do have exclusive rights of access and use of this area - for example for fishing, or natural resource extraction. In the majority of cases these special rights create the conditions of de facto ownership. Correspondingly, it creates special responsibilities within this zone that narrow the (positive) enforcement gap in the law of the sea, although even here there are limits to how general this legal claim is.²⁸ The important point though is that this 200 nautical mile geographical expansion of state jurisdiction, as with the earlier iterations, only really tinkers with the enforcement regime suggested by the free seas framework. It's a regulatory drop in the governance ocean, you might say.

²⁸ Namely, these special rights do not grant a general legal claim to command and control of this zone. Where this difference becomes particularly pertinent is in determining the responsibilities operative within this zone. A state's claim to *economic* jurisdiction over the EEZ has no direct relevance to limiting the jurisdiction other states are able to exert in protecting maritime peace and security; for example, the rights and responsibilities states and other actors have to combat piracy on the high seas are also held within the EEZ; this has been important for establishing rights of third party interdiction within a state's EEZ, but its most far-reaching effect has been in establishing the scope of international environmental law.

But the constitutional significance of this regime goes far beyond the establishment of the EEZ. UNCLOS potentially challenges the prevailing constitutional presumption in favour of the freedom of the seas. Replacing the narrow presumption that this domain is an area beyond effective juridical control is the attempt to establish the law of the sea as a comprehensive, unified framework which could effectively govern this domain. It would do this by bringing together the various overlapping regimes and treaties dealing with issues arising in this domain, aiming to systematize the relationship between the efforts to tackle specific regulatory challenges. The complexity of this field of governance is reflected in the issues covered, ranging from classical concerns with the delimitation of sovereign jurisdiction, piracy and high seas enforcement, to more modern concerns with the regulation of ships, environmental protection, and the right to national resources on, in and under the sea. It was in this light that Tommy Koh – who presided over the conference at which UNCLOS was adopted – hailed the framework as a ‘constitution for the oceans’.²⁹ In this respect the “constitutionality” of UNCLOS is contained in the claim to provide a comprehensive, general and authoritative framework with the capacity to detail the appropriate rules for action on the oceans.³⁰ All three of these aspects of constitutionality are contained in the claim that the rules systematized in UNCLOS reflect, for the most part, customary international law. The implication of this is that to the extent that UNCLOS embodies customary rules the enforcement regime it creates can claim the legitimate authority to direct the future development of law and governance in the this area.³¹

The root scepticism is that this framework lacks the practical force necessary to generate a genuine claim to constitutional authority. Crucially, regardless of the customary basis of the core obligations, the regime lacks the important constitutional hallmark of supremacy.³² Although this can be regarded as merely one black mark (albeit an important one) against an otherwise complete set of constitutional features, the lack of supremacy carries rather a lot of weight when it comes to assessing the constitutional character of a regime. As Dan Bodansky argues, this is because there is an important distinction between a

²⁹ Tommy T B Koh, ‘A Constitution for the Oceans’, Remarks by Tommy T B Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea (see <http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf>, accessed 25 January 2012), xxxvii.

³⁰ See Bernard H Oxman, ‘The Rule of Law and the United Nations Convention on the Law of the Sea’ (1996) 7 *European Journal of International Law* 353-371

³¹ See for example A von Bogdandy, R Wolfrum, J von Bernstorff, P Dann and M Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, Heidelberg, 2010)

³² See Scott, ‘The LOS Convention as a Constitutional Regime’

governance regime possessing constitutional *features*, and the description of a set of rules as a constitutional *order*.³³ That UNCLOS systematizes customary international law in this domain only begs the additional question of the nature of customary international law's claim to authority. Establishing a legitimate claim to pre-eminent or supreme authority is key to whether a legal regime can be understood as establishing constitutional order, both within the specific domain governed by law and as a part of a wider global constitutionalism in which principles specific to this regime reflect and strengthen more general principles of global public order. If UNCLOS lacks a mechanism for establishing pre-emptive authority over states, however, any claim to constitutional authority is, to use Jeffrey Dunoff's term, a mere 'constitutional conceit'.³⁴

The interesting feature of this as far international law's claim to constitutional authority goes is that evidence for the absence of constitutional authority hangs on scepticism about the viability of enforcement practices in the global ocean commons. Despite the regulatory advances, including the presence of international bodies empowered to settle disputes, the suggestion is that very little has changed in practice since the golden days of privateerism which formed the backdrop for the debate between Grotius and Selden. As William Langewische argues in *The Outlaw Sea: A World of Freedom, Chaos and Crime*, despite the rhetoric and regulation suggesting otherwise, the high seas are still 'free' in the most anarchic sense of the word; this is an area beyond authority, outside the effective reach of law.³⁵ Langewische highlights how efforts to bring high seas actors under state and international jurisdiction have been stymied by the continued reliance on regulation through *negative* responsibilities, by the presumption of free and open access, and by the fact that what regulation there is 'lacks teeth', particularly in the continued reliance on the flag state regime as the key enforcement mechanism. The structure is premised on the good-faith commitment of the various actors in this domain to refrain from violating the rules, rather than any threat of punishment or sanction for having violated the rules. Regulation aside, this is still an essentially lawless domain governed by private rather than public mechanisms enforcement.

³³ Dan Bodansky, 'Is there an international environmental constitution?' (Summer 2009) 16 *Indiana Journal of Global Legal Studies*, 571.

³⁴ Jeffrey Dunoff, 'Constitutional Conceits: The WTO's Constitution and the Discipline of International Law' (2006) 17 *European Journal of International Law* 647–675.

³⁵ William Langewische, *The Outlaw Sea: A World of Freedom, Chaos and Crime* (Granta Books, London, 2004).

The continuing operation of the flag-state regime³⁶ is a paradigm example of how the legacy of self-policing undermines the plausibility of UNCLOS representing an extant ‘constitution for the oceans’. The flag state regime essentially extends sovereign territoriality into the high seas by granting states jurisdiction – hence enforcement powers – over ships flying their flag. On the surface this seems to delegate responsibilities in line with a practice of constitutional enforcement. The problem is that the standards of enforcement among the flag states vary widely, particularly in the ‘genuine link’ they require from a vessel in order to be registered as a flag ship, and the level of oversight they exercise once registration has occurred.³⁷ Because the flag state regime is a sizeable source of income for some states ship owners have been able to leverage their market position into loose regulations and few responsibilities; it’s a buyer’s market. In a reflection of why self-policing doesn’t work, and how “flags of convenience” have dominated the market, over 40% of vessels now fly the flags of either Panama, Liberia or the Marshall Islands.³⁸ This genuine link test looks rather stretched when you consider that taken together these countries represent roughly 0.1% of the world’s population. But the income from this business is substantial, meaning that states tend to treat ships flagged under their registry as clients rather than subjects. The end result of this marketization has been to make re-flagging ships an easy, penalty-free way to dodge regulatory oversight. Liberia provides one illustration of the weak interest some states will have in more proactively fulfilling their enforcement responsibilities under the flag-state mechanism. During the Liberian civil wars, where international sanctions restricted legitimate sources of state income, the Liberian Ship Registry accounted for some 70% of government income.³⁹ With other flag states there is an even more direct challenge to global enforcement practices. North Korean and Cambodian flagged vessels, for instance, are known to engage in illicit trafficking of drugs, people and weapons, with the presumption of flag state jurisdiction restricting efforts to interdict and enforce prohibitions on transnational crime.⁴⁰

Port states and coast guards are in a position to pick up some of the slack this creates in the global enforcement regime. Port states can use their role as the gatekeepers to

³⁶ See UNCLOS Article 94.

³⁷ AGO Elferink, ‘The Genuine Link Concept: Time for a post-mortem?’ in IF Dekker and HHG Post (eds), *On the Foundations and Sources of International Law* (T.M.C. Asser Press, The Hague, 2003) 41.

³⁸ ‘Structure and ownership of the world fleet’, *Review of Maritime Transport 2009*, Report by the UNCTAD Secretariat (New York and Geneva, 2009), 36; available at http://www.unctad.org/en/docs/rmt2009_en.pdf.

³⁹ See <http://www.globalsecurity.org/military/world/liberia/registry.htm>, accessed 12 January 2012.

⁴⁰ D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, Cambridge, 2009).

large and lucrative markets to demand repairs or issue fines for non-compliance with international standards. But port states are also in competition with each other, and there are few benefits from exercising anything but the most formal oversight; it is far easier simply to refuse entry rather than risk tying up dock space with a sick or unseaworthy ship.⁴¹ Similarly, the coast guard has interdiction powers if a ship is suspected of illicit trafficking once a ship has entered territorial waters and regardless of the flag it flies. A network of bilateral treaties in which some states have ceded jurisdiction powers for the purposes of enforcement to other states – notably the US – who are regarded as better placed to exercise these enforcement powers extends enforcement authority beyond territorial waters. This is complemented by some multilateral enforcement regimes, both to prevent drug trafficking but also to police compliance with obligations relating to fishing stocks, weapons of mass destruction, and migration.⁴² But the enforcement regime this creates is far from universal, reliant in the first place the flag state’s willingness to cede such interdiction powers, on the strength of the treaty regime, and on the strategic interests powerful states have in policing the oceans or commanding the commons.⁴³

There are some exceptions to the limitations on enforcement imposed by the flag states regime. There is a universal right to inspect ships suspected of piracy, slavery, unauthorized broadcasting or lacking a nationality.⁴⁴ This is certainly not an extensive range of issues but, even so, the enforcement regime fails to create positive responsibilities of enforcement, promising much more enforcement capacity than it delivers in practice. The difficulty of responding to piracy in the Gulf of Aden is one example of how the general and non-specific nature of the interdiction regime has resolutely failed to translate into a practice of constitutional enforcement.⁴⁵ Reflecting this, those states engaged in counter-piracy operations off the coast of Somalia (and now within Somalia) have resolutely rejected suggestions that this is anything but a short term operation. To this end, counter-piracy enforcement practices have been structured in such a way as to avoid any link to

⁴¹ Langewische (n 37) notes how port-state officials mirror national stereotypes in their strategies for avoiding the full extent of their oversight responsibilities. On a more serious note, he recounts a story of a ship’s captain begging the port official to find his ship in violation of international safety standards, pointing out the many violations himself, in order to force the owner to pay for necessary repairs, all to no avail.

⁴² For a good analysis of the range of problems here, see the discussion surrounding the Proliferation Security Initiative in Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge, Cambridge University Press: 2009) and Michael Byers, ‘Policing the High Seas: The Proliferation Security Initiative’, *AJIL* 2004

⁴³ See Guilfoyle, *Shipping Interdiction*; Michael Byers, ‘Policing the High Seas: The Proliferation Security Initiative’ (2004) *American Journal of International Law*; Barry R Posen, ‘Command of the Commons: The Military Foundation of U.S. Hegemony’ (2003) 28 *International Security* 5-46

⁴⁴ See UNCLOS Art. 110.

⁴⁵ See especially Art and Kontorovich, ‘Piracy Prosecutions’.

generalizable constitutional responsibilities of enforcement, either for the naval forces involved in policing the seas or as a judicial matter in terms of establishing a responsibility to try captured pirates.

Although piracy and trafficking have, for good reasons, generated the headlines in this area, in terms of international law's constitutional authority the greatest challenge is from ordinary, everyday practices of legal oversight. It is the everyday nature of the failings here that does most to feed the perception that this is an unconstitutional legal order defined by sovereign exceptionalism and private 'plunder'. In one memorable story used to illustrate the essential lawlessness of this domain, Langewische recounts how the family of one victim – Dianne Brimble – has faced an eight year battle for justice, despite the presence of chilling photographic evidence showing her being raped while unconscious, by multiple men, the same men in who's cabin she was later found dead in.⁴⁶ Rather than questioning those involved when the ship docked, her body was removed, the men were allowed access to their cabin, the ship continued on its journey, and the criminal investigation that would normally have happened as a matter of course was never begun in earnest. Public pressure has now resulted in criminal proceedings against some of these men, but the point to take away here is that this is an extreme but not an exceptional case. Deaths on cruise ships often go down as accidents, suicides or disappearances; prosecutions for crime at sea are rare, partly as a result of investigative responsibilities falling on the cruise companies rather than on any public authority. The ordinary default mindset of states is that they are not positively responsible for law enforcement on the high seas. This is a domain where self-regulation is the norm.

This same fall-back tendency of states to think that their legal responsibilities don't extend to the high seas is part of a more pernicious practice of states using the perceived weakness of their enforcement responsibilities in this domain as a way to contract around international human rights obligations. This mindset is most evident in the detention of 'boat people' on Christmas Island, in which the ordinary human rights of migrants and refugees are seen as inoperative because these individuals are still in a technical legal sense 'at sea'. There are signs too of the Australian approach – the 'Pacific Island Solution'⁴⁷ – being considered elsewhere, for example in Canada where the arrival of 492 Tamil refugees

⁴⁶ For a detailed account see <<http://www.themonthly.com.au/monthly-essays-malcolm-knox-cruising-life-and-death-high-seas-281>>, accessed 17 January 2012.

⁴⁷ Susan Kneebone, 'The pacific plan: the promise of "effective protection"?' (2006) 18 *International Journal of Refugee Law* 696-721.

on the *MV Sun Sea* was met by calls from some quarters to install a refugee holding ship outside of Canada's territorial waters; hence, to hold them on the high seas beyond the sphere of Canada's human rights and refugee obligations. These proposals highlight the perception that the high seas legal regime doesn't just lack an enforcement regime but actively neuters the positive responsibilities arising in overlapping areas of international law. And the principles endangered aren't marginal; the specific challenge is to the peremptory principle of *non-refoulement*.⁴⁸ In an extension of this, positive responsibilities of rescue are increasingly contracted out to states with far less compunction about adhering to their international legal obligations, in much the same way that the judicial responsibilities accrued during counter-piracy action are passed on to institutionally weak states.⁴⁹ As Thomas Gammeltoft-Hansen and Tanja Aalberts persuasively argue, the tragedy of this domain is that 'the "drowning migrant" finds herself subject to an increasingly complex field of governance, in which participating states may successfully barter off and deconstruct responsibilities by reference to traditional norms of sovereignty and international law. Thus, rather than simply a space of non-sovereignty *per se*, the *Mare Liberum* becomes the venue for a range of competing claims and disclaims to sovereignty'.⁵⁰

All of this points to how the perception of international law's limited institutional capacity for enforcement bolsters sceptical arguments regarding international law's constitutional authority. The various practices undertaken and sustained with reference to the law of the sea shows how gaps in the enforcement regime creates and sustains scepticism about the constitutional authority of the wider legal order. It may be a comprehensive regime on paper, in formal terms decisively shifting the terms of governance away from a presumption in favour of the free seas, but there is little respect for the constitutionality of these rules in practice. The lack of 'hard' enforcement mechanisms and the reliance on a process of self-policing create a sense, at least among the subjects of this legal order, that this is, at best, a regulatory regime imposing few actionable enforcement

⁴⁸ See Guy Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*' (2011) 23 *International Journal of Refugee Law* 443-457; S Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection', (2008) 12 *Max Planck Yearbook of United Nations Law* 205-246.

⁴⁹ See Amnesty International, 'Seeking safety, finding fear: Refugees, asylum-seekers and migrants in Libya and Malta', 14 December 2010, available at < <http://www.amnesty.org/en/news-and-updates/report/libya-and-malta-failing-refugees-asylum-seekers-and-migrants-2010-12-14>>, last accessed 15 December 2011; see also Gregor Noll and M Giuffr , 'EU Immigration Control made by Gaddafi?', February 2011, available at <<http://www.opendemocracy.net/gregor-noll-mariagiulia-giuffr %C3%A9/eu-migration-control-made-by-gaddafi>>, accessed 15 December 2011.

⁵⁰ Thomas Gammeltoft-Hansen and Tanya Aalberts, 'Sovereignty at Sea: The law and politics of saving lives in the *Mare Liberum*' (2010) *DIIS Working Paper* 18, 8.

obligations, appealing instead to a weak, non-justiciable sense of responsibility. And where states do support enforcement measures – for example against ‘boat people’ – this is part of a strategy to declaim more onerous responsibilities, rather than to give constitutional effect to the law of the sea. There is, in other words, plenty of available evidence for the fact that international law in this domain lacks constitutional authority, at least as long as the appropriate measure of constitutional authority or supremacy is tied to a general capacity to get states to comply with their enforcement responsibilities.

Constitutional Enforcement in the Global Commons

So far, so sceptical. In this last section, however, I want to point to ways that constitutional enforcement is being developed in this domain, specifically through the institutional delegation of enforcement responsibility. The point is to show how looking for institutional practices of responsibility delegation creates a much rounder picture of how enforcement is able to construct constitutional authority than is likely to emerge from the sceptic’s analysis.

Support for seeing the law of the sea as an example of international law’s constitutional authority comes from perception that the law of the sea is but one aspect of an emerging “global commons law”. The global commons refers to those areas that are the ‘common property of all mankind’.⁵¹ In John Vogler’s words, the global commons are ‘areas or resources that do not or cannot by their very nature fall under sovereign jurisdiction’.⁵² Susan J. Buck similarly defines the commons as ‘resource domains in which common pool resources are found’, by extension seeing international or global commons as ‘the very large resource domains that do not fall within the jurisdiction of any one country’.⁵³ This idea denotes the oceans and deep-sea bed, the atmosphere and global environment, outer space, areas of special ecological and cultural significance and, increasingly, cyberspace.⁵⁴ The governance challenge is set by the ever-present spectre of “tragedy”; as Garrett Hardin famously argued, the ‘tragedy of the commons’ is that you have an area designated either by nature or social convention as open access, hence as beyond the effective control of any one

⁵¹ Susan J Buck, *The Global Commons: An Introduction* (Island Press, Washington, D.C., 1998); Abraham M Denmark, ‘Managing the Global Commons’ (2010) 33 *The Washington Quarterly* 165-182.

⁵² John Vogler, *The Global Commons: Environmental and Technological Governance* (2nd edn, J. Wiley & Sons, Chichester, 2000), 1.

⁵³ Buck, *The Global Commons*, p 5-6.

⁵⁴ Tara Murphy, ‘Security Challenges in the 21st Century Global Commons’, (2010) 5 *Yale Journal of International Affairs* 28-43; J Vogler (n 2) 61-71.

actor or institution, designated unmanageable.⁵⁵ But at the same time, without some measure of control or cooperation to manage the (scarce) resource, the commons would over time degrade and become unusable. The tragedy here is that the open access model creates a structural lack of adequate incentives to regulatory cooperation. The promise of the global commons, providing common pool resources, also has the potential to function as a global sink, threatening independent resources.⁵⁶ Extending from Hardin's conception of the tragic is the inevitability that legal rules promising to govern the commons will fail to fulfil this function, at least as long as they protect a presumption in favour of free and open access. Here of course the 'free seas' become a paradigm example of the tragedy of the commons.

Since Hardin's pessimistic, rational-actor model, others have pointed to how common pool resources such as the high seas can be effectively governed if the "communal" nature of the domain is taken seriously. Elinor Ostrom in particular has detailed how local, non-centralized governance models provide lessons for effective commons management which can be ramped up to manage national, regional or global commons. Where common pool resources have been managed effectively it is because the governance framework acknowledged that a centralized, top-down regulatory framework was inappropriate but, crucially, where there was also an exceptionally strong sense among those at the point of enforcement regarding the responsibilities owed as part of accessing this domain. Ostrom's point is that the tragedy of the commons gives us the terms of the governance challenge, rather than pointing to the impossibility of governance itself.⁵⁷ The institutionally driven re-orientation of (some aspects of) the law of the sea as a framework for protecting either 'our common heritage' or 'our common threat' or 'our common responsibility' can be read as an effort to provide an institutional protection for this culture of responsibility, through the delegation of enforcement responsibilities.

The basis for this institutional shift is provided, in part, by the way that the structure of these obligations has spilled beyond – if it was ever truly contained within – the UNCLOS framework. The structure of the treaty obligations constrains the prospects for international enforcement by suggesting that it is the bilateral, or, in the case of a multilateral treaty, the bilateralizable relationships of responsibility that condition and protect the authority of international law. The reason is that this structure allocates enforcement responsibilities through the principle of reciprocity, where a harm against one state's

⁵⁵ G Hardin, 'Extensions of "The Tragedy of the Commons"', (1998) 280 *Science* 682-683.

⁵⁶ Buck, *The Global Commons*, p 5.

⁵⁷ See similarly Susan Strange, 'The Westfailure system', (1999) 25 *Review of International Studies* 345-354.

interests creating a right of enforcement or redress. Where obligations are structured in this way it is difficult to understand the international legal order as a genuine reflection of a genuine community interest, or states as enforcing a community standard. All of the necessary remedial rules are contained in and limited by this bilateral structure of state responsibility. If the practice of enforcement is triggered by the harm done to an individual state, what triggers enforcement to redress the harm done to the international community? The sceptic's suggestion is that the constitutional value or principle needs to be, and potentially can be, pursued and enforced through the traditional bilateral structures of international law. There isn't a need for international law to move beyond the horizontal model and establish more hierarchical enforcement mechanisms for delegating responsibilities, because these responsibilities are already sufficiently delegated, albeit through the negative responsibilities characterising the free seas principle. There can be constitutional authority even in the absence of anything more than a power to persuade.

As the limitations of enforcement in the "free seas" suggests, however, the bilateral structure of enforcement leaves a number of gaps through which states can wriggle out of their responsibilities. The overarching cause of the worry – and legal gap – is the fact that not all states are signed up to what has the potential to be 'a resounding success for the principles and purposes of the UN, including, crucially, progress towards the rule of law in international affairs'.⁵⁸ UNCLOS lacks the supremacy it would get from a universal acceptance, and as a result lacks the power to unsettle the customary presumption of free and open access, at least in the coherent and comprehensive manner its proponents had initially hoped for.⁵⁹ But, on the surface, who or who hasn't signed up to UNCLOS shouldn't matter for the authority of the obligations created because the majority are also obligations under customary international law. The real gap is not in the enforcement regime of UNCLOS, but the gaps this exposes in the wider practices of enforcing constitutional rules. As a matter of assigning remedial responsibilities it is not just the affected state whose enforcement responsibilities can be triggered, but all states as common members of the international community, as holders of a common interest. It is this interdependent, public responsibility that UNCLOS has needed to effect.

It is in this context that the emergence of the law of the sea as an aspect of global commons law has helped institutionalize a practice of constitutional enforcement.

⁵⁸ Oxman, 'The Rule of Law and UNCLOS'

⁵⁹ See especially BH Oxman, 'The rule of law in international affairs and the law of the sea' (1997) 7 *European Journal of International Law* 353-371, 360.

Particularly important here is the principle of ‘common but differentiated responsibilities’.⁶⁰ Although this principle has emerged in the specific context of international environmental law, it has become the unifying thread to many recent efforts to manage the global commons more broadly, and to give constitutional bite to enforcement practices. In effect, the global commons concept functions to usher in the idea that an underlying obligation of trusteeship, or responsible stewardship, sets the scope of legitimate enforcement authority in this domain.⁶¹ Responsibilities are allocated to the actor best placed to protect the global commons. The fact that these environmental responsibilities have been developed in relation to the basic idea that the agent best placed to act also has a responsibility to act forces positive responsibilities into existence. International institutions are empowered in this way to remedy international law’s constitutional authority by targeted and specifying state responsibilities in this domain. Whether or not it replaces the previously benign protection regime, principally defined around the rights of access and duties of the flag state, it certainly challenges the degree to which practices of declamation can undermine the constitutional order. International institutions in this sense act to make sure the structural failure of states to comply with their responsibilities don’t inevitably corrupt the possibility for constitutional authority, reflecting the institutional concept of constitutional enforcement.

UNCLOS establishes two particularly important institutional bodies whose officials increasingly take on this kind of enforcement role. The International Seabed Authority and the International Tribunal for the Law of the Sea (ITLOS) have both been actively engaged in pushing back against the actions of states and their proxy on the high seas and deep seabed. For example, the International Seabed Authority has recently requested an advisory opinion from ITLOS on the nature of states’ obligations and responsibilities in sponsoring seabed mining and exploration; in its judgment the Tribunal leaves very little room for doubt about the extent of states’ obligations and responsibilities, and about the oversight capabilities granted to the International Seabed Authority.⁶² ITLOS in turn has also claimed jurisdiction over national port authorities, notably in the *Juno Trader* case, using its limited

⁶⁰ See P Sands, *Principles of International Environmental Law*, (2nd edn, Cambridge University Press, Cambridge, 2003), 285-290.

⁶¹ PH Sand, ‘Sovereignty Bounded: Public Trusteeship for Common Pool Resources?’ (2004) 4 *Global Environmental Politics* 47-71.

⁶² ITLOS Case 17, ‘Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)’, judgment issued 1 February 2011, available at <http://www.itlos.org/start2_en.html>, last accessed 15 January 2012.

compulsory jurisdiction to full effect and in the process both solidifying and expanding the scope of its own authority.⁶³ The operation of UNCLOS is also actively orchestrated by the Division on Ocean Affairs and the Law of the Sea, a branch of the UN Office of Legal Counsel, which acts as the Secretariat for UNCLOS. They are responsible for drafting the UN Secretary-General's report on the law of the sea for the General Assembly, a role which they have explicitly interpreted as involving the progressive codification of the law of the sea. Indicative of this is the setting up of the 'Ad-Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction'.⁶⁴ This inauspiciously titled body has had a key role in developing the concept of a 'marine protected area', which has in turn been used to further elaborate the positive responsibilities of trusteeship held by states and other actors.⁶⁵

There is a security dimension to the global commons too, which takes up Alfred Thayer Mahan's suggestion that to control this 'wide common, over which men may pass in all directions' is to hold the reigns of imperial domination.⁶⁶ As Vogler argues, this perspective on the global commons is fundamentally different from that of environmental actors. Referencing Barry Posen's analysis, he points to how the injunction to command the commons is part of a hegemonic foreign policy practice.⁶⁷ By commanding the commons, the suggestion is that a powerful state can essentially free itself from all constraints – including, one assumes, those of international law. But this has changed too, as the threats from a failure to effectively police the global commons have grown. Security actors are increasingly accepting that given the limits of unilateral enforcement in the global commons there are significantly higher pay-offs from coordinating enforcement efforts. As Tara Murphy puts it, in the global commons 'the security of one is tightly linked to the security of all'.⁶⁸ As part of this general effort to preserve freedom of movement and trade, counter-piracy efforts begin to look like part of a general practice of constitutional enforcement

⁶³ S Cassese, B Carotti, L Casini and M Macchia (eds), *Global Administrative Law Cases and Materials*, (University of Rome, Rome, 2006, available at <<http://www.iilj.org/GAL/GALcasebook.asp>>), 56; for a more expansive analysis of the *Juno Trader* case, see H Tuerk, 'Contribution of the International Tribunal for the Law of the Sea to International Law', (2007) 26 *Penn State International Law Review* 289-316.

⁶⁴ See <<http://www.un.org/Depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm>>, accessed 1 May 2012.

⁶⁵ L de La Fayette, 'The Marine Environmental Protection Committee: the Conjunction of the Law of the Sea and International Environmental Law' (2001) 16 *International Journal of Marine and Coastal Law* 155-238.

⁶⁶ AT Mahan, *The Influence of Sea Power Upon History 1660-1783* (Courier Dover Publications, Mineola, 1987), 25.

⁶⁷ Vogler 'Global Commons Revisited', 65; see also Posen, 'Command of the Commons', 2003.

⁶⁸ Murphy, 'Security Challenges in the 21st Century Global Commons', p. 28.

rather than a narrow practice directed at Somali pirates. One of the mechanisms through which UN Security Council has sought to address the growing threat of piracy (especially in UNSC resolutions 1816 and 1846) has been to strengthen the principles governing the use of force in counter-piracy operations. This has helped resolve some of the gaps in the UNCLOS enforcement regime on piracy, specifically the uncertainty about who was responsible for policing piracy, who could legitimately be employed to strengthen the enforcement regime (including private security companies), and the measures that could and should be taken (including intervention to attack pirate bases). It is precisely because the Security Council's role here was directed at giving 'maximum effect' to the customary prohibition on piracy that it becomes a practice strengthening the constitutional order rather than undermining it. This highlights the way that a practice of constitutional enforcement can emerge despite the express efforts from states to prevent enforcement practices having this effect.

This says as much about how international institutional practices reflect the ongoing internationalisation of "officialdom" – of international forms of institutional authority – as it does about the shift from the free seas to the global commons generating a constitutional authority to allocate enforcement responsibilities in international society. These are not isolated practices but part of a raft of recent attempts to reconcile the role of international institutions as public, constitutional authorities, rather than mere venues for private forms of state cooperation. For example, the capacity to act on the 'common threat' of piracy can be linked to arguments for the functional importance of international institutional authority.⁶⁹ The point isn't the importance of any single instance of enforcement but the institutionalisation of a constitutional-type authority, in which public responsibilities are delegated by competent actors. The law of the sea regime is one example of how the international legal order has begun to establish this constitutional enforcement capacity – the capacity to delegate responsibilities – in which a number of institutional actors are empowered through the common purpose to promote what Tommy Koh called the 'common dream' of enacting the constitution for the oceans.⁷⁰

⁶⁹ This is captured in the UN report, 'A more secure world: our shared responsibility', Report of the High-level Panel on Threats, Challenges and Change (December 2004, A/59/565, see <http://www.un.org/secureworld/>); for the more general point, see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, Cambridge, 2011).

⁷⁰ See Tommy Koh, 'A Constitution for the Oceans'

Conclusion

I suggested at the beginning of this chapter that at the core of the pragmatic position was a belief that the constitutional order was too weak to support a commitment to international law enforcement as a constitutional practice. For a start the mechanics of enforcement are under-developed: there is no global police force or comprehensive judicial system with the power to give effect to the obligations. More fundamentally, because of ambiguity surrounding the constitutional rules, enforcement practices retrench state power, rather than strengthening the constitutional type authority of international law in international society. The result of this institutional weakness is that even where it looks like international law is being enforced, the pragmatist is able to argue that this is not “constitutional enforcement” but simply evidence of a contingent political reality.

But this doesn't adequately capture the normative commitments and attitudes shaping the institutional order in this domain. The principles established through the UN Convention on the Law of the Sea enabled constitutionalism in the sense that established a principled basis for developing the idea – and aspiration – for the ocean domain as a global commons, rather than as an anarchical space, a free seas. This clearly doesn't fill the gaps in the comprehensiveness of the regime, including the abuses continuing to take place in the global commons. But it does foster the sense of institutional responsibility among international actors needed to remedy international law's constitutional authority. The possibility that these responsibilities are imperfect and contested is hardly the point, at least from the constitutionalist perspective. The point is that constitutionalism can function as an effective and legitimate strategy for developing international law's constitutional authority, motivated as it is by the drive to make practical and conceptual sense of the constitutional rules by developing a clear idea of the scope of the communal responsibilities they demand. In this respect at least, international law does offers a viable model of constitutional enforcement, a capacity to command the global commons.

Chapter 5

International Rules, Domestic Constitutions: Closing the responsibility gap

The rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations. I do not think this proposition is contentious.

Tom Bingham¹

The most morally compelling features of the ideal of the rule of law have to do with the ways in which a legal system can protect individuals' interests and respect individuals' autonomy; but much of IL concerns the relations among states and in many cases states do not represent the interests of some or even most of their citizens. So it is not clear just how the commitment to the rule of law is to be cashed out in the international arena.

Allen Buchanan²

At the point of decision, should a responsible leader act from a commitment to the rule of international law and an imaginary global public or from a commitment to their own public, to their domestic constitution? From the pragmatist perspective, acting on international law's claim to constitutional authority is to diminish a prior, democratically legitimated responsibility to enact the domestic constitution. The worry surrounding international law's democratic deficit is that public institutions need to be able to track the interests of those they claim authority over, but that this capacity is complicated by the uncertainty surrounding who international law ultimately speaks for and is constituted to protect. For the pragmatist the reason the sovereign state has a privileged role in international society is that it is functionally better suited to judging and acting on their citizens' fundamental interests. For the constitutionalist, international law has developed a capacity – in clearly defined circumstances – to dictate the scope and nature of states' responsibility to advance international legality. Part of the challenge of establishing this constitutionalist perspective is the need to specify how this constitutionalist ethic of international legality is able to manage the tension between domestic and international practices of legality.³ International law's claim to constitutional authority is premised on its claim to be able to protect and promote

¹ Tom Bingham, *The Rule of Law* (London, Penguin: 2010)

² Allen Buchanan, *Human Rights, Legitimacy and the Use of Force*, 2010, Ch. 7 'Democracy and the Commitment to International Law', p. 152-175, at 160

³ See Thomas Christiano, 'Democratic Legitimacy and International Institutions', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, OUP: 2010, p. 121-122

not only international society's existing standards of legality, but to privilege an ethic of legality with the capacity to reconcile the competition between domestic and international practices of legality. This chapter explores the way this challenge has structured practices of rule of law promotion. I argue that the way the tension created for international law by the lack of a global democratic process have begun to be redressed at the United Nations through a practice of exercising trusteeship over the ideal of legality, and in the process implicitly claiming to balance against arbitrary domination.

The responsibility gap

Carving out the space for a constitutional ethic raises both a general problem facing justifications of the constitutional authority of law, and a specific problem for the constitutional authority of international law. In claiming supremacy within a constitutional order, law must at various points clash with the democratic impulse. When this commitment to democratic legitimacy is cashed out, it means that for a judge to review and, potentially, strike down, democratically authored legislation is for the legal order to over-reach into the democratically demarcated and hence constitutionally superior domain of politics.⁴ In practice, however, part of the role of constitutional law is to check the excesses of democratic populism, to provide a measure of stability and certainty that the democratic entitlement does not. As a result questions about the democratic deficit in constitutional law do not necessarily lead to any great worry. Rather than heralding a constitutional crisis, this is simply the great 'paradox of constitutionalism'; as Martin Loughlin and Neil Walker put it, constitutionalism 'is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the "consent of the people" and that, to be sustained and effected, such power must be divided, constrained and exercised through distinctive institutional forms.'⁵ The tension between legal authority and democratic legitimacy – between law and politics – is something that all constitutional orders have had to manage; it forms part of the constitutional politics of social order.

Internationally, international law's constitutional politics are defined by the sovereigntist claim that the state still provides the best metric of "constituent power" in

⁴ See Richard Bellamy, *Political Constitutionalism: A republican defence of the constitutionality of democracy*, CUP: 2007; see also Goldsmith and Levinson, 'Law for States: International Law, Constitutional Law, Public Law', (2009) 122 *Harvard Law Review* 1791

⁵ Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, Oxford University Press, 2007), p. 1

international society and, hence, continues to function as the best source for legitimate authority. The “democratic” content of international law is found in the sovereign equality of states, in the institutionally privileged role of consent and state practice, and in the protection of territorial integrity.⁶ As Guglielmo Verdirame argues, the state both embodies collective liberty and enables individual liberty by protecting the principle of self-determination – a principle that international institutions have been too willing to set aside.⁷ This fits with the traditional justification of the separation between the domestic and international realms, as a way to *protect* the superiority of the domestic constitution, to limit the reach of public international law and cordon off what James Mayall describes as the ‘undemocratic legacies’ of international law.⁸ As Mayall puts it, ‘At first sight, international law, the bedrock institution on which the idea of an international society stands or falls, is not well suited to the discriminatory flexibility that seems to be called for if democratic values are to be seriously pursued at the international level. To begin with, this was not a major problem since the scope of international law was quite deliberately restricted to what could be agreed between, so to say, consenting sovereigns acting in private’.⁹ Where it has *become* a problem is as the constitutionalist of international law began to challenge this sovereigntist limitation on the scope of international responsibilities.

As Steven Wheatley argues, under the guise of constitutionalism ‘international law increasingly asserts a right to determine the normative situation of citizens of democratic states, without, it would seem, any meaningful connection to the idea of democratic legitimacy.’¹⁰ The question for international law is how to ensure that it tracks the interests of those it most affects *better* than the sovereign institutions it threatens to displace. Politics works (most of the time) in domestic societies to create the sense of fit between the legal and political orders; domestic politics (and not only democratic politics, as the Arab Spring highlighted) is how citizens make their constitutional preferences and expectations known. The worry that international law is unable to genuinely reflect the preferences of those it

⁶ See Anne Peters, in Klabbers, Peters and Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press: 2010) p. 271

⁷ Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians* (Cambridge: Cambridge University Press, 2011)

⁸ James Mayall, ‘Democracy and International Society’, *International Affairs* 76 (1) 2000, p. 69; see also Martti Koskenniemi, ‘The Empire of Private Law’ [arguing that it is this private law focus has always been central to the law of nations]

⁹ Mayall, ‘Democracy and international society’, p. 68; see also Michael Walzer, ‘The Moral Standing of States: A Response to Four Critics’, *Philosophy & Public Affairs* 9 (3) Spring 1980, p. 209-229

¹⁰ Steven Wheatley, ‘A democratic rule of international law’, *European Journal of International Law* 22 (2) 2011, 525–548

purports to rule. The lack of a space for genuine political dialogue challenges the capacity of international law to justify its constitutional authority over states because it lacks a way to close the gap between the authority claimed by international law to rule, and the uncertainty among law's subjects about the terms of this rule. One reason for this stands out: international law struggles to identify with any degree of certainty *whose* fundamental interests it ought to protect. There is a fundamental tension between ruling in the interests of individuals and ruling in the interests of states. Treating the state as the sole subject of international law – and as the only agent with international legal personality – was part of a strategy to avoid this tension. Human rights norms have confused this picture, on the one hand seeming to enfranchise individuals against their states, while on the other hand lacking any real force against a sovereign state beyond the power to persuade. For individuals living under the yoke of an oppressive regime that isn't a danger to international peace and security and hasn't violated rules which could trigger an intervention there is no virtue to international legality. Instead, this value cloaks a despotic, anti-democratic leader – think of Zimbabwe, for instance – with the sovereign immunities of state. In protecting the privileges of state, international law's 'others' lose out.¹¹

This is to say that there is a great deal of uncertainty surrounding who it is that international law's constitutional authority is being exercised on behalf of – and how international law might generate certainty in this domain. This creates the type of responsibility gap that the pragmatic approach is able to exploit, to pick at until the only legitimate strategy seems to be one dictated by the recognition of pluralism. One strategy for addressing this problem advocated by some of those writing on global constitutionalism is to approach constitutionalism as a functional tool to 'compensate' states for their loss of sovereign control, incurred as international politics has morphed into global politics, as threats and opportunities have been spilled beyond borders, and as states have struggled to exercise their domestic constitutional responsibility to protect and advance the interests of their own citizens.¹² International law and the institutions of global governance are able to bolster state capacity, and in this sense to protect the *de facto* powers of the sovereign state to fulfil their democratic responsibilities, to serve the interests of their citizens. The process of

¹¹ Anne Orford (ed.), *International Law and her 'others'* (Cambridge, Cambridge University Press: 2006)

¹² Anne Peters, 'Dual Democracy', in Klabbers, Peters and Ulfstein, *The constitutionalization of International Law*, pp. 263-341

fulfilling democratic, domestic constitutional responsibilities must reflect the new transnational form of international society.¹³

Another answer is to argue that the institutionalization of human rights have ushered in a wholesale change to the primary referent of international law. Jeremy Waldron, for example, argues that international law – like any domestic government – is legitimated by its functional capacity to protect and promote the individual’s autonomy. Because of this the benefits from the international rule of law do not accrue to states, but to their citizens.¹⁴ *Both* sovereign states and international law are, equally, agents of individual well-being. This carries significant normative weight: if international law is constituted for individuals, rather than for states, the permissible range of international law promoting actions expands dramatically. More importantly, the responsibilities that follow from a commitment to international legality cannot be limited by reference to the sovereign privilege, not if the sovereign state and the international legal order are both tracking the same basic individual needs and interests. Ruti Teitel captures the basic idea nicely in her arguments that international law has shifted from being for state to being ‘for humanity’.¹⁵ The shift in the addressee of international has created a constitutional order where sovereignty is responsibility; the legitimacy of international law comes from its function as the trustee of this responsibility. This positions constitutionalism as part of international law’s cosmopolitan turn (or cosmopolitanism’s turn to international law). This credits international law with a degree of normative authority on the basis that it does a better job of protecting particularly important moral values than states are able to.¹⁶ The point of these various efforts to “bind” international law to the individual is to reconstitute states – and international lawyers – as local agents of global public order. Framed in this way, however, one of the dangers is that deepens the perception that ‘the key to the transformation from a

¹³ See especially David Held, ‘The transformation of political community: rethinking democracy in the context of globalization’, in Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy’s Edges* (Cambridge, Cambridge University Press, 1999) pp. 84-111

¹⁴ Jeremy Waldron, ‘Are sovereigns entitled to the benefit of the International Rule of Law?’, *European Journal of International Law* (2) 2011; see also Terry Nardin, ‘Theorizing the International Rule of Law’, *Review of International Studies* 34 (2) 2008

¹⁵ Ruti Teitel, *Humanity’s Law* (Oxford, Oxford University Press: 2011)

¹⁶ In particular, the shift has been to detail the obligations arising from and within the global basic structure; see Charles Beitz, *Political Theory and International Relations* (Princeton University Press: 1999) pp. 143-53; Pogge, *World Poverty and Human Rights*, p. 20; Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford University Press: 2007) pp. 83-85; Simon Caney, *Justice Beyond Borders: A Global Political Theory* (OUP: 2005), p. 4; Saladin Meckled-Garcia, ‘International Law and the Limits of Global Justice’, *Review of International Studies* 2010; Roland Pierik and Wouter Weiner (eds.), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory*, 2010, pp. 13-16; Andrew Hurrell, *On Global Order: Power, Values and the Constitution of International Society* (Oxford, Oxford University Press: 2007)

pluralistic international legal order to a constitutionalized one arguably lies in the gradual democratization of international law-making', if only to better reflect and protect these common interests.¹⁷

For a similar reason, from the pragmatic perspective, however, none of these arguments really shakes the structures of international society in a way that justifies a constitutional approach to the responsibilities of legality. To understand why, consider Anne Marie Slaughter's influential attempt to address concerns about international law's authority by showing how the agents of international and domestic authority are, in fact, one and the same. She uses the existence of what she calls 'transnational expert networks' as a way to show that international authority can be domestic authority too. The fact judicial actors, for one, talk to each other helps to craft a global jurisprudence for a new world order. We can ensure that these international actors 'uphold the public trust' because as part of their domestic role they are subject to a raft of administrative, constitutional and professional constraints.¹⁸ There is an implicit constructivist belief that this gets easier over time, as the process of mediating between domestic politics and international law transforms both domains.¹⁹ But at some point even highly networked actors will have to choose between applying the international standard and the democratically grounded domestic standard. They will have to confront the problem of divided loyalties and fragmented commitments. To put this a different way, arguing for international law's constitutional authority in international society requires engaging with the nature of international law's claim to establish a form of *hierarchical* authority, not a horizontal, flat account that leaves the structures of sovereign privilege untouched.²⁰

This raises, again, the need to specify the responsibilities of legality in conditions of uncertainty. From the pragmatic perspective, the constitutional form – how you resolve the paradox of constitutional authority – is still up for grabs. There is a fundamental uncertainty about who 'owns' international law, and this uncertainty grants states a privileged position when it comes to claiming the capacity to best represent individuals' interests. Moreover, the

¹⁷ Samantha Besson, 'Ubi Ius, Ibi Civitas: A Republican Account of the International Community', in Samantha Besson and José Luis Martí (eds.), *Legal republicanism: National and International Perspectives* (Oxford University Press: 2009), p. 237

¹⁸ Anne Marie Slaughter, *New World Order* (New Jersey, Princeton University Press: 2004) p. 9

¹⁹ See Slaughter and Burke-Wight, 'The Future of International Law is Domestic (or, The European Way of Law)', in Andre Nolkaemper and Janne Nijman (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007), pp. 110-133.

²⁰ See especially Anne Peters, 'Supremacy Lost: International Law meets domestic Constitutional Law' (2009) 3 *Vienna Online Journal on International Constitutional Law* 170-198.

sort of structures that could justify international law's constitutional authority – such as the UN – further institutionalise uncertainty in the failure to act on the responsibilities that the Charter provides. As Philip Allott characterises it, the United Nations suffers from the 'grim ambiguity' of being 'an international social system of a new kind trying to organize a new kind of international society but still trapped in the folk-ways of the theatre of ritualized cynicism which is the world of the old diplomacy'.²¹ As long as this a domains where the image of crisis drives constitutional politics, there is no easy institutional resolution to this question. From the constitutionalist perspective, however, the situation is less clear-cut. Developing the conceptual nature of the responsibilities that attach to legality can help generate the conditions for rightful authority, without necessarily requiring democratic institutions. Uncertainty about the democratic purpose of international law does not *necessarily* undermine international law's claim to constitutional authority.

In the remainder of this chapter I argue that the divide between pragmatic and constitutional approaches helps to characterise some of the debates surrounding the practice of rule of law promotion and peacebuilding. But it also helps to show how constitutionalism has the capacity to reconstruct and reframe the terms of this debate, as international actors begin to realise the scope and terms of their trusteeship for the ethic of legality in the public domain, as a response to the need to specify a better and more coherent justificatory framework for their actions. In this regard, I suggest, establishing the promotion of the rule of law by international actors as a coherent operational practice can be seen as a part of instantiating the rule of law as a function of balancing against the arbitrary exercise of power at both the domestic and international space, as part of a global public.

Rule of law promotion

Rule of law promotion is an industry, an industry built on the claim to expert knowledge of the rule of law. Simply within the United Nations system, some form of rule of law promotion takes place across 40 different UN entities, in 125 member states.²² Rule of law promotion has become a locus for normative development and ingenuity, especially in the

²¹ Philip Allot, *Eunomia: New Order for a New World* (Cambridge, Cambridge University Press, 2nd edition: 2004)

²² See: <http://www.unrol.org/>

United Nations.²³ This is because the practice of rule of law promotion acts as a conceptual synapse, cutting across and bringing together work on peacekeeping, peacebuilding, development, security, transitional justice and crime prevention – conceptualizing the nature of legality has helped bring coherence to the broader work of the UN in conflict and post-conflict states.²⁴ For the same reason, investment in rule of law promotion has the potential to magnify the effect of otherwise limited resources, deepening the relationship with parallel efforts to strengthen peace and security, development and human rights.

Attempts to unlock the institutional potential of the rule of law have had to respond to the lack of any *single* definition of the rule of law. Promoting this value might require a relatively thin, procedural set of norms, or it might require a whole host of thick ethical commitments including the protection of basic human rights and, for some, the right to democratic self-government. In practice, rule of law promoters have tended to rely on the idea that there is a relatively coherent understanding of the elements of the rule of law in the ‘general principles of law recognized by civilized states’.²⁵ This cashes out in a practical sense of the institutional features required to establish the rule of law, including limiting arbitrary decision-making through the separation of powers, protecting the independence of the judiciary, enshrining basic human rights, prohibiting detention without trial and retroactive rule-making, and treating all subjects of the law equally. In other words, there is form to rule of law promotion even in the absence of agreed content. At the international level, this working consensus on the rule of law is most comprehensively captured by the UN definition:

‘The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law,

²³ As Steven Humphreys puts it, ‘rule of law promotion is currently a primary generative engine of discourse about “the rule of law”, and is thus, presumably, itself reshaping the parameters of the term going into the future’, *Theatre of the Rule of Law*, p. 220

²⁴ Edric Selous, Director of the UN Rule of Law Unit, personal interview, 24 September 2011.

²⁵ Art. 38.1.c, ICJ Statute; on the uncontested elements of the rule of law, see Simon Chesterman, ‘An International Rule of Law?’, *American Journal of Comparative Law* 56: 2008, pp. 331-361

separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²⁶

This raises more questions than it answers, however. How do you prevent a merely formal, skin-deep commitment to legality taking root? How do you manage the trade-offs, tensions and uncertainty inherent in any legal order? And when the UN commits to ‘ensure the supremacy of law’, to which law does this refer: international or domestic? It is in this context that rule of law promotion – and all the parallel practices of peacebuilding, development, security and so on of which it is a core part – triggers questions regarding international law’s constitutional authority. It raises special questions about the scope of the responsibilities generated by a commitment to *international* as opposed to domestic legality. This is to say that rule of law promotion is part of the larger constitutional practice and politics of reconciling the tensions between sovereignty or ‘national ownership’ and international authority, paralleling the tension between pragmatic and constitutionalism ethics. The potential for conflict about the nature of the constitutional rules governing this domain is particularly evident in the difficulty with specifying the “constitutional” status of human rights standards in rule of law promotion. Should these be treated as absolute, with states emerging from conflict having an obligation to implement human rights standards as quickly as possible? Or do these impose too high a burden on fragile states, an ‘obligation overload’²⁷ which suggest legitimate – and legally permissible – reasons to delay?

In practice these problems tend to coalesce around questions about the legitimacy of expert judgement. This occurs in well-developed constitutional orders too, where the role of the judiciary in resolving these questions can be argued to entrench a form of anti-democratic, expert rule.²⁸ But, as I have suggested, these philosophical uncertainties are further heightened where there is no clear sense that the legal order is capable of generating and protecting a constitutional ethic of legality, where the sense of responsibility needed to remedy these challenges to law’s constitutional authority are lacking. In this sense the conflict and post-conflict context for rule of law promotion serves as a useful parallel

²⁶ ‘Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance’, April 2008, available at http://www.unrol.org/doc.aspx?doc_id=2124

²⁷ Kevin Davis and Benedict Kingsbury, ‘Obligation Overload: adjusting the obligations of fragile or failed states’ (November 2010, unpublished, available at available at: www.iilj.org/courses/documents/HC2010Dec01.DavisKingsbury.pdf)

²⁸ Richard Bellamy, *Political Constitutionalism: A republican defence of the constitutionality of democracy* (Cambridge, Cambridge University Press: 2007)

through which to understand the nature of the challenge to international law's claim to constitutional authority. For example, what a Fox News commentator or Daily Mail columnist says on the nature of the rule of law has, one would hope, a lesser weight than what a Supreme Court justice says. But does that same judge have superior knowledge to the local chief or leader of a distant village community? Or, more pointedly, does an international civil servant have a greater claim to expertise in this area than a local judge or political leader in Costa Rica, Kenya, Saudi Arabia or Pakistan? If so, on what grounds, and within what limits?

There are, I would suggest, three institutional responses to the responsibility gap which emerge from the practices of rule of law promotion. The first is to appeal to the universal nature of the standards being promoted. The second is to privilege the local, rejecting expert rule as anti-democratic. The third approach is to emphasise the expert as an orchestrator, a facilitator, an enfranchiser, connecting the local to the international. The argument I develop here is that pragmatic concerns cash out in either an argument for rule of law universalism or rule of law imperialism, because pragmatism treats the responsibility gap in international law as an invitation to assert political, policy perspectives as a necessary part of the promotion of legality. The constitutional approach – where the justification of authority is treated as a conceptual problem requiring a principled solution – emerges as part of a practice of trusteeship. This is to justify a belief in international authority on the basis that international law can function to prevent an *arbitrary* exercise of power, if properly constituted. In this regard the practices associated with 'ensuring national ownership' can be understood as a partial response to the challenge David Kennedy lays down for humanitarian actors: to take 'responsible action as a ruler where expertise cannot be perfected'.²⁹ The important point as far as the constitutional authority of international law is that there is a coherent sense of the responsibilities required as a result of the commitment to legality becoming embedded in the institutional fabric of international society.

Rule of law universalisms

The classical justification for rule of law promotion is as a technical activity. This paints legality as a measure of good governance, a series of the technical markers a state needs to exhibit on the road to development and stability. On this model rule of law promoters claim

²⁹ *The Dark Sides of Virtue*, 2004p. xxv; see also Barnett, *Empire of Humanity*, conclusion.

to be able to bracket off questions about legitimate authority by appealing to the standards of legality.³⁰ The important outcome for the success of this project is establishing the right institutions and rules; no matter if, initially, they don't function as promised, or accurately reflect a society's existing governance norms and structures, or exert any special pull to obedience. Experience dictates that establishing the institutions of legality will *eventually* come good.

If we can identify the elements of the rule of law, this can establish a standard of expert authority that allows promoters, regardless of their location, to overcome the authority problem. Far from representing a 'disturbingly thin base of knowledge'³¹, practitioner know-how suggests a quite thick base of knowledge. As Simon Chesterman argues, a checklist approach to rule of law promotion can be justified if what we're ticking off corresponds to the necessary elements that the rule of law must express if it is to be able to fulfil its regulatory function.³² There is an uncontested core to the *practice* of the rule of law and legality, never mind that it is theoretically contested at the margins. The point is that if we can agree on either the normative or functional *desirability* of the rule of law, and if we can agree on the minimum features that should be promoted in practice, this is enough to establish the legitimate authority of rule of law promoters.

This 'good governance' rationale was behind what Thomas Carothers terms the 'rule-of-law revival', particularly as spearheaded in the US and World Bank contexts.³³ The US strategy is quite clear: the universal nature of the aspiration for the rule of law entails that 'supporting the rule of law is not necessarily imposing foreign ideas on a society'.³⁴ The World Bank is – at least in recent years – somewhat more circumspect about the dangers of a universalist, checklist approach to rule of law promotion. They accept that there will be conflicts, hypocrisies and trade-offs inherent in the practice of rule of law promotion, and that domestic voices might from time to time not be heard. But even while accepting the authority problem, they treat their indicators of legality as an *a priori* standard for all countries to aspire to. As Kevin Davis, Benedict Kingsbury and Sally Engle Merry have

³⁰ For an elaboration of this point, see especially Rama Mani, 'Exploring the Rule of Law in theory and practice', in *Civil war and Rule of Law: Security, Development and Human Rights* (Lynne Rienner, 2008), pp. 21-46

³¹ Thomas Carothers, 'The Problem of Knowledge', in Carothers (ed.) *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington D.C., Carnegie Endowment for International Peace: 2006), p. 19

³² Simon Chesterman, 'An International Rule of Law?', *American Journal of Comparative Law* 56: 2008, pp. 331-361

³³ Thomas Carothers, 'The Rule-of-Law Revival', in Carothers (ed.) *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington D.C., Carnegie Endowment for International Peace: 2006),

³⁴ USAID Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework, Jan. 2010, p.6

recently suggested, however, these indicators signal a claim to a particular type of authority. They do not establish a free-floating technical knowledge, but a claim to knowledge that is tied to the particular international practice of global governance. In their words, ‘using any given indicator in global governance involves tacitly accepting both a very particular set of claims about the standards against which societies ought to be evaluated and a particular process for generating those claims.’³⁵ Stephen Humphreys similarly argues that rule of law promotion should be regarded as a form of transnationalism because the practice, even though claiming access to a universal type of knowledge, is nonetheless ‘undertaken by agents in (and of) one set of countries but conducted in another set of countries’.³⁶

The problem with this approach is that universalism functions in practice to ground a claim to external, undemocratic forms of authority. It covers the pragmatic *seizure* of authority by international actors. The problematic nature of this kind of attitude can be seen with particular clarity in the international efforts to advance “justice” – including human rights and fair trial standards after conflict. This kind of mindset ends up, however, allowing practitioners to avoid having to take responsibility for the authority being exercised. It prevents practitioners from asking hard questions about the *purpose* of their actions, and about what the intended gains are from the institutions being constructed. As Simon Chesterman argues, “The “why” question is important because it leads to the corollary for whom’.³⁷

Rule of law imperialisms

This difficulty of specifying *who* it is that rule of law promotion serves – and the legitimate scope of the activities that a commitment to legality can justify – leads some to reject these practices as imperialism in disguise. Rather than advancing the good of individuals in weak states, rule of law promotion helps to embed a form and structure of domination, a rule-by-elites. The basic claim is that the application of international standards is in practice both

³⁵ Kevin Davis, Benedict Kingsbury, and Sally Engle Merry, ‘Indicators as a technology of global governance’, IILJ Working Paper 2010/2, April 2010 (available at <http://iilj.org/publications/documents/2010-2.Davis-Kingsbury-Merry.pdf>)

³⁶ Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge: Cambridge University Press, 2010), p. 10

³⁷ Simon Chesterman, ‘Review Essay: International Territorial Administration and the Limits of Law’, *Leiden Journal of International Law*, 23 (2010) 437-447, at 5; he expresses similar worries elsewhere; see Simon Chesterman, ‘Ownership in Theory and Practice: Transfer of Authority in UN Statebuilding Operations’, *Journal of Intervention and Statebuilding* 1(1) 2007; Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (Oxford University Press, Oxford: 2004)

targeted at and implemented by transnational elites. As a consequence, rule of law standards end up reflecting the interests of these elites: when tensions between rule of law standards need to be reconciled, they are reconciled to the benefit of elites, and at the expense of ordinary individuals. Rule of law promotion, in other words, is a practice which allows domestic and international elites to capture the machinery of developing states and, in so doing, replicates ant-democratic and illegitimate colonial modes of domination. Despite the progressive rhetoric rule of law promotion stacks the decks in favour of elite actors and the status quo. Ordinary individuals get left out and screwed over under the guise of a commitment to legality.

These concerns centre on the claim that in presenting the rule of law as ‘a panacea for the ills of countries in transition’³⁸ international practitioners are replicating a colonial belief that to build the institutions of constitutional order, as Martti Koskenniemi puts it, ‘would be to do history’s work, in that it would gradually transform backward societies into the European state form’.³⁹ Antony Anghie argues that this implied colonial superiority abounds in the language of international law, finding that ‘the essential structure of the civilizing mission may be reconstructed in the very contemporary vocabulary of human rights, governance and economic liberalization.’⁴⁰ In this rule of law promotion is an instance of both political and cultural imperialism – it advances political domination under the guise of cultural superiority, embedding a new “standard of civilization” in international society. The problem is that the nature of this standard of civilization is controlled and interpreted by those already in a position of power, in a position to dominate. As institutionalized in international law, in other words, the appeal to legality functions to conceal ‘plunder’, practices in which ‘stronger political actors victimize weaker ones’.⁴¹

David Kennedy captures the ideological aspect of imperialism, in particular in his skewering of property rights, long the darling of development economists.⁴² For Kennedy, the emphasis on property rights highlights the tendency of development actors to reproduce a disciplinary ideology, rather than to establish the sort of sustained social conversation that

³⁸ Carothers, ‘The Rule-of-Law Revival’, p 3-14

³⁹ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002), p. 177; see also Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002)

⁴⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press: 2007), p. 114

⁴¹ Laura Nader and Ugo Mattei, *Plunder: When the Rule of Law is illegal* (Oxford, Wiley-Blackwell: 2008)

⁴² David Kennedy, ‘Some Caution about Property Rights as a Recipe for Economic Development’, *Accounting, Economics, and Law* 1:1, 2011; also *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2005), p. 149-168

could endow the legal order with the capacity to protect both public and private interests – including the interests of investors and development economists in seeing property rights protecting. In place of a genuine attempt to grapple with the complex process of building a legal order, these societies instead get a top-down recycling of disciplinary truths like “strong property rights lead to development” which allow unfair and ineffective practices and policies to persist. Moreover, granting entitlements – which is what property rights does – is not a benign practice. It usurps a conversation about the nature of ‘ownership’ within a society, a conversation traditionally tied to the democratic practices and institutions of constitutionalism.

This feeds the pragmatic perspective on international law by reflecting broader worries about how a claim to expertise or expert knowledge can replace the complex political conversation needed to generate a genuine sense of the commitments and responsibilities implied by the idea of legality. There is no institutional pressure on international actors to question whether the proposals, policies or strategies adopted in order to advance legality actually work in practice – and no accountability if they and when they fail. Even more than that, there is no accountability when the policy ideals fail to be operationalized in practice – there is no democratic mechanism of displacing a disappointing ruler.⁴³ How in these circumstances can a commitment to international law substitute for the domestic sovereign state as the locus of constitutional authority? This is another way to say that the democratic deficit in international law is a problem – there is no mechanism for *public* feedback, and hence no public incentive on these experts to revisit and revise their working practices, methods, concepts and assumptions. The result of this is that rather than being a part of the solution, expert authority becomes a part of the problem, simply another form of elite rule. The ‘governments and recalcitrant populations’ on the receiving end of rule of law promotion become ‘rule-takers rather than -shapers’, imperial subjects rather than full participants in a conversation about the responsibilities unlocked through international actors’ commitment to legality.⁴⁴ As David Chandler puts it, the end result of this is that ‘the needs and interests of those subject to intervention are often ignored, resulting in the maintenance of inequalities and conflicts and undermining the asserted goals of external interveners.’⁴⁵

⁴³ See generally, Verdirame, *Who Guards the Guardians?*

⁴⁴ Humphreys, *Theatre of the Rule of Law*, p. 233

⁴⁵ David Chandler, *International Statebuilding: The rise of post-liberal governance* (Abingdon: Routledge, 2010), p. 21

Rule of law constitutionalism

The UN's approach to rule of law promotion emerged as an attempt to reconcile international, expert authority with the domestic bases of legitimacy. It approached this challenge by stressing that the commitment to the rule of law emerges as an essential part of claiming constitutional sovereignty.⁴⁶ Not only that but this necessary commitment to the rule of law generates certain fundamental responsibilities. Rule of law promotion in this context should be managed through domestic institutions but conceptualised as an international principle, a property required in order to realise the full nature of sovereignty. The key provision in the UN rule of law strategy document capturing this position is given under the principle 'Ensure national ownership' and reads as follows:

'No rule of law programme can be successful in the long term if imposed from the outside. Process leadership and decision-making must be in the hands of national stakeholders. Rule of law development requires the full and meaningful participation and support of national stakeholders, *inter alia*, government officials, justice and other rule of law officials, national legal professionals, traditional leaders, women, children, minorities, refugees and displaced persons, other marginalized groups and civil society . . . Meaningful ownership requires the legal empowerment of all segments of society.'⁴⁷

One way to understand this is as establishing a standard of legality as an *evolved* institutional practice which can't be imposed on a society from outside with any degree of success. The target community needs to buy into whatever actions are being taken. Rather than promote an institutionally proscriptive model of the rule of law, based on international expectations or indicators or sheer hegemonic power, this model starts from the understanding that the development of the rule of law is part of a 'long and painful process', as Nancy Birdsall and Francis Fukuyama put it, with the result that 'institutions such as the rule of law will rarely work if they are simply copied from abroad; societies must buy into

⁴⁶ 'Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance', April 2008, available at http://www.unrol.org/doc.aspx?doc_id=2124; also 'Report of the Secretary-General: Second Annual Report on Strengthening and Coordinating United Nations Rule of Law Activities', August 2010, A/65/318, available at <http://www.unrol.org/doc.aspx?d=2994>; 'The Responsibility to Protect', ICISS, December 2001 available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, p. 11-16; Anne Orford, *International Authority and the Responsibility to Protect*, CUP: 2011

⁴⁷ 'Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance', April 2008, available at http://www.unrol.org/doc.aspx?doc_id=2124, Para. 5, p. 3

their content.⁴⁸ Part of this process of promoting the rule of law is to *enable* the domestic society to claim ownership of the legal order, including establishing a mindset, a practice of believing in the governing institutions, which ultimately enables a society to buy in, to trust in the legitimacy of the aspiration for the rule of law.⁴⁹ Depending on the context, the addressee in this process might, as Stephen Humphries suggests, only be ‘a notional public’, with rule of law promoters speaking *as if* their actions track the interests of this public, but there are increasingly serious attempts to substantiate this and tailor promotional activities to the demands of a real public.⁵⁰ The UK Department for International Development, a particularly important and well-respected actor in this field, makes a similar point, stressing the ‘centrality of politics in building effective states and shaping development outcomes’ and in turn understanding politics in this context as the networked interactions between states, citizens and elites.⁵¹ Stephen Golub speaks to something similar in talking about the ‘legal empowerment alternative’ in rule of law promotion, which sees experts placed in supportive rather than orchestrative roles.⁵²

The hegemonic nature of international authority doesn’t quite disappear, but the focus on the institutional structures through which this authority is mediated has an impact on justifying this authority. Rather than being a *universal* standard, both in terms of the truth of the knowledge claim being promoted and in terms of the validity of the actors promoting it, the rule of law is regarded as a *general* standard, constructed on the basis of internationally extensive principles. There is a close parallel here with the principled development of the communal, constitutional nature of international law, the story I sketched in chapter 1. Some constitutional rules in international law, for example *jus cogens* norms, posit a standard that is true without regard to any particular context, with international custom providing evidence of a fundamental moral prohibition or entitlement. In contrast international law establishes a constitutional claim by elaborating the public standard, by establishing the

⁴⁸ Nancy Birdsall and Francis Fukuyama, ‘The Post-Washington Consensus’, *Foreign Affairs* 90:2 March/April 2011, p. 51-52

⁴⁹ See Pablo de Grieff, ‘Theorizing Transitional Justice’, in Melissa Williams, Rosemary Nagy, and Jon Elster, (eds) *Transitional Justice*, NOMOS LI (New York, NYU Press: May 2012) [talks about the crucial importance of generating “civic trust” to determining the success of transitional justice initiatives].

⁵⁰ Humphreys, *Theatre of the Rule of Law*, p. xx

⁵¹ Department for International Development, ‘The Politics of Poverty: Elites, Citizens and States: The findings from 10 years of DFID-funded research on Governance and Fragile States: 2001-2010’, 21 September 2010, p. 3-4, available at: www.dfid.gov.uk/Documents/.../plcy-pltcs-dfid-rsch-synth-ppr.pdf

⁵² Stephen Golub, ‘A House Without a Foundation’, in Carothers (ed.), *Promoting the Rule of Law Abroad* (Washington D.C., Carnegie Endowment: 2006), p. 107

principled terms of the international community's public commitment to the values protected and promoted by international law.

But there is a more sweeping implication to the UN approach here, in that this conception of needing to ensure national ownership emerged from a more general sense that the concept of the rule of law was in danger of becoming meaningless given the variety of ways and variety of contexts in which it had been deployed to justify the UN authority. In other words, there was a recognition of the need for greater coherence in the concept of the rule of law, in order to bring order to the practice of promoting the rule of law in peacekeeping, peacebuilding, transitional justice, international relations, development, security and so on. Having refined their understanding of the value and virtue of the rule of law, it strengthened the basis for actions to improve *international* constitutional authority.

One way to illustrate how a principle of ensuring national ownership can, in the end, strengthen the basis for a constitutionalist ethic is to look at the principle of complementarity. The principle of complementarity refers to the key trigger for the exercise of jurisdiction by the ICC, but has also slipped beyond this context to be applied across the various domains in which rule of law promoters act. At the ICC the basic idea is that if a state is genuinely 'unable or unwilling' to investigate, prosecute and punish those accused of international crimes, "ownership" of the prosecution can be claimed by the ICC. This principle was originally intended to safeguard the primacy of the domestic legal system and to ensure that the ICC remained a court of last resort. This principle has led Moreno-Ocampo to regard the best possible outcome for the International Criminal Court as one in which it never has any work; in an ideal world, all prosecutions for international crimes would take place at the domestic level. From this perspective, complementarity functions as *backstop* for when the domestic institutions fail. Framed in this way, complementary establishes a negative responsibility: don't prosecute if a state is able or willing. But there is an implied positive responsibility here too: help states develop their ability and willingness to prosecute. It is in this context that the idea of proactive or positive complementarity has evolved, as a catchall concept for describing and discussing the broader institutional responsibilities for promoting peace and justice in conflict and post-conflict societies. This has both been a source of criticism and a cause for optimism. Critically, the worry about positive complementarity is that it is underspecified and over-promises.⁵³ More

⁵³ See for example Leslie Vinjamuri, 'Deterrence, Democracy and the Pursuit of International Justice', *Ethics & International Affairs* 24 (2) 2010, 191-211 [arguing that a holistic approach to international criminal justice can

optimistically, it can be seen as offering a way to bring even greater practical coherence to the practice of rule of law promotion, both at the local level in terms of including local stakeholders, and at the international level, in terms of bridging the divide between the various international institutions with a role in pursuing transitional justice, peacebuilding, and reconciliation.⁵⁴

What is important here is not the practice of complementarity but the language of *shared* responsibilities to advance the rule of law. Putting this in the context of the concept of trusteeship can help explain not only the circumstances in which rule of law promotion might be legitimate but also how rule of law promotion might be regarded as an exercise of constitutional responsibility. This is to say that the drive to develop a conceptually coherent understanding of the commitment to legality helps *both* to justify an expansive set of responsibilities in this domain and, by the same token, to make sense of how the UN has begun to institutionalize a constitutionalist ethic. Trusteeship is a concept that, at its core, is a conversation about the conditions in which rightful rule can be exercised on behalf of another.⁵⁵ In this vein we talk about trusteeship arrangements for the mentally ill, trusteeship (or guardianship) over children and trusteeship over a company or estate. In the debates on a ‘standard of civilization’, trusteeship became part of a politicized division between civilized peoples and barbarian others, used to justify practices of colonial domination. The UN has, more recently, exercised trusteeship over failed or post-conflict states, such as in Kosovo. But trusteeship has more specific connotations in the context of constitutional law, which provides good reasons to think that a trusteeship mentality is both inevitable and justified as part of the responsibility to advance the rule of international law, in particular as part of maintaining a separation of powers in a constitutional order. In a reflection of this, Tom Bingham quotes one Victorian Lord Chief Justice as saying: ‘The constitution has lodged the sacred deposit of sovereign authority in a chest locked by three different keys, confided to the custody of three different trustees’.⁵⁶ This is said to become important in the context of

inflate expectations and gives sceptics ammunition for their criticisms of the legitimacy and efficacy of these expressions of international authority. Securing *both* justice and peace, she argues, ‘may require a pragmatic approach that delays justice until peace is secured and institutions are stable; it does not require that principles are abandoned altogether.’, p, 193]

⁵⁴ Edric Selous, Director of the UN Rule of Law Unit, Personal interview, 21 September 2011

⁵⁵ See generally William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003); Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2007); Keene, *Beyond the Anarchical Society*; Fearon and Laitin, ‘Neotrusteeship and the Problem of weak States’, *International Security* 28(4) Spring 2004, 5-43.

⁵⁶ Bingham, *The rule of law*, p. 169

parliamentary sovereignty, where parliament 'is said to enjoy the privilege of striking off the two other locks when, for any purpose of its own, it wishes to lay hands on the treasure'.

The point of this in the context of the present argument is to suggest that the UN, in attempting to justify its strategy for promoting the rule of law, has implicitly claimed a trusteeship over the idea of the rule of law, and used that position to justify the range of practices undertaken. This is not to say that the UN has always exercised this trusteeship role wisely or well, or that it has been recognized as having any such role by sovereign states. Hammarskjöld, for example, was widely criticized for his role in the Congo crisis; Annan presided over the failure to prevent the Rwandan genocide; perhaps most damningly from a constitutionalist perspective, Moon has resisted the idea that international organisations can be held accountable for violations of international law during peacekeeping operations. These failings shouldn't be minimized. Neither should the UN be forgiven for its failure to operationalize its pursuit of the rule of law at the international level as vigorously as it has done in conflict and post-conflict states.

But this also shouldn't be regarded as an issue that fundamentally disables the United Nations' broader constitutional role as 'the eye of nations, to keep watch upon the common interests, an eye that does not slumber, an eye that is everywhere, watchful and attentive'.⁵⁷ It is in the pursuit of the ideal, in the process of exercising responsibility over the ideal of the rule of law, the process of claiming trusteeship for this value, that the international and domestic constitutional orders begin to be aligned towards the same basic ends, as part of the same basic constitutional order.

Conclusion: Trusteeship and the construction of a global public

In order to manage the lack of direct democratic authorization, rule of law promotion must be understood as an *on-going* process of bleeding constitutional authority into the international system, and this means responding to the ambiguity created by the tension between domestic and international claims. But developing constitutional authority is not a one-shot deal, there is not some magic line to cross at which point states cease to have full sovereignty and international law takes over in compensation. This is to say that international law's constitutional authority is not 'compensatory', because nothing has been

⁵⁷ Kai Falkman, *To speak for the world: Speeches and statements by Dag Hammarskjöld, Secretary-General of the United Nations (1953–1961)*, 2005

lost, except the scope for a pragmatic ethic of legality. The constitutionalist ethic gets its footing through the recognition that the international order has been constituted as a genuinely public sphere – where actors are expected to fully own the responsibilities created through the exercise of public authority, including the responsibility for bringing coherence to the value of legality.

Chapter 6

Constitutional Interpretation and Torture

Bybee gives us Humpty Dumpty literary interpretation, styled as careful legal reasoning. In *Through the Looking-Glass*, Humpty Dumpty says to Alice:

"There's glory for you!"

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean a 'nice knock-down argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Peter Brooks¹

The prohibition on torture is a clear peremptory norm of international law.² It is a core human rights obligation, establishing absolute and non-derogable responsibilities both as a matter of custom and treaty law.³ In the rubric of this thesis, the prohibition on torture is a constitutional rule. And yet efforts to counter terrorism have given rise to considerable normative backsliding in this area, with some characterizing the prohibition on torture as a norm 'in regression'⁴, others finding it suffering a presumably less serious 'crisis of legitimacy'⁵ – on the road to regression but not there quite yet – and others questioning whether a mistake might have been made in the first instance in identifying torture as a peremptory norm, asserting that since some states have done and still do clearly engage in or support torture and associated practices in certain circumstances, it clearly isn't quite as

¹ Peter Brooks, 'The plain meaning of torture?', *Slate* 2005

² On the *jus cogens* nature of the prohibition, see Geoffrey Robertson, *Crimes Against Humanity: The Struggle For Global Justice* (London: Penguin 2000), p. 98 [There can be no doubt that the rule against torture has evolved into a *jus cogens* prohibition which every state has a owed to the international community to outlaw and punish]; for a useful analysis, see Erika de Wet, 'The prohibition on Torture as an international norm *jus cogens* and its implications for National and Customary Law', *EJIL* 15:1 (2004) 97-121

³ UDHR Art. 5; ICCPR Art. 7 and 10(1); ECHR Art. 3; Geneva Convention Common Article 3; Convention Against Torture and other Cruel, Inhuman and Degrading Treatment.

⁴ Adriana Sinclair, *International Relations Theory and International Law* (Cambridge University Press: 2010), p. 158

⁵ Tim Dunne, 'The Rules of the Game are Changing: Fundamental Human Rights in Crisis after 9/11', *International Politics* 44 (2) 2007; Christian Reus-Smit, 'International Crises of Legitimacy', *International Politics* 44 (2) 2007; Ian Hurd, 'Breaking and Making Norms: American Revisionism and Crises of Legitimacy', *International Politics* 44 (2) 2007; Ryder McKeown, 'Norm Regress: US Revisionism and the Slow Death of the Torture Norm', *International Relations* 23 (1) March 2009

out of bounds as international human rights standards imply.⁶ In this way, and despite its formally peremptory status, efforts to introduce exceptions to the reach of torture obligations and counter-efforts to expand the scope of issues prohibited under the torture obligations are part of a battle over whether international law can claim the degree of superior authority suggested by the language of legal obligations, and how the agents of international law are able to respond to challenges to the authority of international law. For the pragmatists, the uncertain application of the prohibition on torture is evidence that the rule needed to change. If it cannot or will not be obeyed, it *should not* have a peremptory status. As Michael Glennon puts it, the failure to recognise this leads to ‘peremptory nonsense’.⁷

The evidence here is not only the high profile failures of the Bush administration but also the widespread practice of torture by illiberal states. The reason the US arguments for torture were so important for the larger constitutional question, however, was that these arguments implied that torture could be, in the right circumstances and with the right definition, a legitimate practice. Torture could be squared with a commitment to legality. This tests the coherence of international law’s interpretive practices; it tests whether these interpretive practices can function to remedy threats to international law’s constitutional authority. It tests whether these interpretive practices are able to generate the right kind of change, whether they are able to fill out the nature of a progressive ethic of constitutional responsibility.

The first section gives an account of the practice of constitutional interpretation, suggesting that this practice is crucial to remedying the binding authority of international law. The second section suggests that appeals to either social fit or legal integrity as the ends of constitutional interpretation reflects the pragmatic and the constitutionalist divide on the responsibilities inherent in the practice of legality. But by focusing attention on the constitutional responsibilities held and exercised by international actors, and in particular the determinate sense of the appropriate, lawyerly practice of interpretation, these debates show how a constitutional ethic can emerge as the responsible ethic. The final section argues that this was the progressive legacy of the torture debates: it created a far better sense of the interpretive responsibilities embedded in the international legal order, and of

⁶ Stephen Toope and Jutta Brunnée, *Legitimacy and Legality in International Law* (Cambridge, Cambridge University Press: 2010)

⁷ *The Fog of Law*, p. 67-76

how the right to progressively interpret a constitutional rule was both limited and premised on a capacity to do so within the existing principles of legality.

Indeterminacy, Interpretation and Constitutional Evolution

Both interrogation and the interpretation of international law can be described as ‘dark arts’, and for similar reasons.⁸ In the case of interrogation, the difficulty is extracting the necessary information from a subject unwilling to give up their secret. This is a dark art in two senses. In the more prosaic sense, it is a practice that can lead to dark places. Interrogation relies on deceit, manipulating a subject’s fear, uncertainty and powerlessness to foster a desire to tell what they know. Where the aim is to get recalcitrant people to talk, being a good interrogator can mean using measures that amount to torture or other cruel, inhuman or degrading treatment; hence the euphemism ‘enhanced interrogation’. As one ex-interrogator puts it, ‘If you’re not abusing someone’s human rights, you’re not doing it right’.⁹ But it is by no means a universal truth that torture is the most effective method of interrogation. There is in reality no one best way to extract information from a recalcitrant subject. This leads to the second sense in which interrogation is a ‘dark art’: in the end, interrogation is a talent, not a science. The interrogator cannot rely on simply applying determinate rules about “how to interrogate a suspect”; they need an intuitive grasp of the method that will work with the context and the character of the suspect. They need an ability to judge best practice in light of the context. As Mark Bowden summarizes it, despite the collected wisdom about best practice, because success comes down to a question of inchoate ability ‘some interrogators are just better at it than others.’¹⁰

In the case of interpretation the difficulty, and the artistic element, comes with assigning the authoritative meaning to an obligation.¹¹ Every act of legal interpretation contains within it a claim that such and such is “the best meaning” to be attached to the obligation. But because there is no settled definition of what this best meaning is, as Sir Humphrey Waldock suggests, ‘In most instances, interpretation involves *giving* meaning to a

⁸ See Mark Bowden, ‘The Dark Art of Interrogation’, *The Atlantic* October 2003; Michael Waibel, ‘Demystifying the Art of Interpretation’, *EJIL* 22 (2) 2011; see also Klabbbers J (2009), ‘Interpretation as the continuation of politics by other means’, *Opinio Juris.org* 2 March 2009, available at: <http://opiniojuris.org/2009/03/02/continuation/>

⁹ Waldron, *Torture, Terror and Trade-Offs: Jurisprudence for the White House* (Oxford, Oxford University Press: 2010)

¹⁰ Mark Bowden, ‘The Dark Art of Interrogation’, *The Atlantic*, October 2003, available at: <http://www.theatlantic.com/magazine/archive/2003/10/the-dark-art-of-interrogation/2791/>

¹¹ see for example Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2009)

text'.¹² This leads to two opposed conclusions. First, the nexus between interpretation and authority suggests that the interpretive practice itself must be as stable, determinate, and rule-governed as possible. If interpretation is a creative activity conditioning the force a legal obligation is able to claim, protecting against arbitrary or subjectively beneficial renderings of the law creates a strong incentive for regulating the interpretative process. Rules of interpretation can ensure that the law applies equally to all subjects. The second effect of the connection between interpretation and authority, however, is that it becomes impossible to imagine interpretive rules that could govern in such an absolute, deterministic way without on occasion making a nonsense of the core obligation. In order to be alive to the appropriate meaning of an obligation, the interpretive process needs to allow for a certain amount of leeway. It needs to allow for practitioner's judgement. The most we should hope for from interpretive rules is that they codify what amounts to a collected wisdom about what constitutes best interpretive practice, otherwise the danger is that the rules strangle the possibility for the meaningful application of the law.

This creative aspect of interpretation makes it central to debates about the evolution of international law.¹³ Interpretation is a key mechanism for remedying any weaknesses in the binding force of international legal obligations. This is true of treaty obligations, but even more so of the overlapping category of what I have been calling constitutional obligations.¹⁴ Interpretation involves establishing the meaning of specific legal provisions but where constitutional-type rules are concerned, the process of establishing the appropriate meaning of a specific rule also tends to implicate the broader task of establishing how law should rule over its subjects.¹⁵ Constitutional interpretation goes hand in hand with the progressive application of law and attempts to establish the constitutional authority of law.¹⁶

¹² Quoted in Gardner R, *Treaty Interpretation* (Oxford, Oxford University Press: 2008), p. 26

¹³ See Van Damme, *Treaty interpretation by the WTO Appellate Body* (Oxford, Oxford University Press: 2008), p. 284.

¹⁴ I would suggest that all constitutional obligations have been codified as part of treaty law. Both the meaning and authority of these obligations, however, although informed by treaty law, is ultimately independent of treaty law. It is the fact that these obligations are habitual and customary, and would have force whether or not a treaty existed, that establishes them as constitutional.

¹⁵ Ronald Dworkin's theory of adjudication is the best expression of this; see also Rosalyn Higgins, *Problems and Process: International Law and how we use it* (Clarendon Press, Oxford: 1995)

¹⁶ See McNair who writes in *The Law of Treaties*, at 365 note 1: "The words 'interpret', 'interpretation' are often used loosely as if they included 'apply', 'application'. Strictly speaking, when the meaning of a treaty is clear, it is 'applied', not 'interpreted'. Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of a treaty". Gardner, *Treaty Interpretation* p. 26-29 discusses this, although he argues that there is no logical division to be made between interpretation and application. He suggests that this follows 'the Red Queen's "sentence first, verdict afterwards"' approach. I would suggest that

Constitutional interpretation needs to be distinguished from ordinary legal interpretation.¹⁷ Timothy Endicott suggests that the best way to make sense of this is to understand that the act of constitutional interpretation does not always refer to a process of legal reasoning. In fact, when the act of interpretation is open-ended and the meaning that is at issue is not contained or discoverable within the terms of the obligation itself – when the process of legal reasoning fails to produce a determinate meaning – the resulting judgment is not strictly speaking “interpretative” but a straightforward exercise of authority. In *Bankovic*, for example, the Court didn’t “discover” the meaning within Article 1 because there was no such meaning (either “original” or “ordinary”) to discover. Instead the Court used the unsettled and far from obvious customary and treaty law on extra-territorial jurisdiction as a way to read meaning into the ECHR. The lesson that Endicott draws from this is that: “Thanks to the charm of interpretation, “constitutional interpretation” is very widely used as a sort of euphemism for a judicial, constitution-building function that includes a responsibility for the non-interpretative reasoning that is needed to give substance to the community’s broad principles in particular areas of life.”¹⁸ The point is that constitutional interpretation cannot escape the question of *who* has the authority to interpret and, in interpreting, to develop the law. Constitutional interpretation privileging an authority to settle disagreement over the nature of the rules. When this is the purpose of an interpretive practice, it is “constitutional” in a creative, evolutionary sense.

The special challenge for international law is that there is no single interpretive authority, no single international agent capable of fulfilling the interpretive function of a constitutional court. There is no one interpretive authority with the standing to decisively remedy the indeterminacy of international law. Instead, international law has traditionally relied on the combined weight of states’ individual interpretations. For example, when we

while the two are linked practices and, often, inseparable, there is a useful and important analytic distinction. The order in which these practices occur is hardly the issue; at issue is what the object of interpretation is taken to be. Any application of the law will involve some type of interpretation, in the sense that moving anything from the two-dimensional world of law-books to the governing actions in the far messier three-dimensional world will require “an interpretation of how this applies in practice”. In most cases the ordinary meaning will be self-evident, or easily resolvable, and not central to determining the outcome of the case. This is what I take Waldock to mean by the application of law. But in some cases, there won’t be the same degree of certainty about the ordinary legal meaning; here the nub of the case requires “an interpretation of what the law is”. This is what I take Waldock to mean by ‘interpretation’.

¹⁷ On constitutional interpretation more generally, see Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007); Joseph Raz, *Between Interpretation and Authority*, p. [last chapter].

¹⁸ Endicott, ‘Legal Interpretation’, in Marmor A (ed.) *Routledge Companion to Philosophy of Law*, (Routledge: 2012) p. 11.

talk about state practice determining the meaning of customary international law what this ordinarily refers to is states' *interpretive* practice, their interpretation of whether a rule is legally binding or not. The result of this fragmented, horizontal interpretive authority is that international law has more of a need than other legal systems for a mechanism where meaning can be resolved exclusively through legal reasoning. It relies on the possibility that when the interpretive rules are applied to an interpretive question they have the power to mechanically produce the *right* meaning (or at least close of the possibility of subjects of law applying the wrong meaning to their obligations). Interpretive rules need to be able to produce a relatively fixed "box" establishing where the line is between legality and illegality.¹⁹

But international human rights obligations highlight how problematic this is. These obligations are most susceptible to the lack of judicial scrutiny because, by their nature, they aim to regulate what is an inherently unequal relationship between the state and the individuals within their jurisdiction.²⁰ Where a state's interpretive powers give them the ability to determine *how* to implement and interpret their obligations, a state has the potential to act in such a way that they can take the measures deemed politically or militarily necessary and at the same time claim to be in compliance with international standards. States' interpretive authority provides the potential for compliance without compromise. As Jan Klabbbers puts it, from a state's perspective interpretive powers mean that 'If you don't get your way when drafting the treaty, you can still try to get your way when a particular provision or term comes to be applied, by trying to control the meaning assigned to it'.²¹ Where presented with a hard case in which legal judgement is put under pressure to conform to political or moral spheres of judgement, this heightens the danger from indeterminacy, whether real or imagined. Lacking traditional institutions of constitutional interpretation, international law needs to get the rules of interpretation right because, otherwise, the practice ends up being corruptible in the same way as the dark art of interrogation.

What, then, is the purpose served by the practice of constitutional interpretation? For one, it establishes the *meaning* of international legal rules. More than that, because law's

¹⁹ See 'You say torture, I say coercive interrogation: the conversation we should have had 10 years ago', Slate 1 August 2011, [reporting on Aspen Security Institute discussion on law and the war on terror; image of lawyer's role as providing a legal box in which president can operate was used by Alberto Gonzales in his remarks]

²⁰ In this respect, in applying human rights provisions a constitutional court acts as a force multiplier for the individual against the state, bolstering the individual's lack of institutional standing with its own.

²¹ Jan Klabbbers, 'Interpretation as the continuation of politics by other means', *Opinio Juris* 2 March 2009

authority is so clearly tied to law's meaning, interpretive practices becomes a key route for maintaining and developing the constitutional authority of international law. In this way the purpose of interpretive "rules" is to fill out the terms of the lawyer's commitment to international law, to better establish the ethic of constitutional responsibility.

Determining fit . . .

There are two broad accounts of interpretation in international law. The first is to privilege the social fit of the obligation – to interpret the force of international law in light of its social fit or acceptance by international society. The second is to start with the legal fit or integrity of the obligation within the broader legal framework. As I argue, these create different pictures of what counts as a responsible interpretive practice. In this respect, it feeds into the pragmatist's and constitutionalist's different understandings of the practice of legality.

The problem addressed by those who advocate 'fit' as the crucial interpretive criteria is that some international legal rules no longer express the socially held beliefs or practices of international society, and international law is too sluggish to remedy this in a way that can both maintain the integrity of the law and their fit with the social context. Because of this structural weakness in the mechanisms available to interpret, re-interpret and eventually evolve international law, faith in international rules is misplaced. Acting as if the rules are truly binding may in fact sharpen and prolong the danger to the rule of law ideal, undermining the ability of political actors to make the changes necessary to close the compliance gap between what international law claims and what states are willing to obey. In the extreme, states may be forced to act illegally to remedy the integrity of international law. In this picture states need to deny the supremacy of defective legal rules in order to maintain the overall supremacy of the constitutional order. Cataloguing non-compliance is not, therefore, a simple descriptive matter of pointing out illegality; cataloguing non-compliance is the first step to charting norm regression, to understanding which legal rules need to be stripped of their binding character, to detailing where and in which direction international law needs to be developed if it is to retain the potential to lead to the rule of law. The decision to comply or not captures a potentially authoritative political judgement about the force or fit of international law which, the sceptic argues, provides the necessary context and guidance for remedying the general authority of international law.

The claim that emerges here is that where state practice fails to signal the legitimacy of an international norm or obligation, the legal obligation can be said to be in crisis. The norm is unable to claim the social authority needed to function as a legal obligation; namely, to bind law's subjects. Public challenges to the legal rules in effect show where formally obligatory norms no longer capture the true content of states' mutual expectations or custom. This opens up a gap between how states actually behave – and feel justified in behaving – and how international law says they should behave. The result of this line of reasoning is that non-compliance is perceived to create a justified impetus for rule change.²² This is a process, as Chris Reus-Smit argues, of 'recalibration, which necessarily involves the communicative reconciliation of the actor's or institution's social identity, interests, or practices with the normative expectations of other actors within its realm of political action'.²³ Jutta Brunnée and Stephen Toope develop this motif, providing an account of international legal obligation centred on the dual need to reflect the public context and inspire legality. They suggest that maintaining the authority of international law is, in part, about ensuring the continuing appropriateness of the legal norms to the regulatory context. The danger to be guarded against is that a gap opens up between what the law claims and the ability of the law to carry through on that claim, and that this gap in the end destroys law's ability to bind: 'a widespread failure to uphold the law as formally enunciated leads to a sense of hypocrisy which undermines fidelity to the law, and may ultimately destroy the posited rule'.²⁴ One aspect of this, one source of this gap between the promise and practice of legality, is that old, existing rules need to be able to meet new challenges. Using Lon Fuller's rule of law characteristics or 'criteria of legality' as their anchor point, they argue that one of the metrics for determining whether a rule has the necessary 'fit' is whether it inspires legality, the will to obey. Where the subjects of law do not practice legality, they argue, we must question the identification of the norm as an obligation proper. In order to ward off irrelevancy international law – all international law – must be capable of inspiring obedience.

Applying this precept to an analysis of the prohibition on torture, they outline what protecting the idea, the aspiration, of the rule of law requires: 'If we discover that the norm prohibiting torture is supported by widely shared understandings, the framework of

²² Reus-Smit, 'International Crises of Legitimacy'; Ian Hurd, 'Breaking and Making Norms', p. 197

²³ Ian Clark and Reus-Smit, 'Preface to the Special Issue: Resolving International Crises of Legitimacy', p. 154

²⁴ Brunnée and Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press: 2010), p. 232

interactional international law still requires the application of the criteria of legality and a further assessment of whether or not the norm continues to be buttressed by a practice of legality. *Only after pursuing this analysis will it be possible to determine the current legal force of the international norm prohibiting torture.*²⁵ Subjected to this analysis their conclusion, reluctantly arrived at they tell us, is that the existing consensus on the prohibition of torture is not as absolute as the rhetoric suggests. Even before the events of 11 September 2001 it was ‘close-to-moribund, despite its supposed status as *jus cogens*’.²⁶ The underlying norm that was in reality guiding state practice was that torture was wrong but sometimes necessary; it was a norm that permitted derogation. They argue that in the immediate aftermath of the terrorist attacks the pervasive fear and pressure for intelligence introduced an even stronger challenge the absolute prohibition, with states substituting ‘necessity’ as the guiding principle for action.²⁷ As they point out, this exceptionalism was relatively short-lived; there has been a widespread backlash against this expansive rendering of necessity, with the result that the legal prohibition on torture is stronger now than it’s ever been. Bush-era attempts to re-interpret the legal obligation have resolutely failed to carve out a space for exceptionalism, helped along by the strenuous reactions from international and domestic civil society and other states. And yet, against the grain of this strengthened interpretive consensus surrounding the obligation, Brunnée and Toope are led to surmise that general state practice has not followed suit: ‘The rule is rhetorically strong but practically weak; it does not truly shape the behaviour of scores, perhaps the majority, of states’.²⁸ As Brunnée and Toope stress, the relevant social practices in this context are the widely felt social understandings of how law should rule. The actors they are most concerned with as determinative of the force of the norm are states and their citizens.²⁹ In failing to reflect the pressure from these agents, binding law lapses, legal norms regress.

²⁵ *Legitimacy and Legality*, p. 222, my italics

²⁶ *Legitimacy and Legality* p. 270; see also Nicholas Onuf, ‘Rules for torture?’, in Anthony F. Lang, Jr. and Amanda Beattie, *War Torture and Terrorism: Rethinking the rules of international security* (Routledge: 2009), p. 25

²⁷ *Legitimacy and Legality* p. 249: ‘For the first few years after 11 September 2001, there appears to have been a further eroding of the already weak shared understanding precluding torture. The striking fear present in international society, and especially in the United States, gave rise to seemingly convincing arguments that ‘necessity’ drove widening exceptions to the prohibition on torture.’ For an example of this, see the near universal support in the UNSC for expanding counter-terrorism practice in the immediate aftermath of 9/11; note also that this support has since dropped off precipitously.

²⁸ p. 269

²⁹ They put particular emphasis on the popular support among citizens for torture in certain necessary situations. Recent evidence suggests that the perception of popular support for torture during the Bush years, even in limited circumstances, has been exaggerated. Actually there was a strong majority against torture in all circumstances. See Paul Gronke, Darius Rejali et al, ‘US public opinion on torture, 2001–2009’. *PS: political science & politics* 43 (03), p. 437

Michael Glennon draws on the same Fullerian image of the obligation becoming a 'dead letter' to provide pragmatic principles able to cut through the fog of law. On his account the great danger facing international law, the danger that needs remedying, is that law's normative claims fail to meet the practical, regulatory reality. This is for two connected reasons. First the obedience demanded by law is not reflected in the behaviour of law's non-compliant subjects: a law cannot be obligatory and at the same time fail to bind. Second, the fact of non-compliance signals a problem with the legal rule. For whatever reason, the legal rule is failing to meet the requirements of its subjects, and whatever else law does, it needs to be *useable*. It is a problem if obeying the promulgated obligation strikes law's subjects as, at some level, nonsensical.

These different justifications of non-compliance tie legality and interpretive practice to a standard of publicity, appealing to the public, inter-subjective and discursive space of international society to authoritatively settle any indeterminacy in the law. Analysing how a legal obligation has been received in this public space and the fit that it is able to inspire should produce all the necessary criteria for working out whether a particular change in the law is legitimate. This is an important insight, and it is an area where the methods available in IR theory certainly have something to contribute, in terms of the rigour with which publicity and fit can be measured. But the danger is that these measurable criteria get elevated to a point where this is the *only* interpretive standard defining legality.³⁰ The law has some communicative avenues, and there is certainly scope for viewing interpretation as a politicized practice – a battleground for the continuation of politics by other means³¹ – but interpretation is not an cannot be an entirely communicative practice of signalling the force of international law, at least not if the core obligation is to retain its binding force. As Gardiner explains this, accepting such a position would make it impossible for international law to exercise any stabilizing or ordering function. It is part of the purpose of a treaty, as with general international law, is to condition the range of possible meanings to be attributed to an obligation.³² Moreover, in methodological terms, using compliance as the metric for interpreting the force of law fails to take account of how rules structure state practice, including *how* states comply with the law. This begs the question of what counts as

³⁰ See Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', *Global Policy*, 1 (2) 7 May 2011.

³¹ Klabbers J (2009), 'Interpretation as the continuation of politics by other means', *Opinio Juris.org* 2 March 2009, available at: <http://opiniojuris.org/2009/03/02/continuation/>

³² Gardner, *Treaty Interpretation*, p. 53; 65-66

compliance for the purposes of establishing a constitutional change in international law.³³ How widespread and systematic does non-compliance have to be for it to decisively undermine the existing legal rules? And if a state maintains that it has complied with international law, but this assertion is based on a contentious interpretation of the rule, what implications should we draw from this for the strength of the underlying norm? And what of “soft law” – at what point does a norm “in flux” either lose or develop a claim to constitutional force? In any event, these are the kind of general questions which are raised as a result of the over-emphasis on the interpretive practice as a necessarily inter-subjective, dialogic process.

. . . or fostering integrity?

A more orthodox, black-letter perspective of interpretation sees *legal integrity* as the crucial interpretive standard. Alexander Orakhelashvili provides one such account, relying on the potential of the rules established by the Vienna Convention on the Law of Treaties to function as objective platform from which to resolve broader questions about the indeterminacy of international law and the resulting challenged to international legal authority. Looking back to Hersch Lauterpacht and J. L. Brierly to anchor his analysis, he argues that international legal interpretation both relies on and is motivated by the need to distinguish between law and non-law, something impossible to achieve with a the singular focus on social fit. He views the process of interpretation having a key effect in either, when the interpretive rules are sufficiently robust, limiting indeterminacy or, when the interpretive rules are weak, fostering indeterminacy. In short, interpretive rules are crucial to the coherence of international law, and coherence is seen as crucial to the authority of international law. As he puts it, in order to understand what these interpretive rules (or principles, conventions, norms) are ‘it is first and foremost necessary to identify the proper conceptual basis for the binding force of international law and the essence of international obligation.’³⁴ If nothing else, this flags the scale of the challenge. If giving an account of the *essence* of international obligation is an essentially contested project, what hope is there for a unified framework of constitutional interpretation?

³³ Howse and Teitel, ‘Beyond Compliance’, p. 127

³⁴ *The Interpretation of Acts and Rules in Public International Law* (Oxford, Oxford University Press: 2008), p. 1

Orakhelashvili manfully denies the scale of the challenge, however. He suggests instead that the ‘doctrine of the integrity of legal obligations’, or the principle of effectiveness, provides the necessary basis for a comprehensive understanding of the legitimate mechanics of international law interpretation, a way to authoritatively distinguish law from non-law.³⁵ International lawyers can, in other words, resolve the hard questions posed by indeterminacy *if* the interpretive act is conducted with the aim of giving ‘full effect’ to the codified obligation. All that needs to happen to ensure that the authority of international law survives the interpretive process is to mandate that interpretive acts be guided by the aim of ensuring that legal system has integrity. In practice, he argues, this is the function served by the VCLT rules: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’.³⁶ On his analysis this allows the meaning of an obligation to extend to cover gaps and stave off the possibility of fragmentation that a more restrictive interpretation of the meaning of the obligation might throw up.

These issues about interpretation, indeterminacy and change in the law track back to the problems that arise where it is the coherence of legality itself that is seen to be in crisis, and the pragmatic call for the need to integrate some account of the wider social and political context in which the law operates. The question is: how do you imbue the law with this external considerations without undermining the integrity of the legal obligations themselves? Orakhelashvili’s argument suggests an implicit belief that if the rules of interpretation are clear enough then such a situation of indeterminacy won’t arise. If, for example, South Africa had possessed more robust rules of constitutional interpretation, putting greater credence on the need for effective and extensive interpretation of the constitutional rules, presumably the state would not have been so readily able to bend the law to justify a policy of apartheid.³⁷ His suggestion is that by narrowing the space for idiosyncratic interpretations and encouraging integrity-building interpretations, the VCLT provides the range of interpretive rules necessary to fill the gaps and, by and large, correct for any residual indeterminacy in international law.

³⁵ *Interpretation of Acts and Rules*, p. 2; see also Lauterpacht’s seminal article on this topic, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties”, 26 BYbIL (1949) 248

³⁶ Vienna Convention on the Law of Treaties, Article 31(1)

³⁷ See David Dyzenhaus, *Hard Cases in Wicked Legal Systems*; also Jens Meierhenrich, *The legacies of law: long-run consequences of legal development in South Africa, 1652-2000* (Cambridge, Cambridge University Press: 2008)

But in a clue as to why this doesn't quite resolve the difficulties, consider the court's judgment in the judges' trials at Nuremberg. What they established was that that effective rules of interpretation *did* exist, but that Germany's judges had failed in their professional and constitutional duty to uphold and protect them. The issue wasn't as simple as the presence or absence of rules of constitutional interpretation; effective interpretation relies on the presence of responsible interpretive agents rather than the quality of the rules. Because he underplays this element, focusing instead on the idea that the existing rules establish a principle of effectiveness, Orakhelashvili struggles to square his account of interpretive practice with the broader purposive development of the law. This is because, as Gardiner argues, it is by no means clear that the VCLT establishes any such principle of effectiveness which, remember, is supposed to endow international law with, at least in part, its progressive, forward-looking, gap-filling character. As Isabelle Van Damme puts it, it remains 'the prerogative of the interpreter to decide how context comes into play'.³⁸

The effect of this reliance on the rules of interpretation is that this approach to preserving the integrity of an ethic of international legality ends up claiming too much for the rules themselves; what is crucial is the interpretive *roles*, and the constitutional responsibilities this generates.

From interpretive rules to interpretive responsibilities

Both of the above approaches have the same basic motivation. If we can detail a set of robust standards for determining which obligations are really, truly binding, determining where to nip and tuck international law's obligations should not prompt any serious existential questions about the viability of international law. Both "integrity" and "fit" establish competing methods for establishing what counts as a valid interpretation, and, hence valid change, in international law. They establish competing frameworks for remedying indeterminacy in the constitutional rules, frameworks which overlay the pragmatic and constitutionalist perspectives of on the ethic of legality appropriate to international society. Fit and integrity are not, however, necessarily in tension. The tension is maintained because the interpretive remedy is seen as a matter of detailing the *rules* of interpretation – whether internal to international law or in the form of social scientific

³⁸Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, p. 213; it is for this reason that Klabbers argues the best way to think of the VCLT rules is, not as rules or even principles, but as a 'methodological device' (Opinio Juris, March 2009).

methodological rules. In either case, the interpretive rules are seen to determine the interpretive art.

The “crucible approach”³⁹ offers one alternative middle ground able to combine considerations of fit and integrity, in a way that broadly approximates the constitutionalist approach. It does this by refocusing the interpretive challenge from one of determining the appropriate rules, to one of determining who holds the appropriate *roles*. To put this another way, it relies on developing an understanding of who can be *trusted* to interpret international law in the right way, in accordance with the more general principles of legality. In this approach, both fit and integrity are considerations to go into the interpretive mix. Which will take precedence – and what the interpretive process will look like – depends on the specific interpretive context, as judged by the interpretive authority. This provides an interpretive method that foregrounds the artistic elements of interpretation and the personal judgement needed for good interpretation, using the rules to ring-fence rather than determine the nature of that art. Central to this approach is that there are both “best practice” standards of interpretation and a shared sense of the appropriate role of the interpreter in developing international law. It is in the interplay between the existing interpretive standards and roles that the meaning of core international obligations can be both discovered and, where necessary, advanced. The result of adopting a crucible approach is to focus on how the different interpretive roles remedy the authority of constitutional obligations, rather than presuming that this authority must come from an analysis of either the existing rules or sovereign states.

In the final part of this chapter I argue that this focus on the interpretive responsibilities has helped to counter US claims to interpretive authority during the ‘torture debates’. These were claims based on a pragmatic ethic; responding to these attempts has required adopting a constitutionalist ethic.

Constitutional Interpretation through the Torture Debates

The torture debates attacked the constitutional status of the prohibition on torture, with states and their lawyers exploiting their interpretive rights as a way to establish an understanding of this prohibition that better squared with the policy objectives of the “war

³⁹ Gardner, *Treaty Interpretation*, p. 9; see also Bardo Fassbender, ‘The UN Charter as Constitution’, p. 595-598 [arguing that the VCLT sets out the authoritative rules for constitutional interpretation]

on terror”. However, the moments of genuinely *constitutional* interpretation leading to an evolution in the law were far more limited than pragmatists have believed, in large part because of the success of international lawyers in clarifying the scope of the interpretive responsibilities attached to the constitutional prohibition on torture.

Debate about the nature of the prohibition on torture after 11 September 2001 can be understood as having gone through two phases, and having now entered a third.⁴⁰ In the first, instigated by the torture memos, the practice of interpretation was about discovering the meaning of the codified obligation. In the second phase, constitutional interpretation of the same core obligation became a much broader matter of establishing the legitimacy of exceptionalism or exemptionalism. Interpretation focused on the wider social and political context – uncertainty and crisis – as the determinant of the rules. The argument I want to draw out of this is that international lawyers have, to a degree, learned from these experiences in responding to the legacy of the torture debates, in debates on drones, on diplomatic assurances, and elsewhere, where the fundamental question is about the capacity of the existing constitutional rules to govern changed or changing circumstances. What emerges from these torture debates is the resilience of the core constitutional rules, when these rules are buttressed by a practical, professional knowledge of what a good – and appropriate – interpretation of international law looks like. Interpretive rules mattered, but the sense of responsibility to international law mattered more.

Torture 1.0: Textual Indeterminacy and Interpretive Prerogative

Jay Bybee’s torture memo starts well.⁴¹ There is no direct refutation of the prohibition on torture. There is an acknowledgement that the US is bound by both international and domestic law to refrain from any use of torture, although there is a not inconsequential decision to focus on its codification in US domestic law. Bybee suggests, ‘The key statutory phrase in the definition of torture is the statement that acts amount to torture if they cause “severe physical or mental pain or suffering.” In examining the meaning of a statute, its text must be the starting point.’ The problems begin when Bybee sets out to resolve the indeterminacy left by the non-definition of ‘severe’; how, he asks, can the law function to

⁴⁰ On the issues more generally, see the excellent Sanford Levinson (ed.), *Torture: a collection* (Oxford, Oxford University Press: 2006); also Karen J. Greenberg (ed.), *The Torture Debate in America* (Cambridge University Press: 2005)

⁴¹ For a detailed account of the torture memos, see Philippe Sands, *Torture Team: Uncovering War Crimes in the Land of the Free* (London, Penguin: 2009)

guide practitioners about the appropriate interrogation practices without having an authoritative interpretation of what sort of actions constitute ‘severe’ suffering? His implicit suggestion is that this provides an opening for the supremacy of states’ and, more specifically, the executive branch’s, interpretive judgement: lacking a determinate definition in either domestic or international law, ‘we construe a statute in accordance with its ordinary or natural meaning’.⁴² His reconstruction of the ordinary or natural meaning of severe mental and physical suffering defines a meaning for the statute, but through what Peter Brooks describes as ‘an ungoverned and unscrupulous reading that uses—very selectively—dictionary definitions to produce arcane and obfuscating interpretations.’⁴³ Brooks goes on to liken Bybee’s interpretation to ‘a parody of a deconstructive reading written by a hostile critic.’⁴⁴ This inept legal reasoning, further supported by the views of Alberto Gonzales and John Yoo – which Harold Koh, the current State Department legal advisor, describes as ‘perhaps the most clearly erroneous legal opinion I have ever read’⁴⁵ – functioned as the de facto legal guidance for interrogators at least until January 2003.⁴⁶

As, in response to the hue and cry that greeted the revelations about US interrogation practices and treatment of detainees, the administration distanced itself from the interpretive positions taken in the torture memos, the justificatory narrative shifted significantly. Rather than looking to justify “enhanced” interrogation practices as falling outside of the prohibition on torture, the administration took the extraordinary step of implying that some of the practices used might amount to torture but that this was ‘torture lite’.⁴⁷ At the base of this contention was that there were practices which straddled the

⁴² Note that a related problem here is Bybee’s implied suggestion that this is a previously unacknowledged obstacle to the application of IL. In fact, it is very well established, and in fact the entire regime of international interpretation can be seen to revolve around an exposition of how to elaborate the ‘ordinary meaning’ of a treaty provision. As G Schwarzenberger puts the difficulty ‘In accordance with the general rule on interpretation . . . the object of treaty interpretation is to give their ‘ordinary’ meaning to the terms of the treaty . . . The difficulty about this approach to the issue is that almost any word has more than one meaning. The word ‘meaning’ itself, has at least sixteen different meanings.’, quoted p. 161 Gardner.

⁴³ Peter Brooks, ‘the plain meaning of torture?’, *Slate* 2005; note that using a dictionary definition is not per se an unusual starting point for international legal interpretation, but the key difference is that the dictionary definition is immediately contextualized, see Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 2009, p. 273

⁴⁴ Brooks, *Ibid.*

⁴⁵ Harold Koh, ‘A World Without Torture’, *Columbia Journal of Transnational Law*, 2005 p. 647

⁴⁶ See Sands, *Torture Team*, arguing that rescinding the Haynes memo of 15 January 2003 essentially signalled the end of the blanket belief that the Geneva Conventions didn’t apply; it was only in June 2006, however, that the US Supreme Court in *Hamden v Rumsfeld* proactively restored Geneva Convention rights to all Guantanamo prisoners.

⁴⁷ See Jessica Wolfendale, ‘The Myth of ‘Torture Lite’’, *Ethics and International Affairs*: 23(1) 2009; this has been backed up by the proud admission of some of the plays since leaving office that they did in fact authorize torture.

indistinct grey-line between legality and illegality when interrogating terrorist suspects. The position in effect was that sometimes interrogators, through no fault of their own, fall foul of pesky, opaque international standards while doing their difficult job of preventing future attacks against the US. Interrogation becomes, as I suggested at the beginning of this chapter, a ‘dark art’ that shades the bright line between legality and illegality, and too important to national security to be constrained by an over-emphasis on the commitment to international legality.⁴⁸ More than that the absolute prohibition on torture as too fixed, too rigorous to function as a guide for practitioners operating in a context where the consequences of failing to counter threats to security from terrorism could be so drastic. The range of contexts in which interrogators would be acting demanded a standard of greater complexity, precision and nuance than the absolute prohibition could give.

In the attempt to establish a broader justification for this argument, a justification based on more than simply policy concerns, it was the pragmatic idea that in order to be relevant, in order to govern in a determinate way, and in order to be able to continue to inspire a commitment to legality, the legal rules need to allow for some degree of flexibility, depending on the circumstances. This is a convoluted logic – on the one hand calling for greater precision in the international rules, on the other hand calling for more flexibility – so making sense of it is perhaps a fools game. But let me try. The argument was that (1) because the clear and absolute standard enshrined in international law was too indeterminate to fulfil its regulatory purpose in practice, (2) if the state was to meet its commitment to international legality, it should (3) interpret the standard in such a way that violations weren’t inevitable and this would (4) make the prohibition on torture more robust for the future. If we wanted to sum this position up, it’s that the absolute prohibition on torture doesn’t establish a sufficiently precise fit with the operational context, and so must be modified.

⁴⁸ Supplementing this perspective was the related argument that the prohibition on Cruel, Inhuman and Degrading Treatment actually legitimated a more permissive standard for interrogation and detention. In a replication of the earlier attempts to reinterpret torture by pointing to the indeterminacy of “severe”, the same play was made with respect to “cruel”, “inhuman”, and “degrading”. These were subjective assessments, certainly not providing the sort of determinate guidance that interrogators needed in order to be sure of their legal obligations. The public guidance on the threshold of cruel, inhuman and degrading treatment needed to be strengthened to ensure that interrogators could know where the line between legality and illegality lay. It was argued that substituting the opaque standards of CIDT for a prohibition on treatment which ‘shocks the conscience’ could provide this more actionable, policy relevant guide to the type of action that was permissible. See Dahlia Lithwick, ‘Stream of Conscience: Why it matters what definition of torture we use’, 13 September 2006, <http://www.slate.com/id/2149564/>

On one level it is easy to agree with critics of this legal reasoning, especially with the benefits of hindsight and the knowledge that this legal reasoning was part of a larger practice of creating a ‘legal black hole’ for US counter-terrorism operations.⁴⁹ But if we put aside this post-hoc advantage of the critic, the problem we’re left with is that in order to dismiss the interpretation introduced by the so-called ‘torture team’ we’re first forced to challenge a state’s interpretive privileges. States have a protected rights to interpret *how* to implement their international obligations. And there was a case to be made that the raft of counter-terrorism and security related rights and obligations created after 11 September 2001 needed to be integrated into the existing human rights framework. The challenge of avoiding fragmentation – of protecting international law’s integrity – posed at least a question about how to interpret the prohibition on torture in order to effectively apply it. When combined with the need for secrecy in counter-terrorism and intelligence gathering,⁵⁰ at a purely functional level the only interpretive authority in a position to determine the scope and nature of the relevant obligations were those states most closely engaged in the practices themselves.⁵¹

For the criticism of the US interpretation to stick it became necessary to show how, by engaging in these dubious interpretive practices, the administration and its lawyers had failed in their responsibilities to the law, both domestic and international. David Luban does just this, arguing that the torture memos were supported by a practice of ‘loophole lawyering’, which itself is a dereliction of the responsibility that a lawyer holds to interpret the law in good faith and give advice to the client based on sound legal reasoning.⁵² When the Bush lawyers gave us an esoteric, idiosyncratic reading of the rules that picked at the textual indeterminacy without regard for the larger object and purpose of the rules, their interpretive authority became void. As Joseph Raz puts the general principle, ‘some interpretations are so bad as to be interpretations no longer’.⁵³ In this regard the

⁴⁹ Philippe Sands, *Lawless World*, see also Margaret L. Satterthwaite, “Rendered Meaningless: Extraordinary Rendition and the Rule of Law”, *George Washington Law Review* 75 (2007) [appealing to ‘human dignity’ and ‘the principle of humanity’ as providing the objective criteria for the practices’ lawlessness]

⁵⁰ See Simon Chesterman, ‘Secrets and Lies: Intelligence Activities and the Rule of Law’, *Michigan Journal of International Law* 28 (3) 2007

⁵¹ In this sense it is a classic example of the author of international law also being its subject and enactor. These interpretive powers were even more pronounced in this case because domestically the US executive was also agglomerating the same type of extensive authority to act without legal oversight in the ‘war on terror’. When commentators speak of Guantanamo being a legal black hole, this is because the administration acted to remove it from both domestic constitutional jurisdiction and international legal jurisdiction, making the case that the *only* relevant authority resided with the executive.

⁵² David Luban, ‘Lawfare and Legal ethics at Guantanamo’, *Stanford Law Review* 60 (6) 2009

⁵³ Raz, *Between Interpretation and Authority*, p. 299

interpretive failures of the Bush lawyers – their professional irresponsibility – led directly to a loss of interpretive authority. The constitutional rules didn't lose their integrity; that fate was reserved for those involved in constructing a 'legal black hole'.

Torture 2.0: Situational Indeterminacy and Interpretive Exceptionalism

But textual indeterminacy wasn't the only basis for the US claim to interpretive authority. Another justificatory narrative played out around the claims of situational indeterminacy. Here the claim was that the meaning of an *absolute* prohibition needed clarifying, because no obligation can be truly absolute. This is a practical nonsense, inviting reinterpretation.

The initial basis for this claim was the contention that legal obligations need to be forward-looking, in that they either explicitly anticipate the full range of circumstances in which they will apply, or they admit exceptions and changes should new circumstances or new regulatory challenges merit it. Law needs to be able to guide policy and practitioners, including in the provision of national and international security. Exceptions to legal absolutism are introduced here by provoking, in some guise or other, a reaction to what Waldron calls '*ruat caelum* absolutism'⁵⁴, to the idea, as Richard Posner puts it, that 'the constitution is not a suicide pact'.⁵⁵ When the heavens are falling – as when struck by a natural disaster, or where there is a grave threat to national security, or an imminent danger of attack by foreign or domestic enemies, or a genocide about to be committed, or when a mob is trying to overthrow the executive – however absolute an obligation might be in ordinary circumstances, the gravity of the threat means exceptions must be admitted. Torture and other ill-treatment can, on this line of reasoning, be compatible with law and justice because, in certain circumstances, such actions are necessary to prevent greater disorder and chaos befalling the state. To the extent that the use of torture, 'enhanced interrogation', ill-treatment, or other ordinarily illegal practices facilitate intelligence gathering and serves national security, setting legal judgment aside can even be painted as a service to law; it becomes a form of *exceptional* action necessary to preserve the rule of law. In this formulation of the rule of law, the executive and government agencies are cast as the protectors of the rule of law ideal, rather than law's subjects or potential corruptors. Even in the act of breaking the law, legality is served because, so the argument goes,

⁵⁴ Waldron, *Torture, Terror and Trade-Offs*, p. 31

⁵⁵ Richard Posner, *Not a suicide pact: the constitution in times of national emergency* (OUP: 2006)

necessary and valid exceptions get introduced to correct an otherwise overly rigid system of positive law obligations.

This kind of “prospectivism” is particularly evident where violations of the torture rules are justified as necessary to ‘forestall future evils like terrorist attacks’.⁵⁶ On Alan Dershowitz’s insidious logic, if legal rules are to be appropriately forward-looking the starting point needs to be an assumption of the worst case scenario. Rather than wait until the moment of crisis to introduce the exception, the responsible lawmaker should start with a consideration of those situations requiring exceptions and work back to reconstruct a more robust, coherent and prospectively applicable obligation. The most notorious example of this kind of “exceptional” reasoning is the hypothetical ‘ticking time bomb’ scenario. Here you know a terrorist suspect in your custody to have information that would allow you to prevent a mass loss of life. What actions should be permissible? Is it responsible, as a matter of public policy formation, to take torture off the table if that’s what it takes to get the necessary life-saving information in a situation of such gravity?⁵⁷ To move beyond the hypothetical, what if simply *threatening* to torture a kidnapper into telling you the location of his 11-year old victim could get the necessary information?⁵⁸ Surely the rules should admit that kind of exception?

This limited basis for introducing exceptions to a constitutional obligation against torture quickly morphed into a much wider discussion about the general limits to constitutionalism in times of uncertainty and crisis – arguments which tracked the pragmatic approach to international legality. The core proposition was that in times of crisis, exceptionalism – suspending the constitutional rules – can become both the legitimate and responsible practice of legality.⁵⁹ But the argument in these debates were

⁵⁶ Luban, ‘Liberalism, Torture and the Ticking Bomb’, *Virginia Law Review* 91, 2005, p. 1436

⁵⁷ It’s worth noting that Obama has expressed a similarly forward-looking thought in defending his decision not to open an investigation into the legality of Bush-era interrogation and detention practices, suggesting that ‘it’s important to look forward and not backwards, and to remind ourselves that we do have very real security threats out there’, http://www.huffingtonpost.com/2009/04/16/obama-on-spanish-torture_n_187710.html.

⁵⁸ See the Daschner case in Germany.

⁵⁹ Michael Ignatieff also talks about exemptionalism as distinct from exceptionalism. On his analysis this refers to the more specific practice of introducing reservations to treaties, of exempting American citizens from the jurisdiction of international courts and tribunals, of failing to comply, of negotiating treaties and then refusing to ratify or ratifying them after an extended delay. Essentially under his analysis exemptionalism with respect to international law is a process of general legal isolationism. But, and this links up with Agamben’s far more general position, it is something that occurs *within* the sphere of international law, rather than standing in direct opposition to the rule of international law; see also Tim Dunne, “‘The rules of the game are changing’”: Fundamental Human Rights in Crisis after 9/11’, *International Politics* 44 (2007) 269–286 [arguing that exemptionalism creates a two-tier standard of international legitimacy, on the basis of US claim to have exceptional Great Power standing in international society, p. 279]

broader than this, seeing the exceptional practice as something which decisively changed the terms of international law's prohibition on torture. Fleur Johns has recently used Agamben's concept of 'the event' to suggest that the torture debates provided, in effect, a constitutional shock, changing and narrowing the existing understanding of the torture prohibition in a way that continues to reverberate in state practice, in effect developing the law in a regressive direction.⁶⁰ This reflects Bruce Ackerman's argument that the problem with defining change, particularly *constitutional* change, in reaction to these exceptional moments is that 'a downward spiral threatens', and the overarching project becomes one of constitutional erasure.⁶¹ The problem that needs to be confronted here is that the narrative of crisis comes to define the public, constitutional conversation, including the perception about the responsibilities owed under the existing constitutional rules.

Whether derogation from a constitutional rule is located within the terms of the constitution or as a species of extra-constitutional exceptionalism, the end result is to challenge the absolute and non-derogable nature of the obligation in question. And this is a possibility that judges, international law and international lawyers have, time and again, rejected with respect to torture. It is part of the nature of a *jus cogens* norm to be immune from the push and pull that the debate about exceptionalism attributes to the process of constitutional interpretation. As Dahlia Lithwick puts it:

'The rule of law requires that there be a floor. For decades most of us believed that Common Article 3 of the Geneva Conventions was such a floor. Its bar against "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," was clearly meant to apply not just to POWs or battlefield soldiers in uniform but to *all captives*. Common Article 3 was intended to be the lowest we went . . . But then along came the Bush lawyers, and they managed to saw into the floorboards. A sub-basement for prisoners at Abu Ghraib and Guantanamo opened beneath us, and our dignity and honour disappeared into it.'⁶²

And yet, international law – and international lawyers – have been able to respond to these pressures by re-asserting the absolute nature of the prohibition. Article 2(2) of the Convention Against Torture doesn't leave any obvious room for interpretive doubt about

⁶⁰ Fleur Johns, 'The Torture Memos', in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds.), *Events: The Force of International Law* (Routledge-Cavendish: 2010)

⁶¹ Bruce Ackerman, 'The Emergency Constitution', *Yale Law Journal*, p. 1029

⁶² Dahlia Lithwick, 'Torture Bored: How we've erased the legal lines around torture and replaced them with nothing', 22 February 2010, available at: <http://www.slate.com/id/2243737/pagenum/all/#p2>

the legality of exceptionalism: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture’.⁶³ Whatever the pull or conceptual elegance attaching to claims of situational indeterminacy and emergency constitutionalism, the absolute nature of the provision has shown an underlying resilience. Where someone alleges to have found an obligation of this type ‘in regression’ and less absolute than previously thought, or subject to a new-found calculus of necessity, or in need of balancing against diplomatic responsibilities in the form of the control principle or extradition cooperation, a red flag should be raised. Not because an analysis of state practice suggests otherwise, but because the authority of these obligations *does not rely in any way on state practice*. No matter how good the analysis of state practice or how many pages are spent detailing the shifts in public attitudes; where these type of absolute constitutional rules are concerned, there are *no* inferences to be drawn from how the obligation functions in *state practice*. This protected status of the constitutional rules means that the interpretive practice in the end results in a one-way process of strengthening and progressively developing the constitutional rule. If the interpreter is acting from a commitment to legality, no other options are possible. As Juan Mendez, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has expressed this:

‘all human rights standards are subject to the norm of “progressive development,” in that they evolve in accordance with new repressive actions and features. In this regard, it is important to consolidate current interpretations of what constitutes torture and cruel, inhuman and degrading treatment or punishment, and to insist on effective implementation of States’ obligations to prevent and to punish violations. In keeping with the progressive development of international jurisprudence, the Special Rapporteur believes that expansive interpretations of norms are possible as long as they better protect individuals from torture and cruel, inhuman or degrading treatment or punishment. At the same time, such expansive interpretations should evolve from agreements among all stakeholders reached after frank and open debate. It is the role of the Special Rapporteur to generate such discussion as appropriate.’⁶⁴

⁶³ Article 2(2), UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, available at: <http://www.un.org/documents/ga/res/39/a39r046.htm>

⁶⁴ Juan E. Mendez, Mendez JE, ‘Statement by Mr. Juan E Méndez, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment 16th session of the Human Rights Council - Agenda

Torture 3.0: Evolutionary Indeterminacy and Interpretive Expansivism

What legacy have these debates left behind? Has Obama ended this narrative of exceptionalism? On the surface at least, the effect of Obama's executive order 13491 ("Ensuring Lawful Interrogations") has been to publicly mark the return to normality, signalling US re-engagement with its international obligations. We might wonder how far or how deep this commitment goes – especially in light of continuing detention practices and human rights abuses in the name of counter-terrorism, and the failure to investigate or punish those responsible for authorising torture. Nevertheless, what seems clear is that Obama has succeeded in drawing a line between his administration's good faith reading of international law and the combative approach of the Bush administration. He has succeeded in this in large part by repositioning counter-terrorism practice as something to be addressed within the language of international law, rather than some necessarily outside and in tension with international law. The nature of US responsibilities have been increasingly tightly defined and regulated.⁶⁵ Counter-terrorism practice has been increasingly normalized, as part of and governed by international law.

As the narrative has evolved and the strain on the constitutionally binding nature of the torture prohibition has receded, however, another set of issues has begun to emerge, making it more difficult to bracket off the legacy of these debates. This is in large part because Obama and his administration espouse the same basic pragmatic mindset that drove the torture debates. Obama, as one commentator puts it, 'embraces uncertainty, provisionality and the continuous testing of hypothesis through experimentation'.⁶⁶ What is problematic for international law's claim to constitutional authority is that international law's rules are treated as a set of hypotheses about how to act, and tested and re-tested *not* against the requirements of legality, but against based on prior policy considerations.

Item 3, 7 March 2011³, available at:

http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE_March2011.pdf

⁶⁵ for example in clarifying the 'unable or unwilling test' that would be used to guide intervention in a sovereign state; see Ashley Deeks, 'Pakistan's Sovereignty and the killing of Osama Bin Laden', ASIL insights 15 (11), 5 May 2011

⁶⁶ James T. Kloppenberg, *Reading Obama: dreams, hopes and the American political tradition*, 2011, p. xii, quoted in Trevor McCrisken, 'Ten Years On: Obama's war on terrorism in rhetoric and practice', *International Affairs* 87 (4) 2011, 781-801.

Debate about the prohibition against torture has now shifted to a concern about how the appropriate approach to interpreting the *range* of obligations the core prohibition gives rise to. In these debates, the pragmatic attitude resolves into a challenge to the *evolutionary indeterminacy* of international law. This focuses directly on the scope of responsibility for torture and the non-absolute obligations that are attached to protecting and advancing the core obligation. This debate accepts, as a starting point, that torture is wrong in all circumstances – it accepts the absolute, constitutional nature of the obligation. But it contests the scope of state responsibility for complicity in acts of torture, for preventing acts of torture and responsibility to provide redress for past acts of torture. In other words, this is a debate that contests the *ramifications* of a constitutional, peremptory prohibition on torture.

This comes out in a number of areas. For example, there is a question at the moment about the legality of the use of “diplomatic assurances” as a way to avoid triggering the prohibition on *non-refoulement*. This prohibition protects an individual from being returned to a country where there is a clear risk that they will be tortured on return. A diplomatic assurance is essentially a promise made by the receiving state not to torture an individual who might otherwise be considered at risk if and when they are returned. The argument that some states have made – and look to be winning – is that this has to be a legitimate under international law because there are security considerations governing the decision to expel an individual which can trump the *risk* of torture, that the level of the risk to the individual is a matter for states to judge for themselves, and that safeguards set up to monitor the individual will ensure that the assurance not to torture is being kept. What activists have pointed out, however, is that the very practice of seeking a diplomatic assurance hollows out the commitment to an absolute prohibition on torture. This is because the way the principle of non-refoulement has traditionally given states quite a wide interpretive license: if a state decides that an individual is not at risk of torture on return, then they are free to return that individual. With this wide interpretive authority, diplomatic assurances simply aren’t necessary, they’re redundant. Given this, what function do diplomatic assurances serve? The charge is that they are a way to water down states’ responsibilities to oppose torture, a way to avoid the hard conversations about the systematic torture of individuals in detention in places like Jordan.⁶⁷

⁶⁷ An enhanced place for diplomatic assurances is also one of the outputs expected from the secretive ‘Copenhagen Process’, see Angus Stickler and Kate Clark, ‘A Charter for Torture’, *New Statesman*, 2

Conclusion

As Rosalyn Higgins points out, ‘We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made’.⁶⁸ Similarly, rules or conventions on legal interpretation will not stop abusive interpretations. But developing an sense of the appropriate, professional attitude – of what it means to *responsibly* interpret the constitutional rules – can prevent these abusive interpretations from having a detrimental impact on the constitutional order, from constituting international society in an illegitimate way. Interpretation has more than simply a defensive function in a legal order, however. It helps to define the scope of legitimate change, and it prevents sweeping constitutional changes from being effected by any one actor, in thrall to the god of crisis.

September 2011, available here: <http://www.newstatesman.com/international-politics/2011/08/afghanistan-torture-rights-nds>; they write: ‘Called the Copenhagen Process, it has received little publicity. Its meetings are closed. Its full membership is secret. Human rights groups such as Amnesty and other interested non-governmental organisations have been excluded. What we do know is that it is led by the Danish government and it involves 25 nations (including the US and UK), as well as Nato, the EU, the African Union and the UN. Since 2007, these players have been pushing to establish a common framework for detainee transfers in Iraq and Afghanistan. In grim committee-speak, it aims to produce an “outcome document”, which it hopes will receive approval from the UN and individual countries. The starting point for those around the Copenhagen table is that, while the principles of humanitarian and human rights conventions may be set in stone, 20th-century law is out of kilter with 21st-century conflict. Military nations need a get-out clause from the Geneva Conventions. Thomas Winkler of Denmark’s ministry of foreign affairs is leading the charge. “The dilemma is . . . [you] have a huge body of law but, when you have to apply the law in these types of conflict or operations, we have met a number of challenges . . . that you detain somebody and that you believe that the individual either is a security threat or a criminal, how do you then deal with it?” he told the Bureau.’

⁶⁸ Quoted in Franck, *Recourse to Force*, p. 185

Chapter 7

Aggression and the Profession of Faith

If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.

Hersch Lauterpacht¹

Perhaps the greatest threat to international law's constitutional authority is from the 'fuzziness' of the constitutional rules.² I am not talking about the "penumbral uncertainty" that comes with any rule of law, nor about the abusive efforts to manipulate the rules so they appear uncertain. I mean the genuine uncertainty that comes from a rule which, although seeming to demand absolute obedience, seems also to need a degree of situational, prudential, political judgement in order to function as promised. Pragmatic arguments pick at the uncertainty surrounding the content and application of a rule claiming a constitutional type of authority. Their scepticism gets its form in detailing the political will needed to make sense of this authority in practice, whether as the driver of compliance, as a reflection of states' commitment to the rule, or as a signifier of the functional suitability of rule to rule.³ Having drawn you in with the fear of uncertainty, the pragmatist killer blow is to expose the hollow commitment to the constitutional rules. These conceptual arguments, when pressed onto service, become a battle cry for the supremacy of political judgement and the irresponsibility of professing faith in the rule of international law.

If fuzziness is a general worry, the rules on the use of force generate a distinctive haze. The rules prohibiting the use of force bundle uncertainty on top of uncertainty – in the definition of aggression, in the triggers for legitimate self-defence, in the possibility of pre-emptive war, in the judgement of proportionality, in the responsibility to prevent or punish, in the permissibility of humanitarian intervention, in the pre-eminence of the UN

¹ Hersch Lauterpacht, 'The Problem of the Revision of the Law of War', *British Yearbook of International Law* 29 (1952) p. 382

² See Ulf Linderfalk, 'Normative Conflict and the Fuzziness of the International Ius Cogens Regime', *Heidelberg Journal of International Law* 69 (2009), 961-977; Michael J. Glennon, *The Fog of Law: Pragmatism, Security and International Law*, 2010; Ian Hurd, 'Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World', *Ethics and International Affairs*, 2011

³ See for example Alex Bellamy, 'The Responsibility to Protect: Five Years On' *Ethics & International Affairs* 24(2) 2010; Edward Luck, 'The responsibility to protect: growing pains or early promise?' *Ethics & International Affairs*, 24 (4) Winter 2010; see however Michael Doyle 'Dialectics of a global constitution: The struggle over the UN Charter', *European Journal of International Relations*, online: September 2011 ['should a will to global governance develop, there already is an institutional way, outlined in the [UN] Charter. What is still missing is the will.', p. 17]

Security Council, in the nature of armed conflict, in the governance of new technology (drones, cyberwar), and so on. The traditional source of uncertainty about the rules, as Oscar Schachter puts it in his inimitable style, is the ‘widespread cynicism about their effect. Reality seems to mock them.’⁴ That states seem able to find a legal justification for whatever action they choose to take undermines any claim law has to rule in this area. Connected to this is the lack of any straightforward argumentative or interpretive remedy to the rules. These rules are essentially contested, because there are coherent reasons in favour of both a conservative and progressive application of the rules. As Ian Hurd puts it with respect to the rules on humanitarian intervention: ‘Since these questions cannot be answered definitively, the uncertainty remains fundamental, and the legality of humanitarian intervention is essentially indeterminate. No amount of debate over the law or recent cases will resolve its status; it is both legal and illegal at the same time.’⁵ The ambiguity in the rules here implicate the entire constitutional order because, combined with the lack of an objectively empowered authority and the need for action, the incoherence in the rules creates a hard case for international society. The final source of ambiguity is in the role of the exception. As Jutta Brunnée and Stephen Toope argue, ‘the wider and more uncertain the exceptions, the less robust the rule’.⁶ The domain governed by the rules on the use of force seem to demand a more nuanced, selective application of the rules; this is a domain where “exceptionalism” – for example, in responding to mass atrocity, or waging a pre-emptive war – seems intuitively justified.⁷

Scepticism about the constitutional authority of these rules is not only the result of the ambiguous effect or application of the rules. It also attaches to the uncertain constitutional *status* of the rules. First, the ‘outlawing of acts of aggression’ is an obligation *erga omnes*, which as I have argued is a crucial marker for international law’s constitutional rule. The fuzziness in the law of war is part of the more general difficulty with pinning down

⁴ Schachter, ‘The Right of States to Use Armed Force’, *Michigan Law Review* 82 (1984), p. 1620; ‘The reasons for this uncertainty do not arise from an absence of reference to legal and moral rules. On the contrary, every time a government uses force or responds to such use by others, it invokes the law along with considerations of morality and humanity. This very fact generates cynicism since it seems possible for every action to find support in law and there appears to be no effective higher authority to settle the matter. These facts understandably lead many to conclude that the legal rules on the use of force may be used to rationalize and justify almost any use of force and, therefore, that they can have little if any influence on the actual decision to use force.’

⁵ Ian Hurd, ‘Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World’, *Ethics & International Affairs*, 25 (3) 2011: 293-313, p. 293

⁶ Brunnée and Toope, *Legitimacy and Legality in International Law*, p. 273

⁷ See also Chris Brown, ‘Selective Humanitarianism: In defence of inconsistency’ and ‘Practical Judgement and the Ethics of Pre-emption’, chapters 16 and 17 in *Practical Judgement in international Political Theory: Selected Essays* (London, Routledge: 2010).

the constitutional effects which follow from the existence of constitutional rules in international society. Second, the nature of the rules on the use of force provide a touchstone for arguments that the UN Charter represents *the* constitution for international society. These arguments are important because they suggest that the UN Charter – and the organizational architecture it has spawned – has the capacity to address the incoherence that comes with fragmentation. Part of understanding the UN Charter as a constitutional framework for international society is that it establishes remedial responsibilities to develop the rules in such a way that they can be consistently applied, that they can weather the uncertainty charge.

The purpose of this chapter is to flesh out the constitutional politics surrounding the rules on the use of force. I argue that despite the focus on the ambiguity in the rules on the use of force, the critical issue is the normative status of this ambiguity. Does this ambiguity authorize exceptionalism? Does it grant constitutional priority to political judgement; is the ambiguity a sign for the limits of legality? From the pragmatist's perspective, the answer in each case is yes. But I use the debates on the use of force against Iraq – and since, in Libya and Syria – to argue that this is not how international lawyers have tended to express their commitment to legality. From their perspective, the uncertainty and ambiguity in the rules occasioned *greater* responsibilities of legality. Rather than justifying exceptionalism, the uncertainty in the rules embedded a call for constitutionalism. Rather than foreshadowing defeat, the 'fog of law' is a call to arms.

Outlawing War

International law does not make any claims to prohibit the use of force, simply to restrict the use of force to clearly defined circumstances where resorting to force is deemed appropriate. Under the customary law of nations these circumstances were self-defence, to assert property rights, and to punish a breach of the natural law. Under the auspices of the UN Charter, these circumstances are restricted to self-defence or, when presided over by the UN Security Council, in order to protect international peace and security.⁸ Because of this, in Lauterpacht's view, the cumulative legal effect of the UN Charter was that war 'ceased to be a right which sovereign States are entitled to exercise at their unfettered discretion'.⁹ Or,

⁸ UN Charter Article 2(4); Article 51; Article 42

⁹ Hersch Lauterpacht, "The Limits of the operation of the Law of War" 1953 BYbIL vol. 30, p. 208

as Oscar Schachter puts it, ‘When the United Nations Charter was adopted, it was generally considered to have outlawed war.’¹⁰ In this sense the UN Charter was imagined to be a kind of constitution, with states giving up their rights of war in exchange for obligations of peace, and the UN Charter functioning, as Inis Claude’s phrase, to turn ‘swords into plowshares’.

The project to deepen and enforce the rule of international law had a special resonance in an international society still bearing the scars of aggressive war. The years of war provided the necessary political motivation, and consensus, on the need to regulate the use of force and ensure respect for the rule of international law. Behind this belief that international law could better ‘save succeeding generations from the scourge of war’ if institutionalized in the UN Charter was an implicit acknowledgment that politics had failed to do so.¹¹ The failure of the political powers to avoid war helped to justify the turn to international law and international institutions. But participants at San Francisco were also conscious of the need to avoid the hyperbole – and subsequent failures – of earlier “utopian” attempts to establish a world order ruled by law. The League of Nations failed because it couldn’t generate a genuine political consensus to back up its claim to authority. As a result, the aspirations for the UN Charter were parsimonious to begin with, judged against both historical and contemporary standards. Most notably, there was a far less evolved role for the human rights standards enshrined in the Charter and Declaration. As a result, although the formal architecture for this ‘last utopia’, as Samuel Moyn has characterised it, would be established alongside the regulation of the use of force, the practical authority attached to human rights standards was weak and would only become a real force well into the 1970s, as a global civil society began to emerge, and as the concepts of jus cogens norms and obligations *erga omnes* gave institutional teeth to dead-letter rights.¹² Even more crucially, however, there was no *positive* obligation to resist acts of aggression; this was a decision to be judged on a case-by-case by the UN Security Council. As Thomas Franck characterizes it, the result of this is that ‘To the extent that we have had collective

¹⁰ Oscar Schachter, ‘The Right of States to Use Armed Force’, *Michigan Law Review* 82 (1984): 1620

[he goes on to say ‘Only two exceptions were expressly allowed: force used in self-defence when an armed attack occurs, and armed action authorized by the UN Security Council as an enforcement measure. These provisions were seen by most observers as the heart of the Charter and the most important principles of contemporary international law. They have been reaffirmed over and over again in unanimous declarations of the United Nations, in treaties and in statements of political leaders. Yet as we are all acutely aware, there is widespread cynicism about their effect. Reality seems to mock them.’]

¹¹ UN Charter, preamble.

¹² See Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press: 2009); Moyn S, *The Last Utopia: Human Rights in History* (Harvard University Press: 2010)

security it has been both ad hoc and voluntary'.¹³ This also had the effect of making the political judgement of the Security Council members central to the operation of the Charter, even as the architects of the Charter were heralding a new world ruled by law. In a similar vein, Mark Mazower argues that despite the collective, community values seemingly codified in the Charter were, for some of those involved, the hope was that the structures of the UN would preserve the fraying imperial order, rather than challenge it.¹⁴

The terms of this political rule became increasingly evident as the Cold War rubbed in, and as the UN became a sideshow to the main event. Even the parsimonious call to outlaw war was difficult to sustain as nuclear weapons technology rehabilitated the policymakers faith in the balance of power as the guarantor of international order. Mutually assured destruction provided its own elegant solution to avoiding the battlefield, and without the need to rely on promises made at the conference table. More than that, the rehabilitation of the balance of power logic as the best hope for international stability also undermined the UN's ability to function as an effective protection mechanism. For all practical purposes, the UN institutional framework appeared to lack the necessary functional authority to protect international peace and security. It may have established the normative framework for a new world order, but the rift between states charged with enacting this legalized, civilized world order undermined the promise and prospects of world peace through world law. Great power politics captured the Charter vision of a world ruled by law, and the UN Security Council failed to exercise the enforcement responsibilities attributed to it under the Charter.

This meant that the UN Charter although theoretically promising a 'watertight scheme for the contemporary reality on the use of force', could not realistically function as such.¹⁵ This wasn't necessarily a cause for concern. As Eisenhower would put it: 'With all its defects, with all the failures that we can check up against it, the UN still represents man's best-organized hope to substitute the conference table for the battlefield.'¹⁶ But, as Oscar Schachter argues, the institutional limitations imposed on the UN because of the Cold War

¹³ Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge, Cambridge University Press: 2002), p. 46

¹⁴ Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton, Princeton University Press: 2009)

¹⁵ Rosalyn Higgins, *Problems and Process*, p. 240-251; see also, Weiss, T., Forsythe, D. and R. Coate, "The Reality of UN Security Efforts During the Cold War" in *The United Nations and Changing World Politics* (Boulder: Westview, 1994).

¹⁶ Kennedy P, *The Parliament of Man: The Past, Present, and Future of the United Nations* (New York, Random House: 2006), 1961

made it crucial that the rules on the use of force were clear and unambiguous, and not pushed beyond the prevailing legal interpretations.¹⁷ Because the UN Security Council wasn't functioning for the international community – and in defence of the UN Charter values – but as a venue for negotiations between competing ideologues, in order for the rules on the use of force to retain their authority there needed to be very few occasions for debates about their application to end up deadlocked in the UN Security Council. In other words, because the collective security regime couldn't be trusted to remedy uncertainty in the rules, this created all the more reason to avoid those “hard cases” which admitted uncertainty about the rules.¹⁸

One of the paradoxical effects of a deadlocked conference table, however, was to generate alternative avenues through which to exercise responsibility for international peace and security. In November 1950, for example, faced with the USSR's decision to block all measures to respond to North Korean aggression, the UN General Assembly (at the prompting of US Secretary of State Dean Acheson), adopted resolution 377 A (V) ‘Uniting for Peace’.¹⁹ This allows that when the UN Security Council fails to exercise its responsibilities for international peace and security because of a deadlock between permanent members, the General Assembly has a subsidiary power to act. Later attempts by the General Assembly to define aggression as a ‘crime against international peace’ can also be understood as rooted in a frustration with the failures of the UNSC to develop the collective security regime, although tellingly these attempts to strengthen the prohibition on aggression weren't widely taken up.²⁰ Alternative security communities were also formed, as a way to escape the constraints of the UN conference table. The formation of NATO in particular would have an impact well beyond the Cold War, both in terms of establishing peace and diplomacy as ‘the common-sense way to act’ among its members²¹ and, eventually, in terms of proving a “subsidiary” form of collective institutional legitimacy that could be appealed to where the UNSC had failed to act, such as in Bosnia and Kosovo. As far as the constitutional status of the UN Charter is concerned, however, the most significant impact was in the expansion of the authority of the UN's *administrative* branches,

¹⁷ Oscar Schachter, ‘The Right of States to Use Armed Force’

¹⁸ See David Kennedy, *On War and Law* [points out how during the Cuban Missile Crisis US state department lawyers invented the legal category of a blockade in order to avoid having to categorise their actions as a use of force; this helped efforts to find a diplomatic resolution.]

¹⁹ See especially Christian Tomuschat, ‘Uniting For Peace’, available at <<http://untreaty.un.org/cod/avl/ha/ufp/ufp.html>>

²⁰ GA 265 (XXV), 24 October 1970; GA Resolution 3314 (XXIX), 14 December 1974, Article 5, paragraph 2

²¹ See Vincent Pouliot, ‘The Logic of Practicality: A Theory of Practice of Security Communities’, *IO* 2008

namely the Secretariat. This was presided over by Dag Hammarskjöld whose innovation, as Anne Orford argues, was to ‘re-imagine the role of “chief-administrative-officer” in political terms’, claiming an executive agency far beyond that envisioned in UN Charter Chapter XV.²² Hammarskjöld’s re-imagination is an important step in developing the constitutional authority of the Charter rules – but not a sufficient development. In practice the nature of this role – and the degree of authority those holding it could claim in practice – as much reflected the changing political context as the judgement or mindset of those filling the role.²³ And much like the Security Council, the Charter provides ‘a discretionary mandate to undertake executive action’, rather than subjecting the Secretary-General to obligations to exercise his authority in a particular way.²⁴

These were in theory important shifts in the location of remedial responsibilities for international peace and security. But none had any very great *immediate* impact on the rules on the use of force. These were largely procedural fixes, of only limited application. Indeed, in the case of the UN General Assembly’s powers to ‘unite for peace’, Korea remains the only time that these were actually used to circumvent the Security Council’s authority. Any deeper uncertainty about the application of the rules was managed and contained by re-emphasising the pre-eminence of sovereign rights. Crucially, the development of communal, constitutional responsibilities to protect international peace and security were frozen by Cold War politics. In these circumstances, where uncertainty about the rules on the use of force could have resulted in a nuclear war, non-intervention became the height of sovereign responsibility.²⁵ There wasn’t any great incoherence or uncertainty in the rules here, but neither could the international order be characterised by the rule of law.

This provides evidence for seeing the rules on the use of force as subject to what Brunnée and Toope term ‘normative ebb and flow’.²⁶ The limited scope of the rules reflects a shared understanding – at least among the permanent members of the UN Security Council – that the rules privileged state’s subjective right to self-defence and territorial

²² Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press: 2011), p. 4 [goes on to argue that R2P is an attempt to integrate the pre-existing but dispersed practices of international executive rule into an integrated framework]

²³ Chesterman S, *Secretary or General? the UN Secretary-General in world politics* (Cambridge University Press: 2007) [argues that those filling the role have consistently re-imagined the requirements of the role, fluctuating between an emphasis on one or the other component. This is not one role but two: secretary *or* general, by turns reflecting or shaping member state opinion.]

²⁴ Anne Orford, *International Authority and R2P*, p. 26

²⁵ See Luke Glanville, ‘The Antecedents of “Sovereignty as Responsibility”’, *European Journal of International Relations*, 17, no. 2 (2011), 233-55

²⁶ Jutta Brunnée and Stephen Toope, *Legitimacy and Legality*, p. 180

integrity rather than requiring a state to exercise or engage with their collective responsibilities in protecting international peace and security. It was this understanding of the constitutional rules as of limited application that had the capacity to ‘generate a sense of legal obligation’ among states.²⁷ There is scope for this to change, for example if the concept of a responsibility to protect is more widely accepted. But any claim to constitutional authority is conditioned, and ultimately weakened, when the rule is subject to normative ebb and flow. This conclusion is similarly reflected in Page Wilson’s argument that the debate over the legality of aggression should be treated as evidence of an underlying division between cosmopolitan and communitarian visions of international politics. The communitarian logic, she argues, acts as a brake on the realisation of the cosmopolitan project and illustrates ‘the folly of seeking to push the evolution of international law beyond prevailing political constraints’.²⁸ In either case, a formal commitment to outlaw war was not the same as a commitment to give effect to the constitutional rule.

Criminalizing Aggression

Quite apart from the political obstacles to institutionalizing an outright prohibition on aggression, there was also the problem that the Charter struggled to communicate the gravity of an act of aggression. Despite the condemnation of aggression, as a legal matter a violation of Article 2(4) attracted the same level of responsibility as a violation of any other rule of law. There was no ‘normative relativity’ in international law – and this was a good thing too, as Prosper Weil argued.²⁹ It gave certainty, predictability to the legal international order. As Bull argued, this feature of international law – prioritising a procedural rather than substantive justice – was wholly suited to the pluralistic nature of international society. But the concept of a ‘crime of aggression’ or ‘crimes against peace’ provides a sign that, even as the UN was resisting attempts to develop the constitutional status of the rules on the use of force, the language of international criminal law was providing an alternative avenue for the progressive impulse.³⁰ The idea motivating efforts to establish a *criminal* sanction for

²⁷ Brunnée and Toope, *Legitimacy and Legality*, p. 279

²⁸ Page Wilson, *Aggression, Crime and International Security: Moral, Political and Legal Dimensions of International Relations* (Routledge, 2009), p. 82

²⁹ Prosper Weil, ‘Towards Relative Normativity in International Law’ *American Journal of International Law* 77 (1983): 413-442

³⁰ See especially Anderson, K, ‘The Rise of International Criminal Law: Intended and Unintended Consequences’, *European Journal of International Law*, 20 (2) 2009: 331-58.

aggression was that this is a key mechanisms for clarifying the normative force of a legal rule. Establishing aggression as a crime – including elaborating on the elements of the crime – is one way to avoid uncertainty creeping into the rules on the use of force, without sacrificing the constitutional status of the rule.

In a famous exchange at Nuremberg, the US chief prosecutor Robert Jackson attempted to pin Goering down on his responsibility for German aggression or crimes against peace, the crime that up until that point had been the central pillar in the prosecution case. The crime was defined by the Tribunal's charter as involvement in 'the planning, preparation, initiation or waging of aggression or a war in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. But there had been unease from the start about using a criminal trial to punish what many regarded as essentially political crimes. The US Secretary of Treasury Henry Morgenthau Jr., for example, favoured summary executions at the discretion of field commanders; the Russians favoured a trial but only if it proceeded on the presumption of guilt, didn't raise too many difficult questions and produced the right end result. Indeed, there was an awareness long before Goering had his day in court that much of the legal basis for aggression with the IMT Charter comes from the Kellogg-Briand Pact treaty obligations – where parties agreed to 'renounce [war] as an instrument of national policy'. This meant that the architects of aggressive war were being charged with a breach of the customary principle of *pacta sunt servanda*, rather than because a criminal prohibition against aggressive war formed part of customary international law.³¹

In any event, as Jackson found out to his chagrin, these were the difficulties that Goering was able to pick at. At every turn Goering was able to reverse the question, pointing out that the historical record of the allies was hardly unblemished when it came to waging war in violation of international law, or renegeing on treaty obligations. Goering's conclusion – the conclusion that Jackson, in making the case for aggression, found so difficult to counter in cross-examination – was that the decision to go to war must be part of a responsible statesman's arsenal, and not subject to post-hoc criminal sanctions. From Goering's perspective, for all the procedural niceties protected at the IMT, when you scratched the veneer away, the allies might just as well have adopted the Russian proposal. In ignoring the political nature of the decision to go to war, the tribunal was showing itself

³¹ Page Wilson, *Aggression, Crime and International Security*, p. 49 [quotes Roosevelt as indicating in a letter to Stimson that he favoured charging Nazi leaders with 'waging aggressive and unprovoked warfare in violation of the Kellogg pact']

up pas a sham, nothing more than victor's justice, because history dictates that 'the victor will always be the judge, the vanquished the accused'.³²

Of course, the success that Goering and his fellow accused felt after this exchange disappeared once the prosecution shifted its focus to proving responsibility for war crimes and crimes against humanity, presenting for the first time the full horror of the Holocaust. These were crimes that did have a basis in customary international law. Neither does the final judgement reflect the trouble Jackson had, instead finding Goering guilty and reaffirming aggression as 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole', an evil which 'is not confined to the belligerent states alone, but affects the whole world'. And yet, in spite of this statement, when it came to punishing the accused for their involvement in aggression the judges were rather more circumspect. As Page Wilson argues, although convinced about the superior *political* wrong attached to aggression³³, the relatively weak sentences given by the tribunal for aggression versus crimes against humanity and war crimes was a reflection of the much less firm precedent in customary international law for the crime of aggression.³⁴

The unease surrounding the application of a criminal sanction for aggression is even more evident in the deliberations of the Tokyo IMT, or at least debated more intelligently.³⁵ As Judge Pal – who presented himself, not entirely accurately, as the only judge on the Tribunal with any experience of international law – explains in his dissenting opinion, there was simply no treaty, statute or customary law basis for the crime of aggression. To conjure it up and applied it retroactively to justify individual punishments, including the death penalty, 'obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in war. A trial with law thus prescribed will only be a sham employment of legal process for a satisfaction of a thirst for revenge. It does not correspond to any idea of justice'.³⁶ Following the trial and the execution of the guilty, Joseph Kennan, the chief prosecutor, made the extraordinary claim that the process was indeed political, but

³² See Jovan Babic, 'War Crimes: Moral, Legal or Simply Political?', in A. Jokic (ed.), *War Crimes and Collective Wrongdoing*, 2001, p. 63 [characterising aggression as a 'crime against defeat']

³³ See also Larry May, *Aggression and Crimes Against Peace*, 2008, noting that the prosecution policy at Nuremberg was that all the accused were charged with aggression, while only some were charged with war crimes and crimes against humanity.

³⁴ As if to hammer home the political nature of the decision making process, as Kirsten Ainley argues, two days prior to the signing of the London Charter which established the Nuremberg IMT (the IS dropped an atomic bomb on Hiroshima, and 1 day later would drop another bomb on Nagasaki, killing an estimated 214,000 in all, 'Virtue Ethics and International Relations', p. 6.

³⁵ John Laughland, *A History of Political Trials: From Charles I to Saddam Hussein* (Peter Lang: 2008) p. 166

³⁶ Pal, dissenting judgement, p. 17

that this was of no consequence: 'had there been an actual miscarriage of justice with regard to some of the defendants, there would have been no wrong . . . the lives of morally and legally innocent men may be sacrificed in the achievement of the common purpose.'³⁷ The common purpose in his view was 'to advance the cause of peace and right notions of international law', to create a new world order based on the criminalization of war.³⁸ A worthy sentiment, but a sentiment that exposes an problematic pragmatic understanding of legality, a willingness to act illegally – in this case ignoring fair trial standards – in order to expand rule of international law.

Reflecting these broader concerns with the subjectivity inherent in the prosecution of aggression, the rising tide of human rights concern in the 1970s offered rationale for avoiding the definitional politics surround the use of force. Human rights offered a way to circumvent what was, by that point, a moribund dream with limited political consensus. It is noteworthy that Amnesty International, the actor that did most to develop international human rights into a viable political project, has actively avoided taking a policy stance on which circumstances might constitute a legitimate use of force. The reason behind this is that, for them, the crucial consideration is whether human rights and humanitarian law standards are respected and civilians and non-combatants protected.³⁹ To dwell on the background legitimacy of the conflict is potentially damaging in that it distracts attention from the more fundamental obligation to comply with human rights and humanitarian law. Even where an intervention is ostensibly justified in defence of human rights, to take a position on the legitimacy of the intervention creates myriad problems down the road, inviting charges of selectivity and inconsistency. Behind this policy, in other words, is an attempt to avoid having to elaborate on the normative hierarchy within the constitutional rules, and a recognition that there needs to be some space for situation judgement if the tensions between the rules of international law are to be managed. What is key, however, is that the situational judgement takes place in defence of the constitutional rules.

It was for similar reasons that the International Law Commission would dismiss the concept of a *state* crime of aggression after a decades long process of attempting to articulate

³⁷ Joseph Kennan and Brendan Francis Brown, *Crimes Against International Law*, 1950, p. 155; quoted in John Laughland, *A History of Political Trials*, p. 173

³⁸ Kennan and Brown, p. 157, quoted in John Laughland, *A History of Political Trials*, p. 173

³⁹ For the same reason they have traditionally avoided taking a stance on illegitimacy of dictatorship, although this position has slipped in their pro-democracy response to the Arab Spring; on Amnesty International see generally Stephen Hopgood, *Keepers of the Flame: Understanding Amnesty International*, 2006; also Samuel Moyn, *The Last Utopia*

the rules on state responsibility. There is a long history here, with efforts to codify the law of state responsibility beginning in 1953, presided over by five different special rapporteurs, with an agreement only reached in 2001. The question of how to characterise the “crime” of aggression was a major point of contention throughout this process. Indeed, the difficulty surrounding this was one of the reasons the process took so long.⁴⁰ At the end of it all James Crawford dropped the category of state crime, reasoning that in order for this category of ‘higher’ liability to make sense, there had to be some institutional form which could give the category meaning. In place of state crime, Crawford substituted the ambiguous concept of ‘serious breaches of obligations under peremptory norms of international law’.⁴¹

The inclusion of aggression as one of the core crimes in the Rome Statute, and the Kampala review conference which detailed both the elements of the crime and the circumstances under which a prosecution for the crime of aggression could be initiated has changed this picture, but only slightly. Yoram Dinstein captures the rationale behind the inclusion of aggression in arguing that the capacity to hold an individual accountable for the crime of aggression establishes a back-door means of giving effect to the constitutional rules on international peace and security. As he puts it: ‘Only if it dawns on the actual decision makers that where they carry their country along the path to war in contravention of international law they expose themselves to individual criminal liability, are they likely to hesitate before taking that fateful step.’⁴² Given the weakness of UN organs at providing this framework for international peace and security, there is a need for measures able to sidestep or “contract around” international political intransigence.⁴³ There is a recognition of its status as a constitutional rule, but an uncertainty about what this means in practice. Kampala can be read as an attempt – not altogether successful it should be said – to institutionalise the authority needed to bypass the UN Security Council on matters of peace and security.

⁴⁰ See especially J. H. H. Weiler, A. Cassese and M. Spinedi (Eds), *International Crimes of States. A Critical Analysis of the ILCs Draft Article 19 on State Responsibility*, 1989; also James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, 2002

⁴¹ Eric Wyler for example goes so far as to suggest that the substantive differences between Ago and Crawford’s formulations are so negligible that the one is the twin brother of the other, Wyler, ‘From State Crime to responsibility for serious breaches of peremptory norms of general international law’, *European Journal of International Law* 2002; for an alternative point of view, although for the moment he seems to have lost this battle, see Alain Pellet, “Can a State Commit a Crime? Definitely, Yes!”, *European Journal of International Law* 1999

⁴² Dinstein, *War, Aggression and Self-Defence* (4th Edition, Cambridge, Cambridge University Press: 2005) p. 117

⁴³ See however Lang, arguing that a functional role for punishing aggression does not solve the basic conceptual concerns over the constitutional legitimacy of the punitive practice. Without a more developed sense of how punitive practices serve international justice in a legitimate way, the danger is that punitive practices will underpin and develop an unjust international order. This is to suggest that short term fixes to the punitive framework are not enough; what is needed is a broader project of international constitutionalization.

The uncertainty that attaches to the “crime of aggression” is not to do with political nature of the act, but with fragmentation. Claims of victor’s justice do not, ultimately, discount the possibility of their being a criminal sanction attached to aggression. The reason these cries have caused such worry is that show up the contradictions that have been allowed to persist in the constitutional rules of international law between a protection of fair trial standards and the preservation of international peace and security. The problem here is not that the rules are ‘fuzzy’ but the uncertainty surrounding the responsibilities attaching to their application.

Constitutionalizing Intervention: institutionalising the exception?

The end of the Cold War brought new uncertainties, new disorders. Academics proclaimed “the end of major war”, and called for a new security discourse to fit this new reality.⁴⁴ This was matched by a consensus of sorts which emerged from the smaller interventions and insurgencies which peppered the Cold War landscape, that the prohibition on the use of force was not so absolute as it had seemed in San Francisco or at Nuremberg. The use of force to counter insurgencies, civil wars and ‘small wars’ had a place in the policy makers toolbox not reflected in the blunt attempts to define and prohibit aggression. The need for a new way of thinking about the use of force was further heightened by the growing interconnectedness of states which introduced new transnational threats and simultaneously made concerns about great power conflict seem quaint, old-fashioned. Beyond this, however, the rules on the use of force came under pressure from the need to respond to mass atrocity.

The failure of the UN collective security regime to prevent atrocities in Bosnia, closely followed by the failure in Rwanda, set the stage for the debate on Kosovo. Following violence against Albanians in Kosovo, and the failure of a diplomatic solution, NATO made the decision to intervene without UN authorisation. The reason no UN authorisation was sought was that had it been taken to a vote at the UNSC, Russia and China would have used their veto. So it was a relatively clear-cut violation of the rule on the use of force which, had it been left at that, wouldn’t have had any major constitutional effect. Where uncertainty begins to creep into the rules is in the post-hoc characterisation of the violation of the rules

⁴⁴ As Geoffrey Robertson puts it, ‘The twentieth century ended much as it began, in a world of small wars and occasional genocides combated by great powers if it suited their national interests’, *Crimes Against Humanity: The Struggle For Global Justice* (London: Penguin 2000), Chapter 5.

as ‘illegal but legitimate’. Nicholas Wheeler’s attempts to justify this violation of the Charter rules are indicative of how this event allowed the existing rules to shade into uncertainty. Wheeler has two arguments, which are sometimes in tension. On the one hand, he argues that the nature of the crimes justifies intervention under customary international law. Even if states have not explicitly recognized a right of humanitarian intervention, their practice suggests they understand such a right to exist. Humanitarian intervention is not a challenge to the rules on the use of force, but an implicit and important part of the rules on the use of force. The second claim he makes is that even if humanitarian intervention is thought to be illegal, this doesn’t matter because in the circumstances we’re talking about the normal rules of international law are suspended. This should be thought of as a ‘supreme emergency’, and hence as triggering a permissive ethic of illegality.⁴⁵ Humanitarian intervention is something done to stop the emergency, to bring the sovereign system back to an even keel. The creates confusion: is humanitarian intervention an application of the rules, or an exception to the rules?

The casualty of this humanitarian sentiment and practice, Thomas Franck argues, was Article 2(4). This was a legacy of the framing, of the fact that the UN Charter was a compromise framework. This didn’t only mean limitations on the scope of the obligations created: in places – important places – the UN Charter fudged a political consensus in order to get a general agreement, enshrining the normative conflict for another day, another set of political actors. Most important, because those at San Francisco had left the *site* of authority ambiguous, the old problem of state subjectivity (in interpretation, in legal compliance) were allowed to remain. No one actor had supreme authority to *remedy* the Charter rules, in a way that presumed the integrity of the Charter itself. Franck argues on this basis that the UN Charter should be thought of as a “quasi-constitutional” instrument, because the remedial power still rests with the political organs of the UN. By attempting to ground a rationale for humanitarian intervention in these existing rules, the effect was to highlight the ambiguous, uncertain, and ultimately inadequate nature of the rules on the use of force. As Franck writes: ‘To admit exceptions may undermine law’s claim to legitimacy, which depends at least in part on its consistent application. On the other hand, the law’s legitimacy is surely also undermined if, by its slavish implementation, it produces terrible consequences. The

⁴⁵ *Saving Strangers*, p. 49-51

paradox arises from the seemingly irreconcilable choice, in such hard cases, between consistency and justice.⁴⁶

Law can provide an institutional remedy to this – ‘to develop ways to bridge the gap between what is requisite in strict legality and what is generally regarded as just and moral’⁴⁷ – but the answer for Franck is not more rules but more reasonableness. By this he means that there needs to be more acceptance that in certain circumstances morality will trump legality. Rather than attempting to rationalise an action as within the rules, it is better to accept that this is a violation of the rules: under question ‘What, eat the cabin boy?’, he argued that ‘in extraordinary circumstances, condoning a carefully calibrated and justifiable violation may do more to rescue the law’s legitimacy than would its rigorous implementation’.⁴⁸ To institutionalize the exception – and this, he thinks, applies equally to cannibalism as to humanitarian intervention – has the potential to weaken the legal order.

Kosovo provided the immediate conceptual context for the debates surrounding the decision to invade Iraq in March 2003. Debates about the responsibilities triggered by the incoherence, fragmentation or ambiguity of international law had a far more public airing in these debates than in the decision to act outside of strict considerations of legality had done in Kosovo. The lines of disagreement can be seen in Michael Wood’s testimony to the at the Chilcot Inquiry, in response to the way that Jack Straw, then Foreign Secretary, had approached the question of legality. Straw had suggested that the need to get the second resolution from the UN was open to debate ‘à la Kosovo’; there were other factors with the potential to legitimate the intervention. The effect was that in intervening it seemed to follow Franck’s injunction to break the rules as necessary but to do so honestly and openly. One reason that Kosovo didn’t provide the appropriate analogy here was that there was no concerted attempt to justify the legality of the intervention. Commentators at the time took that to mean both that the US *couldn’t* offer a legal justification and that it wasn’t trying to hide this fact.

⁴⁶ Franck, *Recourse to Force*, p. 175

⁴⁷ Franck, *Recourse to Force*, p. 180

⁴⁸ Franck, *Recourse to Force*, p. 185; see also Brunnée and Toope, p. 280: ‘all attempts to question the fundamental prohibition [on the use of force] have been unsuccessful. Conceptually, the choice has been made to keep the sweeping prohibition intact, and to address the scope of a rule by way of specific exceptions: collective security, self-defence and, perhaps, humanitarian intervention and the responsibility to protect. It is important to say, however, that it is in these exceptions that a lack of clarity can be asserted. It is in the interplay between the rule and its exceptions that the argument arises that the rule itself has been “killed”’. What is crucial, they argue, in getting around the lack of clarity in the rules is that the clarity of the underlying state practice.

But Straw drew a more fundamental lesson from the Kosovo exception too, regarding the indeterminacy of the rule. The fact that there were legitimate differences on the authority of the UNSC meant that, in his eyes, the legal requirement to seek a second resolution was far from certain. As he put it to Michael Wood, the principle legal advisor to the Foreign Office:

‘I note your advice [on the legality of the Iraq intervention] but I do not accept it . . . I am as committed as anyone to international law and its obligations, but it is an uncertain field. There is no international court for resolving such questions in the manner of a domestic court. Moreover, in this case, the issue is an arguable one capable of honestly and reasonably-held differences of view.’⁴⁹

In his testimony, Sir Michael Wood responds:

‘I think, because there is no court, the legal advisor and those taking decisions based on legal advice, have to be all the more scrupulous in adhering to the law, because it is one thing . . . for a lawyer to say, ‘Well, there is an argument here. Have a go. A court, a judge will decide in the end’. It is quite different in the international system, where that’s usually not the case. *You have a duty to obey the law, a duty to the system. You are setting precedents by the very fact of saying things and doing things.* So I would draw the opposite conclusion to the drawn by the Foreign Secretary from the absence of a general court.’⁵⁰

The key consideration and point of contention within the FCO was the thought of what their responsibility was in the absence of courts, the absence of enforcement. At no point was the absence of courts (and the impossibility of a sanction from the UN Security Council) seen to lead to an absence of responsibility towards the law. The ambiguous and amorphous rules signalled, for the FCO legal advisors, the need to double-down on their commitment to and respect for the international rule of law. As Elizabeth Wilmshurst – who resigned her post in protest over these issues – observed, this had been the big change wrought by the Suez crisis. Collective security, and a commitment to international legality, were part of Britain’s fundamental interests. In her experience the British attitude had been

⁴⁹ Michael Wood, Testimony to the Iraq Inquiry, 26 January 2010, p. 32-33, lines 22-1

⁵⁰ Elizabeth Wilmshurst, Testimony to the Iraq Inquiry, my italics, p 33 line 25 – 34 line 20.

one of both seeing international legality as a benefit in particular instances, and also as a general approach:

“We want to get the world to comply with international law in particular instances, but, also, that it is in our interests that we should go about international peace and security in a collective way.”⁵¹

It was the UK’s reputation as a believer in the rule of law that was at stake. For her and the other FCO lawyers the attitude of Jack Straw and the Attorney General expressed a disdain for the value of legality, and a sweeping scepticism about its authority. Other international lawyers and academics supported this analysis.⁵² In much the same way as at Suez, the question of legality became “fuzzy” only once subjective political considerations were grafted onto the legal advisory process, against the established conventions. For the FCO lawyers arguing against the intervention in Iraq, there was a clear sense that acting from a commitment to legality was the responsible *and* prudential practice. This is what had been lost in Straw’s decision to disregard the advice of his legal advisors, individuals who could draw on their experience of practicing international law in order to arrive at a judgement about the requirements of legality. Elizabeth Wilmshurst sums this up nicely: asked whether Jack Straw’s opinion that international law was an ‘uncertain field’ and subsequent rejection of his legal advisors advice had a degree of legitimacy given his training as a barrister, Wilmshurst replied: ‘With all due respect, he is not an international lawyer!’

But for better or worse, this sense of a constitutional commitment to advance international legality did not shape the outcome of these debates. And what the practice showed, for Michael Glennon, was a different order of exceptionalism to that governing the intervention in Kosovo. This shapes the character of his arguments for pragmatism. He agrees with Franck that exceptionalism represents a danger to the rule of international law. But he regards exceptionalism as having far more profound and far-reaching consequences for the international legal order. His worry isn’t only that Article 2(4) has been killed off in the cauldron of humanitarian sentiment and practice, but that the process of killing it off has

⁵¹ Ibid, p. 10, lines 7-11

⁵² See for example, Phillip Sands, submission to the Chilcot Inquiry, 10 September 2010, available at <http://www.guardian.co.uk/law/interactive/2010/oct/04/iraq-inquiry-submissions-philippe-sands> [‘it cannot reasonably be claimed that there exists a balanced range of views amongst those with legal expertise: the overwhelming preponderance of views is entirely in one direction’, p. 2]; for an interesting analysis of some of the broader issues, see Matthew Craven, Gerry Simpson, Susan Marks, and Ralph Wilde, ‘We are teachers of International Law’. *Leiden journal of international law*, 17 (2) 2004 pp. 363-374

opened up questions about the obligatory standing of all international law. The uncertainty it creates allows people like John Bolton, for example, to argue that ‘International Law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law’.⁵³ Glennon’s worry is that attempt to legally justify violations of the rules on the use of force as instances of “humanitarian intervention” amount to an institutionalization of exceptionalism. In effect, the legalisation of humanitarian intervention hollows out international law’s claim to regulate the use of force. It creates a legal gap, which requires a filler. And since international law has served as such an ineffective, messy, incoherent system for regulating the use of force, there is a good case to be made for accepting that peace and security is an inherently political domain not suited to regulation through law. States use international law and its institutions to enhance their security. When this functional rationale falls away, so too does a commitment to international legality. This justifies a range of remedial responsibilities, but international law is the patient, not the cure. This means that the remedy can’t be located within the institution of international law, but must be located with states that authored and, ultimately, own international law.

These weaknesses are compounded by the uncertainty created by over-promising, for example in creating an expectation that the criminalization of aggression could have any determinate effect on the regulation of the use of force. These are, Glennon argues, rules ‘in blank prose’; they don’t have the capacity to function in an objective way; states won’t allow these rules to function as legal rules ought to be able to function. Even those who are in other respects fully committed to the ICC’s constitutional role in international society share these worries that prosecuting aggression could jeopardise the Court’s hard-fought authority to prosecute genocide, crimes against humanity and war crimes.⁵⁴ And this analysis seems to have been borne out in the agreement reached at the Kampala review conference, in which the UNSC has the final word on a prosecution for the crime of aggression.

⁵³ John Bolton, ‘Is there really “law” in international affairs?’, *Transnational Law and Contemporary Problems* 10 (2000), p. 1

⁵⁴ Andreas Paulus, ‘Second Thoughts on the Crime of Aggression’, *European Journal of International Law* 20 (4) 2009; see also Michael J. Struett, ‘Why the International Criminal Court must *pretend* to ignore politics’, *Ethics and International Affairs* 26 (1) Spring 2012; Mark Drumbl, ‘The push to criminalize aggression: something lost amid the gains?’, *Case Western Reserve Journal of International Law* 41:291 [arguing that the danger is that the current formulation doesn’t go far enough, and therefore gives opens space for criticism that the court of politicised/unfair . . .]; see also Kirsten Ainley ‘Excesses of Responsibility: The limits of law and the possibility of politics’, *Ethics & International Affairs* 25 (4) 2011: 407-431

In the final analysis, these worries bubble out in scepticism about all of the major institutional developments intended to remedy the rules on the use of force. Crucially, this relates to the institutional practices designed to give effect to the concept of “sovereignty as responsibility”. Although in its earliest incarnation the R2P framework seemed to resituate authority away from the UN Security Council, the process of formalizing it neutered much of this early promise. The World Summit document both restricted the circumstances in which force could be used to the core international crimes (meaning that in the wake of Cyclone Nargis, for example, R2P offered no basis for intervention), and it located the power to use R2P in order to justify intervention squarely within the hands of the UNSC. Most importantly, it avoided creating legal obligations to intervene, leading many to argue that the impact of R2P on the legal regime surrounding the use of force is at best limited, at most, non-existent. If R2P doesn’t change the underlying rules on the use of force, if, instead, it seems to further privilege the role of powerful states in deciding when and where to intervene, how can it be regarded as improving international law’s claim to constitutional authority? As Brunnée and Toope argue, the best that can be said about R2P is that it represents a ‘candidate norm’, a norm with the potential to shift state practice and in the future claim a binding type of legal authority.⁵⁵ As for the present, however, we are far better focusing on the clear legal obligations restricting the use of force to self-defence and collective security.

These pragmatic concerns are persuasive. They embed a scepticism about regarding R2P as part of a broader constitutional shift in international society. But the focus on obligations is also a red-herring in understanding the terms of international law’s claim to constitutional authority. Taking her lead from H.L.A. Hart, Anne Orford argues that the responsibility to protect should be understood as ‘a form of law that confers powers “of a public or official nature” and that allocates jurisdiction . . . The vocabulary of “responsibility” works here as a language for conferring authority and allocating powers rather than as a language for imposing binding obligations and commanding obedience.’⁵⁶ She goes on to argue that ‘the responsibility to protect concept develops the idea that while states are responsible for their own citizens or populations the UN is responsible for the international community as a whole.’ Edward Luck has similarly argued that R2P was never intended to be legally binding. The whole point was to create an institutional foothold

⁵⁵ Brunnée and Toope, *Legitimacy and Legality*, p. 324

⁵⁶ Anne Orford, *International Authority and the Responsibility to Protect*, (Cambridge, Cambridge University Press: 2011), p. 26

through which various actors could work to generate the political will, the motivation, needed to intervene. This is not a thought to get carried away on; there is too much hypocrisy surrounding the application of the rules for that, too many occasions on which the necessary motivation will fail to materialise. In spite of this, however, these rules represent more than a ‘candidate norm’. Reflecting the themes developed in this this, Alex Bellamy characterizes the institutionalisation of the responsibility to protect as shifting the debate from whether to act to *how* to act. There will be occasions where, for good reason, states will not intervene militarily to prevent mass atrocity. But where previously this might have been taken as evidence of the incoherence of the rules on the use of force, R2P provides a framework through which to acknowledge and manage the practical judgement required in responding to mass atrocity, with all the complex ethical and political considerations this raises. It institutionalises a commitment to humanitarian action, and this has works to shift the underlying ethic or culture of legality surrounding the rules on the use of force.

To give one example of this, debates on intervention in Syria have been complicated by the complex local and regional politics, a fragmented opposition force, the geo-strategic importance of Syria to Russia, and worries about intervention feeding greater instability in both the short and long terms. For these reasons the early stages of the debate on how to react to the atrocities being committed were dominated by the belief that a diplomatic solution was far preferable to military intervention. Some took this as evidence that the Libyan intervention represented R2P’s “moment”, and that now, in the debates on how to react to Syria, normal service had been resumed.⁵⁷ Politics was driving the agenda, not the humanitarian sentiments embedded in R2P. But this scepticism, and the pragmatic attitude to rule-following it feeds, misses the crucial point. Where, historically, the failure to reach a resolution over Syria might have been taken as evidence of the institutional weakness of international law, or the fact that international law was in a state of flux, the debate was driven for the most part *not* by questions about the legitimacy of the underlying value – responding to mass atrocity – but about how the commitment to protecting fundamental human rights and humanitarian values should be implemented in practice. Even the language of Russia’s foreign minister, for all the bellicose claims about absolute sovereign privilege, shifted as al-Assad’s ramped up the scale of his attacks on his citizens. This reflects

⁵⁷ See for example Stephen M. Walt, ‘Will victory in Libya cause defeat in Syria?’, 6 February 2012, available at: http://walt.foreignpolicy.com/posts/2012/02/06/the_libyan_precedent

Bellamy's idea that, 'Once states accept that international society has a responsibility to protect and that the proper question should be *how* rather than *whether* to fulfil that responsibility, they have limited political room for manoeuvre in the face of compelling evidence of an imminent threat of mass atrocities.'⁵⁸

The idea of the responsibility to protect – and the institutionalisation of the underlying commitment to sovereign as responsibility – helps to generate a sense of the ethic required where there has been a violation of fundamental rules of international law. This is not about formal adherence to the rules, but about establishing the applicable ethic of legality. R2P helps to embed a constitutionalist ethic in international society by developing the principles by which political actors ought to structure their strategic decision-making. In this sense it is wrong to talk about R2P as a mere candidate norm. It is much more than that; it serves to institutionalise a practice of constitutional responsibility.

Conclusion

What lessons should we draw from the politics surrounding the rules on the use of force? Should we accept Michael Doyle's conclusion that 'The UN Charter, like so many constitutions before it, is an invitation to struggle' – that these are not rules intended to rule, merely to structure constitutional politics?⁵⁹ Is this sufficient cause to accept the pragmatist approach to legality, evaluating the authority of the constitutional rules *sui generis*? There remains a great deal of uncertainty. The UN Security Council's contradictory applications of this new norm of responsible sovereignty in Libya and Syria have only heightened the uncertainty, and highlighted the problems that remain. But there are promising signs too. In Libya, and in Syria, the ICC has been a player from the start. This was not necessarily a good thing, but in connecting the dots between R2P, the UN Security Council and the ICC for the first time it highlighted the scope for a constitutionalist practice to be regarded as a responsible practice. In Syria, perhaps the most lasting lesson has been that the promotion of R2P as a governing norm does not commit states to intervention *if* they can find a diplomatic resolution to the problem. But the main lesson is that despite the pragmatic warnings, the use of legality – of the principles established in and through the respect for

⁵⁸ Alex J. Bellamy, 'Libya and the responsibility to protect: the exception and the norm', *Ethics & International Affairs*, 2011, p. 266-267

⁵⁹ Michael W. Doyle, 'Dialectics of a global constitution: The struggle over the UN Charter', *European Journal of International Relations*, online: September 2011, p. 4

international law – provides an avenue for managing the uncertainty surrounding the rules on the use of force.

Conclusion

In this conclusion I want to revisit, very briefly, three themes to emerge from this thesis. The first theme is that the battle between pragmatism and constitutionalism shapes international law's constitutional politics. What I have tried to show is that better understanding the nature of this battle highlights the scale of the difficulties facing the constitutionalist attempts to establish international law's constitutional authority. I have argued that constitutionalism is at base an attempt to establish a determinate and superior claim to the authority of international law, but that the success of this enterprise is heavily conditioned by the perception that international legality is a fundamentally ambiguous practice attempting to govern a fundamentally ambiguous world. In these circumstances, the appropriate ethic to adopt is not one that acts on an image of international law's constitutional authority, but a pragmatic ethic that locates law's constitutional authority as part a broader conversation between political and moral judgements about the best course of action.

The second theme is that the perception that these two ethics are irreconcilable further undermines the scope for constitutionalism, because constitutionalism requires a degree of confidence in the legal order's authority that is in tension with the well-established and well-protected sense of faith that sovereigns have in the superior virtue of their political judgement. This is to say that constitutionalism needs to be able to justify a form of faith in international law that doesn't collapse in the face of uncertainty and ambiguity about the terms of its rule. I argued that the republican tradition – in particular Augustine's insightful understanding of faith as revealed through hope and the exercise of responsibility – provide a particularly strong justification for adopting a constitutionalist mindset.

The third final theme builds on this, arguing that exercising constitutional responsibility provides a way for actors to generate a claim to constitutional authority, building on their sense of trusteeship over the rules. This is not to say that constitutionalism will necessarily or inevitably win out against the pragmatic mindset, but it does put these two ethics on a more equal footing when it comes to defining the constitutional rules of international

society, rules such as those governing the global commons, legitimating peacebuilding, prohibiting torture and outlawing war.

I started with a quote from Hammarskjöld, and it seems appropriate to finish with a quote from him as well. The faith that he calls for in order to justify the spread of liberal international institutions, in order to justify the continued pursuit of the rule of international law ‘is not the facile faith of generations before us, who thought that everything was arranged for the best in the best of worlds or that physical and psychological development necessarily worked out toward something they called progress. It is in a sense a much harder belief—the belief and the faith that the future will be all right because there will always be enough people to fight for a decent future.’¹ International law’s claim to constitutional authority, it seems to me, is premised on this same basic idea, that it can motivate those fighting to shape international society’s constitutional order to have and to keep faith with international law.

¹ Dag Hammarskjöld, from interview with UN press corps, Spring 1958

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