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Introduction

This book serves three purposes. The first is to introduce readers to certain core questions in the philosophy of law, including:

- What is law? What distinguishes law as a normative social practice from other types of normative social practice? What makes the statement "This society possesses a legal order" true or false? Does the existence of law depend on coercion? Or on certain types of institution, such as courts? Or on conformity to certain procedural or substantive rules, or to specific moral standards? If so, why, and what is the nature of this dependence?
- What is *the* law (in this particular community, or this particular case)? What are the truth conditions for statements such as "Your action is a violation of the law" or "You have no legal right to give away this book?" Are such claims warranted solely by certain social facts? If so, which ones? Or must moral considerations also figure in the proper identification of the law? Or indeed, are legal norms simply a subset of moral norms?
- Is there a moral duty to obey the law simply because it *is* the law? Under what conditions, if any, does the fact that a given act is illegal necessarily provide us with a moral reason not to perform that act?

These are some of the questions that comprise a philosophical investigation of the nature and normativity of law. In reflecting on the answers to them, we typically consider how well they cohere with the legal order most familiar to us, which is usually the domestic legal order of the state in which we are citizens.[1] While this approach has its virtues, it also suffers from certain limitations. Familiarity with a particular legal order can make it difficult to distinguish between features that are typical or essential properties of law in general and those that are only typical or essential features of a particular kind of legal order (or even just one example of a particular kind of legal order). Relatedly, it may make it harder to motivate certain

[1] Of course, philosophical reflection may lead us to revise our belief that our state possesses a genuine legal order.

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types of question, or answers to them, particularly for those with a limited experience of the world and the many forms of social organization it contains. Considering the questions set out above in the context of international law serves to diminish these shortcomings. Furthermore, it tends to add a comparative dimension to the investigation of the nature and normativity of law. The differences between international and domestic law can deepen our understanding of the relationship between law and coercion, morality, specialization, and so on. It can also help us recognize why questions regarding the nature and normativity of law matter.

The second aim of this book is to acquaint readers with recent work by legal and political philosophers on conceptual and moral questions specific to particular domains of international law. For instance, in critically reflecting on international human rights law, how should we understand the concept of a human right? Similarly, a proper grasp of the concept of a crime against humanity seems to be a necessary condition for a sound moral assessment of the definition of that crime set out in international law (e.g., in the Rome Statute of the International Criminal Court). As for the justice of specific international legal rules and institutions, philosophers have recently questioned whether certain core features of the law of war are morally justifiable, whether international law ought to promote free or fair trade, whether the absence of an international legal right to unilateral secession is a moral defect in our practice of global governance, and much else besides. Critical moral reflection on the content of international legal norms and the design of international legal institutions is, or at least ought to be, central to international or global political philosophy.

The third goal that informs this book is the advancement of the debate on many of the topics discussed herein. Specifically, I defend a reading of H.L.A. Hart's views on international law at odds with the one defended by many contemporary legal philosophers and international legal theorists. I also offer a reading of Ronald Dworkin's philosophy of international law that largely renders it immune to the various criticisms that are leveled against it. The deeper challenge to Dworkin's characterization of international law as genuine law lies in the dubious quality of the international rule of law, or so I suggest.[2] How we ought to understand the concept of legitimacy, and the possible bases for a moral duty to obey international law, are two additional questions to which I offer original answers. Turning to the justice of specific international legal rules, I advance novel arguments in the debates over the proper understanding of a crime against humanity, the moral grounds of universal jurisdiction, the relationship between the morality and the law of war, and the moral justifiability of international law's current stance vis-à-vis unilateral secession.

[2] This argument is developed in greater detail in David Lefkowitz, "A New Philosophy for International Legal Skepticism?" Draft on file with author.

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The first half of this book is organized around the question "is international law really law?"[3] As H.L.A. Hart notes in the introduction to *The Concept of Law*, the person who poses this question does not intend to deny the existence of the social practice commonly labeled "international law." Rather, she wants to know whether that practice possesses some property or properties that warrant the claim that it is *law*, presumably because she thinks that something of explanatory or normative significance turns on the answer. Following Hart, then, we should delay giving any answer to the question "is international law really law?" until we have found out what it is that puzzles the person who poses it. "What more do they want to know, and why do they want to know it?"[4]

Let us answer these questions in reverse order. Those who question whether international law is really law, or simply assert that it is not, typically do so as part of a practical argument. That is, they advance a skeptical take on international law's status as genuine law to support a particular conclusion regarding what some agent, such as a state (official), should or should not do. Implicit in this skeptical challenge to international law is an assumption that law makes, or at least is capable of making, a distinctive contribution to human deliberation, and so to the production of social order. When a person argues that international law is not really law, she implies that international law does not, and perhaps cannot, matter in the way that law matters.[5]

Consider, now, the question of what more an international legal skeptic might wish to know. What assumptions regarding the nature or concept of law lead her to infer from certain observations that the label "international law" is a misnomer? One possibility is that the skeptic presumes an analytical connection between law and coercive enforcement. In Chapter 2, we consider two versions of this claim. The first is the legal philosopher John Austin's characterization of law as the command of a sovereign, or in Hart's apt phrase, as orders backed by threats. The second treats the mode of enforcement found in the modern state as a necessary condition for the existence of law. If true, each of these conceptual claims provides a sound basis for international legal skepticism. As we will see, however, there are compelling reasons to reject them both.

In Chapter 3, we investigate H.L.A. Hart's characterization of law as the union of primary and secondary rules, and its implications for international law's status as genuine law. While Hart is frequently identified as an international legal skeptic, that conclusion rests on a misreading of his analysis of international law, or in some cases, a misreading of his analysis of law. Hart does not deny that international law is law, only that it constitutes a *legal system*. Properly understood, this is a claim few of

[3] Most international lawyers and legal scholars, and a fair number of philosophers, will roll their eyes at this question, but that is likely because they misunderstand its import. See Carmen Pavel and David Lefkowitz, "Skeptical Challenges to International Law," *Philosophy Compass* 13, 8 (2018): 3.

[4] H.L.A. Hart, *The Concept of Law, 3rd Edition* (Oxford: Oxford University Press, 2012), p. 5. [Originally published in 1961.]

[5] See Oona Hathaway and Scott Shapiro, "Outcasting: Enforcement in Domestic and International Law," *Yale L.J.* 121 (2011): 255–6.

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his critics will deny. Whether it (fully) accounts for the persistence of international legal skepticism, as Hart seems to suggest, is a more contestable claim.

The arguments of Hart's most prominent critic, Ronald Dworkin, are the subject of Chapter 4. We begin by considering his criticisms of Hart and, more generally, of legal positivism; the view that the existence of law depends on certain social facts and not (necessarily) its moral merits. We then examine Dworkin's alternative analysis of the nature of law, and his argument, informed by that analysis, that international law is indeed a genuine legal order. As will become clear, the success of the latter argument depends on the international legal order exhibiting sufficient fidelity to the ideal of the rule of law. Indeed, the same condition holds if we accept a legal positivist account of the nature of law. In Chapter 5, therefore, we investigate the rule of law, including competing accounts of the elements that comprise it and the value of government in accordance with that ideal. We then briefly examine various grounds for questioning the existence of an international rule of law.

One reason to take seriously Hart's advice that we clarify the source of an individual's international legal skepticism before responding to it is that her choice of words may fail to accurately convey her concern. For example, a bit of probing may reveal that that the locus of her concern is not international law's status as law, but rather its legitimacy. Whether, and to what extent, that worry is warranted is the subject of Chapter 6. We begin with an examination of the concept of legitimacy and its relationship to a moral duty to obey the law. We then consider four possible grounds for international law's legitimacy: enhancing its subjects' ability to act as they have most reason to act, the consent of those it claims as subjects, considerations of fair play, and international law's democratic credentials. The chapter concludes with an examination of reasons why we should care about international law's legitimacy; indeed, why from a moral point of view increasing the international legal order's legitimacy might even take priority over making it more just.

In the second half of the book we shift our attention from international legal skepticism to contemporary philosophical investigations of specific international legal regimes. In Chapter 7, we engage with a recent debate among two schools of legal and political philosophers regarding the nature and grounds of human rights. Orthodox theorists argue that human rights are moral rights possessed by all human beings simply in virtue of their humanity. Political-practice theorists, in contrast, argue that human rights are constitutive elements of an ongoing attempt to reconceive state sovereignty and the international political order to which it is integral. This political undertaking, which includes the creation, application, and enforcement of international human rights law, provides the proper object of a philosophy of human rights. The bulk of this chapter is devoted to a critical examination of attempts by political-practice theorists to demonstrate the limited relevance of orthodox accounts of human rights to morally justifying international human rights practice (again, including international human rights law). It concludes with a brief

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consideration of the role that appeals to objective moral principles should play within that practice.

In Chapter 8, we assess four accounts of the relationship between the morality and the law of war and the implications that each has for the retention or replacement of two key features of the latter: the equality of combatants, and noncombatant or civilian immunity. Traditional just war theorists such as Michael Walzer defend these features of the law of war on the grounds that they mirror the content of the true morality of war. In contrast, revisionist just war theorists such as Jeff McMahan, Adil Haque, and David Rodin argue that in its commitment to the equality of combatants and noncombatant immunity, the law of war deviates from the content of the true morality of war. While Rodin argues that the law of war ought to be reformed so as to mirror the (revisionist) morality of war, McMahan and Haque both defend it on the grounds that combatants will generally do better at acting as morality requires if they follow the existing law of war than if they attempt to guide their conduct according to the (revisionist) morality of war. The last theorists we consider, Henry Shue and Janina Dill, reject the assumption shared by all of the aforementioned theorists that the law of war should aim to minimize the violation of individual rights. Instead, they argue that it should serve the humanitarian goal of reducing the harm war causes. The law of war's commitment to the equality of combatants and noncombatant immunity is morally justifiable, then, if it reflects the optimal balance between restrictions on how combatants may fight and their willingness to comply with those rules in their pursuit of self-preservation and victory in war.

Our exploration in Chapter 9 of philosophical contributions to international criminal law focuses on the concept of a crime against humanity and the justifiability of universal jurisdiction over those who commit such a crime. In what sense, if any, are crimes against humanity wrongs done to "humanity?" Does the label "crime against humanity" refer to a distinctive wrong committed by those who perform such acts? If not, what distinguishes crimes against humanity from other types of crime? In the first half of this chapter, we critically examine several competing analyses of the concept of a crime against humanity and the answers they provide to these questions. In the remainder of the chapter, we consider two approaches to justifying the international prosecution of crimes against humanity. The first grounds it in the dangers that such crimes pose to all human beings, while the second appeals to an (emerging) moral or political global community that makes perpetrators of crimes against humanity answerable to courts that act on behalf of all humanity.

Secession and the claims to territory it raises are the subject of Chapter 10. Following some preliminary remarks on the concept of secession and its status in international law, we examine competing answers to two questions that any theory of state secession must address. First, what sort of actor enjoys a prima facie moral right to secede, and in virtue of what features or considerations does that actor do so? Second, on what particular territory is an actor with a right to secede permitted to

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exercise that right? We then examine arguments for and against several international legal norms we might adopt to regulate unilateral secession, drawing on both moral theories of secession and empirically informed conjectures regarding the incentives those norms might create for various international and domestic actors.

Finally, in Chapter 11, we consider the moral justifiability of some of the international legal rules that govern international trade. Our primary focus is on the moral standards we ought to use to critically evaluate those rules or proposals for their reform. Thus we investigate several moral arguments for free trade, such as the claim that it provides an especially effective mechanism for alleviating poverty, and several arguments in defense of restrictions or conditions on trade, including the moral permissible of partiality to compatriots and the right of those whose cooperation makes international trade possible to a fair share of the benefits it yields. In the final section of this chapter, we explore the argument that by importing and consuming oil and other natural resources from countries ruled by tyrants, we violate existing international law and engage in trade in stolen goods.

Given the wide range of topics addressed in this text, the discussion herein can hardly do more than scratch the surface of what philosophers have had to say about them, let alone international legal theorists, political scientists, economists, sociologists, and historians. To this inevitable limitation must be added the cost of my decision to forgo a broader survey of schools, approaches, and positions in favor of a deeper exploration of the arguments advanced by a relatively small number of scholars. But as the title of this book makes clear, my primary goal is to offer the reader a useful *introduction* to some of the core questions in legal and political philosophy as they bear on the practice of global governance commonly referred to as international law. The reader should not infer from the absence of any discussion of a particular theorist, school of legal or political philosophy, or feature of international law that they are unimportant. Rather, my hope for this book is that those who read it will be inspired to dive deeper into the field and engage directly with the many questions and theorists it leaves out.

It is a pleasure to recognize and thank the many people who have assisted me in bringing this book to fruition. Brian Bix and William Edmundson offered me the opportunity to write it, and waited patiently while I took too long to do so. My colleagues in the Ethics Working Group at the University of Richmond have provided invaluable feedback on drafts of several chapters. I am particularly grateful to Richard Dagger, Jess Flanigan, Javier Hidalgo, Rob Phillips, Jeppe von Platz, Terry Price, and Steven Simon for conversations on secession, as well as the concept of a crime against humanity. Others who have provided helpful comments on one or more of the arguments advanced in this book include Edward Barrett, Samantha Besson, Adam Betz, Allen Buchanan, Alejandro Chehtman, Thomas Christiano, Win-chiat Lee, Matthew Lister, David Luban, Frank Garcia, Jose Luis Marti, Margaret Moore, Colleen Murphy, Terry Nardin, Carmen Pavel, Steven Ratner, Mitt Regan, Massimo Renzo, Nicole Roughan, Mortimer Sellers, Anna Stilz, John

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Portions of this book were completed while I served as an Isaac Manasseh Meyer Visiting Research Fellow at the National University of Singapore, and as the Class of 1958 Rorer Ethical Leadership Visiting Fellow at the United States Naval Academy's Stockdale Center for Ethical Leadership. I am grateful to both institutions for their generosity; nevertheless, the views expressed herein are strictly my own.

I also wish to express my gratitude for the permission to reprint some earlier work. Chapter 3 includes material previously published in "What Makes a Social Order Primitive? In Defense of Hart's Take on International Law," *Legal Theory* 23, 4 (2017): 258–82, reprinted by permission of Cambridge University Press. Chapter 6 revises and expands the arguments first presented in "The Legitimacy of International Law," in *Global Political Theory*, eds. David Held and Pietro Maffettone (Cambridge: Polity Press, 2016), reprinted by permission of Polity Press. It also includes material previously published in "The Principle of Fairness and States' Duty to Obey International Law," *Canadian Journal of Law and Jurisprudence* 24, 2 (2011): 327–46, reprinted by permission of Cambridge University Press. A portion of the argument presented in Chapter 10 first appeared in "International Law, Institutional Moral Reasoning, and Secession," *Law and Philosophy* 37, 4 (2018): 385–413, reprinted by permission of Springer Nature.

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