Introduction

This is a treatise on the philosophy of international law. Hence, its successes or failures should be measured primarily by the yardsticks of legal philosophy. Still, its purpose, as in the case of any other work in the area of jurisprudence, is to cast some new light on the legal practice – in this case the international one – and to offer to those working in this practice a fresh perspective on the issues with which they deal on a daily basis. In doing so, legal philosophers are not there “to act as backroom boffins for the law industry.” That is, theirs is not “to lay on new ideas or arguments for lawyers any more than philosophers of art are there to provide new ideas or materials for artists.” Theirs is to “see legal problems . . . as different problems from those that appear on the face of the law.” In that respect, this book aspires to persuade international legal practitioners that it is meaningful to take a deep gaze at old problems with new eyes.

This aspiration is far from warranted though. International scholars are not necessarily keen to employ a jurisprudential perspective. Take Brownlie’s words from his *General Course to the Hague Academy of International Law*: “In spite of considerable exposure to theory, and some experience in teaching jurisprudence, my ultimate position has been that . . . theory produces no real benefits and frequently obscures the more interesting questions.” It is mainly legal philosophers’ fault for the fact that this statement could, until recently, be taken as representative enough of the overall attitude of the international scholarship. With the notable exception of Kelsen, whose legal philosophy is not always easily digestible even for those working in the field, no other

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2 Ibid, 7.

prominent contemporary legal philosopher was ready to seriously engage with the subject matter of international law. Worse still, those who decided to grapple with the topic, including the one who “was credited with having more or less reinvented the philosophy of law” in the Anglo-American world – Herbert Hart,⁴ did so without much enthusiasm for the subject of inquiry. Hart opens The Concept of Law with a remark that “only a relatively small and unimportant part of the most famous and controversial theories of law” are focused on the topic of international law,⁵ as if he wanted to convey the message to all those who will become his followers – “Don’t waste your time on these topics.”⁶

Although the situation has improved recently, jurisprudence is still in need of more systematic philosophical accounts of international law. This book offers one such account. It proceeds from a cursory excursion into philosophizing about international law (Chapter 1). This historical journey reveals how the interest in law beyond the state (polis) was born with the natural law doctrine and its idea that certain legal rules are of universal validity. Throughout the centuries, this philosophical doctrine has played a dominant role in formulating theoretical background for the study of international law. However, this philosophical landscape has slowly started to change with the rise of nineteenth-century legal positivism. While it became the dominant force in the German international legal discourse (Staatswillenspositivismus), the British school of analytical jurisprudence “found no room for a law beyond sovereignty.”⁷ The subsequent influence of the analytical school of thought was reflected in the fact that most jurisprudential dealings with international law, including Hart’s, did not go far beyond the “ontological” question of whether international law is “true” law, thereby reinforcing skepticism of the pioneers, Bentham and Austin.

One may concede to Franck’s famous dictum that we have by now entered the “post-ontological era”⁸ without denying the necessity of a more thorough study of both conceptual and normative issues about international law. While

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the latter might indeed be “the most pressing” ones,9 the former are far from being jurisprudentially settled. The conceptual question concerning the nature of international law, which is the subject of this book, requires first and foremost laying down an adequate methodological approach. While it is undisputable that some sort of analytical work is needed, it is far more questionable whether such work can be provided by the now dominant method of the metaphysically driven conceptual analysis. It is directed toward finding essential, a priori, and necessary features that are present in each instance falling under the given concept. The aim of Chapter 2 is to show that the mentioned methodology does not live up to its expectations. First, it has been rightly accused, primarily by socio-legal scholars, of being unable to strike the right balance between an empirical step and the analytical work. Conceptual analysis is guilty of either arbitrarily or selectively reporting about instances of a social practice to which competent users of language attach the word “law,” which, in the next step, becomes the ground for metaphysical claims about necessary, i.e., universal features of law.10 Secondly, conceptual analysts regularly employ the terminology of “borderline cases” (international law is often classified in such a way), despite the fact that it is incompatible with one of the central premises of this method, namely, that all the instances satisfying necessary conditions are equally good examples of the category membership. This leads to the final problem. To the extent that the conceptual analysis in its pre-analytical step has to rely on intuitive categorization judgments, it is limited by our ordinary representation of concepts. However, this method seems to be premised on psychological assumptions that are contrary to recent experimental findings in the field of cognitive psychology. Experiments have demonstrated that we take category (concept) to be “a representation of an array of features clustered around some sort of prototype.”11

The analytical work in this book, undertaken within the prototype theory of concepts, boils down to an explanatory elucidation of law. Law is conceived in its most abstract sense as a “genre,” that is, as “a type of human activity”12 that is in some respects distinguishable from other social practices. This elucidation leads to the formulation of the concept of law, understood as a representation of a group of features clustered around some prototype case. In proceeding

12 As noted by Ehrenberg, “[w]hen general jurisprudents offer theories of law, they are trying to account for this general type of activity.” Kenneth M. Ehrenberg, The Functions of Law (Oxford: Oxford University Press, 2010), 18.
from the idea that our pre-analytical samples of law have to account for various social contexts, including the one beyond the state, in which the concept-word is used to denote this complex human practice, Chapter 3 comes up with a preliminary finding: A social practice is typically judged as falling within the category of “law” if it consists of rules purporting to coordinate behavior of actors and to settle their disputes (normativity); if it at least possesses institutions in charge of judging whether those rules were violated (institutionality); if the rules in question are guaranteed, normally through some form of coercive mechanisms ([coercive] guaranteeing); and if the rules are, overall, apt for inspection and appraisal in light of justice (justice-aptness). These typical features, which vary depending on contexts (e.g., municipal v. international level; simple v. modern society), are further elaborated in the remainder of the book.

It is a widely held belief of contemporary legal philosophers that the key for law’s distinctiveness is its normativity. Chapter 4 challenges this claim, by distinguishing between the two how questions of normativity. The first how question calls for the epistemological perspective. It is concerned with finding out how to ascertain a norm, and more specifically a legal norm. It relies on Kelsen’s understanding of “validity” as a specific norm’s “existence,” which is determinable due to the doctrine of formal sources of law. This question is, then, investigated in the specific setting at the international level, where the following problems are discussed: how to ascertain a valid international legal norm and differentiate it from a mere act of will; how to ascertain a valid customary legal rule; how to ascertain what is a jus cogens rule; how to ascertain what is an erga omnes obligation; and, finally, how to ascertain invalidity of an international rule based on its inefficacy (desuetudo).

The second how question endorses the perspective of practical rationality. It tries to elucidate how norms in general and legal norms in particular provide us with reasons for action. According to the traditional wisdom, legal norms pre-empt and exclude all the conflicting reasons that norm-subjects might have for the contrary behavior, that is, they are “binding,” i.e., “non-optional.” It is argued that this view raises unsolvable paradoxes of “intentionality” (Rodriguez-Blanco) and “practical authority” (Hurd) and, thus, has to be abandoned. The undertaken analysis leads to a rather unorthodox conclusion that there is nothing special about the normativity of law. Law’s normative force competes with the normative force of other normative orders, and its capacity to be authoritative for its norm-subjects, that is, to generate the sense of obligation, cannot be attributed to some special sort of normativity, but to combined effects of law’s typical features. Such an understanding of law’s capacity to provide us reasons for action opens the room for gradation of legal
normativity, which is of particular importance for the perennial topics of international legal scholarship – relative normativity of international law and soft law.

Chapter 5 discusses international law as an institutionalized and (coercively) guaranteed order. In providing a short genealogy of institutionalization of the international order, which largely rests on horizontality of international law and the balance of power, this chapter reveals specificities regarding law-making and law-applying institutions at the international level. In the legal order in which states are key subjects of law-making, through the processes of treaty and customary rule making, it is questionable to what extent various non-state institutional actors are assuming this role as well. Having in mind the relevance of the United Nations as the global institutional structure, the chapter addresses this issue, by putting particular emphasis on the law-making capacities of the UN Security Council and General Assembly.

Since institutionalization of a normative order implies primarily institutionalization of judgment, the second section of the chapter deals with the process of judicialization of the international legal order. Not only we have been witnessing in last decades a rapid multiplication of new international courts and tribunals, but their functioning also has raised the question of whether these institutions at times go beyond the law-applying role and actively contribute to international law-making. It is claimed that the answer to this question largely depends on the understanding of judicial interpretation, as well as on the precedential nature of various international adjudicative regimes.

The final section of this chapter is dedicated to the role of coercion in guaranteeing the order with the lack of centralized enforcement agencies. After showing that even at the municipal level, where such agencies normally exist, law’s coerciveness implies neither that it necessarily threatens the infliction of “evil and pain” (Austin), nor that the enforcement mechanism relies in the first place on the use of physical force, it is argued, alongside Hathaway and Shapiro, that the primary model of international coercive guaranteeing is “external outcasting.” It is “outcasting,” because it “involves denying the disobedient the benefits of social cooperation and membership.” It is “external” because it is “frequently carried out by those outside the regime.”

Chapter 6 deals with law’s justice-aptness. Both law-making and law-application are in the function of coordinating behavior of norm-subjects and settling their disputes. These functions are conducted through the

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allocation of certain benefits and burdens in the form of rights and obligations, as well as through remedying harms stemming from the wrongful behavior of norm-subjects. Therefore, “[i]n view of the function of law in creating and enforcing obligations, it necessarily makes sense to ask whether law is just.” Justice-aptness “applies as much to the substance of law as it does to its administration and procedures.”

Proceeding from Aristotle’s classical distinction between distributive and corrective justice, this chapter explores to what extent international law can be appraised in these terms.

The closing Chapter 7 discusses “fragmentation” as a possible distinctive feature of international law. First, it discharges Hart’s well-known argument that, due to its institutional deficiencies and the lack of a unifying “rule of recognition,” international legal rules “resemble that simple form of social structure” that can be “contrast[ed] with a developed legal system.” In the next step, it is shown that what at first seemed to be the International Law Commission’s incredibly negative portrayal of international law in terms of its “fragmentation,” turned eventually into a more positive picture of a legal order that has at its disposal a wealth of interpretative devices for the solution of normative conflicts between mushrooming specialized international legal regimes. However, since these techniques are not self-applicable, it is of crucial importance that the adjudicative bodies of different specialized regimes use them in such a way “as if” international law is a coherent and unified system of rules. The chapter closes with the argument that there are plenty of indicators that various international adjudicative bodies adopt the adequate “as if” lens and depict themselves as officials of a unified international legal order.

The final introductory caveat is of the methodological nature. It is important to bear in mind that, unlike scientists, legal philosophers are not in the position to forge the concept of law, thereby completely revising the complex social reality they are studying. Thus, a jurisprudential inquiry into the nature of law is always “partly responsive to our normal notions, and partly [it is] a stipulative regimentation of these notions.” By being such, no jurisprudential account can claim to be the correct depiction of the nature of law. In that respect, Finnis’s comments on the title of Hart’s The Concept of Law come to mind. Finnis says that “despite the definite article (‘the’) . . . [t]he book does

15 Hart, The Concept of Law, 214.
not for a moment try to establish that there exists ... a concept of law which is entitled to be called ‘the’ concept of law.” Instead, Hart’s treatise seeks “to arrive at an ‘improved understanding,’ a better concept, of law.” Finnis concludes that “Hart might more accurately, if less elegantly, have called his book A New and Improved Concept of Law.” Without any pretension of drawing an analogy with the most influential twentieth-century jurisprudential treatise, I am using Finnis’s reminder merely to emphasize that the definite article in the title of this book should be similarly understood as an attempt to provide a new and improved explanatory account of international law.

International Law as a Subject Matter of Legal Philosophy – A Brief Historical Overview

Any talk about law regulating relations between different states is, conceptually speaking, based on a set of empirical conditions.¹ As Bederman has stated, “[I]nternational law is impossible without a system of multiple States, each conscious of its own sovereignty and the choice between relations being premised on order or on anarchy.”² Now, one may object that this statement already employs some concepts, like “system,” “state,” “sovereignty,” or “anarchy,” which are not only theoretically controversial, but can also be considered as products of a certain era. In order to meet this challenge, it seems possible to rephrase this statement in a more neutral fashion, as follows: International law talk is impossible without a world of multiple political communities, each conscious of the idea that it should be ruled from the inside rather than from the outside, and of the choice between rule-based or rule-less relations among them. When put this way, it becomes clear that such conditions existed in antiquity. This still does not warrant extending the discussion of international law back to ancient times because everything hinges upon our prior understanding of “international law.” Nonetheless, there are authors who claim that talking about international law made sense even in antiquity. They tend to support this argument by demonstrating that even in the ancient Near East³ there was “a common idea or tradition” that

³ Bederman’s study is confined to “(1) the ancient Near East including the periods subsuming the Sumerian city-States, the great empires of Egypt, Babylon, Assyria and the Hittites (1400–1150 BCE), and a later, brief period focusing on the nations of Israel and their Syrian neighbors (966–700 BCE); (2) the Greek city-States from 500–338 BCE; and (3) the wider Mediterranean during the period of Roman contact with Carthage, Macedon, Ptolemaic...
international relations were to be grounded in some basic rules that are nowadays regarded as norms of international law.4

1 EARLY THEORIZING ABOUT LAW BEYOND THE STATE – ANCIENT GREECE AND ROME

With far less controversy, it is possible to argue that the philosophical treatment of law can hardly be traced before ancient Greece.5 There, we find a distinctive tradition of thinking about law beyond the state (polis) that very much resembles contemporary concepts of universal human rights and jus cogens.6 As noted by Gagarin and Woodruff, “[a] concept of universal law, applying to all peoples . . . is well attested for the classical period.”7 In that respect, one may argue that the current distinction between international and municipal law displays some similarities with the Greek differentiation between natural and positive law, insofar as this division was, inter alia, structured around the criterion of the territorial sphere of validity of the two sets of legal rules. Aristotle was the first one to draw this distinction. He writes in the Rhetoric that there are two kinds of laws, “particular” (idios) and “common” (koinos). While the former are “those established by each people in reference to themselves,” the latter are “those based upon nature.” Natural law is equivalent to natural justice, that is, to “a general idea of just and unjust in accordance with nature.”8 Apart from the criterion of territorial validity,
natural and positive law could be also distinguished with respect to the temporal sphere of validity. Whereas natural law “is ever constant and never changes,” particular laws “often vary.”

Interestingly enough, in none of his political and ethical works does Aristotle speak again of “natural law.” Instead, he introduces the distinction between “natural” (physikon) and “legal” (nomikon) i.e., positive law “justice.” Natural justice has universal force, whereas positive law justice is conventionally established for this or that political community. Commentators note that in *Nicomachean Ethics*, Aristotle contradicts what he writes in the *Rhetoric*, by raising “an objection against the possibility of natural justice.” Despite apparent inconsistencies, Aristotle’s work laid down foundations for the subsequent doctrines of natural law, which are more boldly connected to the idea of law beyond the state.

Such was the philosophy of Stoicism, which not only marked the turn from ancient natural law to Middle Age/Christian natural law, but also shifted the focus of the investigation from *polis* to *cosmopolis*. Stoics argued that “the cosmos is, as it were, a polis, because the cosmos is put in perfect order by law, which is right reason.” This teaching was very influential throughout the Greco-Roman world, partly because it was apt to provide a philosophical account of the rise of empires, particularly the Roman empire. Despite the fact that Romans were exposed to different Greek philosophical traditions, natural law, especially in Cicero’s works, has continued to develop

12 For more detail, see *ibid*, 94–99.
13 This is particularly true of the *Rhetoric*, which “offers a coherent account of natural law with noteworthy similarities to the later natural law tradition.” *Ibid*, 95.
14 One of the reasons for claiming that Aristotle made a crucial contribution to the foundation of the natural law doctrine has exactly to do “with the impact which his ideas had, or may plausibly be thought to have had, on the thinking of the Stoic thinkers who came after him.” Tony Burns, *Aristotle and Natural Law* (London: Continuum International Publishing, 2011), 175.