
Law Beyond the State: A Reply to Liam Murphy

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A man is properly called a philosopher not primarily in virtue of holding a particular doctrine, but in virtue of having submitted himself to a particular kind of curiosity ... [A] philosophical doctrine is an ordered system of answers to the questions which a philosophical curiosity brings to the surface.¹

1 Ennui in Legal Philosophy

International law has, since perhaps the middle of the 19th century, maintained a defensive crouch with respect to the two principal questions of (Anglo-American) legal philosophy concerning the law. In his book-length treatment of *What Makes Law* – from which his *EJIL* article is drawn – Liam Murphy identifies legal philosophy with an inquiry into what he calls ‘the grounds of law’: the question of ‘how to determine the content of the law in force’ and the question of ‘what makes a normative order an order of law.’² Answering these two questions in regard to international law quickly tends to devolve into an argument about whether international law is law at all and whether international law – without central legislature or courts of compulsory and comprehensive jurisdiction – is sufficiently ‘system-like’ to provide determinate answers to what the law requires.

But as Ronald Dworkin observes in his posthumously published article on international law, ‘the question of whether there is international law no longer seems to trouble anyone ... The old grounds for challenge remain; they are only ignored’.³ Part of the reason for this, as Murphy indicates, is that ‘the political significance of the global legal order’ has expanded after globalization.⁴ There is such an increase in international legal materials, and so many institutions and officials charged with interpreting, adjudicating and applying international law, that it seems oddly churlish, if not unreal, to maintain that all of this practice, rule making and rule interpretation, accompanied by copious evidence that legal persons and natural persons take

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¹ Oakeshott, ‘The Concept of a Philosophical Jurisprudence’, 3 *Politica* (1938) 203, reprinted in M. Oakeshott, *Selected Writings*, volume 3: *The Concept of a Philosophical Jurisprudence: Essays and Reviews 1926–1951*, edited by L. O’Sullivan (2007), at 181.

² L. Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (2015), at 1–2.

³ Dworkin, ‘A New Philosophy for International Law,’ 41 *Philosophy and Public Affairs* (2013) 2.

⁴ L. Murphy, ‘Law Beyond the State: Some Philosophical Questions’, in this issue, 203, at 204.

‘such patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity’,⁵ does not warrant the application of the label ‘law’.⁶

But philosophy too, as Hegel would have it, ‘is its own time comprehended in thought’.⁷ The waning interest in answering the questions concerning the grounds of law as they might be applied to international law reflects also an ennui in the philosophy of law with such questions,⁸ an exhaustion evident in both Murphy’s article and his book. In the article, Murphy canvasses ‘positivist’ and ‘non-positivist’ accounts of how to determine the content of international law and concludes that it does not really matter terribly much which side one is on: ‘It is not the case that we must first decide between positivism and non-positivism before we can be confident that there is any law in force.’⁹ In his book, Murphy rehearses the 40-year debate between positivists and non-positivists¹⁰ and concludes that:

we cannot give up on the idea that it matters what the law is, but disagreement about the grounds of law runs so deep and is so tenacious that we frequently have no option but to say that on one not unreasonable understanding of the nature of law, the content of law is such and such, but that on another, it is something else.¹¹

Philosophical disagreement on the grounds of law seems intractable, if not necessarily permanent, and quite possibly ‘a waste of time’.¹²

This conclusion (found in his book) leads Murphy to change the subject, with strong implications for questions posed by the philosophy of law to international law. Murphy’s chastening of legal philosophy, and his attempt to find a more fertile point of view, leads him to a startling conclusion: that international law and other ‘law for states’ provides a ‘focal case’ for how to think about our duty to obey the law and that we have strong consequentialist reasons to obey these laws.

In what follows, I devote some space to reconstructing Murphy’s argument about law, in general, and about international law, in particular, drawing on both his article

⁵ H.L.A. Hart, *The Concept of Law* (1st edn, 1961), at 255.

⁶ Even those today who emphatically deny that international legal rules have strong ordering or compliance-inducing effects – and who thus insist on the limits of what can be achieved through international law – do not have recourse to a wholesale denial that international law is law. See, for example, E. Posner, *The Perils of Global Legalism* (2009). One could be forgiven, of course, for apprehending this position as a retail denial of the law-like quality of some international law rules.

⁷ G.W.F. Hegel, *Elements of the Philosophy of Right*, edited by A. Wood (1991), at 21.

⁸ See, e.g., Hershovitz, ‘The End of Jurisprudence’, 124 *Yale Law Journal* (YLJ) (2015) 1160. Hershovitz states: ‘For far too long, [jurisprudence] has been preoccupied with a question that is poorly formed. The time has come to set it aside and take up a better one’ (at 1163). And Kornhauser, ‘Doing without the Concept of Law’, New York University School of Law Public Law and Legal Theory Working Paper 15–33 (2015). Kornhauser writes with characteristic parsimony: ‘For roughly fifty years, the Hart-Dworkin debate over the concept of law has dominated the literature on the philosophy of law. It is time to stop. We can largely do without the concept that has generated so much debate’ (at 1).

⁹ Murphy, *supra* note 4, at 207.

¹⁰ Murphy, *supra* note 2, chs 3–4.

¹¹ *Ibid.*, at 102.

¹² *Ibid.*, at 109.

and his book. I then develop a criticism of his conclusion that suggests that his argument about the duty to obey international law is incomplete and even potentially corrosive of compliance with international law in the absence of further specification. I venture that his argument is successful only if it can be understood as entailing a commitment to an ideal that blurs the distinction between consequentialism (which Murphy believes his argument to be) and other modes of moral justification.

2 Abandoning Conceptual Debates and Reconstructing Everyday Heuristics: Why Obey the Law?

Instead of trying to settle the positivist/non-positivist debate, Murphy instead asks: what kinds of working theories and heuristics are revealed and ‘naturally’ reached for when different legal subjects – individuals, legislators, executive officials, judges – try to understand how they should respond to legal materials and what the normative implications of these legal materials are for them. None of this requires, or is much helped by, one concept of law – positivist or not – but, in Murphy’s argument, it seems that what it does require is that we are in some inescapable sense (presently) governed by law and, thus, need to know (for perhaps very different reasons, depending on whether we are law-abiding characters or not and what our official relationship to law is) what law requires of us. This could entail a different inquiry for a judge than for a police officer, a legislator or an executive official.

A corollary of Murphy’s argument is that we ought to ask what the law requires of us because we are (instrumentally) better off governed by law. Herein lies whatever special normative import we might attribute to ‘law’ as a concept. Governance by law has more value than governance without law or no form of governance because it brings about independent goods.¹³ The independent goods that Murphy seems to have in mind are, at least, the goods generated through political order (what Bernard Williams calls solving the ‘first’ political question of ‘the securing of order, protection, safety, trust and the conditions of cooperation’).¹⁴ Solving the first political question at the level of the state under modern conditions entails:

the existence of institutions that can provide basic security, protect rights, preserve the environment, promote economic justice and overall welfare, and so on. And law as a mode of governance is clearly superior to alternatives, from a moral point of view, in view of its potential to achieve such goals while at the same time respecting the agency of persons. There may be law without the rule of law, but *only legal systems* can achieve the ideal of the rule of law.¹⁵

¹³ Kornhauser characterizes this as ‘an evaluative concept of law. Such a concept identifies the value of legality’. Kornhauser, *supra* note 8, at 8.

¹⁴ B. Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, edited by G. Hawthorn (2005), at 3.

¹⁵ Murphy, *supra* note 2, at 130 (emphasis added). Or, ‘though law and legal institutions would have no moral significance if they could do no good, governance by and through law may be an essential condition of any legitimate coercive pursuit of those aims’ (at 137).

The instrumental moral reasons for obeying a law obtain in light of the goods generated by the political order reflected in, and constituted by means of, the legal system. As individual subjects, our (weak) duty to obey the law derives from two cumulative propositions: (i) that the political coercive order maintained by law is ‘otherwise good enough’ so that its overthrow probably has morally worse outcomes than maintaining (and, maybe, reforming) it and (ii) that we ought to obey the law, all things considered, to the extent that widespread non-compliance risks the collapse of the legal order (an argument from prudence) and that our individual non-compliance would mean we would benefit from the goods generated by that order without sharing any of the burdens (an argument from fairness).¹⁶ Murphy maintains that, on this kind of reasoning, the duty on legal officials and state agents to obey the law is consequentially much stronger. Since ‘modern coercive orders are understood in good part in terms of their structural legal features,’¹⁷ individual acts of non-compliance by state officials and legal officials are much more likely to threaten the political order and legal system decisively:

[W]e quickly end up with the state not binding itself to law at all. The benefits of the constitutional state ... depend on close to full compliance with law by the state ... If we, the subjects of that system, cannot count on the executive to comply with law that applies to it, we cannot properly assess our reasons for supporting the overall political coercive order.¹⁸

Official non-compliance gravely threatens our solution to the first political question, and the goods that this makes possible, and thus points us to the weightiest instrumental reasons for a duty to obey the law on the part of those actors and agents against whom the law cannot easily be directly enforced. For these actors and agents, Murphy concludes, the question of what the law requires (as opposed to morality, political self-interest, efficiency or some other criteria of judgment) is critically important, and, hence, an orientation to the specific normative demands of the law in force is necessary.¹⁹ While we can apparently do without the philosophical conceptual debates about law, we cannot do away with ‘law’ in so far as we ought to ask what law requires of us.

3 International Law: From Stepchild to Archetype

I have devoted considerable space to reconstructing Murphy’s conclusions from his book-length inquiry into ‘what makes law’ because it provides a necessary means of

¹⁶ *Ibid.*, at 131–133.

¹⁷ *Ibid.*, at 139.

¹⁸ *Ibid.*, at 138–139.

¹⁹ I would note in passing that this position seems to me compatible with that of Hershovitz, who would regard himself as having eliminated the need for a concept of law, or, as he puts, for a theory of a distinctively legal domain of normativity. He maintains that while we can have good moral consequentialist reasons for not substituting our individual moral judgments for a judgment about what law requires of a particular legal official (such as the enforcement of the Fugitive Slave Act by a federal marshal when such Act was duly enacted and in force), this does not imply some distinctive legal domain of normativity; it only implies that we have reasons that allow us to identify what the law requires, distinguish these from reasons that allow us to identify our moral obligations, and recognize that the two can conflict. Hershovitz, *supra* note 8, at 1192.

grasping the wider import of his article. One crucial conclusion is that international law and 'law beyond the state' ought to be a 'focal case' for explicating our instrumental reasons to obey the law and, thus, to reveal our working theories of what the normativity of law amounts to:

The upshot here is that conventional thinking about what is the focal case of law, the municipal legal system effectively enforcing law as against individual subjects, is very misleading. It pushes to the margins law for states, both domestic and international. Since a central reason for being concerned about the content of law is that there are moral reasons to obey it, our focal case should to the contrary be that of the under-enforced or unenforced law that applies to state.²⁰

International law ceases to be a stepchild of municipal law and takes centre stage as an archetype for examining what we have in mind when we speak of the normative force of law. In the first third of his article, Murphy engages in what he calls 'philosophical and theoretical house-keeping,' clearing the ground of the dead wood left by legal philosophy's earlier set of questions concerning international law. He refutes Hart's well-known – and highly contested claims – that international law lacks a rule of recognition and, therefore, constitutes a simple set of legal rules rather than a legal system.²¹ Of course, exactly what the rule of recognition amounts to, and the theoretical purposes it is supposed to achieve, remain deeply contestable and confusing.²² But, as Murphy observes, Hart seems to have failed to grasp that the criteria of validity for customary international law is not simply that the rules are accepted and function as legal rules by legal officials but, rather, that a given rule of customary international law is constituted by the practice of states and the opinion of states as manifested through certain kinds of statements by certain kinds of state officials.

Not anyone's belief about what the law is will do, but, rather, as in any legal order, there is considerable background agreement among legal officials and legal professionals about what qualifies as a competent and plausible argument concerning the existence and content of a rule of customary international law. International law's standard formulation for customary international law could well qualify as a rule of recognition, particularly if (as Jeremy Waldron notes), Hart does not make greater demands than he does on municipal orders, in which deep disagreement about whether a customary law rule exists and whether it amounts to binding precedent

²⁰ Murphy, *supra* note 2, at 143.

²¹ See, recently, Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart', 21 *European Journal of International Law* (2011) 967; see also Jeremy Waldron, who calls Hart's reflections 'obtuse'. Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?', in L.D. d'Almeida, J. Edwards and A. Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (2013) 378, at 378.

²² See Lamond, 'The Rule of Recognition and the Foundations of a Legal System', in d'Almeida, Edwards and Dolcetti, *supra* note 21, at 179–225: 'The unity of a legal system may have more to do with the relationships between various legal institutions than with those institutions all using exactly the same criteria of validity. ... The legal system may have many foundations, rather than just one' (at 213). In the same volume, Waldron, *supra* note 21, at 392: 'I find it hard to evaluate this contention, partly because I am still unsure after all these years what the idea of a rule of recognition is supposed to add to other secondary rules.'

‘does not and should not lead to a denial that the municipal order lacks a rule of recognition.’²³ In international law as well, ‘we know how to argue our way through these issues, even if we don’t have a precisely formulated and mechanically applicable meta-rule at our fingertips’.²⁴

More important it seems to me is Hart’s insistence that international law’s criteria for validity cannot provide a means by which the rules of international law are ordered into a structural unity in which the priority between rules can be determined.²⁵ This worry seems to underlie his conclusion that international law is not a legal system. While he rejects Hans Kelsen’s contention that a basic norm can be identified in international law, by which the validity for every other rule can be assessed, Hart holds fast to the idea that this hierarchically organized unity of norms is the correct concept of a system for the purposes of identifying a legal system. In this, Hart shares with Kelsen the *Stufenbau* concept of a legal system, even as he denies that international law corresponds to this concept.²⁶

The *Stufenbau* ideal of a legal system, as Alf Ross pointed out 54 years ago, represents not so much the reality of any municipal legal order but, rather, a ‘confessed, official ideology’ evinced by many municipal systems.²⁷ Murphy defends a ‘natural’ way of talking about international law as a legal system that does not require a *Stufenbau* conception:

A set of rules ... can nonetheless be connected in that they refer to each other and develop in the context of the existence of others. ... These connections among the rules enable us to say ... that this group of legal rules makes up a legal system. ... International law is a system of ‘interlocking norms’ even if [it is not a system in Hart’s sense].²⁸

If we free ourselves from the *Stufenbau* concept, then it becomes not especially problematic to picture ‘distinct legal orders relating to distinct subject areas, and not relating to each other, all being generally complied with by states’.²⁹ In the event of latent or patent conflicts between these distinct legal orders, legal doctrines and techniques nonetheless exist that could be used to casuistically reduce or avoid conflict.³⁰

²³ Waldron, *supra* note 21, at 393, referring to Hart’s *The Concept of Law*. Hart, *supra* note 5, at 134.

²⁴ Waldron, *supra* note 21, at 394.

²⁵ Hart, *supra* note 5, at 236.

²⁶ ‘A legal order is not a plurality of valid norms on the same plane but rather a hierarchical structure (*Stufenbau*) of superior and subordinate norms.’ ‘The unity of a legal order is the unity of a network of generative relations. That a legal order can be described in non-contradictory propositions is another expression of this unity.’ Kelsen, ‘The Concept of the Legal Order’, 27 *American Journal of Jurisprudence* (1982) 64, at 69.

²⁷ Ross, ‘Review: The Concept of Law by HLA Hart’, 71 *YLJ* (1962) 1185, at 1186, n. 8: ‘The various sources [of a legal order] in actual fact do not make out a logical hierarchy but a set of cooperating factors.’

²⁸ Murphy, *supra* note 4, at 212.

²⁹ *Ibid.*, at 214.

³⁰ For an extended and sophisticated treatment of this observation, see Tuori, ‘Transnational Law: On Legal Hybrids and Perspectivism’, in M. Maduro, K. Tuori and S. Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (2014) 11.

All of this ground clearing helpfully avoids the dead ends to which the earlier philosophical questions about international law seemed to lead. It is not so much that the questions do not persist but, rather, that they do not seem especially pressing or interesting anymore, if they ever were. Whether it is one system or several – and whether this matters – remain open to argument, but Murphy’s article de-dramatizes the question of whether international law is sufficiently system-like to avoid the label ‘primitive’ or ‘simple’ and answer the question of whether international law can share in the positive evaluative glow cast by the ascription of the label ‘a legal system’. This allows him to address in the balance of the article more central concerns; not ‘is it law’ per se but, rather, ‘what is at stake when we call it law and why defend legal governance beyond the state?’.

4 International Law and Order

In light of my reconstruction of Murphy’s lengthier arguments about the normative force of law, it is not surprising that attempts to reduce international law to nothing but the convergence of self-interest, or an expectation that a price will be attached for non-compliance, will not do.³¹ None of these approaches captures, in Murphy’s view, the reasons we might have to ask what the law requires of us. Whether or not a violation actually results in a sanction is not essential to the existence of a legal system or the normative force of law, although a minimum level of effectiveness certainly is.³² Law implies the possibility of authorized and justifiable enforcement and, in turn, provokes demands for reasons as to who or what is authorized to coerce which legal subjects in order to bring about compliance with the law. Legal governance implies a structure of justification for such accountability: ‘[T]o call for new legal norms is to express confidence that any moral objection to enforcing them *could* be met.’³³

To the extent that the idea of law imports a structure of (possibly or probably enforced) accountability that can be justified, a call for legal governance, as opposed to something else (virtue ethics of international organizations, for example), is also a demand for a re-ordering of existing relationships in such a way as to render them, in principle, amenable to compliance with the new law. Of course, the burden of realizing this re-ordering may be so high, or so unlikely to be actualized in light of the current distribution of power and authority, that the demand ‘there ought to be a law’ will be utopian. Nonetheless, it seems valuable to me to clarify in what sense the claim is utopian in a given context.³⁴

³¹ Murphy, *supra* note 4, at 220.

³² *Ibid.*, at 218, 221. Murphy, citing Lamond, observes: ‘[T]he link between a legal system and coercion is, as [Lamond] puts it, justificatory rather than constitutive ... [L]aw presents itself as a set of legitimate demands that, things being in order, may be justifiably enforced in accordance with the rules and standards provided for by law itself.’

³³ *Ibid.*, at 226 (emphasis added).

³⁴ I would add as an aside that my reading of the global administrative law literature is that it does not really insist that ‘there ought to be a law’. Rather, it looks to existing, immanent procedures and mechanisms of accountability and tries to discern whether they can represent a whole greater than the sum of its parts from which clearer heuristic principles can be derived in conceptualizing certain relationships between decision makers and those subject to exercises of decision making.

In the final part of the article, Murphy returns to the key claim he develops in his book: that there are strong instrumental moral reasons for legal officials to obey the law even if it is harder, or proves less likely, for law to be enforced against public officials. He extends this logic directly to international law and contends that ‘in the case of international law, the obligation is to support the practice of general compliance with the law’. This is because, in essence, we are better off within a system of legal governance among states than we would be without one, and in a society of almost 200 states, the non-compliance of a relatively small number of states would imperil the legal order itself: ‘With so few legal subjects, each act of non-compliance has a reasonable chance of being part of a pattern of increasing non-compliance that snowballs into a situation where compliance is no longer the norm.’³⁵

This argument is attractive and disarmingly straightforward. It leaves room for the argument that self-interest may be the best explanation for why a certain rule comes into existence or whether a proposed rule has reasonable prospects of being complied with.³⁶ However, once a rule is a legal rule according to the canons of legal validity relevant to international law, states have instrumental moral reasons to comply with it. But there remain questions about how Murphy’s argument cashes out, even if one is sympathetic to it as I am. One relates to the premise of his basic argument for the instrumental moral reason to obey the law. The argument rests on the empirical proposition grounded in the domestic context that political orders governing with, and through, the modality of law generate independent goods such as security, rights, environmental regulation and so on. And, indeed, political orders at the level of the sovereign state – precisely because they are more consistently and intensively coercive and densely governed than any existing non-state political-legal order – do generate more such goods than the international legal order. In fact, this extensive capacity for the creation of public goods seems to me to be really what is at stake in the distinction between *Stufenbau* legal orders exemplified by the ideal-typical municipal order and other kinds of legal systems.

It does not follow that the international legal order generates no goods, but it does seem to me to be true that the goods it can plausibly create are fewer in number, and much more incompletely realized, than those that we have come to expect from a territorially bound coercive political order. Moreover, if the international legal order is better understood as being composed of several interlocking normative regimes, it seems plausible to think that some regimes effectively deliver public goods and others do not or do so only very weakly. For example, international human rights law does not directly generate political and economic security for anyone. It relies on states’ coercive political and legal orders to do so but endeavours to change law and politics within states as a means of realizing rights for persons.³⁷ In this sense, the

³⁵ *Ibid.*, at 231.

³⁶ See L. Murphy, ‘More Than One Way to Be of Use,’ 45 *New York University Journal of International Law and Politics* (NYUJILP) (2013) 821.

³⁷ On this point, see Bhuta, ‘The Frontiers of Extraterritoriality: Human Rights as Global Law’, in N. Bhuta (ed.), *The Frontiers of Human Rights* (2016) 1.

international law of human rights has (highly variable) effects on the way states generate goods such as rights but is not an order generating goods.³⁸ By contrast, some scholars maintain that there are certain kinds of international legal regimes that successfully generate cooperation and collective goods even where the level of compliance is far from perfect, such as the law of the sea or international trade law.³⁹

If this is right, then I cannot see why Murphy's instrumental argument would not invite us to ask regime by regime, context by context and good by good whether the international legal rules in question should be complied with. The problem, of course, is that even the invitation to such an inquiry could be disastrous for compliance with international law since states' evaluations of the efficacy of a given legal regime may vary enormously and agreement may be hard to come by. John Yoo, for example, maintains that the existing international legal framework severely restricting non-defensive uses of force, and placing control of such uses of force in the hands of the UN Security Council, manifestly fails to generate the public good of security for those people living in failing states:

The international legal system, therefore, should encourage nations to use force when the global benefits outweigh the global costs. Contemporary rules on the use of force, however, have the opposite effect. By demanding that the level of interstate violence fall to zero, the international legal system prohibits many wars and smaller scale interventions that might improve overall global welfare.⁴⁰

There is a great deal to disagree with in Yoo's argument, from his highly stylized historical claims to his primitive comprehension of the politics of other places. But he is far from alone in holding views along this spectrum. The point is that agreement on which rule complexes effectively generate goods, and which do not, will often be absent, and the debates will be mired in empirical and methodological disagreement about how one reaches a conclusion on such matters. Under the rationale that Murphy proposes, the result could be a very piecemeal approach to compliance if indeed each state ought to use this set of motivating reasons to determine whether it ought to comply with (any given) international legal rule.

To sustain the broader proposition that the moral duty 'comes close to entailing a duty of all states to comply with all [international] law [that binds them],' I think something more is needed. The duty would need to be a duty to avoid undermining the legal system of international law as such so as to maximize the possibility that it can continue to provide such independent goods as it does. This amounts not so much to a moral duty to obey the law but, rather, to a moral duty to maintain the order of juridical relationships that in sum constitute the international legal system, on the

³⁸ The literature on the effects of the human rights regime is now very large, but see B. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009); R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights through International Law* (2013); S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006) for different accounts of how international human rights law has empirical effects within state legal orders.

³⁹ See, e.g., Sykes, 'The Inaugural Robert A. Kindler Professorship of Law Lecture: When Is International Law Useful?', 45 *NYUJILP* (2013) 787.

⁴⁰ J. Yoo, *Point of Attack: Preventive War, International Law and Global Welfare* (2014), at 119.

grounds that we are (collectively and on the whole, tangibly and intangibly) better off with such an order of relationships than without it.

The demand must be, in effect, that each state live up to Immanuel Kant's exhortation (directed to individual humans in the *status naturalis*) to '[b]e a Juridical Person!' to continue to keep alive the prospect of a proper juridical constitution among states with all of the benefits this will (eventually) bring to them.⁴¹ Emer de Vattel's concept of the voluntary law of nations likewise articulates a necessary presupposition for the bindingness of any given pact or customary norm – a commitment to the maintenance of the 'natural and universal society' of states, without which states themselves could not realize their essential purpose, which is the provision of peace and security to their citizens and, thus, their individual and collective flourishing.⁴² I cannot reconstruct the Vattelian or Kantian account here, but the short point is that an argument for an instrumentalist duty to obey and not undermine international law as a system of law requires a commitment to legality that can be justified only through a wider consequentialist account of the purposes achieved by the ideal of an international legal order. But if I am right, then it seems to me that the difference between deontological and consequentialist arguments is slim at this point. What we are perhaps interested in doing is reminding ourselves of the benefits to our present reality of a continued belief in a kind of collective dream.⁴³

⁴¹ B.S. Byrd and J. Hruschka, *Kant's Doctrine of Right: A Commentary* (2010), at 62, glossing Kant's reformulation of Ulpian's formulae in I. Kant, *The Science of Right*, edited by W. Hastie (1887), at 8.

⁴² E. de Vattel, *The Law of Nations or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, edited by B. Kapossy and R. Whatmore (2008), at 76.

⁴³ As Oakeshott once observed in relation to Hobbes' *Leviathan*, 'we are apt to think of civilization as something solid and external, but at bottom it is a collective dream ... The office of literature in a civilization is not to break the dream, but to perpetually recall it, to recreate it in each generation, and even to make more articulate the dream-powers of a people ... But from a book of philosophy ... a more direct, less subtle consequence may be expected to spring. Its gift is not an access of imaginative power, but an increase of knowledge; it will prompt and it will instruct. In it we shall be reminded of the common dream that bind the generations together, and the myth will be made more intelligible to us'. Oakeshott, 'Leviathan: A Myth' (1947), in M. Oakeshott (ed.), *Hobbes on Civil Association* (1975) 159.