Hague Journal on the Rule of Law
https://doi.org/10.1007/s40803-024-00219-2

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Between a Rock-Hard Reality and a Pious Wish Place: Postema on the Rule of Law Beyond Borders

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Accepted: 22 March 2024
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Abstract

In the final chapter of *Law's Rule*, his recently published tour de force on the nature, value, and viability of the rule of law, Gerald Postema defends the desirability, possibility, and actuality of an international rule of law. I contend that his attempt to defend the latter two claims fall short of what is needed, focusing in this essay on his argument for the possibility of a rule of law beyond state borders. Postema moves quickly from an argument for the existence and efficacy of international law to the conclusion that an international rule of law is no pious wish. Yet as I explain, the refutation of rule-skepticism does not suffice to refute rule of law skepticism. Indeed, I demonstrate that Postema misconstrues the most interesting and plausible challenge to an international rule of law he considers, namely the economic analysis of international law, and consequently his response misses the mark. The economic account of how international law works, together with those developed by TWAIL scholars and Marxist theorists of international law, pose far greater challenges to the possibility of an international rule of law than those Postema considers, as each offers a plausible explanation for why any attempt to realize that ideal is doomed to fail. To address these challenges, theorists should look to Postema's discussion of the institutions and culture that foster fidelity to the rule of law, rather than his remarks on a global rule of law.

Keywords International law · Law and economics · Marxist · Postema · Rule of law · TWAIL

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Published online: 22 April 2024

1 Introduction

In the final chapter of *Law's Rule*, his recently published tour de force on the "nature, value, and viability of the rule of law," Gerald Postema considers whether the rule of law is an exclusively domestic value (Postema 2022, 307). This question is open to three interpretations. The first concerns the (moral) *desirability* of the rule of law beyond the borders of the state: is that ideal one we should strive to realize in the international legal order? A second concerns the *possibility* of the rule of law beyond borders: is it a standard for the exercise of political power that can be realized in the existing international legal order, or at least a reformed version that retains its paradigmatic features?[1] On the third interpretation, the question concerns the *actuality* of the rule of law beyond state borders: to what extent does international law presently exhibit fidelity to the ideal of the rule of law, if it does so at all?

Postema addresses all three of these questions. With respect to the desirability of an international rule of law, he observes that "the concerns that motivate us to look to the rule of law in the domestic context do not suddenly vanish when we look beyond national borders" (Postema 2022, 307).[2] But is the rule of law beyond the borders of the state possible? Postema maintains that it is, or more precisely, he rebuts the charge than an international rule of law is impossible because (so-called) international law is either not law properly so-called or it is inefficacious. Indeed, Postema clearly believes an international rule of law is possible since he contends that it actually exists, albeit in a highly imperfect form. The commitment to resort to law rather than brute force is fragile, he writes – perhaps unintentionally echoing Ronald Dworkin's description of international law as fragile, nascent, and in critical condition (Dworkin 2013, 23). Still, "while a global community ordered by transnational law is [not] a rock-hard reality," neither is it "a pious wish" (Postema 2022, 331).[3] The fundamental question, as Postema sees it, "is not whether the rule-of-law ideal can speak credibly and with normative force in this context [i.e., beyond state borders], but rather whether the global community has created a legal order that approximates the ideal" (Postema 2022, 308). The real challenge to a global rule of law concerns the adequacy of our efforts to realize it, and what can be done to make it *more* robust (Postema 2022, 308).

[1] Postema frequently speaks of a "global rule of law," rather than an "international rule of law." One reason to do so might be that a global rule of law can only be realized via institutional reforms that effectively replace an international order with a practice of government that looks more like that of a modern state. So, for example, suppose the establishment of the rule of law beyond the borders of an individual state requires an institutional arrangement akin to that of the European Union. It seems to me that were such an institutional development to occur globally, it would spell the end of the legal order that began to emerge in Europe in the sixteenth and seventeenth centuries. Arguably, this would not be an example of the rule of law beyond the borders of the state, but instead the expansion of the borders of a state-like political entity to encompass the entirety of the globe.

[2] Postema briefly describes four respects in which the global rule of law can serve the freedom, dignity, and fundamental well-being of individual human beings. See Postema 2022, 325–331.

[3] Despite his use of the phrase 'transnational law' here, Postema focuses largely on international law and the possibility or reality of an international rule of law, and so I will do the same. On the relationship between international and transnational law, see Jessup 1956; Cotterrell 2012.

While I share Postema's belief in the desirability of an international rule of law, I think his attempt to defend both its possibility and its actuality fall short of what is needed. In this essay I focus on the first of these shortcomings.[4] The kind of possibility that interests me and, I think, Postema, is the kind that figures in the claim that something is or is not a pious wish – *unlikely* to happen – and that relies on an empirically-informed explanation of why this is so.[5] What explains why some societies have developed a political order premised on a commitment to the rule of law (even if their fidelity to that commitment has been imperfect), while others have not? What factors contribute to the erosion of such a commitment in societies where it has begun to take root, or where it has long flourished? How can we attempt to cultivate a commitment to government in accordance with the rule of law? As these questions suggest, our best (but fallible and always revisable) judgments of what is possible depend on how well we understand what is actual – in this case, both the accuracy of our description of the international legal order, and the accuracy of our explanation of why it works and has the form it does rather than working in some other way or having some other form.

A central thesis of Postema's book is that the ideal of government in accordance with the rule of law "promises protection and recourse against the arbitrary exercise of power using the distinctive tools of the law" (Postema 2022, xi). Thus, the rule of law requires law. But some skeptics argue that international law is a myth; it "is either non-existent or impotent" (Postema 2022, 308). The first step to defending the possibility of a global rule of law, therefore, must be disproving skepticism regarding the existence and efficacy of international law. That is what Postema sets out to do in the book's final chapter. But what follows if he succeeds? I worry that Postema moves too quickly from the claim that international law exists and is sometimes or even frequently efficacious to the conclusion that an international rule of law is possible. As I explain, the refutation of rule-skepticism does not suffice to refute rule-of-law skepticism. Specifically, I contend that Postema misconstrues the most interesting and plausible challenge to an international rule of law that he considers, which he labels Practical Reason Realism. Contrary to Postema's presentation, proponents of this analysis of international law do not argue that it plays no role in states (and other actors') practical reasoning. Rather, they argue that an economic analysis of law provides an accurate account of how it does so, and that such an account of how international law works is fundamentally at odds with fidelity to the moral-political ideal of the rule of law. Moreover, proponents of an economic analysis of international law at least occasionally gesture at empirically informed accounts of *why* international law works this way that bear directly on the question of whether an international rule of law is simply a pious wish. Properly understood, then, Practical Reason Realism, or the economic analysis of international law, poses

[4] I argue for the plausibility of a skeptical conclusion regarding the actuality of an international rule of law in Lefkowitz 2024.

[5] A pious wish or hope is defined as "something that is hoped for but will probably not happen" (Merriam-Webster 2024), or one that is "sincere but unlikely to be fulfilled; unrealistic" (Oxford English Dictionary 2024).

a challenge to very possibility of a global rule of law and not merely to the adequacy of our efforts to realize it, one that I contend is much more serious than Postema recogizes.

Indeed, I worry that Postema has missed an opportunity to take on the most powerful arguments against the possibility of an international rule of law. All of these are advanced from *within* the practice itself, in the sense that each attributes to international law a fundamental regulative ideal, a conception of its point or purpose, that is at odds with a political community committed to the ideal of the rule of law. Besides the Law and Economics analysis of international law, I have in mind here TWAIL scholars who maintain that international law remains inextricably bound up with the political project of imperialism, and Marxist scholars (and some Crits) who maintain that international law is inextricably bound up with the political-economic program of capitalism.[6] These are challenges to the claim that an international rule of law is not simply a pious hope that purport to explain why international law does not temper political power but instead serves only as a tool by which power can be wielded. Postema is right to observe that "the failure of law's rule [in practice] does not [necessarily] entail the poverty of the ideal" (Postema 2022, 327). Yet certain patterns of failure should prompt us to ask whether a particular practice of holding accountable is even an imperfect example of a rule of law order. A skeptical answer to that question may lead us to question why a commitment to the rule of law has not taken root. As I briefly explain later in this essay, the answer to that query may lead us to conclude that the pursuit of an international rule of law is indeed a pious wish.

2 Postema on International Legal Skepticism

Postema begins his defense of the reality of international law, and so the possibility of an international rule of law, by criticizing the identification of law *tout court* with the legal order we find in (or that is constitutive of) a moderately well-functioning modern state. Though widely discredited, this argument remains a familiar one. The existence of law is said to require "centralized ruling power, articulated in legally authorized law-making bodies, a centralized and hierarchically structured court system, and mechanisms for effectively enforcing norms made and applied" (Postema 2022, 319). Insofar as international law largely lacks these features, it fails to qualify as an example of genuine law.

Postema offers two rejoinders to this argument (Postema 2022, 318–21). First, it is not clear why we should treat specialization in the performance of governance tasks as necessary (and perhaps sufficient) for the existence of law, rather than, say, as features that distinguish different types of legal orders. Second, he maintains that we will do better at understanding and so also evaluating legal orders if we locate them along a continuum rather than classifying them as either centralized

[6] Some might also add the New Haven school and its progeny in the IR/IL movement whose commitment to a managerial style of global governance conflicts with a non-instrumental conception of the rule of law of the sort Postema defends.

(vertical) or decentralized (horizontal) practices of government. Doing so allows us to acknowledge the various respects in which the international legal order is characterized by specialization in the performance of governance tasks; for example, the existence of courts or dispute resolution bodies, or the UN Security Council's legal authority under Article 42 of the UN Charter to use force to maintain or restore international peace and security. Additionally, if we locate legal orders along a continuum then we are more likely to recognize the various respects in which domestic legal orders "do not fit neatly into the orthodox paradigm of formal rules of fixed and determinate meaning, that are made, identified, applied, and enforced by institutions and officials that stand apart from those subject to them"(Postema 2022, 320). Postema gives the example of constitutional law to illustrate this point. The crucial question, Postema observes, "is not whether international law looks like domestic law, but whether it can function in ways appropriate to its purpose" (Postema 2022, 320). While that seems right, it does leave open the question of whether a fairly state-like institutional arrangement is a necessary condition for tempering states' exercise of political power by subjecting it to an international rule of law.

Having addressed the attempt to rule out the possibility of international law by conceptual fiat, Postema turns his attention to the claim that international law is necessarily impotent. Postema distinguishes three versions of this Realist challenge to international law's efficacy: Power Realism, Practical Reason Realism, and Fiduciary Realism. I focus my remarks on the first two, since only they speak to the potency of international law, that is, to whether it plays any role in agents' practical reasoning.[7]

Power Realists rely on or recapitulate an Austinian analysis of (legal) obligation: A has an obligation to Ø if and only if B expresses a desire that A Ø, and B is willing and able to impose a sanction on A in the event A fails to act as B wishes. Postema offers two rejoinders to the Power Realist. First, he points out that as a general account of law's normativity, Power Realism ignores the critical problem at the core of the rule of law idea: how to guard the guardians (Postema 2022, 321). A Power Realist will not see this problem as one that can be addressed by "using the distinctive tools of the law" to provide "protection and recourse against the arbitrary exercise of power" (Postema 2022, xi). Austin, for instance, thinks the sovereign is necessarily above the law, and so does Schmitt, who maintains that the sovereign is he who decides on the state of exception (Austin 1995/1832, 164–171; Schmitt 2005/1922, 5–13). Postema suggests that Power Realists ignore the fact that in some states officials are motivated to comply with the law even in the absence of a "centralized coercive mechanism" willing and able to impose sanctions on them should they fail to do so. A commitment to the rule of law, realized both in the design of governing institutions and, crucially, in a culture that shapes the outlook and conduct of officials and subjects alike explains this phenomenon. Though our ability to cultivate rulers who hold themselves accountable to the law is fragile, it does exist.

[7] In contrast, Fiduciary Realism addresses a moral question, namely whether and when international law *ought* to play a role in an agent's practical reasoning.

Postema implies that if domestic law can motivate even in the absence of a sanction, then so too can international law.

One might challenge the claim that (the highest ranking) domestic officials conform to the law even when it runs counter to their own interests and/or substantive moral judgments because of their commitment to the moral-political ideal of the rule of law.[8] My concern, though, is not with Postema's claim regarding the efficacy of domestic law even in the absence of sanctions for illegal conduct, but with the implied inference from this fact (assuming it is one) to the conclusion that international law may also be effective in the absence of sanctions. Postema devotes a significant portion of his book to presenting a nuanced and complex account of how a domestic political society can realize, at least to a considerable degree, a culture of fidelity to the moral-political ideal of government in accordance with the rule of law. It is not at all obvious that such an effort can succeed in the global domain, or put another way, that belief in such a project is not a pious wish. Thus, even if Power Realists should concede that the rule of law is possible under certain conditions that can be (and sometimes are) realized in a modern state, there may still be good reasons to think that the project of developing a global political community committed to the rule of law is doomed to fail.

As a second rejoinder to the Power Realist, Postema invokes Oona Hathaway and Scott Shapiro's work on outcasting and international law to describe how a political community can enforce its norms even in the absence of a centralized enforcement mechanism that employs physical force (Hathaway and Shapiro 2011). Thus, even if legal obligations are nothing more than threats backed by sanctions, international law is not impotent. Most Realists will concede this point, but with two related qualifications. The first is that outcasting is only effective against weaker states. Powerful ones can either ignore the costs of being denied the benefits of some form of cooperation, or they can threaten to impose costs on any state that attempts to deny them those benefits (or at least enough such states to prevent legally authorized outcasting from occurring). The identification of outcasting as a mechanism for enforcing international legal norms does not challenge the fundamentally Melian nature of the international political order: the strong do what they can, while the weak suffer what they must. The second qualification is that even if we take on board the possibility of enforcement via decentralized outcasting, international law's normativity remains entirely prudential: it provides an actor with reasons for action by indicating the costs other actors (purportedly) stand ready to impose on it in the event they discover it has performed a particular kind of act.[9] This doubly qualified concession brings us to the second type of Political Realism Postema considers, which he labels Practical Reason Realism.

[8] See, for example, Schauer 2010.

[9] More precisely, on this account international law provides a reason for belief, not action: it enables states (and other international legal actors) to predict how other actors are likely to respond to their conduct, and to choose their course of action accordingly. In a Holmesian spirit, we might say that if you want to understand international law, you must look at it as a bad statesman who cares only for the material consequences which such knowledge enables him to predict.

The Practical Reason Realist maintains that "what passes for law in the global domain does not count *in the way* law counts" (Postema 2022, 323). Law functions properly *as law*, in the distinctive manner of law, just when it operates as guiding and binding norms. But international law does not and cannot do so because international actors, especially states, act only from their understanding of their national self-interest (Postema 2022, 323). Postema draws on Jack Goldsmith and Eric Posner's *The Limits of International Law* to illustrate this position. The latter authors maintain that "states do not act in accordance with a rule that they feel obliged to follow; [rather,] they act because it is in their interests to do so" (Goldsmith and Posner 2005, 39, quoted in Postema 2022, 323). Indeed, "because states have no intrinsic desire to comply with international law, all international law is limited by the rational choice of self-interested actors… States cannot bootstrap cooperation by creating rules and calling them 'law'" (Posner 2003, 1919, quoted in Postema 2022, 323). Postema rightly concludes that "on this view, states are exclusively self-interest maximizing rational actors" (Postema 2022, 323). Put another way, Practical Reason Realism is simply a different name for the Economic Analysis of (International) Law.[10]

Postema argues that Practical Reason Realists fail to demonstrate that there is no role for the rule of law in the global domain. That is because they work with a "very narrow and implausible understanding of how law could and does count for purposes of realizing and implementing that ideal" (Postema 2022, 324). Specifically, Practical Reason Realists treat practical considerations as counting in the way law counts "only if agents *obey* its rules for the *sake of the rules alone*; they can function to constrain the behavior of these agents in the way the law does only if *those rules alone* determine conclusively the choices and actions of agents" (Postema 2022, 324). Yet we need not, and perhaps should not, demand this kind of practical single-mindedness from international actors. Rather, "we ask, at a minimum, that international actors take law to play the role of a policy or plan in their practical reasoning," where a plan is understood as "a kind of practical resolution that parties stick to when they are caught in nets of high stakes interaction where long-range commitments are needed to prevent the interaction collapsing into self-defeating and destructive struggle" (Postema 2022, 324). In short, international law enables states (and other international actors) to build and act on plans that enable them to navigate their practical environment, and as "rational actors… they feel "bound" by them" (Postema 2022, 324). Postema concedes that states' commitment to law-shaped

[10] Postema's brief presentation of Practical Reason Realism obscures the fact that the best economic analyses of international law treat a state's self-interest as an empirical matter; roughly, the preferences of those who act in the state's name. Nothing in the economic analysis of international law excludes the possibility that a state has a highly ranked preference for advancing the welfare of people in other states or a "taste" for fairness, and views certain international legal norms as helpful rules of thumb for how best to satisfy those preferences. When Law and Economic scholars of international law conclude that international law serves (almost) exclusively as a means for states to advance the well-being of their citizens (or perhaps mainly or only their ruling elite) in light of their relative power, as they frequently do, they offer empirical support for this conclusion, albeit in the form of abductive arguments, or what is the same, constructive interpretations of international legal practice.

plans "may rest ultimately on considerations of self-interest," but observes that "it may also converge with consideration of the good of a wider community and the shared benefits of mutual commitments over time" (Postema 2022, 324).

3 Practical Reason Realists: Rule of Law Skeptics, Not Rule Skeptics

I contend that Postema's response to the Practical Reason Realists misses the mark. He describes them as holding that international law makes no difference to states' practical reasoning. Yet despite the occasional overstatement by Goldsmith and Posner, the theorists Postema identifies as Practical Reason Realism's standard bearers, that is not their position. Rather, as Postema himself writes, they contend that international law does not figure in states' practical reasoning *in the way law does*. Or perhaps it would be more accurate to say that Practical Reason Realists deny that international law operates in the deliberative economy of states in the way that *international lawyers* maintain it does, where 'international lawyer' refers to precisely the sort of agent Postema lauds earlier in his book, one devoted to serving the moral-political ideal of the rule of law. Lawyers, Postema writes, "are guardians and conservators of the rule of law," or as I've put it elsewhere, lawyers are those for whom realizing the rule of law is a calling or vocation (Postema 2022, 126–130; Lefkowitz forthcoming). Properly understood, then, Practical Reason Realists deny neither the existence nor the efficacy of international law. What they deny is the existence of an international rule of law, and the form of practical reasoning appropriate to, or constitutive of, a practice of holding accountable premised on a commitment to that moral-political ideal.[11]

On the Practical Reason Realist's account, international law serves as a tool whereby states seek to advance their national interest in light of their relative power. Conformity to law is neither an end in itself nor intrinsically valuable; rather, it is something states (ought to) do if and only if conformity is a means to advancing their interests, and therefore it is only instrumentally valuable. The social order constituted by international law is best modeled as a market, not as a community, or at least not the kind of community whose members enjoy the good of membership that Postema argues provides the moral foundation for the ideal of government in accordance with the rule of law.[12] As one leading proponent of the economic analysis of

[11] In a retrospective on *Limits of International Law* fifteen years after its publication, Goldsmith and Posner reiterate (and, perhaps, clarify) that "the book is not skeptical about international law in the sense of arguing that it is a fiction or unimportant, as some realists in the political science tradition claim, or that international law is not "law," as some philosophers have argued." Rather, "Limits is skeptical about the claims made by international law scholars about international law, … [and] above all… about the methodological value of an assumption that states experience "compliance pull" (Goldsmith and Posner 2021, 119, citations removed). When reflective international lawyers talk about international law's "compliance pull," I think they have in mind the feeling that accompanies a commitment to the ideal of the rule of law. Goldsmith and Posner challenge this account of international law's normativity; that is, they are international rule of law skeptics.

[12] "Membership puts individual dignity equality, and freedom from subordination to the will of another in close internal, mutually qualifying connections. They find their home and best expression as components of an especially valuable kind of community. The best explanation of the focus, force, and scope

international law writes, "in international society, the equivalent of the market is simply the place where states interact to cooperate on particular issues – to trade in power – in order to maximize their baskets of preferences" (Trachtman 2008, 10).

Law and Economics scholars offer a sophisticated account of how international law enable states to better advance their national interest.[13] Some international legal norms serve to communicate conditional offers. In the case of a bilateral treaty, for instance, each state indicates its willingness to cooperate in some way (e.g., to lower trade barriers, or to treat particular coordinates as demarcating their respective right to exercise domestic jurisdiction) on the condition that the other state does so as well. Some international legal rules serve to reduce the costs of engaging in mutually beneficial cooperation. As Posner and Sykes observe, international legal rules governing the construction of treaties, accession to them, and how they should be interpreted are much like contract law, a set of ready to hand tools that states can employ to create and operate a cooperative scheme (Posner and Sykes 2013, 24–26; Trachtman 2008, 120–22). International legal norms can also facilitate mutually beneficial cooperation by establishing common understandings of what counts as a permissible or impermissible barrier to trade, or a permissible or impermissible form of nuclear engineering, or a permissible or impermissible flight path, and so on. Additionally, international law creates mechanisms for fact-finding, such as the IAEA, WTO panels, and UN Special Rapporteurs. This information plays a crucial role in enabling states to determine whether others are holding up their end of the deal, deciding whether violations are worth contesting (and if so, in what way – that is, at what cost), and identifying opportunities for deeper or entirely novel forms of cooperation. Finally, game theory provides valuable insights into how to design international legal regimes and institutions so as to facilitate coordination or cooperation, from permitting efficient breach so long as compensation is paid, to side payments, to expanding the scope of bargaining to include either more actors or more issues (Posner and Sykes 2013, 26–36).

As this brief description makes clear, the Practical Reason Realist does not deny that states act on the basis of plans, as Postema describes them. Nor, contra Postema's assertion, does the Practical Reason Realist think that states should (or, generally, do) engage in case-by-case assessments of advantage. While he or she will likely view suspiciously any talk of states being bound by international law, the Practical Reason Realist might accept it so long as the word 'bound' is enclosed in scare quotes – as, in fact, Postema does. But the Practical Reason Realist – that is, the Law and Economics scholar who defends a sophisticated and empirically-informed account of states as rational actors – will likely prefer to speak of rules of thumb, or default rules. After all, for any agent with limited cognitive resources, it is rational to rely on some such rules (Lieder and Griffiths 2019).

Footnote 12 (continued)
of the rule of law locates its source in a complex interweaving of them all as components of the deeper notion of community that I call "membership"" (Postema 2022, 81).

[13] See, e.g., Trachtman 2008; Posner and Sykes 2013.

This is all the more so for those agents who exercise the most influence over what the rules are, including the secondary rules governing the creation, application, and enforcement of the primary rules. Like many critics of Political Realism, Postema invokes Louis Henkin's oft-quoted line that most states comply with most international legal norms most of the time (Postema 2022, 323). But of course they do! Powerful states craft the (interpretation of) rules so that they generally serve to advance their national interest in light of their relative power, which often includes making it difficult for other actors to enforce those rules against them. Weak states might prefer different rules (though not always), but they lack the power necessary to either change the rules or to consistently flout them. Weak states sometimes also benefit from powerful states unwillingness to craft effective enforcement regimes. The upshot is that we should not be surprised that most states comply with international law most of the time, but that fact does not tell us much about *why* international law is effective, or how it figures in states and other international legal actors' practical reasoning.

With a thumbnail sketch of the economic analysis of international law in hand, consider Postema's description of how law figures in the deliberative economy of agents (Postema 2022, 324–25):

- "Norms shape the interactions, giving meaning to expectations and playing a meaningful role in the deliberative economy of interacting agents."
- Law "provides grounds for claims and demands that each can make on the actions of others, resources for vindicating one's actions in the eyes of other agents, and challenging those of others. On this basis, reciprocity is sustained among agents caught in nets of interaction, and retaliation is understood, affirmed, resisted, and protested."
- Laws "constitute and highlight options and give meaningful shape and salience to a range of potentially competing reasons."
- Law "helps to give publicly recognizable shape to individual and collective aims."

The Practical Reason Realist, or Law and Economics scholar, will happily agree to all of these claims. The same is true for Postema's claim that states' "law-shaped plans may rest ultimately on considerations of self-interest" (Postema 2022, 324). Indeed, that concession makes it hard to see Postema's argument as a rebuttal to Goldsmith and Posner's claim that "states do not act in accordance with a rule that they feel obliged to follow; they act because it is in their interests to do so" (Goldsmith and Posner 2005, 39, quoted in Postema 2022, 323). Nor will the Practical Reason Realist dispute Postema's observation that considerations of self-interest may converge with consideration of the good of a wider community. To the contrary, the Realist may argue that we can make significant progress in mitigating some of the worst evils or injustices enabled by international law simply by encouraging state officials and citizens generally to exercise better prudential judgment (See, e.g., Posner and Weisbach 2010; Lefkowitz 2023). Yet what states judge to be in their national interest will sometimes diverge from

what justice or morality requires, and the Practical Reason Realist maintains that in those cases international law will be powerless to advance the latter.

This brings us to the one claim Postema makes regarding (international) law's normativity that the Practical Reason Realist will not accept, namely that law excludes certain reasons for action from an agent's consideration (Postema 2022, 324). To get that property we need norms that count in the way that law counts. But what way is that? Postema's answer, recall, is that Practical Reason Realists treat "practical considerations [as] count[ing] *in the way law counts*… only if agents *obey* its *rules for the sake of the rules alone*; they can function to constrain the behavior of these agents in the way law does only if *those rules alone* determine conclusively the choices and actions of agents" (Postema 2022, 323). That is not quite right, or at least it is not the best way of putting the point. Here is a better alternative: practical considerations count in the way law counts if and only if they are treated as categorical imperatives, or unconditional reasons for action, grounded in a conception of the subject as entitled to the treatment in question, as having the standing to demand such treatment as a matter of right.

As I noted earlier, Goldsmith and Posner and other Practical Reason Realists target a certain conception of international law that they maintain is widely shared among international lawyers. These lawyers conceive of *law* as the norms of a practice of holding accountable premised on a commitment to the moral-political regulative ideal of the *rule of law*. Norms count in the way law counts – that is, in the manner specified above – in virtue of their being constitutive elements of such a practice. I argue elsewhere that among the most well-known advocates of such a view is the international lawyer and legal theorist Martti Koskenniemi (Lefkowitz forthcoming). Koskenniemi eschews talk of the rule of law and writes instead of a 'culture of formalism' and 'constitutionalism as a mindset' (Koskenniemi 2001, 500–509; 2007; 2014). Nevertheless, the type of social order he describes bears a striking resemblance to Postema's account of a political community premised on a commitment to the moral-political ideal of the rule of law. Here I offer a brief explication of Koskenniemi's reflections on a culture of formalism that serve to illustrate this affinity while also providing evidence for the claim that norms count in the way law counts only if they figure in a practice of holding accountable premised on a commitment to the rule of law.

When Koskenniemi describes law as 'formal,' he means that it provides agents with a reason for action that does not depend on their particular interests or prudential goals, what (they believe) is good for them, or what (they believe) will make them happy (Koskenniemi 2014, 40–41). To interact on the basis of law, then, is to employ general rules for action that apply unconditionally to hold oneself and other members of the relevant community or society accountable. So understood, law contrasts with instrumentalism, which predicates reasons for action on agents' interests or prudential goals and the means available to satisfy them. Whereas instrumentalism provides actors with strategic reasons for action, law provides them with rights and responsibilities. It does so by constituting them as members of a single, common, juridical community, as agents and subjects of law. As Koskenniemi writes, "the form of law constructs political adversaries as equals, entitled to express their subjectively felt injustices in terms of breaches of the rules of the community to

which they belong no less than their adversaries – thus affirming both that inclusion and the principle that the conditions applying to the treatment of any one member of the community must apply to every other member as well" (Koskenniemi 2014, 41).

As a "social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it," a culture of formalism constitutes "a culture of resistance to power" (Koskenniemi 2001, 500). In any political society where such a culture flourishes, might cannot make right. Or put another way, where fidelity to the ideal of the rule of law is a basic assumption that structures how its members conceive of their relationship to one another, whether as fellow citizens or as rulers and subjects, it will not be possible to justify one's conduct to oneself or to others in purely instrumental terms, that is, in terms of power and interest. Rather, every public act will need to be justified in *legal* terms, by reference to a general rule that applies unconditionally to members of the political community as such, and therefore agents will be able to demand treatment that is theirs by right even where they lack the power to give others a prudential reason to treat them that way. Hence, Koskenniemi's description of a culture of formalism as a social practice of accountability and (juridical) equality. Moreover, by framing the enterprise of government in terms of rights and duties, justice and fairness, and respect for human dignity, a culture of formalism provides resources that agents can use to resist oppression or domination.[14] In Koskenniemi's words, "notions such as 'justice,' or 'human rights' … give voice to individuals and groups struggling for spiritual or material well-being, fighting against oppression, and seeking to express their claims in the language of something greater than their merely personal interests" (Koskenniemi 2014, 44).

Practical Reason Realists challenge the claim that international law qualifies as an even imperfect example of the type of social order Koskenniemi describes, one that I maintain is essentially the same as the community premised on a commitment to the rule of law that Postema defends in his book. In particular, Practical Reason Reaslists contest the claim that international law includes genuinely duty imposing norms, ones that participants in the practice treat as categorical imperatives. This is the sense in which they deny that states obey international legal rules "for the sake of the rules alone." Contrary to Postema's assertion, then, Practical Reason Realists do not reject the existence and efficacy of international law, but only its commitment to the ideal of the rule of law.

4 Is an International Rule of Law a Pious Wish?

Thus far I have focused on the gap between Postema's argument that international law plays an important role in the production of human social order and the seemingly implied conclusion that this demonstrates the possibility of an international

[14] Similarly, Postema characterizes the complex value of membership that serves to ground the value of the rule of law by juxtaposing it to relationships of domination and subordination (Postema 2022, 82–92).

legal order that exhibits, at least to a threshold degree, fidelity to the ideal of the rule of law. In fairness, Postema does describes various features of the existing international legal practice that he maintains are best construed as reflecting or expressing a commitment to government in accordance with that ideal (Postema 2022, 311–17). If accurate, the description of an *actual* international rule of law provides conclusive proof of its *possibility*. Elsewhere, I challenge the accuracy of this description (Lefkowitz 2024). Indeed, Postema's brief survey of recent developments in the international legal order nicely illustrates a point I make in that essay, namely that defenders of an international rule of law frequently succumb to the temptation to infer from the presence of certain features associated with the rule of law that a practice of holding accountable is premised on fidelity to that ideal, even if only weakly. Before we draw that conclusion, however, we should first consider why the practice in question falls short in realizing the rule of law in the specific ways it does, but not in others. When we do so, we may find that the best explanation is that the practice is not an imperfect example of a rule of law order, but instead that it is an example of a different type of social order with features that overlap to some extent or in specific ways with one in which law rules.[15] It is in light of that possibility that I want to close by drawing attention to several challenges to the possibility of an international rule of law that acknowledge the existence and efficacy of the international legal order.

Scholars affiliated with the Third World Approaches to International Law (TWAIL) movement typically conceive of international law as intimately intertwined with the project of European or Western colonialism and imperialism.[16] While some legal reforms since the end of WWII may have lessened the brutality of imperial rule exercised via the international legal order, the core imperial project continues to animate the practice and evolution of international law. That project concerns gaining access to economic inputs – raw materials and labor – in the Third World or Global South and exercising control over markets for finished goods in those parts of the world.[17] It also encompasses a "civilizing mission," with TWAIL scholars such as Antony Anghie arguing that "many of the most important projects of contemporary international law reproduce the essential structure of this mission by positing some 'uncivilized' entity that must be transformed by international law and institutions to ensure the progress of civilization" (Anghie 2016, 166). Moreover, as TWAIL scholars occasionally note, the international legal order can serve any imperial power, not just European or Western ones.[18] For example, from the late

[15] For an illustration of this point, see Lon Fuller's discussion of the partial overlap between the norms constitutive of the legal (i.e., rule of law) and managerial forms of social order (Fuller 1969, 207–17).

[16] See Gathii 2022 and Anghie 2016, and the many TWAIL scholars referenced therein.

[17] "For TWAIL scholars, international law is not simply a set of formal rules that guarantees sovereign equality, but rather also a system that entrenches formal inequality that produces international economic and political hierarchy and domination of the rich industrialized economies over poorer ones. [I]nternational legal regimes such as those relating to trade, investment, development and human rights… structure global markets so that they continue to serve as sources of raw materials for European capitals" (Gathii 2022, 158–9). See further Gathii 2022, 160–64, and Anghie 2016, 166–170.

[18] Anghie 2016, 170–71; Gathii 2022, 173.

19th to the mid-twentieth century it served Japan's imperial ambitions quite well (even if not as well as those of Western powers). Arguably it does the same today for China, a state that is also busy trying to roll back even the few modest attempts to reform international law so that it can help check the exercise of arbitrary power both beyond and within a state's borders.[19] The question, then, is whether it is possible to rid international law of the markers of its imperial past.[20] Doing so requires not only forward-looking changes but also responding appropriately to the past wrongs enabled by the international legal order. It seems a rather open question whether this can be done and, if it can be, whether the resulting political order will look anything like the contemporary international legal one.[21] This may be a project worth pursuing, and yet also one that is presently best described as a pious wish.

TWAIL criticisms of the international legal order overlap to some extent with those advanced by Marxist scholars. The latter advance a twofold critique of international law.[22] First, they offer a genealogical account of international law as a tool for capitalist exploitation, with some disagreement over whether this is a contingent feature or instead a necessary one, an entailment of the fact that law, like commodity-exchange, is a form of domination and abstraction that is inseparable from the capitalist structure of society as a whole.[23] Second, Marxist scholars depict international law as an ideology that serves to mask its constitutive contribution to the activity of capitalist exploitation; for example, by obscuring the systemic political-economic causes of events by focusing attention on the moral conduct of individuals.[24] If the international legal order is simply a means by which capitalists seek to extend their domination of humanity and the rest of the planet, including by making an end run around attempts within some states to reign in or even eliminate their power, then any attempt to realize an international rule of law without first eradicating capitalism is doomed to fail.[25] As China Miéville observes, "the attempt to replace war and inequality with law [is]… self-defeating, [as] a world structured around international law cannot but be one of imperialist violence" (Miéville 2005, 319).

More generally, and without committing ourselves to a Marxist analysis of social order, we might well worry that the rule of law cannot be realized in a society where some parties enjoy an enormous economic (or material) advantage over others, one that gives them a massive advantage in the use of force to advance their aims, including resisting attempts to create a more robust system for holding them

[19] See, e.g., Ginsburg 2020.

[20] For a range of answers from within the TWAIL movement, see Gathii 2022, 166–67, 171–73.

[21] For example, if Anghie rightly maintains that "colonialism… is central to the formation of international law, and, in particular, its founding concept, sovereignty" (Anghie 2006, 739), then purging the international order of its colonial and imperial features may well require radical revisions to the concept of sovereignty that fundamentally transform the practice of government in which it figures.

[22] See Knox 2016; Tzouvala 2022; Bianchi 2016, and the authors referenced therein.

[23] Knox 2016, 315–19,321-24; Tzouvala 2022, 309–312; Bianchi 2016, 76–80; 86–87.

[24] Knox 2016, 319–21; Tzouvala 2022, 312–13; Bianchi 2016, 82–83.

[25] This conclusion reflects Marx's observation that the sum total of "relations of production constitute the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness" (Marx 1978, quoted in Knox 2016, 308).

accountable under law. This does not mean that powerful states can get away with anything they want to do, as less powerful states (or their populations) do have some ability to impose costs on more powerful ones. Rather, the point is that an international rule of law cannot take root, let alone flourish, in a society characterized by massive inequalities of resources that can be used by some to control the lives of others. If so, massive material inequality between states provides a serious challenge to Postema's claim that an international rule of law is not a pious wish.

A final challenge to that claim comes from economists' attempt to explain the size and number of states. Alesina and Spolaore, for example, argue that two factors limit the size of a state (Alesina and Spolaore 2003; Spolaore 2016). One is the degree of heterogeneity within its population – the more diverse it is, the less likely its members are to agree on what the state ought to do and on how it ought to do it. The second is that the larger the state grows, the harder it becomes to monitor officials in order to ensure that they act in the interests of the state's subjects, including by exhibiting fidelity to the rule of law. In combination, these two considerations strongly suggest that no world state is in the offing. If so, and if the rule of law can only be realized in a state-like political community, then there is no hope for establishing an international rule of law. Postema expresses some doubts regarding the second of these two claims, and it is true that we must be careful not to treat as necessary for realizing the rule of law what are only parochial norms or institutional designs that have served that aim in our own societies. Nevertheless, before we conclude that an international rule of law is not a pious wish, we need some evidence that a complex society characterized by a diversity of conceptions of justice and the good can realize that ideal absent a state-like structure.

In my view, the arguments of TWAIL theorists, Marxists, and Law and Economics scholars present the most serious challenges to the possibility of an international rule of law. Moreover, the same is true for the rule of law within a state. For instance, there is a version of the argument that slavery is part of United State's DNA that looks a lot like the TWAIL critique of international law. Likewise, the claim that the rule of law simply facilitates capitalist exploitation was advanced within the modern industrial state long before it was brought to bear on the international legal order – not least by Leftist critical legal scholars whose influence on international legal scholarship has far surpassed its influence on domestic legal scholarship (at least in the United States). Finally, the racial or ethnic nature of many of the contemporary populist movements around the world offer some support for the Law and Economics claim that increasing heterogeneity threatens the rule of law. It is unfortunate that Postema does not address these challenges. However, his observations on the pre-conditions for pursuing the rule of law as well as the institutions and culture necessary for its realization may offer readers of *Law's Rule* a foundation from which to do so.

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References

Alesina A, Spolaore E (2003) The size of nations. MIT Press, Cambridge, MA
Anghie A (2006) The evolution of international law: colonial and postcolonial realities. Third World Q 27:739–753
Anghie A (2016) Imperialism and international legal theory. In: Orford A, Hoffmann F, Clark M (eds) The Oxford handbook of the theory of international law. Oxford University Press, New York, pp 156–172
Austin J (1995/1832) The province of jurisprudence determined. Rumble (ed). Cambridge: Cambridge University Press
Bianchi A (2016) International law theories. Oxford University Press, New York
Cotterrell R (2012) What is transnational law? Law and Soc Inq 37:500–524
Dworkin R (2013) A new philosophy for international law. Phil Pub Aff 41:2–30
Fuller LL (1969) The morality of law, revised. Yale University Press, New Haven
Gathii JT (2022) The agenda of third world approaches to international law (TWAIL). In: Dunoff JL, Pollack MA (eds) International legal theory: Foundations and frontiers. Cambridge University Press, Cambridge, pp 153–173
Ginsburg T (2020) Authoritarian international law. Am J Intl Law 114:221–260
Goldsmith J, Posner EA (2005) The limits of international law. Oxford University Press, New York
Goldsmith J, Posner EA (2021) The limits of international law fifteen years later. Chi J Intl Law 22:112–127
Hathaway O, Shapiro S (2011) Outcasting: Enforcement in domestic and international law. Yale L J 121:252–469
Jessup PC (1956) Transnational law. Yale University Press, New Haven
Knox R (2016) Marxist approaches to international law. In: Orford A, Hoffmann F, Clark M (eds) The Oxford handbook of the theory of international law. Oxford University Press, New York, pp 306–326
Koskenniemi M (2001) The gentle civilizer of nations: The rise and fall of international law 1870–1960. Cambridge University Press, Cambridge
Koskenniemi M (2007) Constitutionalism as mindset: Reflections on Kantian themes about international law and globalization. Theoretical Inq L 8:9–36
Koskenniemi M (2014) What is international law for? In: Evans MD (ed) International law, 4th edn. Oxford University Press, Oxford, pp 29–52
Lefkowitz D (forthcoming) The life of international law is not logic but experience. HagueYIL
Lefkowitz D (2023) Political feasibility and a global climate treaty. Ethics Policy Env. https://doi.org/10.1080/21550085.2023.2282915
Lefkowitz D (2024) A new philosophy for international legal skepticism? Int Theory
Lieder F, Griffiths TL (2019) Resource rational analysis: Understanding human cognition as the optimal use of limited computational resources. Behavioral and Brain Sciences 43:1–60
Marx K (1978) Preface to a contribution to the critique of political economy. In: Tucker RC (ed) The Marx-Engels reader. WW Norton and Company, New York
Merriam-Webster (2024) Entry on 'pious hope/wish.' https://www.merriam-webster.com/dictionary/pious%20hope%2Fwish. Accessed 16 Mar 2024
Miéville C (2005) Between equal rights: a marxist theory of international law. Brill, Leiden
Oxford English Dictionary (2024) Entry on 'pious wish or hope.' https://www.oed.com/dictionary/pious_adj?tl=true. Accessed 16 Mar 2024
Posner EA (2003) Do states have a moral obligation to obey international law? Stanford Law R 55:1901–1919
Posner EA, Sykes AO (2013) The economic foundations of international law. Harvard University Press, Cambridge, MA
Posner EA, Weisbach D (2010) Climate change justice. Princeton University Press, Princeton, NJ
Postema GJ (2022) Law's rule: The nature, value, and viability of the rule of law. Oxford University Press, New York
Schauer F (2010) When and how (if at all) does law constrain official action? Ga L Rev 44:769–801
Schmitt, C (2005/1922) Political theology: Four chapters on the concept of sovereignty. G. Schwab (trans). University of Chicago Press, Chicago
Spolaore E (2016) The economics of political borders. In: Kontorovich E, Parisi F (eds) Economic analysis of international law. Edward Elgar, Cheltenham, pp 11–43

Trachtman JP (2008) The economic structure of international law. Harvard University Press, Cambridge, MA
Tzouvala N (2022) International law and (the critique of) political economy. The South Atlantic Q 121:297–320

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