

Is International Law Even Law?

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Can there be international law? Few would argue that there are no institutions that claim to enforce it, as there are several; some that come to mind include the United Nations (UN), the International Court of Justice (ICJ), and the International Criminal Court (ICC). It differs from municipal law, it is legitimized through state consent, and it is formed by bilateral treaties, multilateral treaties, and customary rules that govern state practice.¹ Skepticism of its legitimacy is common, and it is easy to see why. Consider cases of so-called ‘enhanced interrogation techniques,’ characterized by Human Rights Watch as against international law,² as well as other more recent instances of international legal complaints against the United States (US) and its allies.³ If we accept that international law really is law, then it does not seem to effectively shape the behaviour of powerful state actors nor can it punish violators impartially. The core claim of international law skepticism seems to be this: if it cannot bind all parties equally with sanctions, and if it depends on mere consent, then is it *really* law? Can international law be presumed to be real like Thomas Franck, who reframes this question to whether it is really “effective, enforceable, understood, or fair,”⁴ or does it truly fall short of the conceptual definition of law? This paper will critically characterize consent-based conceptions of international law from the perspectives of

realists, positivists, and interpretivists, arguing that there is some kind of international law; but any conception of international law must reckon with the shared commitment of Westphalian states to protect their sovereignty at all costs, justice be damned.

Consent and Realism

Carmen E. Pavel and David Lefkowitz outline three different types of skeptical challenges to international law. There is the argument that the institutional structure is necessarily different from the legal systems we see in states, the argument that legitimacy of international law is debatable on the grounds that it is nothing more than an expression of the interests of powerful state and non-state actors, and international law is challenged as being incompatible with the self-determination of sovereign states.⁵ As many legal theorists point out, it seems that international law operates on the model of state consent or ‘self-help.’ Even the ICC depends on voluntary submission to its authority, with the only real international law exception being the use “of force or economic sanctions authorized by the [UN] Security Council.”⁶ *The American Service-Member’s Protection Act*, which authorizes the use of its military against any American or allied official detained by the ICC, is a clear example of this consent model. Sec. 2008 states that “the President is

authorized to use all means necessary ... to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court;" subsection (b) covers American citizens, "allied persons," or anyone who was detained for an official action on behalf of America and its allies.⁷ This statute also explicitly defines the scope of international treaties in terms of consent:

It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound. The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals.⁸

This statute seemingly captures the nature of all three challenges to international law. A citizen cannot simply opt out of being governed by a law in a sovereign state; this means that if international law is really law, it is completely different than state law. Importantly, the ability to actively punish the ICC for prosecuting American war crimes can only be feasible through substantial military force, putting aside the lack of consent. The US believes it is *defending* democracy by opposing the ICC on the grounds of state consent⁹—or so they say, but their true reasons may be more prudential than principled. Regardless, if international law is real and it is based in

consent, it cannot command obedience from a great power like the US, and this is reason enough for many to doubt that it is really law.

One of the most influential challengers to international law was John Austin: he famously believed law is the command of the sovereign whose orders are backed by coercive threats; since there is no international sovereign, there is no international law.¹⁰ This command theory approach, though it predates the existence of any international legal institutions, still survives today in the view of realist international relations scholars. They believe "the lack of centralized enforcement, the fragmentation of international treaty regimes, and the (alleged) fact that states are only bound by international law with their consent" means it does not bind in the way law should; this reduces it to a "policy tool" for powerful states or even mere bluster that has little effect on the behaviour of international actors.¹¹ Realism views 'anarchy' as definitional to the international system, and that it is an empirical reality that "national power, including but not limited to the ability to wage war, matters more than anything else."¹² Since there are no neutral international enforcement mechanisms, powerful states can transgress the rules if they so choose, and realists warn against the idealistic view that international law can replace the balance of political power.¹³ If international law is more than the preferences of powerful actors like the US, then it should be able to bind state actors with orders backed by threats, or these 'laws' are really 'guidelines' for the

powerful to pick and choose freely. The powerful need only consent to laws they themselves benefit from or help write themselves, weak states may be *coerced* into international agreements, and “insufficiently representative governments” may not be able to generate genuine moral obligations.¹⁴

Hart on Consent

Perhaps realists are conceptually confusing the sovereign ability to sanction to be a necessary condition to the possibility of law. H.L.A. Hart is an influential legal scholar who believes this and is a committed critic of command theory.¹⁵ Hart believes that to argue international law is non-binding because of “its lack of organized sanctions” is to tacitly accept command theory, which utterly distorts the ideas of obligation and duty.¹⁶ Comparing municipal law with international law is confusing the issue; command theory cannot even accurately describe municipal legal orders, and to try and draw analogous comparisons to international law based on the assumption that municipal laws need centrally organized sanctions creates a “mistaken assumption” that these are necessary for law.¹⁷ He repudiates the Austinian insistence that international rules are merely moral rules, which is justified by the claim that “any form of social structure that is not reducible to orders backed by threats can only be a form of ‘morality.’”¹⁸ In fact, international law seems to be “a regime of primary rules” which resemble modern municipal laws with their level of conceptual and methodical sophistication.¹⁹ It is *not* moral obligation that make international rules

binding. It is because we make claims in reference to rules, and breaches of them warrant criticism and compensatory claims; though Hart admits it is true that they could not exist “unless a preponderant majority accepted the rules and voluntarily co-operated in maintaining them,” which admittedly makes them weak and disorganized in nature.²⁰

Hart at least believes there are consent-based international rules and his case for this is convincing. However, Pavel and Lefkowitz argue that Hart’s positivist theory precludes the possibility of international law. As they point out, legal systems have both primary *and* secondary rules, and since Hart admits that international law consists only “of a *set* of separate primary rules of obligation which are not united in this manner,”²¹ the secondary ‘rule of recognition’ that can “explain how [generally accepted] primary rules are made, changed, and interpreted” does not exist in this system.²² Hart’s argument is confusing, but his point is that the rules of international law *do* create binding obligations; the rule of recognition is a luxury to be “found in advanced social systems whose members not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rule, marked out by general criteria of validity.”²³ So, it may not be an advanced legal *system* in Hart’s definition, but the rule of recognition is not an objective precondition to law, so it is law in the most generous interpretation of Hart. The rule of recognition does however make lawmaking clearer and more expedient; when the system is simpler,

there is a waiting period to “see whether a rule gets accepted as a rule or not.”²⁴

So, *does* Hart think international law is really law? Hart himself acknowledges that “international law or primitive law” may be regarded “as disputable or borderline examples of law.”²⁵ Pavel and Lefkowitz identify two general attitudes of Hart’s respondents: some deny that international law is primitive or lacks a rule of recognition,²⁶ and Ronald Dworkin points out that other positivists have attempted to locate the principle of consent within Article 38 (1) of the *Statute of the International Court of Justice* as the international rule of recognition.²⁷ Others believe that since the capacity of international law is to produce a social order differing from that of municipal states—which has implications for its ability to realize justice—there is a challenge inherent in “identifying international legal officials.”²⁸ This may offer “a compelling reason to reject Hart’s analysis of law and a legal system,” since his conception too closely resembles municipal law.²⁹ A realist might counter that in the abstract sense, consented-to international primary rules might not definitionally *require* coercion. But since this consent model serves the greatest coercive powers, they are merely semantically obscuring the power dynamics behind why, say, the ICC can be coerced into not challenging the US power to torture civilians.

Salience and the Problem with Consent

Dworkin felt that Hart, instead of answering whether international law truly

counted as law, merely changed the subject and rephrased the question to whether there is “any system of practices that can sensibly and usefully be described, for their sociological or anthropological purposes, as international law.”³⁰ The thrust of Dworkin’s critique is that consent “offers no standard for deciding how many states must accept a practice as legally required before the practice becomes “customary” and therefore binding on everyone,” there is no standard to say what states “are sufficiently civilized to participate in that essentially legislative power,” or what norm could possibly count as *ius cogens*.³¹ Dworkin says consent implies an interpretive question; “what is it most reasonable to assume that these nations, whose consent made the principle law, understood that they were consenting to?”³² He points out how the NATO bombing of Kosovo seems to violate the letter of Article 2 (4) of the UN Charter,³³ yet many international lawyers have defended it. It is unlikely that every state that comprises the UN would share an answer to the above interpretive question, nor is it likely that a body like the International Court could impose whatever answer it wishes if consent were the “ultimate basis of international law.”³⁴ It is tempting to consider self-limiting consent to be this basis, since consent makes international law compatible with state sovereignty and the idea that coercive domination may be justified by the unanimous consent of those subject to that domination—but consent is not necessary nor sufficient grounds for legal legitimacy.³⁵

As always, Dworkin offers an interpretive solution. Unlike Hart, he has no problem with the Austinian classification of international law as a kind of morality, since morality is the basis of his theory. The interpretivist asks: “which political rights and obligations of people and officials are properly enforceable on demand through institutions like courts that have the power to direct coercive force,” which is “a moral question whose answer is a legal judgment.”³⁶ Though as previously shown, the US government rejects the authority of the ICC to punish it for war crimes, it is also the case that the Bush administration claimed its treatment of suspected terrorists is permitted under international law—Dworkin provides a counterargument to this exact case.³⁷ To summarize: Dworkin believes these mistaken conclusions about the legality of these atrocities are “the product of a constructive interpretation of international legal materials in light of the moral purpose we ought to attribute to the practice of global coercive rule,” which obscures that the Westphalian conception of state sovereignty poses an unignorable threat to human rights; threats including domestic and international crimes against humanity and genocide, the failures of international cooperation, and cross-border power politics. The duty to mitigate these threats constitutes a “fundamental structural principle.”³⁸

Dworkin has a second principle to provide more substance to this duty: salience. This is the *prima facie* duty to subscribe to the agreed-upon codes of practice followed by a significant number of states with a significant population, if

and only if this general practice serves to legitimize the state and international order.³⁹ It is the moral force of this duty that creates the obligation to observe the Rome Statute or the UN Charter, and this is what makes these international laws binding—not consent—which provides a better explanation for Article 38’s legitimate legality.⁴⁰ So, the failure of the US to sign the Rome Statute, which has been signed by 125 out of 195 countries in the world,⁴¹ is seemingly a violation of salience, though the world’s other most powerful and populated countries are too notably absent from this list. Dworkin has a prescriptive solution to the problem of ‘enhanced interrogation techniques’ violating the salience principle: a four-majorities system based in the UN General Assembly that sends majority-voted legislation to the ICJ, which can theoretically eliminate the legitimacy problem of the UN General Assembly.⁴²

So, Dworkin definitively rejects consent as the basis of international law. One of the reasons why the ICC is so contentious for the US is because before it was created, justice was dependent on the fulfilment of some principle of duty to mankind, and it was dependent on the will of the powers of the UN Security Council, the US being one member—the ICC can prosecute the crimes of states with minimal state involvement.⁴³ Though the US seemingly does not wholly reject the idea of international criminal justice, it maintains an “imperial urge to decide when and where justice should be done,” supporting an international society only to accommodate American exceptionalism and to advance their interests unfettered.⁴⁴

The US has no problem with directly sabotaging international justice when it is inconvenient for themselves or allies like Israel; they unilaterally sanctioned ICC judges for daring to issue arrest warrants for the actions of Israeli government officials.⁴⁵ Indeed, Executive Order 14203 references the *American Service-Members' Protection Act* directly,⁴⁶ which proves how this notion of sovereign consent in combination with exceptionalist attitudes can undermine any notion of international law being a kind of rule or principle that is enforceable on demand—unless we are willing to accept economic and military intrusion as a moral principle, something few people likely would.

The interpretivist must ask: can this state exceptionalism be defended using the interpretive principle of salience or the duty to mitigate international threats? Neither the US nor Israel is measuring up to these standards of legitimacy, but since the international order does nothing about this, it does not seem to matter. And as Adam Chilton points out, if states took Dworkin's approach, they may be less willing than ever to sign treaties that restrict their sovereignty, which would go against the mission to advance basic human rights, in turn bolstering the skeptical view.⁴⁷ Dworkin believes, rightly, that 'advanced interrogation techniques' are not defensible as international law. But he also believes that even though the unequal distribution of state power creates a legitimacy issue for international democracy. International law is still young and fragile; and though there exists no duty to develop one. A coercive world government that in theory shows equal

respect and concern for all citizens may very well solve the problems of inequality inherent to the Westphalian system, but this is at best an imaginary future.⁴⁸

Conclusion

So, can there be international law? Hart and Dworkin at least give salient reasons to reject that it is merely the political expression of brute force; and though the scope of this paper does not include an analysis of 'service,' this concept attempts something similar.⁴⁹ The question of American exceptionalism certainly presents a difficult conceptual problem for international law, and the US is certainly not alone in seeing the ICC as a threat to their sovereignty.⁵⁰ But as Franck and Dworkin claim, just about everyone today agrees there is international law; the real question today is *why* are these rules and principles law,⁵¹ and are these laws legitimate? Hart and Dworkin are right to point out that law is more than the mere exertion of power, but the realists have a point too. If a state like the US can simply choose not to consent to be bound by a set of laws that can punish crimes against humanity it has provably aided, abetted, and committed, these laws are currently a hegemonic tool at best—no matter if you presume consent or salience to be the governing principle of the international order. Ultimately, it is up to the entire international community—and not just its Westphalian state representatives—to demand the kind of international law that puts the defence of real people from atrocities over this so-called democratic concept of sovereign state consent, which is often a thin veil for imperial ambitions.

Endnotes

1. Carmen E. Pavel and David Lefkowitz, "Skeptical Challenges to International Law," *Philosophy Compass* 13, no. 8 (2018): 3, <https://doi.org/10.1111/phc3.12511>.

2. Reed Brody, "Getting Away with Torture," *Human Rights Watch*, eds. Andrea Pradow, et al., July 12, 2011, <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees>.

3. Matthew Lee, "US sanctions more ICC judges, prosecutors for probes into alleged American, Israeli war crimes," *AP News*, August 20, 2025, <https://apnews.com/article/us-icc-trump-israel-rubio-sanctions-5e633947709ffe781e92525041c13ca9>.

4. Pavel and Lefkowitz, "Skeptical challenges," 3.

5. *Ibid*, 2-3.

6. *Ibid*, 2.

7. *American Service-Members' Protection Act of 2002*, Pub. L. No. 107-206, §2008, Stat. 820.

8. *Ibid*, §2001, 11, Stat. 820.

9. Jason Ralph, "International Society, the International Criminal Court and American Foreign Policy," *Review of International Studies* 31, no. 1 (2005): 42. <http://www.jstor.org/stable/40072070>.

10. Pavel and Lefkowitz, "Skeptical challenges," 3.

11. *Ibid*.

12. Stephen D. Krasner, "Realist Views of International Law," *Proceedings of the Annual Meeting (American Society*

of International Law) 96 (2002): 265.

<http://www.jstor.org/stable/25659786>.

13. Krasner, "Realist Views," 266-8.

14. Pavel and Lefkowitz, "Skeptical challenges," 6.

15. The gist of Hart's repudiation of command theory is that an order or command does not capture the idea of a rule in a legal and sociological sense: even criminal statutes apply to those who enact them, which does not characterize orders backed by threats. Laws that confer legal powers cannot be conceived as orders backed by threats; some legal rules differ from orders since "they are not brought into being by anything analogous to explicit prescription; and habitual obedience to the sovereign does not account for the continuity of authority, which cannot be accounted for in the electorate or legislature of a state. *The Concept of Law*, pp. 79-80.

16. Pavel and Lefkowitz, "Skeptical Challenges," 4.

17. *Ibid*.

18. H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford UP, 1994): 227.

19. *Ibid*.

20. *Ibid*, 231.

21. *Ibid*, 233.

22. Pavel and Lefkowitz, "Skeptical challenges," 4.

23. Hart, *The Concept of Law*, 235.

24. *Ibid*.

25. *Ibid*, 79.

26. Pavel and Lefkowitz, "Skeptical challenges," 4.

27. Ronald Dworkin, "A New Philosophy for International Law," *Philosophy and Public Affairs* 41, no. 1 (2013): 5.

<https://doi.org/10.1111/papa.12008>.

28. Pavel and Lefkowitz, "Skeptical challenges," 4.

29. Ibid, 4.

30. Dworkin, "New Philosophy," 4.

31. Ibid, 7.

32. Ibid.

33. "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." Ibid, 7-8.

34. Ibid, 8.

35. Ibid, 10-11.

36. Ibid, 12.

37. Ibid, 15.

38. Pavel and Lefkowitz, "Skeptical challenges," 5.

39. Dworkin, "New Philosophy," 19.

40. Ibid, 20-21.

41. "The States Parties to the Rome Statute," International Criminal Court, accessed December 15, 2025, <https://asp.icc-cpi.int/states-parties>.

42. Dworkin, "New Philosophy," 27-28.

43. Ralph, "International Society," 28.

44. Ibid, 29.

45. Lee, "US sanctions."

46. The White House, "Imposing Sanctions on the International Criminal Court," February 6, 2025, <https://www.whitehouse.gov/presidential-actions/2025/02/imposing-sanctions-on-the-international-criminal-court/>.

47. Pavel and Lefkowitz, "Skeptical challenges," 5-6.

48. Dworkin, "New Philosophy," 29.

49. Pavel and Lefkowitz, "Skeptical challenges," 7-8.

50. Ralph, "International Society," 29.

51. Dworkin, "New Philosophy," 3.