

Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law*. Oxford: Oxford University Press, 2010. Pp. 624. \$115.00. ISBN: 9780199208586.

Despite its important tradition in international law, international legal philosophy has, for the most part, been left aside by scholars during the past decades. While there has been a revival in legal philosophy in most fields starting with Hart and Rawls in the 1960s, international law has been conspicuously left out of this move. The founders of the discipline at the beginning of legal modernity (Grotius, Pufendorf, Vattel), as well as the pioneers of current ways of thinking about law and politics in the international sphere (Kelsen, Lauterpacht, Morgenthau), are, of course, all acknowledged – but not so much reread, rediscovered, or even overturned by contemporary research. Is it time to catch up?

Samantha Besson and John Tasioulas, the editors of a comprehensive volume on *The Philosophy of International Law*, explain the disregard of the past decades towards international legal philosophy by the lower state of the development of international law compared with other fields of law. For a long time, international law and international lawyers have found themselves on the defensive. With international law being a law with little coercive means, always at the mercy of states and their representatives, the discipline was busy enough proving that international law is, indeed, law. In this situation, scholarship presented international law as a means to further progress and peace in order to counter doubts, questions, and critique forcefully raised by others. Such a constellation is not prone to fundamental questioning. While legal philosophy can be affirmative towards its object, it depends on a basic openness to critique. The recent revival of international legal philosophy can thus be interpreted as a sign of the development and the increasing maturity of international law: international law has widened in scope and intensified in depth; international financial, economic and environmental relations have been put on a solid legal basis. In consequence, theoretical questioning and research have intensified as well.

Besson and Tasioulas' volume needs to be read in this context: it comes at a time when the need for and the value of normative-theoretical reflection of international legal issues have been acknowledged and have motivated renewed interest and ample research in the field. Especially in times of manifold political and legal change, legal development and application call for reflection and questioning of its deep structures and underlying assumptions. According to Besson and Tasioulas, international legal philosophy is 'a burgeoning field', with several sub-schools, contributing from different disciplines (law, philosophy, sociology, as well as political science departments) to all possible questions of international legal relations. The publication of a comprehensive volume on *The Philosophy of International Law* which brings together different authors on many important subjects of international law therefore makes sense. It illustrates where international legal philosophy can offer important new insights – on general as well as on very practical issues, such as poverty or the environment.

Besson makes the case for a specifically normative theory: '[t]heorizing international law does not amount to descriptive sociology, but sets standards for a coherent and legitimate international legal practice' (at 16). The editors not only intended to assemble authors from critical legal studies or economic analysis of the law, but aimed at illustrating the value of a more constructive type of international legal theory – since 'the most pressing questions that arise concerning international law today are arguably primarily normative in character' (at 4). Maybe this is the reason their book is called 'The *Philosophy of International Law*' instead of *The Theory*. The philosophers serving as reference points for the contributions in this volume are, *inter alia*, Hart and Raz, as well as classics such as Hobbes and Kant.

Already the opening article by Kingsbury and Straumann, however, illustrates that the dichotomy between normative and descriptive work is limited. Debating the inter-relatedness of the philosophical thinking of Grotius, Hobbes, and Pufendorf, they make a highly convincing

case for the necessity and usefulness of historical work in international legal philosophy: Historical accounts can 'show us which tradition we are in fact part of, and may help identify some of the contingent features of that tradition' (at 51). Kingsbury and Straumann point out two different approaches to theory: a historical and a transhistorical one. They demonstrate how an understanding of individual historical circumstances and conditions, on the one hand, and theoretical knowledge and questioning – the transhistorical (unconditioned) reflection of more basic issues – on the other hand belong together. They come up with an innovative reading of how Grotius, Hobbes, and Pufendorf conceptualized the state of nature. Now, is this a normative or a descriptive research goal? On the surface, historical research is descriptive. However, there is an additional – more elusive and normative – layer to it. Not seldom in legal scholarship, the normative quality of the research object miraculously spills over and adds a normative colour to the research itself. Is it even possible to analyse norms in a non-normative way? Kingsbury and Straumann exercise this phenomenon with a level of clarity and reflection that is simply admirable.

What does the book say about the current status of international legal philosophy? On the one hand, the collection shows that many of the 'old' questions of international legal philosophy regarding the nature of international law's normativity, its sources, or the relationship between legal orders are not at all outdated. On the other hand, it is impressive how diverse, comprehensive, and concrete the fields are that the articles deal with: the contributions for example by Thomas Franck on humanitarian intervention and by Jeremy Waldron on self-determination show that legal philosophy does not need to be concerned with lofty issues of little practical relevance. The volume shows convincingly that, on the contrary, a philosophical approach can be brought to any subject and legal field, no matter how concrete, detailed, or specific.

By making a conceptual decision to invite two articles on one particular issue which in some cases present a comment to one another, the authors confess to a belief in epistemological intersubjectivity. Legal philosophy does not provide a single right answer; no different from law itself, philosophy is a discursive field in which different positions are not only thinkable but also legitimate. In consequence, philosophy cannot serve as an escape route from the inherently political nature of law: recourse to philosophical argument does not liberate from the necessity to take decisions. The reference to stoic or enlightenment sources of human rights, for example, does not imply that human rights always have a clear-cut meaning. 'There is a diversity of views that might be defended on a given topic, as opposed to some canonical "philosophical" view' (at 19).

Having said that, the editors could at times have made more of a systematic effort to introduce the field to readers less acquainted with international legal philosophy. The title leads one to expect a textbook type of overview (without necessarily having to present that type of knowledge in a textbook-like way): Which are the main questions of international legal philosophy today, which its working methods, and most important schools? How do they relate to each other, and respectively: how do they differ? Given that there is a lack of well-written and comprehensive introductions to international legal philosophy, one cannot help but be a little disappointed by the piecemeal approach of the book. It would be ever so helpful for the 'burgeoning', but still vulnerable field to be able to present itself by way of such a handy recommendation.

Therefore, the most important criticism would be that the book lacks coherence; the authors share neither one philosophical background nor one overarching research question. It is telling that there is no editorial at the end which concludes the added research value of the volume by going beyond the sum of the individual articles. It would have been interesting to learn more about how 'general' and 'specific' international philosophical questions relate to each other: what is the relevance of 'sources' specifically for international humanitarian law? This is one of the questions that the conception of the book implies but, unfortunately, hardly approaches. Another connection that is hard but important to make is the genuine bridging between 'philosophy' and 'law': The best and most gratifying sort of research combines both serious

theory and skilful application of the law. In this volume, the authors have a hard time escaping their disciplinary background. Contributions by philosophers read much more ‘philosophically’ than those written by lawyers and *vice versa*.

An exception to this is Will Kymlicka’s contribution. By looking for the interrelatedness and mutual influences of international law and political philosophy with regard to the issue of minority rights, he makes interdisciplinarity the object of his article. Maybe driven by a quest for the practical effects of political philosophy, he asks if and how philosophy influences not only legal science, but law-making practice. The UN seems to be a place where the concepts of political philosophers have a chance to be heard and inform the formulation and application of minority rights: ‘[t]he apparent success of these real-world practices of liberal-democratic multiculturalism has spurred efforts to formulate political theories of liberal multiculturalism, which in turn have helped to inform and justify emerging regimes of international minority rights’ (at 380).

While critical legal studies authors would probably shudder at so much openly voiced interest in the practical effects of ‘normative theory’, the volume is to be lauded for this approach. In the interest of research pluralism, it is time to counter-balance the hegemony of ‘the crits’ in international legal theory. Even more surprising and, for a German reader, also a little sad is the dearth of ‘continental’ authors in this volume. Is this because here the philosophy of international law has been neglected even more than elsewhere, or is it simply due to the Anglo-Saxon orientation of the editors? In continental Europe, the number of authors seriously interested in international law theory and philosophy is still desperately small. Unlike constitutional or European lawyers who exercise a natural and fruitful proximity to political theory and legal philosophy, most international lawyers practise a very pragmatic type of scholarship, strictly related to the distinction between legal work on the one hand and philosophical or political reflection on the other. This self-restriction stands in sharp contrast to a very vivid and productive political philosophy and political theory in the philosophy and political science departments, where international events and developments are being explained and made sense of with an ever more nuanced range of theories and philosophical constructions.

It is a strength of the volume that there is one overarching issue, running like a red thread through many of the contributions: legitimacy. While there is not one agreed meaning of the term, it is obvious that many of the authors consider it to be a key question of international law today. It also becomes clear that legitimacy cannot be reduced to a substantive concept; it is a question going right down to core themes. Which actors produce international legal rules, in which procedures, according to which standards? Legitimacy is an issue which concerns the doctrines of sources and of subjects of international law.

Buchanan’s article on the legitimacy of international law is a highly rewarding read: he not only presents different perspectives on how international law’s legitimacy can be conceptualized, but also develops basic criteria for the legitimacy of international institutions. He thoroughly rejects democratic legitimacy as too strong, too demanding a concept for international institutions, but he also rejects the traditional – instrumentalist – understanding which posits the achievement of a peaceful state of international affairs as the ultimate aim of international law. Pointing to the limitation of state consent as the single benchmark for legitimacy, Buchanan underlines the inherent legitimacy of change, of the revisability of rules: If self-determination instead of the achievement of peace is the main justification for international rules, the changeability and dynamic of rules become more important: self-determination can only be achieved in time and its meaning can change over time. Still, this does not mean that democracy is the right benchmark for the legitimacy assessment of international legal institutions: Buchanan pleads for Broad Accountability as the standard of legitimacy, a standard which equally aims at a deliberative politicization of international institutions. It is made up of the requirement for cooperation with epistemic actors in order ‘to create conditions under

which the goals and processes of the institution as well as the current terms of institutional accountability, can be contested and critically revised over time, in a manner that helps to ensure an increasingly inclusive consideration of legitimate interests, through largely transparent deliberative processes' (at 94).

In the same vein, Samantha Besson argues that the positivity of international law is an important factor in its justification: only positive law can be democratic, that is changeable law at the disposition of its subjects who are most likely to disagree. Her account of the sources of international law differs in an uplifting way from traditional presentations. Of course, sources cannot be thought, as she says, without thinking about subjects ('the democratic international community'), processes of law-making, and the quality and normativity of these processes (the international rule of law).

Andreas Paulus embeds his article on adjudication in the context of paradigms of international law: fragmentation, liberalism, and postmodernism, each of them implying a different take on the role and direction of international adjudication. Asserting that the 'debates between state rights and human rights, democracy and effectiveness cannot be solved on the basis of existing law' (at 208), he reaches a middle ground: Proper international adjudication has to do justice to the requirements of each of these paradigms: 'a "positivist" regard for the confines of the judicial task of interpreting existing legal rules; a Dworkinian examination of the foundational principles of an international legal order allowing for legal decisions standing on principle; and a postmodern view of the element of choice involved in any legal interpretation' (at 223). It seems that Paulus evades taking a final position on the precise ramification of the political nature of international law. While he concedes that the judge can never escape judicial policy-making, he still adheres to a depoliticized self-understanding, or at least communication, of adjudication: '[i]t is in the detachment from the political environment that the authority of rules and principles lies' (at 219). It would have been interesting to have Samantha Besson's comments on this remark, since she tried to take the political dimension of international law-making very seriously.

The volume is forceful evidence of the relevance of philosophy for the study of international law. 29 articles by 33 scholars prove that doctrinal questions on human rights, humanitarian intervention, and sources express underlying choices which cannot be addressed by doctrinal means alone. The philosophy of international law is not something external to it; it does not belong to a different discipline, and therefore should not be delegated to philosophy departments. Accounts of doctrinal issues need to be grounded in a systematic understanding of their reasons and causes in order to be reflected, reasonable, and informed. Philosophy can amount to many things, methods, and research interests, but what international law today needs is exactly the kind of systematic and normative thinking about its structures and implications that Besson, Tasioulas, and their co-authors exercise in this book.

## *Individual Contributions*

*Samantha Besson and John Tasioulas*, Introduction;

*Benedict Kingsbury and Benjamin Straumann*, State of Nature versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes, and Pufendorf;

*Amanda Perreau-Saussine*, Immanuel Kant on International Law;

*Allen Buchanan*, The Legitimacy of International Law;

*John Tasioulas*, The Legitimacy of International Law;

*Thomas Christiano*, Democratic Legitimacy and International Institutions;

- Philip Pettit*, Legitimate International Institutions: A Neo-Republican Perspective;  
*Samantha Besson*, Theorizing the Sources of International Law;  
*David Lefkowitz*, The Sources of International Law: Some Philosophical Reflections;  
*Andreas Paulus*, International Adjudication;  
*Donald H. Regan*, International Adjudication: A Response to Paulus – Courts, Custom, Treaties, Regimes, and the WTO;  
*Timothy Endicott*, The Logic of Freedom and Power;  
*Jean L. Cohen*, Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective.;  
*James Crawford and Jeremy Watkins*, International Responsibility;  
*Liam Murphy*, International Responsibility;  
*Joseph Raz*, Human Rights without Foundations;  
*James Griffin*, Human Rights and the Autonomy of International Law;  
*John Skorupski*, Human Rights;  
*Will Kymlicka*, Minority Rights in Political Philosophy and International Law;  
*Jeremy Waldron*, Two Conceptions of Self-Determination;  
*Thomas Pogge*, The Role of International Law in Reproducing Mass Poverty;  
*Robert Howse and Ruti Teitel*, Global Justice, Poverty, and the International Economic Order;  
*James Nickel and Daniel Magraw*, Philosophical Issues in International Environmental Law;  
*Riger Crisp*, Ethics and International Environmental Law;  
*Jeff McMahan*, Laws of War;  
*Henry Shue*, Laws of War;  
*Thomas M. Franck*, Humanitarian Intervention;  
*Danilo Zolo*, Humanitarian Militarism?;  
*David Luban*, Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law;  
*Antony Duff*, Authority and Responsibility in International Criminal Law

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