FROM BILATERALISM TO PUBLICNESS IN INTERNATIONAL LAW

Benedict Kingsbury and Megan Donaldson

> We may not always be aware of how thin the theoretical ice is on which we are moving . . .[1]

Bruno Simma entitled his celebrated Hague lectures 'From Bilateralism to Community Interest in International Law'.[2] His premise was that international law is, and should be, building on and evolving from its foundations in a minimal, statist system based on a series of consent-based bilateral legal relations of opposability between States ('bilateralism'), toward a legal order of something he termed 'international community'. By this he meant a 'more socially conscious legal order', increasingly reflective of 'community interests' as well as the narrower interests of States.[3] The notion of an 'international community' is employed both as a descriptive device, explaining and rendering intelligible certain developments in international legal doctrine and in international institutions, and as a way of embodying a normative view about what international law should increasingly (although not exclusively) be about. It is the existence of an 'international community' of all individuals, and the capacity of international law to serve the interests of this community, that grounds international law's promise of universalism. As he put it in a 2008 lecture:

> [I]nternational law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between states, but also incorporates common interests of the international community as a whole, including not only states but all human beings. In so doing, it begins to display more and more features which do not fit into the 'civilist', bilateralist structure of the traditional law. In other words, it is on its way to being a true *public* international law.[4]

His separate Declaration in the 2010 *Kosovo* Advisory Opinion of the International Court of Justice (ICJ) is a specific instantiation of this position. The Court was

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[1] B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 Eur J Intl L 265, 297.

[2] B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours de l'Académie de Droit International 217.

[3] Simma, 'Bilateralism to Community Interest' (n 2) 234.

[4] Simma, 'Universality of International Law' (n 1) 268.

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wrong, he argued, to confine itself to a *Lotus*-style inquiry into whether any specific rule of international law was violated by Kosovo's Declaration of Independence:

> [I]n a contemporary international legal order which is strongly influenced by ideas of public law, the Court's reasoning on this point is obsolete…By reverting to [the *Lotus* principle], the Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent. Under this approach, everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from 'tolerated' to 'permissible' to 'desirable'.[5]

This chapter, written with much pleasure in Bruno Simma's honour, seeks to explore the ideas embedded in Simma's notion of a move toward 'a true *public* international law' or 'a contemporary international legal order which is strongly influenced by ideas of public law'. We argue for two distinct but overlapping meanings of 'public' in this context. The first is an international law that is 'inter-public' law, being made by and for a set of entities (primarily States) that are not merely 'actors' (in the jargon of international relations), but public entities operating under public law. The second is a quality of publicness in law that is also becoming part of understandings of international law of the sort Bruno Simma has enunciated. Neither of these ideas—inter-public law and publicness—are commonplace or widely accepted in international law. We argue, however, that they represent important dimensions in current and future international law. We observe some tension between Bruno Simma's idea of an 'international community' based on shared interests and the concepts underlying 'inter-public law', and we heretically suggest that the idea of 'international community' may become something of a by-way on the path to developing a theoretical basis for the dense and intrusive rules and institutions and governance processes serving multiple interests and constituencies that more and more characterise international law. We argue that it is fundamental for any publicly-oriented approach to international law to be built on an adequately-theorized account of the concept of law and the roles of law. This is a challenge that has not yet been fully met.

I. The International Community as a Community of Interests?

Simma's Hague lectures focused partly on changes in the structure of the international legal order from a network of bilateral obligations to a system that increasingly accommodates the notion of obligations owed to an international community of States and ultimately all humankind, and enforceable by (or on behalf of) this community. These structural changes occurred in tandem with expansion in the reach of international law into more and more areas of State policy and human

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[5] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) 2010, Declaration of Judge Simma, paras 3, 8 <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4> accessed 6 August 2010.

life and activities; and were accompanied by a transformation of the moral stance of international law, from an order that permitted governments to cause or tolerate human suffering that would not be accepted within their own societies to one centrally concerned with human wellbeing. Simma did not believe that this shift in international law from a bilateral model to a community interest model had been fully accomplished. Much of the structure and content of international law remains in a form bequeathed by the bilateral model—and is unsuited for the making of new international law that genuinely serves the community interest. A central question, as he saw it, is how a community interest of all individuals can be articulated through, and against, a structure of international law designed to accommodate the interests of States as such.

A strong emphasis on interests as a basis for law has been a consistent theme in Simma's thought since his powerfully-argued early work on inter-State reciprocity,[6] and his seminal textbook with Alfred Verdross.[7] For Simma, the existence of an international community is inextricably connected to the existence of certain community interests, shared at least in some degree by all human beings. Simma does not seek to delimit in any precise way a closed category of these community interests: the essential characteristic of community interests, by his account, is simply that they transcend the interests of States as such, and instead 'correspond to the needs, hopes and fears of all human beings, and attempt to cope with problems the solution of which may be decisive for the survival of entire humankind'.[8] He lists as obvious community interests matters ranging from maintenance of peace and security, and protection of the environment, to human rights and at least a minimal degree of economic solidarity.

International political thought in the Western tradition has engaged with ideas of a community of all human beings for well over two millennia. Many claims have been made for the institutional embodiment of some such international community, including claims of ancient Rome, the Holy Roman Empire, and other imperial rulers who also claimed authority to make and apply law. Each such assertion has been strongly and often violently contested. With multiple sovereign States and clarity that universal empire will not or should not be established, one influential strand of thought has focused on the possibilities of an international society of States: its modest core of system-preserving norms, its basic institutions including war and diplomacy and law, and the conditions for its maintenance including in particular a balance of power.[9] Bruno Simma's claims for international community have been carefully circumspect; he is cautious about its reach, and its

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[6] B Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Duncker & Humblot, 1972). The argument in this book is much closer both to bilateralism and to realist thought on international politics than is Simma's writing on community interests.

[7] A Verdross and B Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd edn, Duncker & Humblot, 1984).

[8] Simma, 'Bilateralism to Community Interest' (n 2) 244.

[9] H Bull, *The Anarchical Society* (Macmillan, 1977).

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institutionalization, and mindful of the inevitable challenges that arise when a particular group claims to speak for, or to be, *the* international community. Simma's international community is similar to Hedley Bull's international society in being a society of States based on modest common interests mediated by power.

In the spectrum of possible approaches, Simma stays close to what Bull and other founders of the English School of international relations described as political-realist or some pluralist positions in giving little emphasis—much less than some from other post-1945 legal scholars writing on 'international community'—to the role of law in delineating the international community.[10] His idea of a community grounded in community interests is expressed as being prior to law. Yet, as Simma himself recognizes, there are difficulties with this conception of a pre-legal community of individuals, based on interdependence and commonality of interest: its foundations seem shaky if the commonality is unrecognized (or denied) in specific instances by most individuals; reducing law to interest-based analysis undervalues other important dimensions of law; and reasoning from postulates of common interest produces very underspecified results in terms of norms and modes of action.[11]

Questions about the existence of an international community can be analyzed from many perspectives, three of which may be noted here. One perspective is sociological or empirical, investigating the extent of human interdependence in fact, or the extent of the subjective sense of interconnectedness. A second perspective is doctrinal, an inquiry internal to what is accepted as the law, or even what constitutes prevailing normative political theory, looking at what the tenets of that law or theory provide. A third perspective is at an even higher level of abstraction, and involves choosing between different concepts of law or (political) theories about the roles of law.

The international community approach developed in Simma's work is a sometimes uneasy combination of the first and second perspectives. On its face, Simma's international community seems to be grounded on an empirical reality—a concrete commonality of interests—that is increasingly reflected in particular areas of law. However, as suggested above, interests prove a very fragile foundation for an international community. The community as Simma outlines it may actually rest more on the second perspective, on an extrapolation of what the corpus of international law today provides or presupposes, particularly in the areas of equality and human rights. This reliance on doctrine as evidence of a commonality of interests

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[10] See Simma, 'Bilateralism to Community Interest' (n 2) 245; B Simma and AL Paulus, 'The "International Community": Facing the Challenge of Globalization' (1998) 9 Eur J Intl L 266, 267. Cf, eg, H Mosler, 'The International Society as a Legal Community' (1974) 140 Recueil des Cours 1, 18; C Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993) 241 Recueil des Cours 195, 211, 219–20.

[11] Simma, 'Bilateralism to Community Interest' (n 2) 247; Simma and Paulus, 'The "International Community"' (n 10) 276.

is unsurprising, if only because it is law (more than other normative traditions) that furnishes a vocabulary for the expression of these moral and political ideals.[12] To this extent, the international community may not be something that precedes or transcends international law, but something that is elaborated through and against international law. This is true also if the common interest of all individuals is understood at a more abstract level: the interest all have in a stake in a moral and political construction concerning the right order of the world and human life in it. An 'international community' based on a construction of this kind may in fact bear an intimate relation to international law. However, the reach of international law and regulatory rights and obligations now extends into so many areas, with so many underlying addressees and beneficiaries, that its norms and institutions and processes are far too numerous and complex to align with a single set of common interests, or with one unified community.[13]

Recognizing this complexity, work on 'publicness' forces an engagement with the third perspective on international community, one that calls for reflection at the level of a concept of law itself. While the publicness approach is informed by aspects of what the corpus of international law currently provides, and how its content is changing, the central conceptual problems of this approach—defining a 'public' and saying something meaningful about the public quality of law that flows from the fact that law stands in the name of a public—reach and transcend the limits of the second perspective. Existing international legal doctrine, and prevailing normative political theory (at least the basic model of liberal democracy) do not provide any plausible answers about the existence or nature of publics at the global level.

II. International Law as Inter-public Law

In place of the bilateral model, the publicness approach proposes that international law be conceptualized as a law between 'public entities' (primarily, but not limited to, States), these public entities being subject to public law and thus to basic public law principles, including legality, rationality, proportionality, rule of law, and fundamental rights, as well as to an additional quality of 'publicness' inherent in law, one that is difficult to define but nevertheless crucial.[14] As described by Jeremy

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[12] B Kingsbury, 'People and Boundaries: An "Internationalized Public Law" Approach' in A Buchanan and M Moore (eds), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge University Press, 2003); A Hurrell, 'International Law and the Making and Unmaking of Boundaries' in ibid.

[13] On arguments for a multiplicity of publics, see N Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' in C Calhoun (ed), *Habermas and the Public Sphere* (MIT Press, 1992); IM Young, *Inclusion and Democracy* (Oxford University Press, 2000); T McDonald, *Global Stakeholder Democracy: Power and Representation Beyond Liberal States* (Oxford University Press, 2008).

[14] B Kingsbury, 'International Law as Inter-Public Law' in HR Richardson and MS Williams (eds), *Nomos XLIX: Moral Universalism and Pluralism* (New York University Press, 2009) 167.

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Waldron, this public character of law lies in 'the fact that law presents itself not just as a set of commands by the powerful [or] a set of rules recognized among an elite, but as a set of norms made publicly and *issued in the name of the public . . . that ordinary people can in some sense appropriate as their own, qua members of the public*'.[15]

In this vision of international law as inter-public law, it is the law itself that functions as the vessel for normativity. International law is more than a series of interactions between States as rational actors, pursuing their own interests, but it need not depend on any consensus as to a priori principles of morality or the normative ends of international life, and there may be no coherent pre-legal international community or community interest. Rather, it is the existence of law that both creates a certain kind of society in its own right, through the practice of seeking law-governed relationships, and allows other communities—or publics—to come into being and assert their interests, by making available certain institutional mechanisms to satisfy public law principles of rationality and rule of law, and by creating rhetorical possibilities for demands that the law respond to the felt needs of a particular public. Whereas the Stoic tradition of the law of nature and of nations envisions a universal international community of all individuals, rooted in shared interests, the sense of community that emerges in an account of 'publicness' is more complex: a set of inter-related and possibly overlapping publics, commonality between which is rooted, if anything, in the law itself.

Having framed such an approach, we turn now to note some of the continuing major challenges in theorizing the relationship between law and the multiple publics envisioned by work on publicness. In global institutions, much of the process of law-making is far removed from any processes analogous to democracy, and there do not exist clearly defined publics other than those of each State (assuming a universal community of all individuals is set aside as not being operationalizable or even a reality for most purposes). While it is impossible to identify a public for many public entities operating at the global level in the way that it may be possible to point to a body of citizens or constituents within a State, it is neither desirable nor possible to abandon the notion of a concrete polity. Broad public law principles, particularly rule of law and fundamental rights, depend for their meaningful operationalization on the specific contextual features of the way law is made, and on the existence of a particular, determinate group of individuals constituting the public in whose name the law stands. The same is true for an abstract quality of publicness in law.

Jeremy Waldron has argued that the public character of law is not peculiar to law in democracies, and may be found in other systems of law.[16] In societies of all types,

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[15] J Waldron, 'Can There Be a Democratic Jurisprudence?' (2009) 58 Emory LJ 675, 684 (emphasis added).

[16] Waldron, 'Can There Be a Democratic Jurisprudence?' (n 15) 701. However, it is not clear that Waldron ever entirely lets go of a sense that publicness is rooted in some idea of self-government or at least representative government.

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he contends, laws must purport to stand in the name of the whole society, and address matters of concern to the society as such, rather than just matters of personal or specific concern to individuals or groups who formulate the laws.[17] In so far as a quality of publicness *is* connected to democratic processes of law-making, it is obviously of limited significance at the international level: although there have been significant steps in the direction of expanding the range of actors concerned in the formulation of international law, there is no immediate prospect of altering the processes of law-making internationally so that they resemble democratic processes within States. However, even if, as Waldron suggests, the public character of law might be said to exist in systems of law that are not directly or comprehensively democratic, there is a further obstacle at the level of international law, in the sense that there is no pre-defined 'public' in whose name the law can be said to stand. This problem becomes more acute as the range of bodies understood as public entities grows. It is possible to imagine a situation in which a public entity considers an issue, proceeding in accordance with the principles of legality, rationality, proportionality and so on, and reaches a decision with full participation of *its* public, understood in a narrow sense as actors involved in a particular, relevant area of activity or associated in some way with the entity as an institution, but where this limited public will not be the public truly affected by the decision. This occurs even now, when State governments take decisions that affect citizens of other States, but is likely to occur more and more often at the global level, particularly as more non-State and even sector-specific bodies take up roles in governance and come to be considered public entities. These situations might be characterized as ones in which the public entity is not an adequate representative of the relevant public, but representation—itself an important and complex issue—may not get to the heart of the problem. The real question might be whether it is possible to identify a determinate public at all. In such a situation it seems hard to see the claim of the decision and the rules on which it is based to 'stand in the name of the whole society and to speak to that whole society even when . . . addressed to narrower groups'—if only because we do not know how far the 'whole society' extends.[18]

It is possible to imagine a series of overlapping publics constituted by the pool of those individuals liable to be affected—or at least affected to a certain threshold level of significance—by particular decisions. For example, the World Trade Organization (WTO) Appellate Body ruling in *Shrimp/Turtle*[19] rested in part on a failure by US authorities to fulfil certain of the requirements of publicness; specifically, US authorities had failed to consult a 'public' that extended beyond American citizens and corporations to Indian interests.[20] But a public comprised of all those susceptible to being affected might have included not only Indian interests in the

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[17] Waldron, 'Can There Be a Democratic Jurisprudence?' (n 15) 700.

[18] Kingsbury, 'International Law as Inter-Public Law' (n 14) 174.

[19] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998) WT/DS58/AB/R.

[20] Kingsbury, 'International Law as Inter-Public Law' (n 14) 182.

shrimp market but the interests in that market of corporations from any other member of the WTO. Thinking only about the WTO, the number and range of people affected by rulings is enormous, and may be impossible to predict in advance.

Moreover, constituting a public on the basis of susceptibility to being affected by a regulation or decision is not only practically unwieldy, but normatively questionable. There are many areas of law in which legal relations of one entity or person to others are articulated and analyzed after the fact; but any strong claim of publicness seems to rely on a sense that a regulation or decision has been made in the name of a pre-existing collectivity, whereas constituting a public based on vulnerability to the *effects* of a decision or regulation involves ex post facto inquiries of fact. Further, unless the extent and nature of a public is known prior to the making of a rule or decision, it is difficult to see how public law principles of rationality, proportionality, and rule of law could be satisfied.

Thus, even if there might be said to be a quality of publicness inherent in law, quite independently of any democratic law-making process, such a quality of publicness does seem to depend on the existence of a unified polity or collectivity that is not necessarily present, or not fully present, in much international legal governance.

III. The Concept of Law and the Roles of Law

In so far as an emphasis on publicness finds at least a limited normative quality in law itself, the concept of law, and the delineation of what qualifies as law, become crucial. The challenge is thus to develop a concept of law that responds to concrete realities at the global level, without relying on the conceptual categories that have been developed in connection with the democratic State.

The delineation of a concept of law inevitably reflects subjective or normative considerations. Even a putatively 'descriptive' account of what 'law' is involves a choice of some aspects of practice, rather than others, as essential to law, this choice being dependent on some sense of what is relevant to law, and thus on a sense of law's purpose and value. The publicness approach as a whole goes further than a descriptive approach: it rests on the notion that certain public law principles, and a more abstract quality of publicness, are inherent in law itself and, to this extent at least, explicitly incorporates criteria which, if not straightforwardly moral in content, at least have a strong normative dimension.

The publicness approach is underpinned by a conviction that a theoretically productive, and normatively desirable, concept of law would have certain basic characteristics. It would mark out some boundaries (albeit contestable ones) between law and coercion, on the one hand, and law and morality on the other. It would accommodate the heterogeneity of interests and moral commitments that

characterizes international life, while incorporating the normative dimensions of public law principles. Perhaps most importantly, it would make sense of current practice, including the diverse sources of international law and processes of law-making, the absence at an international level of a centralized hierarchy of law-making and adjudication, and the resulting centrality of deliberation about the weight to be given to particular norms or decisions, rather than merely the determination of whether those norms or decisions are valid law. This responsiveness to practice would not be a purely functional inquiry, focused on how international law works in the current constellation of power; rather, it would be attuned to the content of international law, including the formal characteristics and aspirations which might find only imperfect reflection in concrete outcomes.

There are real questions about whether it is possible to develop a concept of law adequate for international law from the theoretical apparatus provided by the Anglo-American jurisprudential tradition, which has focused largely on the nature of law within a single State. The very nature of international law and its claim to universalism would seem to require an openness to other bodies of thought about the nature of law. Even within the confines of the Anglo-American tradition, an engagement with international law requires more than merely measuring international law against established concepts of law: 'if international law does not fit the criteria of the concept of law used at the domestic level, it may not (only) be a problem for the legality of international law, but (also) for those criteria themselves'.[21] Moreover, while Anglo-American jurisprudence has tended to channel thinking about law more broadly into a certain number of longstanding questions about the nature of law, the determination of whether given norms are valid law, the normativity of law, and whether there is a duty to obey it, it is not self-evident that work on international law is most usefully undertaken in precisely these categories of inquiry. A concept of law and theories of normativity and legitimacy adequate for international law might take a different path. On the other hand, given the increasing interpenetration of international law and domestic law, and in light of the fact that those normative considerations central to publicness are themselves the product of a public law tradition within the State, a concept of (international) law needs to remain at least in some relation with the concepts of law that continue to frame our understanding of law at the level of the State.

One effort to articulate a distinct concept of law, responsive to the circumstances and practices of international law, is Jan Klabbers' attempt to differentiate law from non-law in the international sphere by trying to find a *via media* between source-based and substantive criteria of validity. His proposed approach has three elements: a threshold requirement, from Tamanaha's non-essentialist legal pluralism, that sufficient people with sufficient conviction consider the norm to be law;

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[21] S Besson and J Tasioulas, 'Introduction' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 8.

a requirement that it fulfil Fuller's 'inner morality of law' (the eight desiderata, which in their content bear resemblance to the public law principles central to publicness); and then a formal criterion of validity, based on consent. Although it is not necessary that a norm emanate from a public authority, it must either enjoy State consent or, perhaps, consent expressed by individuals through some representative mechanism beyond inter-State communication. Lastly, Klabbers argues for a 'presumption' that normative utterances, at least those made by certain established institutions and those appearing in agreements between States, is law. This presumption may be rebutted on various grounds, including lack of participation by those affected.[22] A legal philosopher accustomed to thinking about law within the State might be perturbed by Klabbers' synthesis of recognition or an efficacy condition, Fuller's desiderata, and an expression of State consent, coupled with a 'presumption' that a normative utterance of particular institutions is law. But it is not fanciful to think that international law, given the range of matters it deals with, the plethora of actors involved in making and complying with it, and the political tensions involved, might demand such variegated approaches to validity.

Bearing in mind the limitations of existing theories of law developed within the State, a broadly positivist approach nevertheless seems apt to fulfil what have been identified above as the main desiderata of a concept of international law (maintenance of a distinction between law and coercion, and law and morality; consistency with an absence of consensus on moral questions; accommodation of current international legal practice). It may even be possible to understand basic principles of public law, and a more abstract quality of publicness, as immanent in international law within a positivist framework, in the sense that these requirements increasingly form part of practices, if not a singular rule, of recognition. As Simma has noted in his academic works, there have been evolutions in the nature of sources of international law, and international lawyers are now less inclined to rely on bilateral, voluntarist sources and more inclined to look to sources reflecting generality, solidarity and integration into world public order. But as his blunt criticism of the ICJ's *Kosovo* Opinion demonstrates, this evolution is far from being complete or completely accepted. Public law principles are not yet uniformly considered as criteria for the validity of putative international law, or even as relevant factors in determining the weight of any particular norm or decision. Moreover, Hart had envisaged that, in any legal system, the rule of recognition may become a technical instrument used primarily or exclusively by the elite of officials within the system, while the subjects are quiescent and disengaged from the question of what counts as law.[23] Although this does not formally exclude the possibility of a system in which individuals would play an active role

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[22] J Klabbers, 'Law-Making and Constitutionalism' in J Klabbers, A Peters, and G Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009) 110 et seq.

[23] HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press, 1994) 117; see on this point J Waldron, 'All We Like Sheep' (1999) 12 Canadian J L & Jurisprudence 169.

in formulating and contesting the law, before deferring to officials in relation to adjudication and enforcement, reliance on Hartian positivism does seem to tend in a direction opposite to what it might be hoped that a conception of publicness in international law would achieve.[24]

Even more significantly, the public law principles central to publicness range from rule of law, which is at least in part procedural or capable of reduction to a list of procedural requirements, to proportionality and protection of fundamental rights, which are more substantive. While not being purely moral criteria, these are irreducibly open-textured and contestable, and do involve some moral dimensions. Although Hart appears to have accepted that moral criteria might form part of the law, and even of a rule of recognition,[25] building such criteria into a loosely positivist account by trying to incorporate them into a rule of recognition is arguably in tension with what Hart considered a rule of recognition to be: the social fact of a more or less uncontroversial threshold, at least among officials, for determining validity.[26] It also arguably undermines what have typically been seen as the advantages of a positivist concept of law: a relative degree of certainty about what is valid law, and the advantages that this confers from the perspective of predictability and rule of law; and the clarity that a separation between law and morality brings to deliberation about whether there is a duty to obey the law, particularly where it appears to conflict with other moral obligations.[27]

Ultimately, the positivist tradition, as it has developed within the State and by reference to the institutions and processes of State legal systems, may not be capable of accommodating the complexities of international law, or the publicness approach sketched here. However, the orientation of positivism towards law as a social practice makes it at least a valuable point of departure for further efforts to build a useful concept of (international) law for the current era of increasingly dense global regulatory governance, if only because it grounds a concept of law capable of regeneration from within, in accordance with changing practices that themselves will be driven not only by material interest, but also by moral and political contestation.

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[24] Waldron's own argument about a quality of publicness is developed as a divergence or at least extension of Hart's work, rather than a natural outgrowth of it.

[25] Hart, *Concept of Law* (n 23) 204, 247.

[26] A potential response here might be that, despite a certain indeterminacy flowing from the incorporation of moral elements, a rule of recognition retains significance in the sense that it at least sets the parameters of debate about validity: see J Waldron, 'Law' in F Jackson and M Smith (eds), *The Oxford Handbook of Contemporary Philosophy* (Oxford University Press, 2007) 190–1.

[27] See HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard L Rev 593. For a discussion of the latter claim, see L Murphy, 'Better to See Law This Way' (2008) 83 New York U L Rev 1088.