by a handful of civilizers, slowly evolving more into the shape of a gathering of 192 equal and sovereign states? Perhaps. But some of the assumptions on which the book is based can be refuted. The most important one is the first 'axiom' Mazower has identified, namely the idea that it is generally held that the United Nations had little to do with the invention of Smuts and Wilson, namely the League of Nations. It is true that the delegates in San Francisco in 1945 hardly mentioned the League, and that the representative of the League, who was invited to San Francisco, was largely ignored and went home already after one month, when the Conference was only halfway.[7] However, as the managing editor of the *New York Times* at the time, Edwin L. James, accurately remarked, '[e]ven though forgotten by the delegates here assembled, who can doubt that the spirit of Wilson hover[ed] over San Francisco?'[8] Smuts, with his pale, ghost-like appearance, might have been that spirit; he was in any case one of the few persons attending both the 1919 and 1945 conferences. Mazower does seem to acknowledge that it was generally understood that the United Nations was a continuation of the League but that it was better not to say so openly (see especially p. 149), but he gives this generally known fact little attention. Scholars, of course, had no reason to remain silent. Indeed, contrary to what Mazower suggests, they have generally not been the naive dreamers Mazower talks about. Indeed, almost all scholars commenting on the work being done in San Francisco compared its main product, the UN Charter, with the Covenant of the League of Nations.[9] They all had objections to the major role allotted, through the UN Charter, to 'old Europe', especially Britain and France, and some other chosen few. 'Be critical and be skeptical' in 1945 – that just seemed the obvious thing to do in the invisible college of UN scholarship. And, contrary to what Mazower seems to suggest, nothing much has changed since that time. And thus Mazower has corrected a mistake in the conventional storytelling about the United Nations that was never made in the first place.

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Samantha Besson and John Tasoulias (eds.), *The Philosophy of International Law*, Oxford, Oxford University Press, 2010, 611pp., ISBN-978-0-19-920858-6 (hb).
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One of the many tensions that lie at the heart of thinking about law – including about international law – is the perennial strife between those who approach it as insiders and those who approach it as outsiders. This much-awaited collection, comprising

7 '"Old League" Chief Quits Conference', *New York Times*, 27 May 1945, 19.
8 E. L. James, ' Wilson Forgotten at San Francisco', *New York Times*, 30 April 1945, 10.
9 One of the most important examples is H. Kelsen, 'The Old and the New League: The Covenant and the Dumbarton Oaks Proposals', (1945) 39 AJIL 45. In the newspapers, the comparison was also often made. See, e.g., N. McNeil, 'A New Kind of League, a New Kind of World', *New York Times*, 24 June 1945, 55.

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29 contributions, is filled with well-known and well-respected figures, the great majority of whose research expertise lies predominantly in philosophy rather than international law. No more than a third of the contributors are recognized experts in international law (e.g., James Crawford, the late Thomas Franck, Andreas Paulus); the remainder are either legal theorists (e.g., Joseph Raz, Antony Duff, Jeremy Waldron), moral philosophers (e.g., Roger Crisp, James Griffin, John Skropuski), or political philosophers (e.g., Will Kymlicka, Philip Pettit, Thomas Pogge), with political science, international relations, and comparative law also among the disciplines represented. This diversity itself raises the following question: is there a coherent scholarly endeavour we may call 'the philosophy of international law'? If there is, and if it is to be predominantly the province of philosophers rather than lawyers, this may potentially distinguish it from the more lawyerly field of 'international legal theory'. But to what extent, if any, should a self-proclaimed *philosophical* enterprise engage with the current practice of international law (e.g., with doctrine and the case law of international tribunals)?

These questions are difficult partly because of the absence, in the international arena, of anything like the strong professional identity that characterizes national legal practice; for example, there is no 'international legal bar' (although there is an informal network of respected practitioners), and there is also an increasing number of specialized academics working in branches of international law and a corresponding decrease in so-called 'generalists'. To this must be added the acknowledgement that any philosophical exercise will need not only to abstract from the technical details of practice on the ground, but also to distance itself somewhat from the self-understandings of practitioners. Nevertheless, one would expect that a collection that calls itself 'the philosophy of international *law*' (rather than, say, global justice or international politics) would at least strive to engage with the practice of international law in one or two ways: first, it would strive to address some of the problems that emerge from the distinct features of the practice of international law; and/or, second, if addressing more traditional philosophical problems, it would strive to connect the answers offered to some of the contemporary and specific challenges facing legal experts and practitioners in the field. A few of the papers in this collection strive in one or both of those ways, but most are responsive to traditional problems faced by philosophers – problems such as authority, legitimacy and normativity – and many engage with these problems without sustained attention to current institutional arrangements and recent developments in international law. To give but one quick example (more to come below), the entire discussion on humanitarian intervention (to which Section 13 of the book is devoted) feels largely outdated; the new discourse of the 'responsibility to protect' (including the 'responsibility to react') receives but a few lines.

The above apparent diversity of disciplinary backgrounds ought not, however, to mask the remarkable unity in approach: it is difficult to avoid the observation that the editors, Samantha Besson and John Tasoulias, have cherry-picked contributors who were congenial to the prospect of applying H. L. A. Hart and John Rawls to as many issues and domains of international law as possible. The result is a collection of papers that will warm the cockles of a liberal analytical Anglo-American jurisprude, but

only serve to alienate those with more continental, critical, feminist, Third World, law-and-literature, or Marxist viewpoints, to mention but a few of the approaches that are not covered. Neither feminism nor Marxism even appears in the index, let alone is represented in any chapter. Martti Koskenniemi (one exponent of the critical school) receives but a couple of footnotes (see Chapter 9, 'International Adjudication', by Andreas Paulus; pp. 218 and 222). This is deeply problematic, especially in light of the 'ultimate goal' of the collection, which is to 'help shape an agenda for future research in a burgeoning field' (p. xii). Does the future belong exclusively to the Hartians and Rawlsians?

Concerning this question of the future, for a collection on 'the philosophy of *international* law' to claim that it is forward-looking, and yet to gaze back so fondly and virtually exclusively to 'the great and the dead' that have recently dominated liberal analytical Anglo-American philosophy, is worrying: is the audience being encouraged to think that there are no philosophical resources outside that peculiar philosophical tradition? This question is all the more pressing given that the editors state that 'the volume's overarching theme concerns the articulation and defence of the moral and political values that should guide the assessment and development of international law and institutions' (p. xii). Again, without any representation of the views of the philosophers of the south – think only of those represented in William Twining's recent book, *Human Rights, Southern Voices* (CUP, 2009), namely Francis Deng, Abdullah An-Na'im, Yash Ghai, and Upendra Baxi – and with hardly any acknowledgement of perspectives without a liberal pedigree, this collection risks promoting the imperialism of a very narrow range of moral and political values. This is not, of course, to suggest that Anglo-American liberalism, whether Hartian or Rawlsian, has little to offer; on the contrary, it has and will continue to have profoundly important lessons to teach. But an exclusive focus on such influences does raise questions about both the ambition of this book and its self-proclaimed status as 'the most up-to-date and comprehensive treatment of the philosophy of international law in existence' (non-attributed blurb on the back cover).

The book is divided into two parts, the first dealing with 'General Issues' and the second with 'Specific Issues' in international law. Each section in each part has two contributions (with the exception of human rights, which has three), such that the second contribution is designed to respond, at least in part, to the first. This 'dialogical format' is a welcome editorial direction, and shows that much labour has gone into the planning and editing of the book. So it is all the more disappointing to see that the editors chose to stick with a very conservative categorization of subjects that reflect the table of contents of any standard textbook on international law, like the run-of-the-mill notion of 'sovereignty' (Section 6) or 'international adjudication' (Section 5, whereas distinct sections could easily have been devoted to different international judicial institutions), and isolating allegedly distinct areas from one another (the eight sections in Part Two cover human rights, self-determination and minority rights, international economic law, international environmental law, laws of war, humanitarian intervention, and international criminal law). What this textbook approach to the categorization of topics indicates is that the editors were more concerned with transposing traditional philosophical problems onto

traditional international legal categories, and not, for instance, with considering how theorizing about international law might itself help us rethink such categories and enrich our understanding of contemporary developments. This is a pity, for being the first collection of papers of its kind, this book offered a real opportunity at showing how innovative the philosophy of international law could be.

But innovation aside, and where editors may wish, for whatever reason, to tread carefully if not conservatively, special effort needs to be made to ensure that the philosophical problems discussed, and the various proposed solutions canvassed, connect up with the specificity of the international legal context. Unfortunately, as noted above, these connections are only rarely spelled out in this book, even though there are many excellent papers, which could have been rendered more plausible and more relevant to an international legal audience.

Take, for example, the section on 'Human Rights', with papers by Joseph Raz, James Griffin, and John Skorupski. Raz's contribution has an important message: we ought not to proceed to analyse human rights without our ear to the ground, namely without close attention to human rights practice. And yet, this call does not translate into a discussion, in any of the contributions, of any of the different human rights regimes, or of any case law. Indeed, no single human rights case is mentioned. Certainly, the issues discussed by Raz, Griffin, and Skorupski are all very important, but in the absence of any substantial link to legal materials, procedures, and institutions, it is difficult to see these contributions finding ready audiences amongst those working in the field of human rights (again, the point here is not that all such philosophical treatments of the topic of human rights must always do so; just that, especially in the context of this collection, it is a pity they do not). Skorupski, for instance, provides a definition of rights and an analysis of duties, but his only references are to J. S. Mill, Hart, and Rawls: why not at least one illustration of the applicability of his approach to at least one human rights case, or to the practice of one human rights court? Skorupski speaks, at one moment, of philosophers 'as citizens not as specialists' (p. 366), but in the context of this collection, this reads like an apology.

A more striking example of the lack of engagement with the particularities of the international dimension can be found in Philip Pettit's contribution to the section on 'International Democracy'. Pettit focuses almost exclusively on how republican legitimacy might be achieved in the national context. Realizing that a focus on the domestic, rather than the international, level might be amiss in the context of this collection, he then adds:

> I would have liked to concentrate more exclusively on the international context but the notion of legitimacy emerges in the first place with domestic regimes and, in any case, the legitimacy of the international order turns in good part on the domestic legitimacy of the states that constitute it. (p. 140)

This statement – remarkable, surely, in a collection on international law – takes us back to the days when all treatments of the question of legitimacy engaged strictly and exclusively with states' right to rule. One would like to think those days have passed: surely, no observer of global affairs can afford to ignore the growing

ubiquity of post-sovereign, transnational, and other kinds of cosmopolitan, bottom-up approaches to the legal ordering of societies. Many of these developments cannot be understood through the conventional optic of the justification of (state) authority, but rather rely on alternative conceptualizations of how best to protect the weak, the vulnerable, the poor, the excluded, and the marginalized across borders.

In some cases, precisely as a result of the dialogical format of the book, criticisms concerning the relevance and plausibility of a proposal made on philosophical grounds appear in the responses to the leading chapter. For instance, in a helpful reply to Thomas Pogge (Chapter 20), Robert Howse and Ruti Teitel (in Chapter 21) make the important point that discussions of international economic law (including those focused on the problem of global poverty) ought not to proceed in isolation from consideration of 'the context of international law as a whole, including concepts such as sovereignty and self-determination of peoples, and the full range of human rights, not only those that directly seem to bear on poverty and its elimination' (p. 444). Accordingly, they argue, very reasonably, that questions concerning security are relevant to the issue of global poverty. Howse and Teitel also observe that it is one thing to push for changes in intellectual property rights (as Pogge advocates), and that it is quite another to consider whether any such proposed reforms bear in mind the realities of 'interpretative practices and culture surrounding the existing rules', namely especially the way in which 'certain narrow developed country interests managed to largely capture the interpretative space with respect to TRIPs' (p. 447). Howse and Teitel's response reminds us that although we ought to make much room for ideal theory in critical reflection on any area of regulation, we ought to exercise care that the potential impact of proposals is not minimized as a result of the neglect of the practical context in which they must be implemented.

Despite these shortcomings, it ought nevertheless to be observed that there is a great deal to learn from this book, particularly from a number of outstanding contributions. Donald Regan's riposte to Andreas Paulus's abstract attack on fragmentation, in the name of the now increasingly popular slogan of international constitutionalism, is to argue that if one looks carefully at how the World Trade Organisation (WTO) 'actually operates' (p. 241), then one will see that it is only from a distance that the WTO regime appears to be dedicated to one value that is bound to conflict with other single values allegedly espoused by other regimes, and that, further, when one looks again at the details, the WTO's downward move to several member states (as opposed to an upward move to general international law, advocated by Paulus) is often the right one because of the WTO's peculiar focus on 'market-mediated effects'. What Regan's contribution reveals is that quite often the most important contribution theorists can make is not to indicate the relevance of theoretically constructed principles or ideals, but to show precisely the limits of theory: for example, of the dangers of generalizing from too great a distance.

But theory can also most certainly make important positive contributions. It can do so, for instance, by being a genuine beacon of value, pointing to matters that may need to be paid more attention to in the development of, say, a specific kind of jurisdiction. Antony Duff, for example, in his brief but powerful statement in the section on 'International Criminal Law' (Section 14), emphasizes the moral

demand placed on the International Criminal Court (ICC) in doing 'justice not only to the victims of the crimes with which they are to deal, but also the perpetrators of those crimes' (p. 604). Duff's reminder that 'if we are to see international criminal trials as a way of calling those who commit such wrongs to account, we must be able to see the perpetrators as full members, rather than as enemies, *humani generis*' (p. 602) is an excellent example of what an agenda-setting collection of papers might render: moral attention based on a well-informed observation of the potential difficulties faced by specific institutional arrangements currently existing on the ground.

There are other examples in this book of contributions that show, via an informed understanding of the peculiarities of the law, what kinds of problem might lie ahead and what options there might be for dealing with them. James Nickel and Daniel Magraw, for instance, argue that although there is some overlap in terms of issues faced by environmental ethics and environmental law, the latter has some distinctive problems of its own. These include the fact that international environment law (IEL) 'primarily addresses the actions of governments' and yet must confront the reality that many environmental problems are caused by private conduct (p. 453), and, given that IEL it is a relatively new area of regulation, that many of its immediate difficulties are going to arise in the context of 'the making and implementation of law, not just the interpretation and adjudication of existing legal norms' (p. 455). It is a pity that Nickel and Magraw do not go on to deal with these issues in any detail: they could have, for instance, addressed the recent literature on legisprudence (or the philosophy of law-making) and considered how it fares in the context of the making of IEL. What they do go on to discuss – the question of 'intergenerational fairness' – is, of course, important, but what one gains in the philosophical sophistication of their analysis of that problem, one loses in terms of a discussion of the peculiar problems faced by the specific characteristics and the stage of development of this area of international law. This is further highlighted by the response from Roger Crisp, where the specific institutional context of IEL is completely lost sight of, leaving us with such unhelpful generalizations as 'IEL is primarily an instrument for human purposes, and these purposes may be moral ones' (p. 473) or 'much IEL is aspirational' (p. 490).

There are so many promising agendas for the philosophy of international law. First, one can, for example, look closely at the institutional and functional peculiarities of international legal reasoning and proof. After all, the International Court of Justice is not only a highly distinctive institution in its own right, but its own jurisprudence also differs markedly as between exercises of its advisory and contentious jurisdictions. One can also consider the changing shifts in international legal normativity, not via the old and worn-out dichotomies of hard and soft law, or the even more worn-out analytical scheme of primary and secondary rules, but via different kinds of concept (after all, is not the practice of philosophy at least in part the creation, and not mere application, of concepts?). Alternatively, one can go beyond reflecting upon the distinctive mix in international criminal law of common-law and civil-law traditions, and theorize about a criminal-law tradition that is unique to the international level by, for example, analysing the categories of individual

criminal responsibility and the procedural innovations at the ICC, to see what specific normative problems these produce.

One cannot help but ask: where in this volume is the spirit of adventure, of conceptual innovation and risk, of genuinely looking forward by reference to a wider realm of philosophical resources than just those in one's own backyard? Is it the fragility of the very prospect of the philosophy of international law as a discipline that encouraged the editors to surround themselves with traditional philosophical concerns that were not originally developed in the context of the specificity of international law and its institutions, and which are now simply transposed and imposed, via the safe hands of Anglo-American philosophical celebrities, onto old-fashioned categories and a worn-out taxonomy of international law? One wonders why this book was not seen and taken up as an opportunity to demonstrate what a philosophical treatment of international law could achieve, namely something innovative enough to be capable of de-familiarizing and challenging theoretical predispositions and practical self-understandings, while at the same time being informed by and engaging with the particularities of practice on the ground.

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James Thuo Gathii, *War, Commerce, and International Law*, New York, Oxford University Press, 2010, 304pp., ISBN-13 9780195341027, US$65.00 (hb).
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At a certain period in history, the conduct of war and economic activity began to be seen as incompatible. In his essay on 'Perpetual Peace', Immanuel Kant argued that 'the spirit of commerce sooner or later takes hold of every people, and it cannot exist side by side with war'.[1] War and commerce were relegated to different spheres of activity, as the state's increasing monopoly on violence went hand in hand with the separation between the use of force and commercial enterprise. While war was fought between states, commerce became the preserve of individuals.

In the nineteenth century, this distinction between public war and private commerce was sharpened. War was a state that was declared or otherwise manifested by sovereign authority. The 'state-of-war' doctrine meant that states were at war only if they intended to be – if they possessed the requisite *animus belligerendi*.[2] Types of private force that had been common in previous centuries – mercenaries and

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1 I. Kant, 'Perpetual Peace: A Philosophical Sketch', in H. S. Reiss (ed.), *Kant: Political Writings* (1991), 114. In a somewhat similar vein, the American columnist Thomas Friedman argued in 1996 that countries in which McDonald's restaurants were established had never gone to war with each other. T. L. Friedman, 'Foreign Affairs Big Mac I', *New York Times*, 8 December 1996, available online at www.nytimes.com/1996/12/08/opinion/foreign-affairs-big-mac-i.html. This theory was disproved by the 2008 war between Russia and Georgia. M. Rice-Oxley, 'War and McPeace: Russia and the McDonald's Theory of War', *The Guardian*, 6 September 2008, available online at www.guardian.co.uk/world/2008/sep/06/russia.mcdonalds.

2 A. D. McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals', (1925) 11 *Transactions of the Grotius Society* 29.