Thinking Constructively Together

A Reply

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Thank you to Kostia Gorobets and Andrea Carcano for convening this symposium, first in Groningen and now here, and to all the contributors, who so thoughtfully responded to my piece. Engaging with this group has been enormously rewarding for me. And though I cannot do justice in this reply to all the excellent points they raise, I want to draw on a few threads that seem to me the most fruitful for continuing the conversation.

Veronika Bílková asks what, exactly, is so bad about the sovereigntist theory that permeates contemporary thinking about international law. She rightly notes that most international lawyers no longer adhere to the classical version of the theory; and she suggests that the only surviving remnant might be that international law is still state-centric. I don't think that's the only surviving remnant. What survives – and still dominates the field – is the demand that international law today mirror the law of the mythical sovereign. Indeed, many international lawyers suggest that international law must approximate that kind of law if it is to exist, to function, or to be justifiable as law. The theory is bad because it is confused. It defines too narrowly and ultimately misrepresents what international law (in practice) is, what international law (in practice) does, and why international law (as a practice) can be worthwhile. And in so distorting the legal field, it hamstrings those who rely on it from effectively analyzing, responding to, or changing the world around them.

From the Existence to the Practice of Law

Start with the question of what exists – or counts – as international law. The sovereigntist theory posits that law must come from official sources and establish binding obligations for its subjects to obey. The reason to insist that law must come from official sources is to distinguish it from nonlaw and thereby to ensure that it alone establishes identifiable obligations for its subjects to obey. Today, most international lawyers recognize that the doctrines for identifying the official sources of international law are not entirely accurate. However, many still insist on drawing a line between law and nonlaw. And many suggest that the critical distinction is that only law can and at times must be binding.

Bílková seems committed to maintaining this condition for law's existence. She asks, if authority does not derive only from official sources – "if it emerges through dispersed practices and interpretive communities" – "what makes certain practices specifically legal" in kind so that we can "identify who possesses authority to make binding decisions." Gemma Lligadas Gonzalez likewise reverts to this condition, when she says that "[i]nternational law's connection to sovereign authority … is what distinguishes it from other normative frameworks." My view – supported by both the practice of international law and a good deal of social theory – is that the distinction between law and nonlaw is variable across social contexts, unstable in any given social context, and incapable of being delineated by official sources alone. The sources condition misrepresents what actually counts as law and denies those who rely on it the tools they need to navigate the field.

For example, legal experts widely recognize that international courts and tribunals do not adhere strictly to the sources doctrines when making decisions. Lawyers who appear before these institutions would be less effective in advancing their claims, if they relied only on materials that satisfy the doctrines and ignored the broader web of social practices that

routinely inform how courts and tribunals make decisions. Lawyers who practice outside formal legal venues, in the "real world" where law and nonlaw bleed more clearly together, would be even more inept if they relied exclusively on the sources doctrines to advise their clients on what to do.

I do not myself define what counts as international law. My claim is that, to the extent that authority is an essential ingredient of law, as most believe it to be, it cannot be confined to official sources that stand apart from its subjects and impose on them binding obligations to obey. In my paper, I use the example of a sign that reads "no vehicles in the park" to illustrate that authority must be allocated with the people in relation to whom it is used – people whom the sovereigntist theory designates as mere subjects. In practice, if not in formal law, these people have agency in shaping how authority is allocated in their social surroundings, and their allocations are rarely uniform or consistent over time. Outside observers who purport to identify the decisions that "really" have authority as law seem to me to be trying to occupy the role of the sovereign and settle for everyone else what counts as law, stripping them of their rightful agency in the process.

So, rather than ask, "what counts as law?", I focus on a different question: what happens when people invoke what they contend is law and thereby put the allocation of authority at issue in their interactions? One thing that happens, as they negotiate how authority is allocated, is that they constitute the terms of their relations – their social order – with it. In the language of social theory, it and they are mutually constitutive. Neither stands apart from or above the other, and neither controls what happens with the other. Wouter Werner's metaphor of a set of nested improvisational scripts describes this dynamic better than I did. Law provides the scripts that enable people to define "who acts, who talks, about whom and how" in their social order.

Lligadas Gonzalez gets at a similar idea by drawing on Martti Koskenniemi's theory of hegemonic contestation. But Lligadas Gonzalez implies that one participant or another always imposes her will on the law, universalizing her predetermined preferences through it. My account and Werner's script metaphor both suggest otherwise. Even as the individual participants might try to shape what happens through the practice of law, it also shapes them – so long as they engage with it. This clarification opens for further inquiry a possibility that most international relations and legal scholars fail even to consider: to the extent that a hegemon (if you want to use that term) has disproportionate influence in the practice of law – and in the allocations of authority that occur through it – it will also have a disproportionate influence on the hegemon. Law and the hegemon are constituted together; neither stands apart from or controls what happens with the other. One cannot see how law might influence the hegemon, however, if one assumes, with the sovereigntist theory, that law is nothing more than a set of binding obligations issued by official sources to control the hegemon, along with all its other subjects.

From Controlling People to Constituting their Social Order

The reason the sovereigntist theory fixates on the distinction between sovereign and subject – law and nonlaw – is that it aspires for the former to control the latter. Indeed, the theory's classical variant posits that law cannot have a practical effect, if its obligations do not control the forces that lie "outside" it, in the hands of its individual subjects. Many contemporary analysts still expect international law to settle strict obligations for states to obey. And many suggest that it works insofar as it brings states under its control. As I just explained, however, the authority element of law does not exert control. To the extent that law is controlling, what makes it controlling is not its authority but the coercion that often lies behind or alongside it. And though coercion might sometimes be necessary to bring under control certain wayward actors, it should, in my view, be used only sparingly.

Meanwhile, the fixation with settling clear obligations that states obey diminishes what authority actually does – and diminishes its constitutive processes that are necessary for the legal system to work. These processes are how people from different walks of life

participate together in defining the terms for their collective governance. As they engage in the practice of law, they decide to whom they should (or should not) allocate authority for which of the decisions before them and thus what kind of social order they will create together with it. If they never grant authority to anyone else to make decisions that affect them, or if no one ever grants authority to them, they will have a harder time advancing their preferred governance projects. Conversely, if they grant too much authority to a single source, they will lose their voice and agency in the process and, again, be limited in their capacity to advance their preferred projects. The trick, then, is for them to maintain enough opportunities to participate in at least some of the decisions that affect them, without insisting that they must participate in every such decision or that a single entity (or group) be given the authority to settle the matter once and for all for everyone involved.

To be clear, I share Doruk Erhan's worry that the "forces of privatization and social fragmentation . . . leave us without an accessible domain of politics." But I believe that this dynamic reflects one manifestation of the reality that I describe: authority cannot be used to control the "colorless technocrats, PE professionals, and false visionaries" who might try to consolidate authority amongst themselves and box out the masses who are affected by their decisions. Though Erhan suggests that the ICJ might offer a more fruitful alternative, I am more dubious. After all, the ICJ is also inaccessible to the masses, and its technocratic legalese tends to mute, rather than accentuate, the political stakes of its decisions. And again, I do not think that looking to any one entity to settle the obligations for everyone else to obey will work, at least not without attending to the constitutive processes that keep the legal system going. As Judge Tladi says in his declaration in the provisional measures stage of South Africa's genocide case against Israel, "the Court is only a court!" Though it might define the obligations that some people expect states to obey, that is only a small part of what a legal system might – and must – do.

The current war in the Middle East is revelatory. As far as I can tell, Donald Trump is not effectively being controlled by law (domestic or international). Moreover, even though he has at his disposal the enormous military and economic power of the U.S. government, he is failing to translate this power into the authority he needs to advance his preferred governance projects – and establish a new order in the Middle East. His mode of governance is to rely heavily on coercion, while disavowing the need to earn authority for what he wants done. He seems not to appreciate that, though coercion without authority can destroy the old order, it cannot constitute a new one. A constitutive agenda requires the capacity not (just) for coercion but (also) for authority. And this requires more than someone just assuming the role of sovereign and declaring what everyone else must do. It requires a willingness to work with, and to make compromises and concessions to, those whom one wants or needs in the governance enterprise. Trump's disregard for authority leaves him without what he needs to constitute the governance arrangements that he might prefer in the Middle East. The more authority he squanders, the less capacity he will have to get what he wants done.

From Equality under Law to Emancipation through Law

But of course, denying Trump authority might not be enough to get him or others to stop sowing destruction. The reason the sovereigntist theory is so alluring is that it promises that law will protect weak and strong alike – by controlling those who might use coercion to dominate the rest. Critical legal scholars have amply demonstrated that international law has never realized the promise of equality "under" law. Formal international law itself codifies the unequal status of the states that it contends are its equal subjects. It most obviously does so in the composition of the UN Security Council. It also codifies their inequality by providing for them to be differently situated, depending on the arrangements within which others are willing to share authority with them. Outside formal international law, the inequalities are even more obvious. Over the past few decades, the United States was regularly permitted – sometimes actively, other times only passively and grudgingly – to make governance deci-

sions that no other state could or would have made. Now that the United States's global ambitions, authority, and capacity are all dissipating, there are serious questions about who and what will fill the void.

We should not assume that less authority for the United States will automatically translate into more for everyone else. As I have been explaining, authority does not work like coercion, by suppressing the agency of one side in the exchange for the benefit of the other. Authority must instead be shared. It enhances the agency of both sides together, relative to where each would be without it. World events are again instructive. The dissipating authority of the United States seems also to be undermining the authorities – and thus the governance capacities – of its historic allies, with whom it once worked closely to constitute arrangements that let them do together what none of them could (as easily) have done alone. For example, Europe seems increasingly sidelined from the arenas in which globally transformative decisions are being made and unable effectively to claim and exercise the authority it needs to preserve its standing in the international order.

For those who aspire for the world to be saturated with law, the only path forward, it seems to me, is to find new ways to share authority, at different levels of social organization, so that more people, from disparate walks of life, can participate with others in their collective governance. Though this path is unlikely to lead to planetary equality under law, it is, as far as I can tell, the only way to realize more emancipation through law. We do not – and in my view, should not want to – live in a world in which a single person, entity, or group stands in for the mythical sovereign and dictates what everyone else should do. Marcel Brus's recommendations for the future push in a similar direction. He urges international lawyers to invest in institutions and coalitions – the social spaces in which authority can be allocated among different actors, in the service of the governance projects that enough of them find sufficiently worthwhile to take measures to support. Relinquishing the sovereigntist thirst for control and instead devolving authority to people around the world to exercise voice and agency in the projects that *they* deem fit is not some concession to weakness. It is the ideal to which we should, in my view, aspire.

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