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# Legal Interpretivism beyond the State

Alexander Green\*

This paper is a manifesto for an interpretivist theory of international law. Legal interpretivism is the theoretical approach to law and legal reasoning developed by Ronald Dworkin, which will be sketched in more detail below. I will distinguish ‘interpretivist’ from ‘Dworkinian’ theories of international law because I believe that whilst an interpretivist approach to international law is viable, Dworkin’s own work on the subject is neither adequate nor true to his own methodology. I will begin by setting out the core tenants of the interpretivist approach, which I will assume for present purposes is the correct way in which to investigate legal phenomena (and, as shall be dealt with later on, ethical, moral and political problems as well). Next, I shall highlight three difficulties that interpretivism might be supposed to face in the international context. I will then look at Dworkin’s own work on international law and argue that it is not a viable interpretation of the international legal system but rather a reformist argument of political philosophy from first principles. I then suggest an interpretation that avoids at least two of the difficulties supposedly faced in the international context. Finally, I will indicate what questions must be answered in order to complete this project and roughly sketch the beginnings of an answer.

## 1. Legal Interpretivism

If the fundamental question of legal theory concerns ‘the nature of law’, then Dworkin is unusual in that he comes to it obliquely. For him, such abstractions are essential only to the extent that addressing them is required by the more practical matter of identifying the law on any given issue.<sup>1</sup> Furthermore, he conceives of law as interdependent with the reasoning through which it is determined. For Dworkin, legal metaphysics and legal epistemology are integrated, rather than independent.<sup>2</sup> As a result of this interdependency, law can only be investigated by someone actively participating in it as a social practice.<sup>3</sup> This means that the issue of how to responsibly determine legal standards is both practically and necessarily anterior to the abstract nature of law. The process Dworkin suggests for undertaking this task is as follows:

- "(i) The social phenomenon ‘law’ is capable of pre-interpretive identification. Before interpretation, however, we know nothing about it other than it exists and where to look in order to begin an investigation about it.
- (ii) When we begin looking we will discover that certain legal practices (activities, attitudes or propositions that we can justify as ‘legal’) will be considered paradigms. These paradigms form the starting point of interpretation.
- (iii) One interprets these paradigms as a complete doctrine, producing a theory of ‘legality’ or ‘the point of law’.
- (iv) This theory allows one to reach conclusions about the content of other laws that expand (or otherwise alter) the list of paradigms (the ‘post-interpretive stage’).
- (v) This, in turn, allows one to modify one’s theory of law (by returning to stage three).”<sup>4</sup>

This breakdown illustrates how a purposive account of law in general both emerges from and feeds into the question of what the law requires in any given case.<sup>5</sup> However, three clarifications must be made. First, the paradigms mentioned here are provisional only, because they are determined exclusively by participant consensus, which (without some additional principle to explain why consensus deserves respect) is morally inert. Any paradigm can be

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\* Research student and Teaching Fellow, University College London; Graduate Teaching Assistant, London School of Economics and Political Science (email: [alexander.green.09@ucl.ac.uk](mailto:alexander.green.09@ucl.ac.uk)) I am grateful to the participants of the UCL Laws Work in Progress Forum for their comments, particularly Lea Raible, Simon Palmer and Oisín Suttle.

<sup>1</sup> Ronald Dworkin, *Law’s Empire* (Oxford: Hart Publishing, 1986), 1; Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Belknap Press, 2006), 8-9; 185-186

<sup>2</sup> Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap Press, 2011), 82-87, 116; Alexander Green, ‘Expanding Law’s Empire: Interpretivism, Morality and the Value of Legality’, 4(1) *European Journal of Legal Studies* (2011), 121-150: 128. I am grateful for Miguel-José López-Lorenzo’s paper ‘Truth and Knowledge in Law’ (on file with the author), which suggests ‘integration’ to be an important general facet of the relationship between legal metaphysics and epistemology.

<sup>3</sup> *Law’s Empire*, 48-53; *Justice for Hedgehogs*, 66-67, 404-405

<sup>4</sup> Green, ‘Expanding Law’s Empire: Interpretivism, Morality and the Value of Legality’, 121-122 (references omitted), see: *Law’s Empire*, 48-49, 65, 72, 87, 89; *Justice for Hedgehogs*, 160-163

<sup>5</sup> The importance of this continuum is often underplayed in the literature. For example, see: Başak Cali, ‘On Interpretivism and International Law’, 20(3) *European Journal of International Law* (2009), 805-822: 807

dropped along the way, if we can demonstrate that it is inconsistent with the most attractive theory of law that explains the other paradigms we wish to endorse as instances of legal practice.<sup>6</sup> It would be open, in theory at least, for an interpretivist to begin stage (ii) assuming that political regime change is illegal, purely because most international lawyers believed it to be, only to revise this view at the conclusion of stage (iii).

Secondly, as a result of the weak *pro tanto* nature of these paradigms, any ongoing reliance upon a certain *type* of 'raw data' will need to be justified by a moral argument and cannot be continued unreflectively.<sup>7</sup> To take an example, for an interpretivist to hold that any account of customary international law must fit State practice and *opinio juris* to some extent, they must explain why *in general* State practice and *opinio juris* are morally relevant to the identification of binding international standards.<sup>8</sup> The relevance of this material cannot be assumed beyond the beginnings of investigation just because most international lawyers agree that it is a paradigmatic feature of custom. Whilst we cannot get off the ground without accepting the agreed paradigms of a practice, we cannot responsibly complete stage (iii) without questioning our initial assumptions, even if our theory of law ends up confirming them.

Thirdly, the extent to which a theory at stage (iii) is required to fit such 'raw data' will depend upon how attractive the former is in substantive terms. This is because the twin dimensions of 'fit' and 'substance' are not separate tests to be applied independently of each other, but part of the same attempt to arrive at the most attractive interpretation of legal practice.<sup>9</sup> For example, as Tasioulas has argued, customary legal standards that clearly reflect the values that *should* govern the international legal system will need less basis in State practice and *opinio juris* to be held binding, whereas those that are less obviously linked to such values will require more.<sup>10</sup> He deploys this insight to explain why the International Court of Justice in the *Nicaragua* case could justifiably conclude that there was a binding customary prohibition on the threat or use of force other than for self-defence, despite the fact that so much contrary practice exists surrounding that standard.<sup>11</sup> It should be clear that the link between this and the previous point is essential. Considerations of fit limit those of substance because there is moral value to a theory that fits legal practice. But this only pertains if the 'raw data' that theories must fit has content-independent moral weight that can exert this interpretive 'tug'. Unfortunately, Tasioulas seems to omit this necessity, assuming that *opinio juris* and State practice are just brutally relevant.<sup>12</sup>

## 2. International Law and Interpretivism

So far, so general: there is nothing here that is obviously inapplicable to the study of international law. However, Dworkin can be understood as relying upon three further claims about the interpretation of law that seem problematic from the international lawyer's perspective. The first claim is that law is unique as a social practice because it concerns the limitations that should be placed upon the collective exercise of coercive force. As Dworkin puts it:

“the most abstract and fundamental point of legal practice is to constrain the power of government...[with reference to] individual rights and responsibilities flowing from past political decisions about when collective force is justified”<sup>13</sup>

<sup>6</sup> *Law's Empire*, 73; Stephen Guest, *Ronald Dworkin* (Stanford: Stanford University Press, 1991), 212

<sup>7</sup> Green, 'Expanding Law's Empire: Interpretivism, Morality and the Value of Legality', 142-143; Başak Cali, 'On Interpretivism and International Law', 809

<sup>8</sup> I take State practice to be what State representatives do and say in their official capacity and *opinio juris* to be publically accessible statements made by a State representative in their official capacity, which affirm either the representative's belief in the existence of a particular customary standard or their desire to see such a standard brought about.

<sup>9</sup> *Law's Empire*, 257

<sup>10</sup> John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 *Oxford Journal of Legal Studies* (1996), 85-128: 109-113

<sup>11</sup> *Ibid.* at 113-114; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* 1986 ICJ Rep at 98, para 186

<sup>12</sup> John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', 112-113; John Tasioulas, 'Customary International Law and the Quest for Global Justice', in A. Perreau-Saussine and J.B. Murphy (eds.), *The Nature of Customary Law: Legal, Philosophical and Historical Perspectives* (Cambridge: Cambridge University Press, 2007), 307-335

<sup>13</sup> *Law's Empire*, 93. See also: *Justice in Robes*, 18, 169, 172, 176

If this conclusion is a necessary part of any interpretivist theory of law, then we must accept that interpretivism cannot explain international law *qua* law and is therefore either: i) deficient in this respect; or ii) correct because international law is in fact *not* law. This dilemma arises because international law cannot generally rely upon the support of collective force and, even if it could, this would not come from the centralised power of a global state. Instead, international law emerges from the activity of a plurality of States and other international actors, over which it places duties that cannot usually be forcefully enforced within the bounds of the system.<sup>14</sup>

Some might be happy to bite this bullet. They might agree that Dworkin's 'fundamental point of legal practice' cannot accommodate international law and therefore, for the interpretivist, domestic law and international law are just different things.<sup>15</sup> Whilst this response is tenable, not least because domestic law and international law clearly *are* different so far as collective force is concerned, I am not prepared to accept it so quickly. Firstly, I do not accept this characterisation of Dworkin's theory of domestic law. Centralised coercion is *not* the organising idea of that account.<sup>16</sup> Secondly, other important threads of Dworkin's argument about the domestic context are equally applicable at the international level.<sup>17</sup> Section 4 will develop this argument, suggesting that the central theme of Dworkin's moral, political *and* legal philosophy is the importance of treating persons (whether legal or natural) with the respect that befits their moral status, whatever that status might be. However, let us take the problem of coercion at face value for the time being: it is a concern that needs answering.

The second, and connected, commitment that might problematise interpretivism's application to international law is Dworkin's belief that domestic law should be viewed as the attempts of political communities (that is to say, States) to treat their members with equal concern and respect.<sup>18</sup> He argued that judicial precedent and statutes are morally relevant to the identification of legal standards within those communities because they promote equal treatment in the exercise of collective force.<sup>19</sup> This is generally considered to be the core of his theory of law as the 'integrity' of a political community, something he explicitly stated to be relevant only *within* such communities and not between them.<sup>20</sup> The obvious implication of this is that international law, if it attaches to a community at all, attaches to a community of communities and *not* to the sort of political community that Dworkin was talking about.

I will say nothing further in relation to this point in this section other than this: the objection as it stands amounts to asking what an interpretivist theory of international law might look like. Law as integrity is Dworkin's *answer* to the question of law's value within the State. It remains to be seen what its value in the international community might be.<sup>21</sup> One answer to that question could come from normative legal positivists such as Jason Beckett or Prosper Weil, who might construct a theory upon the importance of sovereignty, stability and clarity.<sup>22</sup> Sections 4 and 5 will sketch my own approach and the tasks that must be undertaken in order to pursue it.

The third commitment that interpretivism might have at odds with international law is that it is premised upon compulsory adjudication. International courts and tribunals generally lack compulsory jurisdiction and rely upon the

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<sup>14</sup> I assume here that the resort to force in order to uphold international law is illegal without a UN Security Council mandate. See: Article 2(4), United Nations Charter (26 June 1945); United Nations General Assembly Resolution 2625 (XXV) ('The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'); *Nicaragua*, *supra* nt. 10 at 98-101

<sup>15</sup> For a broadly interpretivist take on customary international law that seems to accept this, see: Emmanuel Voyiakis, 'Rethinking the Normative Force of Customary International Law', page 8, (conference paper, cited with permission) delivered at *The Role of Opinio Juris in Customary International Law*, Duke-Geneva Institute in Transnational Law, University of Geneva, July 12-13, 2013

<sup>16</sup> Cf. Nicos Stavropoulos, 'The Relevance of Coercion: Some Preliminaries', 22(3) *Ratio Juris* (2009), 339-58: 349-354

<sup>17</sup> One might also dispute that the meaning of 'coercion' is exhausted by centralised and generally effective force. Coercion in the relevant sense might be a more varied phenomenon, of which the collective use of force is just a particularly extreme example, see: Laura Valenti, 'Coercion and (Global) Justice', 105(1) *American Political Science Review* (2011), 205-220. I am generally sympathetic to arguments such as this, but will not explore the possibility here.

<sup>18</sup> Jason A. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law', 12(4) *European Journal of International Law* (2001), 627-650: 634

<sup>19</sup> *Law's Empire*, 164-224

<sup>20</sup> *Ibid.* at 185

<sup>21</sup> Başak Cali, 'On Interpretivism and International Law', 818-819

<sup>22</sup> Jason A. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law', 627-650; Prosper Weil, 'Towards Relative Normativity in International Law?', 77 *American Journal of International Law* (1983), 413-442

consent of the parties to bring disputes before them. There have been some exceptions to this, in the form of international criminal tribunals that enjoyed compulsory jurisdiction over persons. However, as between States, this generalisation holds true. Even those States that have accepted the compulsory jurisdiction of the International Court of Justice under Article 36(2) of that court's Statute had to accept it in the first place. On this basis, Jason Beckett has claimed that:

"...the tendency towards stability, the role of law, and the avoidance of radical indeterminacy in the Dworkinian analysis are all predicated on the centrality of the courts, or at least of the possibility of unilateral recourse to the courts. Dworkin relies on the courts to stabilize the law (and thus authoritatively determine which values are in the system) but in PIL they simply cannot play this role."<sup>23</sup>

Of course, a commitment to courts as the necessary arbiters of interpretive disputes does not follow from the interpretive methodology set out above. Individual lawyers, academics and State representatives can all engage in the sort of exercise there described. However, it would be too quick to dismiss this objection on that basis. The challenge is that, because interpretivist methodology is irreducibly evaluative, without an institutionalised means of determining the correct international values, international law will founder in indeterminacy and contention. The argument is not that international lawyers *cannot* be legal interpretivists but rather that they *should* not.

In one sense, this objection can be disposed of very quickly. We might reply that it is simply legal interpretivism in disguise. Beckett and others like him have done exactly what Dworkin has asked them to do: considered certain paradigm features of international law, constructed a theory of what is valuable about that practice, and concluded that it must be pursued in a certain way. The fact that their approach looks identical to legal positivism simply reflects the emphasis they place upon stability, clarity and a particular understanding of State sovereignty, as well as their belief that some conception of State consent or 'sources' of law represent the best tools with which to identify law in line with these values.<sup>24</sup> There is nothing in this belief that undermines the soundness of interpretivism as a theoretical approach. Rather, it is as consistent with methodological interpretivism as the normative positivism of Jeremy Waldron is in the domestic context.<sup>25</sup>

However, this would be a rather pyrrhic victory. Interpretivism would have won the methodological battle by conceding the practical war. In their strongest form, interpretivists want every participant in a legal system to make moral judgements about the substance of the law as it relates to specific legal problems, not to accept some version of legal positivism out of fear of adjudicative evaluation.<sup>26</sup> The motivation for this is that, whilst interpretivists recognise the values of stability and clarity, they believe them to be argumentatively downstream from the value of treating entities with the respect that befits their moral status, an exercise that sometimes requires decision makers to depart from the majority view of what past practice might require.<sup>27</sup> In addition to developing the moral status understanding of legality in Section 4, I will sketch some implications of this understanding for a fully interpretivist account of international law in Section 5, which I hope readers will find independently attractive. What I cannot attempt here is the larger task of demonstrating that such a theory is *superior* to a normatively positivistic account of international law.<sup>28</sup> To this extent the challenge raised by Beckett must remain incompletely answered: it the great fight to which this paper is merely the warm-up round.

### 3. Dworkinian International Law

Dworkin appears to take the first and third challenges seriously. In his only published paper on international law, he asks:

<sup>23</sup> Jason A. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law', 635

<sup>24</sup> *Justice in Robes*, 176

<sup>25</sup> Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 164-208

<sup>26</sup> *Law's Empire*, 238-258; Green, 'Expanding Law's Empire: Interpretivism, Morality and the Value of Legality', 141-149

<sup>27</sup> Stephen Guest, 'The Role of Moral Equality in Legal Argument', in Du Bois (ed.), *The Practice of Integrity: Reflections on Ronald Dworkin and South African Law* (Cape Town: Juta & Co., 2004), 18-43

<sup>28</sup> I attack the application of one version of normative positivism to international law in my paper 'The Majoritarian Account of Customary International Law' (on file with author).

“How far can we treat international law as a part, but a very distinct part, of what morality and decency require of states and other international bodies in their treatment of one another?...we face a problem. We can draw that distinction easily for national systems because we find institutional structures there that provide the appropriate vocabulary. These structures broadly distinguish between courts, which have the responsibility and power to enforce rights and obligations on demand, and other sorts of political institutions, like legislatures, that do not. So we can helpfully frame our basic political question in institutional terms: we can ask what rights courts have a responsibility and right to enforce. But no such structure, in any but the most rudimentary form, is yet in place in the international domain, and none can be expected soon.”<sup>29</sup>

This can feasibly be read as an admission of Beckett’s charge that Dworkin’s method cannot get off the ground without compulsory adjudicative jurisdiction to give shape to claims of about the justified use of collective force. Such a reading is confirmed when Dworkin continues:

“Here is my suggestion. Let us imagine (though initially not in much detail) an international court with jurisdiction over all nations of the world. We imagine that cases can be brought before that court reasonably easily and that effective sanctions are available to enforce the court’s rulings...If we can imagine such a court, even as fantasy, then we can frame a tractable question of political morality. What tests or arguments should that hypothetical court adopt to determine the rights and obligations of states (and other international actors and organizations) that it would be *appropriate* for it to enforce coercively? This is a moral question but a special one because judicial institutions with compulsory jurisdiction and sanctions at their disposal are subject to special moral standards of legitimacy and fairness. They have no right to declare and enforce general standards of comity, decency, or wisdom.”<sup>30</sup>

The fundamental question of how to discover the content of international law is being asked in the context of a fictional institution with both compulsory jurisdiction and the capacity to rely upon centralised coercive enforcement. This is tantamount to accepting, as necessary objections to interpretivism, both the problem of coercion and Beckett’s prediction of indeterminacy without compulsory adjudication. Dworkin seemed to believe that the methodology identified in Section 1 cannot be separated from these two issues when considering law. Granted, identifying international law in Dworkin’s way might allow him to deploy interpretivist methodology alongside his other commitments whilst overcoming these difficulties. It would thereby facilitate the second query noted above: what value does analogous work to political integrity at the international level.

However, these gains come at a crippling price. Firstly, Dworkin’s fiction requires us to imagine such fundamental changes to the institutional structure of international law that we would no longer be investigating the same system. Secondly, and perhaps as a result of this, many of his conclusions about what international law requires, look more like conclusions of speculative political theory than moral justifications for what legally enforceable rights and obligations currently exist at the international level.

In his critique of John Rawls’ contractualism, Dworkin warned against appealing to hypothetical agreements in order to settle what duties of justice apply in the real world. He suggested that what one *should* accept, under one set of conditions, may have no bearing at all on what one *might* accept in altered circumstances and therefore cannot bind one by virtue of consent.<sup>31</sup> Whilst I do not consider this to be at all a fatal objection to Rawls, there is truth to the observation that pure hypotheticals cannot conclusively establish what duties exist in the real world, awash as the latter is with various moral, logistical and institutional complications. In light of Dworkin’s insistence on this point in the 1970s, I find it mildly bizarre that he resorted to such an extreme hypothetical when suggesting how we should investigate what actual duties exist under international law.

<sup>29</sup> Ronald Dworkin, ‘A New Philosophy for International Law’, 41(1) *Philosophy & Public Affairs* (2013), 2-30: 13-14

<sup>30</sup> ‘A New Philosophy for International Law’, 14

<sup>31</sup> Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 150-183

The problem is that when one changes the fundamental institutional structure of a legal system one alters, not just *how the law should be identified* in that system, but also *what law there is*. If we are to imagine a hypothetical court with compulsory jurisdiction and effective coercive sanctions, then huge swaths of international law become moot. For instance, what use would the law of countermeasures be, insofar as they provide disincentives and remedies to unlawful behaviour, if such an institution existed?<sup>32</sup> How are we supposed to interpret their content, scope and application if we are compelled to imagine an institutional context under which they would have no reason to exist? Similarly, why would we even entertain a debate over the legality of unilateral humanitarian intervention, if an effective means of judicial recourse existed for serious breaches of fundamental human rights? In the domestic context, the refusal to recognise basic rights by institutions analogous to Dworkin's fictional court merits discussions of civil disobedience, not of legally endorsed self-help. Dworkin actually cites humanitarian intervention as an important debate, apparently without considering that his hypothetical assumes away the context within which it takes place.<sup>33</sup> This is not to mention that procedure of *actual* international courts and tribunals is itself a discrete subject of some importance in international law.<sup>34</sup> All of this is to say that, even on its face, Dworkin's investigative methodology does not seem to be one aimed at *our* international system.

Dworkin might have replied that his hypothetical court is simply designed to elucidate the 'basic structure' (in the Rawlsian sense) of the international legal order.<sup>35</sup> It might not matter that thinking in these terms precludes us from considering certain areas of practice: it is just our 'way in' to thinking properly about international law. Nonetheless, I seriously doubt that Dworkin could have endorsed this interpretation of his project. He described his hypothetical 'as a way of providing a scheme for identifying international law', which suggests a certain comprehensivity.<sup>36</sup> More fundamentally, the absence of a real-life counterpart to his hypothetical seems to be such an important feature of the international legal system that wishing it away would be a corruption of interpretivist methodology. The point of interpretivism is to investigate normative practices *as they are*, not as they might be. The purely *illustrative* use of hypotheticals to clarify claims about how certain practices should be pursued (e.g. Dworkin's Judge Hercules) is one thing.<sup>37</sup> Such imaginings do not yield institutional alternatives but 'ideal types'; instructive idealisations of practices that already exist.<sup>38</sup> To posit a dramatically different institutional structure is to do something quite different. It is to abandon interpretation and move into the realms of reformist political theory. This is what imagining Dworkin's hypothetical international court requires us to do.

This is all pretty damning stuff. Dworkin either seems to be interpreting an alien system of international law, or he has abandoned interpretation and taken up constructivist political philosophy. But there is one final difficulty with Dworkin's account, in that one may question to what extent his substantive theory of international law 'fits'. In itself, a moderate lack of fit might not be fatal to an interpretivist account because the demands of fit are flexible in the face of a substantively appealing interpretation. However, given its questionable methodology and the fact that the last few sections of the paper concern law *reform*, a lack of fit may further suggest that Dworkin's work is not an interpretation of international law, but an account of how it should be changed.<sup>39</sup>

<sup>32</sup> Hubert Lesaffre, 'Countermeasures', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 469-475

<sup>33</sup> 'A New Philosophy for International Law', 8, citing: Alicia L Bannon, 'The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism', 115 *Yale Law Journal* (2006), 1157-1165; Michael Reisman and Myres S. McDouglas, 'Humanitarian Intervention to Protect the Ibos', in Robert B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (Charlottesville: University of Virginia Press, 1973), 175-177

<sup>34</sup> See for example: Chittharanjan Amerasinghe, 'Judges of the International Court of Justice – Election and Qualifications', 14(2) *Leiden Journal of International Law* (2001), 335-348; Ruth Mackenzie and Philippe Sands QC, 'International Courts and Tribunals and the Independence of the International Judge', 44(1) *Harvard International Law Journal* (2003), 271-285; Philippe Sands, 'Global Governance and the International Judiciary: Choosing Our Judges', 56 *Current Legal Problems* (2003), 481-504

<sup>35</sup> John Rawls, 'The Basic Structure as Subject', 14(2) *American Philosophical Quarterly* (1977), 159-165

<sup>36</sup> 'A New Philosophy for International Law', 14

<sup>37</sup> *Law's Empire*, 264-266

<sup>38</sup> Guest, *Ronald Dworkin*, 46-47. As I have suggested elsewhere, even ideal types can create difficulties when not handled with care: Green, 'Expanding Law's Empire: Interpretivism, Morality and the Value of Legality', 141-143

<sup>39</sup> 'A New Philosophy for International Law', 25-29

According to Dworkin, international law rests upon the values of ‘legitimacy’ and ‘salience’. Legitimacy is presented as something that States should progressively realise in order to escape from the inherent flaws of a Westphalian conception of sovereignty. Dworkin describes it as follows:

“...the general obligation of each state to improve its political legitimacy includes an obligation to try to improve the overall international system. If a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive government, then it has a political obligation to do what it can in that direction. Of course that obligation demands only what, in the circumstances, is feasible.”<sup>40</sup>

For present purposes, I will accept that States have a general duty to improve their political legitimacy (but not necessarily that this duty forms the heart of international law). The principle of salience gives more determinate content to Dworkin’s principle of legitimacy by particularising ‘feasibility’:

“If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other forms of coordination, then other states have at least a *prima facie* duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole.”<sup>41</sup>

Notably, Dworkin does not indicate what ‘a significant number of states’ or ‘a significant population’ might be, nor whether these thresholds should be sensitive to the *substance* of putative international standards, *à la* John Tasioulas.<sup>42</sup> (Incidentally, Dworkin considers exactly the same omission to be an ‘unsolvable problem’ faced by international legal positivism.)<sup>43</sup> If we are to assume that ‘significant’ means ‘majority’, so that the agreed codes of practice of a significant number of States equate to the stable practice of a majority of the international community, then Dworkin cannot explain customary international standards such as the prohibition on torture or the use or threat of aggressive force, which pertain despite significantly divergent State practice.<sup>44</sup> It is not open for him to bypass his principle of salience in relation to such standards and instead rely directly upon the general duty of States to pursue their legitimacy. This is because, if he abandons salience here, it would be inconsistent to arbitrarily uphold it elsewhere. This move would effectively reduce his theory of international law to the proposition that ‘international law requires States to pursue greater legitimacy’, which is potentially so far reaching that it could not stand as interpretation of international practice.

The conception of legitimacy Dworkin employs is rather confused and only elaborated through five legitimacy deficits that he suggests international law might solve, of which I propose to examine four.<sup>45</sup> His discussion is ambiguous between the positions that: (i) international law is important because it prevents States from dropping below some minimum standard of legitimacy; and (ii) international law is valuable because it can increase a State’s legitimacy regardless of its extant level. Notably, neither of these propositions is incompatible with, nor automatically follows from, a general duty upon States to increase their legitimacy: we can still ask up to what point legitimacy must be pursued. Depending upon what we take Dworkin to be saying here, his legitimacy principle might cause further problems of fit. To take the first issue he identifies:

<sup>40</sup> ‘A New Philosophy for International Law’, 17

<sup>41</sup> ‘A New Philosophy for International Law’, 19

<sup>42</sup> *supra* nt. 9 and adjoining text

<sup>43</sup> ‘A New Philosophy for International Law’, 7

<sup>44</sup> *Nicaragua*, *supra* nt. 10, para 74

<sup>45</sup> I will not deal with Dworkin’s final concern that ‘people everywhere [should] be permitted to participate in some way - even if only in some minimal way - in the enactment and administration of at least those policies that threaten the greatest impact on them’, see: ‘A New Philosophy for International Law’, 18. My reason for this is twofold: firstly, as will become apparent from my comments on statehood in Section 5, I do not believe that international law is concerned with democratic legitimacy as such, but rather with the existence of viable political communities in a broader sense. Secondly, I find it difficult to locate in international practice any duty that would correspond to this arm of legitimacy when constrained by Dworkin’s principle of salience. It is notable that Dworkin provides none himself. Indeed, he actually admits that realising this principle would require substantial law reform, see: ‘A New Philosophy for International Law’, 27-29



“A coercive government is of course illegitimate if it violates the basic human rights of its own citizens. Any state, even one that has so far been just and benign, therefore improves its legitimacy when it promotes an effective international order that would prevent its own possible future degradation into tyranny.”<sup>46</sup>

This passage seems to suggest that international law helps States to secure minimal legitimacy. However, the heterogeneous nature of human rights instruments indicates that there is more to legal practice in this area than a concern for the minimal legitimacy of States.<sup>47</sup> Some provisions contain policy goals to be progressively realised, rather than minimal conditions. Therefore, if we are to read Dworkin as making a minimalist legitimacy claim about human rights, his approach seems radically under inclusive of legal practice. On the other hand, Dworkin might embrace the heterogeneous nature of the instruments in this area and make a claim of the second sort: that States become *more* legitimate if they do what human rights law as a whole requires them to do. In support of this, he might rely upon a Razian conception of authority.<sup>48</sup> By progressively realising the right to healthcare or housing, my State might become more legitimate by helping me to comply with more reasons that already apply to me: in this instance, by bringing about greater social justice through the deployment of a resource pool to which I have a legal duty to contribute. Dworkin might also posit that such activities confer certain benefits upon me, and my State becomes more legitimate the more it achieves this sort of goal.<sup>49</sup> Such increases in legitimacy would be measured against the extant level. However, if this is the correct reading of Dworkin, we might wonder why he talks in limited terms of ‘basic human rights’ and ‘tyranny’.<sup>50</sup> Dworkin also claims that a State is defective in legitimacy:

“...when it cannot protect those over whom it claims a monopoly of force from the invasions and pillage of other peoples. Any state therefore has a reason to work towards an international order which guarantees that the community of nations would help it to resist invasion or other pressure.”<sup>51</sup>

This is clearly an argument about the minimal legitimacy of States: they must be able to secure territorial integrity and political independence. However, it struggles to explain why *all* States have a duty to uphold these values *in general*. Imagine a global superpower so strong that it has no need for reciprocal peace.<sup>52</sup> The security limb of its internal legitimacy would be guaranteed by the mere fact of its armed might: international law would add nothing. On Dworkin’s account, such States would have no reason to respect the territorial integrity or political independence of others. Indeed, violating these principles may even help to secure its position. But this seems perverse. It is precisely *because* some States are so much more powerful than others that international law places a premium upon such values. The argument therefore suffers both in terms of fit (*qua* superpowers) and substance (because it is unattractive).<sup>53</sup> Perhaps in anticipation of this objection, Dworkin adds a third legitimacy concern:

“There is a mirror-image problem...that threatens legitimacy in a different way. People around the world believe that they have – and they do have – a moral responsibility to help to protect people in other nations from war crimes, genocide, and other violations of human rights. Their government falls short of its duty to help them acquit their moral responsibilities when it accedes to definitions of sovereignty that prevent it from intervening to prevent such crimes or to ameliorate their disastrous effects.”<sup>54</sup>

<sup>46</sup> ‘A New Philosophy for International Law’, 17; see also: Ronald Dworkin, *Justice for Hedgehogs*, 332-339

<sup>47</sup> George Letsas, ‘Dworkin on Human Rights’, 10-12 (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2237860](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2237860)) forthcoming (2014) in *Jurisprudence*

<sup>48</sup> Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 53

<sup>49</sup> Views that link legitimacy to benefits might include, for instance, Hobbes and Mill, see: Thomas Hobbes, *Leviathan or the Matter Forme & Power of a Common-Wealth Ecclesiastical and Civill*, in particular Chapters XIII, XIV, XV, XVII; John Stuart-Mill, *Considerations on Representative Government*, in particular Chapters II and III

<sup>50</sup> Another reason I find such readings hard to swallow is that Dworkin has stated different views on legitimacy elsewhere: “No government is legitimate unless it subscribes to two reigning principles. First, it must show equal concern and respect for the fate of every person over whom it claims dominion. Second, it must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life.” *Justice for Hedgehogs*, 2

<sup>51</sup> ‘A New Philosophy for International Law’, 17

<sup>52</sup> It is at least arguable that the United States had such power in the immediate aftermath of the Cold War.

<sup>53</sup> Apparently, some are prepared to accept exceptionalism, see: John Tasioulas, ‘The Legitimacy of International Law’ in in Samantha Besson and John Tasioulas eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 103-105

<sup>54</sup> ‘A New Philosophy for International Law’, 17-18

This seems like a plausible justification for the existence of the International Criminal Court, the Security Council and various *ad hoc* United Nations tribunals and relief organisations. However, the ambiguity in this passage is brought out when read alongside the fourth legitimacy concern:

“Governments fail their citizens’ legitimate expectations...when they accept an international system that makes impossible or discourages the international cooperation that is often – and increasingly – essential to prevent economic, commercial, medical or environmental disaster.”<sup>55</sup>

In both passages, Dworkin refers to ‘disasters’ and claims that avoiding them will enhance the legitimacy of States. If we accept a progressive interpretation of the relationship between international law and legitimacy, which is to say that the former enhances the latter regardless of the extant level, his claims will likely prove true.<sup>56</sup> States might have authority, in the Razian sense, to demand their citizens’ support so that they can engage in global justice initiatives or coordinated efforts to solve collective action problems. Doing so will increase their legitimacy to the extent that these measures are effective ways to ensure that their populations fulfil *more* of their existing responsibilities. At least in respect of the second of these two passages, Dworkin might also claim that the activity in question yields benefits, the provision of which directly enhances the legitimacy of States. However, if this is the sort of argument that Dworkin intended to make, why is he focused on the prevention of disasters to the apparent exclusion of the relationship between legitimacy and the conferral of other benefits?

Dworkin might be assuming a morally significant distinction between the conferral of protection and other benefits, so that the extent to which a State avoids transnational *harm* is relevant to its legitimacy, whereas the extent to which it provides positive benefits is not. Even if we accept the debateable notion that one can meaningfully distinguish between harms and benefits in this way, Dworkin will still struggle to explain international law that exists to secure such benefits relative to a baseline of non-cooperation. Great swaths of international trade law do not avoid disasters that would have otherwise occurred, but instead allow for gains to be made that would not otherwise have been realised. For instance, agreements securing free trade, in circumstances where it did not exist before, seem to fall more naturally within the category of benefits than harms (assuming that: (i) such distinctions make sense here and (ii) that global economic efficiency is necessarily a benefit).<sup>57</sup> If Dworkin cannot account for such elements of practice, his interpretation of international law further suffers in terms of fit.

#### 4. Interpretivism and Moral Status

I believe that Dworkin’s theory of international law interpretively founders because, despite his protestations to the contrary, he struggled to engage with international law *qua* law without thinking in terms of centralised coercive power and compulsory adjudication.<sup>58</sup> In this section, I propose both a fresh start and a rescue operation. We can meaningfully pursue an interpretivist account of international law, without conceding that it is a radically different thing from domestic law, by emphasising another link between it and the domestic corollary. I shall argue that it is not appropriate limits upon coercive power that define the interpretivist project, but rather a concern for treating entities with the respect that befits their moral status. Crucially, this focal point is not just present in Dworkin’s legal philosophy but is a central theme of just about everything he wrote. By emphasising this continuity, we underline the close link between his moral and political philosophy on the one hand, and legal interpretivism on the other. It also enables us to extend the latter into the international realm without needing to explain away the absence of a global State. Dworkin’s method can be preserved whilst avoiding the difficulties he faced.

<sup>55</sup> ‘A New Philosophy for International Law’, 18

<sup>56</sup> It is difficult to see how global justice failures necessarily undermine States’ *minimal* legitimacy. A legal system that was fully democratic and respected basic human rights, or one that made an otherwise sound claim to Razian authority, would not lack minimally acceptable legitimacy *qua* its domestic population purely because it failed to support global justice initiatives and was *imperfectly* legitimate thereby.

<sup>57</sup> The difficulty with the first assumption lies in finding some pre-evaluative level for setting the baseline against which something should be judged either harmful or of benefit. Take the example of an economic disaster (*E*) caused by existing global economic practices and a coordinated effort sufficient for avoiding it (*C*). We could set out the problem as follows: if States do not *C* then they will suffer the harm of *E*; but we could as easily say that: if States *C* then they will benefit from the avoidance of *E*. Whether one chooses to speak in terms of avoidance of harm or conferral of benefit entirely depends upon whether one places the baseline at the current level of economic inefficiency or at the ideal one is aiming for. (I am grateful to Oisín Suttle for this point.)

<sup>58</sup> ‘A New Philosophy for International Law’, 2, 27, 30

Let us begin in ethics, which concerns how we should approach the challenge of living our own lives.<sup>59</sup> Dworkin distinguished ‘a good life’, seen as a complete ‘product’ of various intersecting causalities, from ‘living well’: the ‘process’ of responsibly pursuing that end, regardless of success or failure.<sup>60</sup> Because we cannot pursue the former save by undertaking the latter (even though we might be frustrated in our attempts) Dworkin argued that we must focus on living well as an end in itself.<sup>61</sup> To this end he presented two ethical imperatives. Firstly, I must treat the success of my life as something of objective value, rather than something I can take or leave as the mood arises.<sup>62</sup> Secondly, because I recognise the importance of this kind of self-respect, I must pursue the success of my life only through means and in accordance with principles that I can honestly endorse.<sup>63</sup> Such authenticity requires that I take seriously my responsibility for the challenge of living well, which in turn forbids me from unreflectively deferring to the authority of others on ethical matters.<sup>64</sup> This responsibility is engaged whenever I experience choice making whilst in possession of the capacities to: (i) hold true beliefs about the world; and (ii) conform my choices to what I believe to be good or right.<sup>65</sup>

Throughout his discussion of ethics, and, indeed, of morality and politics, Dworkin pursues the interpretive method outlined in Section 1.<sup>66</sup> The only difference is that, instead of fitting his account to some aspects of a social practice, he argues that it is true to the phenomenology of ethical decision-making and several of our intuitions. There are two essential points to highlight at this stage. The ethical question *must* be asked in the first person: by the individual living the life at issue. The necessity of personal judgement cannot be escaped. Secondly, it is concerned with how someone should understand their *status*: in terms of what valuable characteristics should I view myself and how should these direct my thought and action?

Turn now to morality, the domain of how we should treat others.<sup>67</sup> Here, Dworkin argues that one cannot claim to recognise the objective value of one’s own life without also recognising the value of human lives in general. To do so would be to replace an objective evaluation with a subjective preference.<sup>68</sup> Throughout his discussion of morality, he argues that our responses to several important issues (when we should aid others, under what circumstances it is wrong to cause harm and when we have obligations to abide by certain conventions) should reflect the integrated nature of morality and ethics.<sup>69</sup> I assume that this approach is generally correct and believe that we can agree to it without having to adopt many of the substantive answers that Dworkin provides. For instance, we might accept that our special responsibility for making a success of our own lives should influence what duties of aid we owe to others, without accepting Dworkin’s argument that it is permissible to rescue a loved one instead of two other people.<sup>70</sup> The points I want to emphasise here are that, for Dworkin: (i) the *moral status* of individuals is doing the same foundational work in morality that it did in ethics; and (ii) the relevant questions are *still* being asked in the first person: what duties do I owe to person X in virtue of their status? The jump from ethics to morality does not require a shift from the first person to an imagined alternative perspective.<sup>71</sup> For the interpretivist, this integration holds for reasons that are both substantive and methodological. Methodologically, we best understand values, be they ethical or moral, by understanding them in light of each other.<sup>72</sup> But it is the *normative* importance of our finding the truth

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<sup>59</sup> *Justice for Hedgehogs*, 12-13, 191

<sup>60</sup> *Ibid.* at 195-202

<sup>61</sup> *Ibid.* at 201

<sup>62</sup> *Ibid.* at 205-209

<sup>63</sup> *Ibid.* at 209-214

<sup>64</sup> *Ibid.* at 99-122; 210-213; Ronald Dworkin, *Life’s Dominion* (New York: Vintage Books, 1994), 69-101, 148-159

<sup>65</sup> *Justice for Hedgehogs*, 238-247

<sup>66</sup> *Ibid.* at 123-188

<sup>67</sup> *Ibid.* at 12-13, 191

<sup>68</sup> *Ibid.* at 255-258

<sup>69</sup> *Ibid.* at 271-317

<sup>70</sup> *Ibid.* at 281

<sup>71</sup> Cf. Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge MA: Harvard University Press, 2009); Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991); Bernard Williams, ‘Persons, Character and Morality’ in *Moral Luck* (Cambridge: Cambridge University Press, 1981)

<sup>72</sup> *Justice in Robes*, 116

that makes understanding our values so important. Additionally, it is *a good thing* that our ethics and our morality do not conflict and our *responsibility* not to simply accept that they inevitability will.<sup>73</sup>

Dworkin's work on political morality has a different focus. He asks what rights, liberties, distributions of resources and governance structures are necessary to ensure equality for everyone pursuing the good life.<sup>74</sup> But it would be wrong to interpret the shift from personal responsibility to institutional arrangements as symptomatic of 'freestanding' political morality. Just as interpersonal morality is integrated with ethics on an interpretivist reading, so is politics.<sup>75</sup> The basic question of political morality is how, given conditions of pluralism, we can live together in such a way that everyone has an equal normative space within which to pursue their conceptions of the good life. We might express this another way: how do we arrange our affairs so that everyone's moral status as ethical agents is equally respected? When put thusly the continuum is clear. We have a personal responsibility to pursue political arrangements that respect the moral status of all who fall within them. Our change of perspective from the first person to the systemic only occurs because:

"...citizens acquit their political obligations in part through a separate, artificial collective entity. Political communities are only collections of individuals, but some of these individuals have special roles and powers that allow them to act, singly or together, on behalf of the community as a whole...Political morality...studies what we all together owe others as individuals when we act in and on behalf of that artificial collective person."<sup>76</sup>

Within this framework Dworkin proposes that justice within a political community consists of the collective's equal concern and respect for the success of each citizen's life.<sup>77</sup> This is to be achieved through the provision of an equal share of resources to each member, with corrective measures designed to offset any handicaps or inequalities of talent that might exist through brute bad luck.<sup>78</sup> The content – but not the size (conceived in abstract terms) – of each bundle of resources should be choice-sensitive, so that abstract equal distribution is commensurable with each person's concrete preferences about particular types of resource.<sup>79</sup> The metric for determining the abstract amount of resources that a person holds is the cost of the choices they make to the actual or potential exercise of freedom on the part of others.<sup>80</sup> Although free to dedicate my life to collecting rare and universally coveted jewels, I will likely meet with less success than those who want to collect something that most consider to be of very little value. This is because a life of collecting coveted jewels is widely desired and we cannot all enjoy success in our goal to the extent that another might, who values undesired rubber bands. Our claims to a particular resource are sensitive to the claims of others. Nonetheless, how my equal share of abstract resources is 'spent', or whether they should be spent at all, should be up to me.

Notice the integration of ethics. Justice acts as a normative parameter upon ethical decision-making. I cannot fully understand a given conception of the good life without understanding the costs to the freedom of others of my pursuing that conception.<sup>81</sup> Conversely, I should have equal abstract resources *because* my justice-sensitive conception of the good life deserves equal respect.<sup>82</sup> When the circumstances I find myself in are unjust I am prevented from meeting the challenge I *should* have faced: the opportunity to use the share of resources to which I have a right.<sup>83</sup> Furthermore, it is *only* under equality of resources that I am justified in exclusively pursuing the success of my own life, because only then do others have an equal capacity to do the same.<sup>84</sup> Despite the complexity

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<sup>73</sup> *Justice for Hedgehogs*, 99-120

<sup>74</sup> Ronald Dworkin, *Sovereign Virtue* (Cambridge Mass.: Harvard University Press, 2000), 65-284; *Justice for Hedgehogs*, 327-399

<sup>75</sup> *Sovereign Virtue*, 278

<sup>76</sup> *Justice for Hedgehogs*, 327-328

<sup>77</sup> *Sovereign Virtue*, 2-4; *Justice for Hedgehogs*, 2

<sup>78</sup> *Sovereign Virtue*, 65-109

<sup>79</sup> *Ibid.* at 68-71

<sup>80</sup> *Ibid.* at 150; Guest, *Ronald Dworkin*, 257

<sup>81</sup> *Sovereign Virtue*, 263-267

<sup>82</sup> *Ibid.* at 279-280

<sup>83</sup> *Ibid.* at 235-236

<sup>84</sup> *Ibid.* at 280-281

of this theory, the moral status of individuals as ethical agents is still central. Political morality, on this account, is just a particularly complex branch of interpersonal morality.

With this in mind, let us return to Dworkin's claim that domestic *law* reflects the attempts of political communities to treat individuals with equal concern and respect. If this simply implies treating them as ethical agents – people capable of being governed by reason and working within the confines of justice to develop a conception of the good life – then it is clearly the moral status of individuals that is doing the foundational work. But law, unlike political morality, is interpreted with reference to the practice of social institutions, rather than just our intuitions and evaluative concepts. This suggests that interpretations of law must be more practice-dependent than those of more abstract political virtues, such as liberty or equality. But what makes this so is not any brute fact about legal practice: as commented above, nothing is *automatically* relevant to legal interpretation. It is the value of integrity that requires us to account for past practice: the latter does not somehow 'cause' us to accept the importance of integrity. The claim is this: in the real world, equal concern and respect for people's moral status requires, amongst other things, that representatives of political communities apply coherent, historically embedded conceptions of justice and fairness within their legal jurisdictions.<sup>85</sup>

How do we get from abstract consideration of equal concern to the requirement of coherent interpretations of past political practice? First, consider what Waldron calls the 'circumstances of politics'.<sup>86</sup> Real people disagree, not only about what the good life consists in, but also about what justice and fairness require. If we are to live together, our plurality must endure the adoption of common standards, even though not all of us will endorse every standard as ideal. Dworkin argues that the most attractive response is for pluralities to accept that they are governed by a scheme of principle, rooted in but not exhausted by their past political activity.<sup>87</sup> This is to be achieved through employing the methodology set out in Section 1. Only by applying a coherent scheme of principle can pluralities become and remain political communities that act with equal concern and respect towards all who fall within their jurisdiction.<sup>88</sup> That scheme of principle is the law of the community in question.

Famously, this cannot ensure justice by itself.<sup>89</sup> Any scheme of principle adopted by a community will likely contain imperfect conceptions of justice and fairness.<sup>90</sup> In an ideal world, the moral status of individuals requires that we treat them as political principle *truly* demands. However, under conditions of plurality, political practice is likely to include moral mistakes. Therefore even the most attractive interpretation of past practice, even excluding decisions that cannot cohere with that interpretation, will fall short of perfection in the eyes of many reasonable people. How should legal interpreters respond? (Note that this is once again a first person question that the interpreter has a personal responsibility to answer.) Abandoning the requirement of fit entirely would have two unattractive implications: a) the moral judgements of the interpreter would be uncurtailed: they would effectively become sole and retroactive legislator for the given dispute; and b) the political community, as a plurality of individuals contributing to a common scheme of principle through their political activity, would cease to exist, replaced with tyrants of the moment.

Integrity requires that interpreters act on behalf of their communities rather than pursuing personal quests for justice. This attitude is attractive because, whilst accepting the special responsibility that interpreters have for the substantive merits of their interpretations, it appreciates the efforts of those that have contributed to the same project in the past. Those who value past practice recognise that they are one of many participants in an ongoing

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<sup>85</sup> *Law's Empire*, 195-202, 219-224. It is likely that the behaviour recommended by integrity would have other beneficial consequences, see: Scott Hershovitz, 'Integrity and Stare Decisis' in Scott Hershovitz ed., *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford: Oxford University Press, 2006), 103-118

<sup>86</sup> Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 101

<sup>87</sup> *Law's Empire*, 211; *Sovereign Virtue*, 233-234

<sup>88</sup> *Ibid.* at 213-214

<sup>89</sup> *Ibid.* at 202

<sup>90</sup> Elsewhere, I have argued that law requires what morality would require, given the history and institutional context of the legal system in question. (See: Green, 'Expanding Law's Empire: Interpretivism, Morality and the Value of Legality', 147-149.) We need not abandon this view in order to concede that no legal system is perfectly just. Justice, understood as ideal political relations and distributions, abstracted from institutional structures, is an important part of morality but not the only part. Institutional, logistical and procedural considerations might pull in other directions.

political venture: they accept their own fallibility and respect the political activity of others.<sup>91</sup> If respecting individuals as ethical agents requires us to value political decisions to which they have contributed, then integrity is integrated with the former sort of respect, at least within democratic contexts.<sup>92</sup>

There are two additional ways in which fitting interpretations to past practice respects the moral status of individuals. The first is directly implied by having the same coherent scheme of political principle applied to all.<sup>93</sup> Equalising legal subjects in this way is, by definition, to treat them as entities with a particular status. Indeed, the revilement of arbitrary adjudication can be neatly explained as an aversion to ignoring that status. The second is that even qualified fidelity to past practice promotes both the stability and clarity of law, by limiting the range of viable interpretations. If we believe this valuable because we appreciate the importance of individuals being able to plan their lives with (or around) common standards, then we accept them as entities capable of being governed by reason and making ethical choices. As we have seen, this forms the core of Dworkin's own interpretation of our moral status.

With these links between integrity and moral status in mind, we can reconsider collective force: is it a necessary part of any interpretivist theory of law? Dworkin uses integrity to ground a legitimacy claim: States are internally legitimate when they display integrity. I see no reason why we cannot do the same for the international legal system, for there is no necessary connection between the need for legitimacy and the availability of force-based sanctions. The collective use of force certainly requires special justification, but there might be many reasons why non-coercive legal practices also require justification of this kind. For instance, legal obligations can be considered burdensome, irrespective of the effectiveness of available coercion, because of the expressive impact of breach. When a collective adopts *legal* practices, it consciously works towards a system of principle that governs the behaviour of its members. Flouting the obligations of a system without moral cause undermines that system.<sup>94</sup> The wrongdoer becomes an outlaw: an enemy of the collective attempt and thereby the individual members of the collective. This expressive impact is instantiated in the abhorrence of lawless behaviour, present at domestic and international levels.<sup>95</sup>

Rational choice models – the most common means employed to explain the burdensome nature of legal standards – cannot adequately capture expressive impact because they only address *consequences*: the likelihood of further disadvantage accruing once lawlessness has occurred.<sup>96</sup> But institutionalised moral condemnation carries its own currency. The equal status of legal subjects is premised upon their treating others as possessing the same. When they abrogate this respect by breaching their obligations, the law makes secondary normative devices ('secondary obligations') available that can be intra-systemically employed to secure (or, more weakly, promote) compliance and/or redress the wrong.<sup>97</sup> At international law, such devices are either: i) the imposition of a secondary duty to provide a remedy, for example damages or restitution; or ii) the imposition of a liability in respect of some conduct another party may then legitimately undertake, such as punishment or countermeasures.

Effective force is not required for secondary obligations to create expressive harm. Their being awarded alone communicates that lawlessness has occurred. Furthermore, should a legal subject refuse (without justification) to comply with their *secondary* obligations, they out themselves as committed enemies of the system, actively working to undermine the entire endeavour.<sup>98</sup> This applies even if other members must continue to interact with them for practical purposes (as may be the case when a truly powerful State flouts their secondary obligations). The lack of respect becomes a matter of record, expressed through a public act of lawlessness that necessarily countermands

<sup>91</sup> *Law's Empire*, 189-190. This might also explain why law as integrity permits interpreters to consider foreign authority, see: Green, 'Expanding Law's Empire: Interpretivism, Morality and the Value of Legality', 146-147

<sup>92</sup> *Sovereign Virtue*, 200-203

<sup>93</sup> *Justice in Robes*, 177; *Law's Empire*, 213-214

<sup>94</sup> Plato, *The Last Days of Socrates*, Hugh Tredennick and Harold Tarrant trans., Harold Tarrant ed. (London: Penguin Books, 2003), 90; David Bostock, 'The Interpretation of Plato's *Crito*', 35 *Phronesis* (1990), 1-20

<sup>95</sup> This view is coherent with the possibility of civil disobedience insofar as the latter is characterised by respect for the law in general, viewed as concurrence with the underlying normative commitments of the relevant community, see: *Taking Rights Seriously*, 214-215.

<sup>96</sup> Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005), 7-10

<sup>97</sup> Hans Kelsen, *Pure Theory of Law*, Max Knight trans. (Berkeley: University of California Press, 1970), 233-236

<sup>98</sup> Accordingly, I take the central case of civil disobedience to be where one disobeys the law openly, whilst willingly accepting the imposition of secondary obligations (usually in the form of punishment).

the collective endeavour. The guilty party may of course not care: they might consider even this degree of expressive harm to be an acceptable price to pay for the advantages gained through non-compliance.<sup>99</sup> But that does not undo the harm – only some act of public pardon can do that. To use Dworkin's words, it affects an entity's 'critical' interests as well as (potentially) any 'volitional' concerns.<sup>100</sup> Because legal obligations are necessary for harm of this sort to accrue, special justification is required. The presence of centralised coercion merely makes an already important task even more imperative.

If international law displays integrity, thereby taking the moral status of its subjects seriously, there is a strong *prima facie* case for believing that its use of secondary obligations is justified. Indeed, *unless* it generally displays integrity, expressive harm of the sort contemplated here will not potentially attach to breaches of international standards in the first place. Of course, the international legal system is not a political community of the same nature as States. The second objection noted in Section 2 still needs to be answered: Dworkin's legal theory requires additional fleshing out in the international context. In the next section, I contemplate what this might require.

##### 5. International Legal Interpretivism and Some Thoughts on Statehood

If I am correct and integrity is potentially applicable to the international sphere, then any features unique to that legal system can be the genuine subjects of an interpretivist study, rather than roadblocks to such an enquiry. To my mind, the most unique feature is that whilst domestic legal systems deal with legal relationships between individuals, or between individuals and the State, the international legal system also deals with legal relationships *between* States. What is more, it is paradigmatic of international legal practice to view States as particularly salient subjects of the law. Therefore, whilst there are many aspects of international practice that might be amenable to interpretivist study, it seems most profitable to answer the following question: what justifies and explains one State having an obligation to another? If we can answer this, we will have uncovered a central structural element of international law.

With this in mind, I propose a three stage project. First, we need to know what about States makes them worthy of respect as legal subjects. Secondly, we need a story about collective responsibility that can explain, amongst other things, how obligations accrued at one time can bind the same State at a later date, even though its population has changed completely.<sup>101</sup> Thirdly, these general observations must be tied to normatively appealing accounts of both treaty and customary law. Furthermore, if these stages are to be interpretations of current practice, they will need to fit international doctrine to an appropriate degree. Needless to say, such a large project cannot be completed here. However, I want to make a few indicative remarks about the first stage, which I suspect will be the most controversial.

As argued in the previous section, the normative core of law as integrity is the importance of treating legal subjects as befits their moral status.<sup>102</sup> Dworkin's work has done much to clarify what this requires in respect of natural persons. However, nothing he wrote directly touches upon what the moral status of other entities might require. Therefore, any interpretivist study of inter-State obligations must begin by asking whether States have a particular moral status and what that status might be. It is of course possible that States in general have no moral status: we might be forced to reach a sceptical conclusion. Nonetheless, I believe that we can find something valuable in the idea of statehood that explains why international law treats States as primary legal subjects, rather than simply as subsidiary administrative bodies.<sup>103</sup> But before setting out my thoughts, I want to be clear about the question we are asking.

<sup>99</sup> We should be sceptical about the assertion that State representatives are *only* concerned with the pecuniary impacts upon their State. If a State's 'honour' (for want of a better word) was not generally taken to matter, then it is difficult to explain why superpowers make a point of convincing the global population that their legally dubious actions are in fact lawful.

<sup>100</sup> *Sovereign Virtue*, 242-244. In the case of States, on the account developed below, this amounts to the interest of each member of a political community in their community being one that behaves with respect towards others.

<sup>101</sup> For discussion, see: James Crawford and Jeremy Watkins, 'International Responsibility' in Besson and Tasioulas eds., *The Philosophy of International Law*, 283-298; Liam Murphy, 'International Responsibility', *Ibid.* at 299-315; David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 81-163

<sup>102</sup> Cf. Cali, 'On Interpretivism and International Law', 818

<sup>103</sup> Cf. Timothy Endicott, 'The Logic of Freedom and Power' in Besson and Tasioulas eds., *The Philosophy of International Law*, 243-259: 253-256

What we are *not* asking, for its own sake at least, is when States constitute legitimate political authorities. It is not necessarily legitimacy that concerns us but *value*. Whilst it is important to ask when States may command obedience, they might merit certain treatment even when they are not legitimate. Consider two loose analogies. Parents can hold legitimate authority over their children for certain purposes, in part justified by the associative relationships in play, in part by the benefits they impart. But parenthood also makes demands upon children that are neither exhausted by, nor dependent upon, parental authority being legitimate. I have a duty to pay particular heed to my mother's feelings just because she is my mother, even though this does not rely upon or necessarily imply that I must do what she says. Similarly, we acknowledge that sentient beings possess a certain status, without imputing any general political authority to them. Your duty not to punch me only relies upon my authority in the narrowest sense: my authority to rely upon or waive the corresponding right. There is no question here of my being akin to a political authority. The value we are searching for is similar. It must ground the obligations States have to each other but need not justify a full political legitimacy claim.

But what if legitimate authority is the only value that States can possess? Many States, perhaps an overwhelming majority, are not legitimate: they either fail for want of democracy or because their distributional frameworks are insufficiently egalitarian to demonstrate equal concern and respect for those living within their territory. If States are only valuable to the extent that they are legitimate, it seems unlikely that international legal obligations can be grounded in the value of statehood. Instead, we would have to ground them in purely instrumental concerns, such as the avoidance of conflict and the procurement of mutual advantage for individuals at the global level. This would be discouraging however, because it jars with the phenomenology of international law, which treats States, and the obligations between them, as important in themselves. We would be forced to concede that such treatment was surface level only.

But I want to suggest (tentatively) that international doctrine points to a value, instantiated in many more States, itself more modest than political authority but important enough to merit respect. This is the value of political community, not in the full blown egalitarian sense discussed above, but rooted in the same concern for political action. It conceives of individuals, not as passive recipients of State institutions, but as beings with the capacity for transformative political activity, who are able, together, to change their collective affairs.<sup>104</sup> On this picture, States are worthy of respect because they are the products of such action, as well as the normative and geographical spaces within which it takes place. I can do no more than provide a sketch of this status here, alongside some indication of how it might fit contemporary legal practice.

Politics, in the sense I am now contemplating, is the business of interacting with equals in the public sphere, in debate over, and pursuit of, collective goals and/or mutual advantage.<sup>105</sup> In order to do this, people need certain kinds of freedom: that of speech, movement and association, as well as sufficient resources – both communal and personal – to allow for their exercise.<sup>106</sup> Where to set the baseline for these things will of course be a matter of some contention, but I think that we can imagine situations in which the adequacy of their provision would be more or less clear one way or the other. Pervasive social instability is clearly destructive of the potential for the (more or less) equal exercise of these capacities, as are persistent conditions of tyranny and abject poverty. Similarly, we can imagine – and observe – States with serious democratic deficits or economic inequalities that provide sufficient conditions for the overwhelming majority of their members to be able to engage in this sort of activity to a non-

<sup>104</sup> Hannah Arendt, *On Violence* (New York: Harcourt, 1970), 44

<sup>105</sup> Hannah Arendt, *The Human Condition*, 2<sup>nd</sup> Edition (Chicago: University of Chicago Press, 1998), 198-199, 215; Hannah Arendt, *The Promise of Politics*, Jerome Kohn ed. (New York: Schocken, 2005), 117

<sup>106</sup> *Sovereign Virtue*, 180, 201-202. A normatively appealing aspect of this approach is that it renders minimal protection of certain rights – some civil and political and some socio-economic – necessary to the central case of statehood. By making portions of human rights law more tightly coherent with statehood it also promotes the idea of international law as a unified system.



negligible level.<sup>107</sup> In contemporary parlance, the former are usually referred to as ‘rogue’ or ‘failed’ States, indicating, perhaps, some sensitivity to the distinction I am drawing.<sup>108</sup>

States that enable this sort of activity need not be internally legitimate. However, they merit a particular kind of respect from external actors. The political capacities of a people concern their *potential* as much their extant state of affairs.<sup>109</sup> It is important, not just that justice pertains amongst a particular group, but that it was *that group* who made it so. Whilst we should be careful not to fetishise this value, so that we abrogate any *in extremis* duties certain institutions might have to take an active role in the internal affairs of particular States, ignoring it completely is to infantilise foreign communities. This point can be tied back to an important aspect of Dworkin’s political thought: States, as personifications of political communities, are constructs through which members fulfil their personal duties to each other. I have an obligation to my fellow members to do all that can be reasonably expected of me to make our State more just, in the same way that I have an obligation to them to show respect for our past political practice. This might require me to push for greater democracy, gender equality or more progressive taxation. The complex network of political action produced by myself and others acting in this way constitutes the ongoing political venture of my community. But unless my fellow members and I are afforded the normative space within which to undertake the relevant activity, we are denied the ability to make good upon this personal responsibility. In an important ethical sense, we are denied the ability to undertake that challenge.<sup>110</sup>

This conception of statehood helps to explain why colonisation is wrong, whilst not justifying the secession of every national group with a will to do so. Colonisation demonstrates disrespect for the equal right of relative political independence that attaches to every community with the *potential* to adopt an appropriate set of social relations (through the collective action of its members). Additionally, political activity within the colonial territory, even on the assumption that the freedoms identified above are available there, is generally less likely to influence the actions of government than activity undertaken within the colonising State’s own territory. A relationship of subjugation pertains, where the local population are politically unequal to the colonisers, simply by virtue of living within the colony. Other – purely instrumental – reasons may also apply, such as a general likelihood that colonisation increases social injustice.<sup>111</sup> However, statehood as political community helps to explain our intuition, derived from the tenor of international practice, that anti-colonialism has a deontological element.<sup>112</sup>

Conversely, this understanding of statehood does not support the proposition that all *national* groups have rights to complete political independence. Firstly, the relevant status attaches to extant political communities, however these happen to be constituted, rather than groups with some shared national identity.<sup>113</sup> Secondly, statehood as political community emphasises the special responsibility that exists in such communities to strive together for a just social

<sup>107</sup> I use the word ‘members’ here, rather than ‘citizens’, because, on the account I am now sketching, the relevant group is not exhausted by those with formal citizenship. For an indication of the kind of scope I am contemplating, see: Samantha Besson, ‘Human rights and democracy in a global context: decoupling and recoupling’, 4(1) *Ethics & Global Politics* (2011), 19-51: 23

<sup>108</sup> Some States facilitate political activity only for portions of their population, excluding groups such as women from political life. My approach to statehood has the (in my view attractive) implication that such States are at peril of abrogating their normative status.

<sup>109</sup> *The Human Condition*, 200-201

<sup>110</sup> An advantage of this minimalist approach to statehood in its link to non-intervention is that it avoids making the empirical assumptions usually associated with communitarian views – that moral consensus exists and is reflected in national governance – see: Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999), 195. My view has many similarities to, but claims less normative currency than, Walzer’s notion of ‘the rights of contemporary men and women to live as members of a historical community and to express their inherited culture through political forms worked out among themselves’, see: Michael Walzer, ‘The Moral Standing of States’, 9(3) *Philosophy & Public Affairs* (1980), 209-229: 211. For one thing, it does not rest upon the presumption of legitimacy at the international level (at 214), however it does suggest that a right to revolution can exist *without* concomitant rights of intervention and may accommodate the view that premature intervention violates the right to revolution (at 215). Provisionally, I accept many of the complexities discussed by Walzer in pages 89-108 of *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977). The exact applicability of Walzer’s arguments to the status I identify, and their independent appeal, is matter for another time. For a critical discussion, see Charles Beitz, ‘The Moral Standing of States Revisited’, 23(4) *Ethics & International Affairs* (2009), 325-347.

<sup>111</sup> *Ibid.* at 98-105

<sup>112</sup> One possibility – albeit one that merits greater reflection – is that, because of the deep contradiction between colonialist practices and the value of statehood, instances of State practice and *opinio juris* that seem to endorse colonialism will be barred from considerations of fit for the purposes of identifying customary international law. Similar considerations may also apply to any ‘raw data’ that deeply conflicts with the political liberties considered here.

<sup>113</sup> David Miller, *On Nationality* (Oxford: Oxford University Press, 1999), 18-19, 59

order, even (and perhaps particularly) in the face of multinationalism and radical pluralism. It supports territorial self-determination, not a politics of national identity.<sup>114</sup>

On this conception, statehood also helps to explain other legal relations. The international rights and obligations accrued by States are as much a part of their ongoing political ventures as their domestic policies. Should another State fail to comply with an obligation owed to mine, then they risk upsetting the attempts of my community to chart its course through history. This demonstrates a lack of respect for the individuals contributing to that process, which in a community that affords the freedoms I have indicated, amounts to disrespecting each potential actor. If this suggestion has merit, then it would be mistaken to argue that unless there is a legitimate government in place, breaching international obligations or violating a State's political independence is to commit no intrinsic moral wrong. When international law values States *qua* States it is not the claims of legitimate governments that do the moral work but the respect due to the special responsibility of each member as a political actor with the potential to influence the community to which they belong.

We should not overstate the normative weight of this status: it is not a justification for sovereignty in the strong Westphalian sense. It is also unlikely that it can be made to justify certain distributive features of international law, such as permanent sovereignty over natural resources, without some powerful adjoining argument. But using it to explain why States are worthy of moral consideration is no stretch at all. A whole host of other considerations will no doubt come into play during the identification and interpretation of customary standards and treaty obligations. Nonetheless, this account of statehood does important foundational work.

It explains why we should be sensitive to the practice of States when identifying custom: when setting out practice and making statements of *opinio juris*, States are taking a political position in the same way that they might take any other. The key difference is that by contributing material that grounds global law, they are making an attempt at guiding the international 'community of communities'. Under these circumstances, their contribution can only be one of influence, rather than unilateral legislation.<sup>115</sup> This does not provide a full theory of custom. We will have to decide whether that practice requires the substantive moral evaluation of putative standards or whether we must simply identify a majority aggregate of support for one standard or another. However, statehood so conceived does answer a question posed in the first section of this paper: why we consider this *type* of 'raw data' – state practice and *opinio juris* – to be relevant to what binding obligations exist at the international level.

It also indicates that States, rather than simply the individuals and administrations that sign and ratify them, have at least two content-independent reasons to uphold their treaty obligations. On the one hand, entering into an agreement with a juridical equal is an important way for political communities to define themselves. This sort of activity enriches the domestic political environment, defining the community's character, whether it results in internal controversy or solidarity. On the other, the very core of this process involves the community becoming bound to the politics of another: failing to uphold a treaty obligation is to risk the disruption of another, morally proximate, community, in a way that fails to show respect for the value of political community in general. This account of treaties is, of course, incomplete. Distinctions will need to be drawn between simple bilateral agreements and multilateral regimes of a more 'constitutional' character; what implications, if any, these thoughts have for treaty interpretation is an additional question in itself. Moreover, all of my remarks about treaty and custom are hostage to the success of stage two: finding a convincing theory of collective responsibility that coheres with our project as a whole.

## 6. Conclusion

This paper has been deliberately speculative, anticipating a larger and more complex argument yet to come. I have tried to show that there is nothing about interpretivism that prevents it from being applied to international law and that, despite what some have concluded, the basic value of integrity is just as applicable in that context. Having identified this value as the importance of treating entities as befits their moral status, I went on to sketch an account

<sup>114</sup> Jeremy Waldron, 'Two Conceptions of Self-Determination' in Besson and Tasioulas eds., *The Philosophy of International Law*, 397-413: 407

<sup>115</sup> This holds even in respect of the most powerful States when making unilateral declarations that are swiftly accepted as grounding customary law, such as the United States when making the Truman Proclamation. Even these have to be generally accepted.

of the moral status of statehood, an important first step in answering the question of what it means for one State to have an obligation to another. If we can develop a more extensive account of each part of the three stage project I identified, then we will have done valuable work towards demystifying the basic structure of international law.

In terms of exegesis, I took pains to demonstrate that my reading of law as integrity coheres with Dworkin's work, taken as a whole. It is perhaps both fitting (and a reflection of the great complexity therein) that his writing is amenable to this sort of potentially controversial interpretation. As Dworkin commented himself, the 'work of philosophical icons is rich enough to allow appropriation through interpretation. Each of us has his or her own Immanuel Kant'.<sup>116</sup> If any modern legal philosopher's work is capable of such an accolade, it is that of Dworkin himself. Although I have taken some pains to distance myself from his position on international law, I hope to have captured at least the spirit of his writing with the suggestions I have made. I believe that an international legal interpretivism provides the best chance for constructive debate about the content and application of international doctrine. It is Dworkin's legacy, both substantively and methodologically, which provides the foundation for this prospect.

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<sup>116</sup> *Justice in Robes*, 261