論　説

Rethinking the Foundations of International Law: A Philosophical and Jurisprudential Perspective

MOUSOURAKIS, George

Abstract

This paper will discuss the extension of Ronald Dworkin's philosophy of value and his theory of political morality from the domestic to the international domain. Dworkin's analysis on this issue, expounded in his posthumous work "A New Philosophy of International Law", is a valuable tool for expanding his thinking on political morality to the global level. In this work, international law theory is understood to revolve around the key concept of legitimacy. The author argues that the principles governing the international legal system are not fundamentally different from those underpinning domestic legal systems. He even goes so far as to assert that the moral title to govern a particular territory is based on the principles that permeate the international system and that, therefore, the legitimacy of domestic legal systems is inextricably linked with the legitimacy of the international system. This is a significant claim that is not elaborated in the above-mentioned work in great depth. Through further conceptual analysis of Dworkin's theory of justice, as expressed in his work on equality, freedom, democracy and law, along with his understanding of responsibility, aid, harm and obligation, this essay will attempt to provide a basis for a more comprehensive account of Dworkin's theory of International Law.

Keywords: *international law, legitimacy, political morality, justice, dignity, rights*

Introduction

In the final years of his long and distinguished academic career, Professor Ronald Dworkin turned his attention to what he regarded as the important yet tenuous and complex field of public international law theory. In an article published posthumously in the journal *Philosophy & Public Affairs* he offered an account of international law grounded in the concept of political morality.[1)] In seeking to construct a theory of international law as a form

of international political morality, Dworkin was building on the argument contained in his groundbreaking work *Justice for Hedgehogs*,[2] in which he pulled together the principal strands of his thinking from the previous five decades to present the most comprehensive articulation of his philosophy.

Even though the final destination may be the international domain, Dworkin commences his account of justice at the level of the individual. What is a good life, a life that is well lived, is a question that goes to the very heart of what it means to be a human being. The title *Justice for Hedgehogs* references the philosopher Isaiah Berlin, who was himself quoting the ancient Greek poet Archilochus' statement that "the fox knows many things, but the hedgehog knows one big thing."[3] According to Dworkin, "value is one big thing" and "the truth about living well and being good and what is wonderful is not only coherent but mutually supporting."[4] Dworkin maintains "that value has truth and that value is indivisible."[5] According to him, the idea "that ethical and moral values depend on one another is a creed; it proposes a way to live."[6]

Dworkin views justice as part of a broader political morality, which together with personal ethics and individual morality are branches of the 'tree of value'.[7] The two fundamental questions situated at the top of that tree are, firstly, how to live? And, secondly, how to treat other people? According to Dworkin ethics is concerned with the question of how to live well; morality is concerned with the question of how to treat other people.[8] Dworkin addresses these questions firstly at the level of the individual. He then proceeds to answer the same questions at a political level and on this basis he constructs his theory of justice.

Dworkin's point is that addressing deeper philosophical issues at the level of individual personal ethics is necessary for understanding the theory of justice he is proposing.[9] For legal theorists primarily interested in the general themes covered in a standard jurisprudential text only the final fifth of his book is relevant. In this, Dworkin is staking his claim for a much grander philosophical vision – his *philosophy of value*. The idea that law is itself a subset of morality is not simply bold but, as Dworkin puts it: 'a liberation'.[10] If this is true at the level of domestic or municipal law, then it should be equally true for law as it operates on the international level. Dworkin asserts that the sources of international law flow from the fundamental moral precepts on which the legitimacy of the entire international legal system ultimately depends.[11] He then goes on to propose that the legitimacy of the sovereign nation state, the 'moral title to govern', is in a crucial way linked to the legitimacy of the international legal system as a whole. This represents a major departure from traditional accounts of the relationship between the domestic and international legal orders.[12]

Dworkin's thesis of the unity of value

According to Dworkin, law is situated within an interconnected and mutually sustaining web of norms that gives meaning to and reinforces political rights and duties. It is only through comprehension of the entirety of this complex structure that one can understand Dworkin's thesis and evaluate its usefulness in constructing a meaningful account of international law. There are three key aspects to Dworkin's theory of value: firstly, that moral judgments are independent; secondly, that moral values are interpretive in nature; and

thirdly, that moral values are integrated and mutually supporting (the 'unity of value' thesis).

The age-old debates in jurisprudence revolve around the questions of what laws are and how they come about, what justifies the duty to obey the law, and most importantly, what makes a law a *good* law, where does morality intersect with law? At one extreme we find the classical doctrine of natural law, which holds that there is a moral order that is intrinsic to the nature of the world, out of which spring certain eternal, universal principles of duty and right. According to natural lawyers, citizens are expected to obey the law not because of the might of the political power that creates it, but because it is founded in a moral principle. This approach to natural law is grounded in metaphysics: natural law is seen as a universal, unchangeable law from which all human positive laws ultimately draw their force. It is significant that the notion of God as the supreme lawgiver is intimately connected with this conception of natural law.

The natural law approach is contrasted with the positivist theory of law according to which the law, as it is laid down by the lawmakers, in logically and conceptually distinct from the law as it ought to be.[13] Another way to express this is to say that a clear distinction must be drawn between 'ought', in the sense of what is morally desirable, and 'is', in the sense of that which actually exists as a matter of fact. In the British philosophical and legal tradition, the distinction between *is* and *ought* is associated with the famous passage of the eighteenth-century philosopher David Hume wherein he denies the prospect of deriving moral premises from statements of fact. In his *Treatise of Human Nature* (1739), Hume stated that "the distinction of vice and virtue is not founded merely on the relations of objects nor is perceiv'd by reason."[14] This is traditionally encapsulated in the phrase: an 'ought' cannot be derived from an 'is'. Law cannot be conflated with morality. If morality exists, it is a totally distinct domain. According to Jeremy Bentham, one could divide jurisprudence into two distinct areas, an area where one stated the law as it is and an area where one looked at the law as it ought to be. For Bentham the distinction between law as it is and law as it ought to be is a necessary condition for the sound appraisal and intelligent reform of positive law. This approach to the matter is essentially an assertion of the difference between law and morality, and that while morality can provide the basis for the critical evaluation of the law there is no necessary connection between the two.

The Continental European understanding of the distinction between *is* and *ought* derives from the Kantian distinction between the phenomenal world, the province of the *is*, and the world of the *right* wherein the categorical imperative reigns – the province of the *ought*. According to Kelsen, we can perceive the world around us in two distinct ways: we can explain it in scientific terms and through scientific laws, which invokes the domain of the *is* where the mode of explanation is causal; or we can look at the world in normative terms and this introduces the domain of the *ought* wherein the mode of explanation is no longer causal but imputational. There is no logical connection between these two ways of perceiving the world and so we cannot employ methods appropriate to one domain to interpret the other. Kelsen regards legal science as a *normative science:* a science that constitutes knowledge of a normative order. According to Kelsen and others in the Continental tradition, an adherence to legal positivism implies a non-cognitivist theory of ethics, which postulates that

ethics is not a matter of knowledge but of attitude. From this viewpoint it is said that in moral reasoning there can be no rational solutions as we cannot 'objectively' know what is right or wrong. Some scholars argue that the British tradition, if it is to be regarded as positivist, must also imply the same. However, neither Bentham nor his successors seem to accept that moral judgements are inherently arbitrary. Although they are regarded as committed positivists and upholders of the distinction between positivist and critical jurisprudence, they proceed from a cognitivist theory of ethics, namely utilitarianism.

In *Justice for Hedgehogs*, Dworkin adopts Hume's thesis that the empirical world should be seen as separate from the realm of value. This is reflected in Dworkin's belief that we do in fact derive 'oughts' from other 'oughts'. His entire thesis rests on the assumption that there is an independent domain of value and that arguments about truth or falsity in that domain are arguments of value leading to value judgments. According to him, "value judgments are true, when they are true ... in view of the substantive case that can be made for them. The moral realm is the realm of argument, not brute, raw fact."[15] Dworkin seeks to redeem values from the negative connotations attached to the term 'value judgment' as a merely personal opinion. He gives morality a place to stand in public debate and, at the same time, he provides us with new insights into fundamental questions of legal theory.

In his highly influential work *Taking Rights Seriously*, Dworkin draws attention to the important distinction between a concept and a conception: "when I appeal to [the concept] of fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it."[16] In his more recent work *Justice in Robes* he describes the concept of justice as 'interpretive' and requiring a shared understanding: "people will share the concept of justice in spite of sharp disagreements both about the criteria for identifying injustice and about which institutions are unjust."[17] As these statements suggest, a concept of justice can be shared even if people have very different conceptions of how to attain justice. Dworkin then proceeds further to argue that not only is the concept of justice interpretive, but the conceptions or theories that we construct about it are also interpretive:

> So a useful theory or conception of an interpretive concept, such as a theory of justice, cannot simply report the criteria people use to identify instances or simply excavate the deep structure of what people mainly agree are instances. A useful theory of an interpretive concept must itself be an interpretation, which is very likely to be controversial, of the practice in which the concept figures.[18]

If justice is an interpretive concept and a theory of justice is an interpretive conception, then a theory of interpretation is needed. Dworkin proposes a 'value-based general theory' of interpretation: "Interpreters have critical responsibilities and the best interpretation of a law ... is the interpretation that best realizes those responsibilities on that occasion."[19] The 'value-based' component of this definition is the requirement of moral responsibility. As there is no neutral scientific or metaphysical plane[20] on which to finally adjudicate, Dworkin constructs his theory of responsibility in terms of the idea of an interpretive form of moral reasoning:

> We cannot be, in any causal way, 'in touch' with moral truth. But we can nevertheless think well or badly about moral issues. What is good and bad thinking is itself a moral question, of course: a moral epistemology is part of substantive moral theory. We use part of our overall theory of value to check our reasoning in other parts.[21)]

According to Dworkin, justice is a facet of political morality. His theory of justice consists of integrated conceptions of four key political concepts: *equality, liberty, democracy* and *law*. He declares that in political morality, as in the realm of value in general, integration is a necessary condition of truth. This means that conceptions of justice will have persuasive force only if they ultimately 'mesh.'[22)] As Dworkin points out:

> it would be flaccidly circular to appeal to liberty to defend a conception of liberty. So political concepts must be integrated with one another. We cannot defend a conception of any of them without showing how our conception fits with and into appealing conceptions of the others.[23)]

From the personal to the political domain and the role of dignity

Dworkin holds that moral responsibility, both personal and political, is intimately linked to ethical responsibility. External responsibility – concerned with how to treat other people – stems from personal responsibility – concerned with how to live – and vice versa. The lens through which all questions of value should be viewed is that of *dignity*, which again is an interpretive concept.

In responding to the question "How to live?", Dworkin holds that our ethical responsibility includes "trying to find appropriate conceptions of the two interpretive concepts: living well and having a good life."[24)] Living well involves striving to attain a good life, even though having a bad life does not necessarily entail that one has not lived well. It is possible to have lived well and had a bad life due to unfortunate life circumstances, such as poverty, severe disability or some other form of hardship. Conversely, an objectively good life marked by professional accomplishments, prosperity and joy can have been lived badly if made possible by murder, fraud, betrayal and other forms of wrongdoing. According to Dworkin, these two ideas are interconnected, although living well is the more basic ethical responsibility.[25)]

The essential requirements of living well are embodied in two ethical principles that together form Dworkin's conception of human dignity, namely the principle of *self-respect* and the principle of *authenticity*. According to the first principle, each person must take his own life seriously – it is objectively important how a person lives. The second principle pertains to the personal responsibility to make our lives our own, endorsed by us and us alone, which implies a right to ethical independence.[26)] These two principles of dignity are taken to operate simultaneously and reinforce rather than conflict with each other.[27)]

Personal ethics and morality are integrated through the operation of the first principle of dignity, since "the self-respect demanded by that first principle of dignity entails a parallel respect for the lives of all human beings."[28)] In other words, the principle of self-respect as applied to morality entails that the lives of others are objectively just as important as one's

own life. The second principle of dignity – the principle of authenticity – as applied to morality, requires that respect must be shown for the ethical responsibilities of other people. Some room is allowed for partiality in matters of personal morality, for it is "not unreasonable to favour yourself ... when that means only that you have weighed the impact of some decision on your own life more heavily than its impact on someone else's life."[29] This does not mean that one has failed to accept that the life of others is objectively just as valuable as one's own. Dworkin relies on the concept of reasonableness as an important ethical criterion to help bridge the gap between ethics and morality. He declares that "it is unreasonable of you to favour your own interests in circumstances when the benefit to you is relatively trivial and the cost to others very large."[30] This is because such a stance is inconsistent with recognizing the "objective as well as subjective importance of your own life."[31]

Individual citizens discharge their political obligations in part through participation in an collective body or political community.[32] Dworkin holds that political morality pertains to what "we all together owe others as individuals when we act in and on behalf of that artificial collective person."[33] He declares that in the domain of political morality a focus on 'rights' is more useful than a focus on duty or obligation because the 'precise location' of political rights is with the individual. At this point, finally, the above-mentioned principles of dignity are applied to the political realm. The principle of self-respect requires that government treat all those in its charge with equal concern – it should respect the individual's right to equal concern. The principle of authenticity requires that government show respect for its subjects' independent ethical responsibilities – the individual's right to full respect.

Throughout his analysis, Dworkin emphasises his belief in the possibility for attaining objective truth in matters of value: "I believe that some institutions really are unjust and some acts really are wrong no matter how many people believe that they are not."[34] At the personal level, "our dignity requires us to recognize that whether we live well is not just a matter of whether we think we do."[35] At a political level, there will be disagreement about correct conceptions of justice, but those in power must believe that their actions are just.[36] According to Dworkin, moral truth is even more needed in the political domain because politics involve the exercise of coercive power: "we cannot stand up to our responsibility as governors or citizens unless we suppose that the moral and other principles on which we act or vote are objectively true. It is not good enough for an official or voter to declare that the theory of justice on which he acts pleases him."[37]

Legitimacy, justice and human rights

According to Dworkin, the two central aspects of political morality are people's convictions about the legitimacy of government and human rights. Both have their origin in human dignity.[38]

Dworkin holds that democracy is constrained by the requirement of legitimacy. Political obligation is a kind of associative obligation where "coercive political organisations undermine the dignity of their members unless each accepts a reciprocal responsibility to the others to respect collective decisions."[39] This is the case as long as such decisions have met certain appropriate conditions that are normally determined by constitutional structure

and history. Dworkin utilizes the concept of legitimacy to address what he refers to as the 'paradox of civil society.'[40] Collective government capable of enforcing its mandates is essential to our dignity as "anarchy would mean the end of dignity altogether"[41] and yet coercive government also threatens to make dignity impossible as one's special responsibility for one's own life is subject to the dominion of others.[42]

Dworkin draws a distinction between legitimacy and justice and declares that both are a matter of degree as a state will never be entirely legitimate or fully just:

> Governments have a sovereign responsibility to treat each person in their power with equal concern and respect. They achieve justice to the extent they succeed. But it is controversial what success means: nations, political parties and political philosophers disagree about justice.[43]

How then can a government meet the requirements of dignity? How can it strike the requisite balance between equal concern and full respect? The coercive authority of government is predicated on taking cognizance of and observing the twin principles of dignity. Even where the government's coercive action would enhance or promote the welfare of the community as a whole, such action would lack legitimacy unless it respects the two requirements of equal concern and full respect 'person by person'.[44] Dworkin declares that the principles of dignity are the ultimate source of all political rights, and as such they have the capacity to function as 'trumps' over otherwise adequate justifications for a government's collective policies. He remarks that a government can still be regarded as legitimate in circumstances where it is striving for its citizens' full dignity even though it may be following a flawed conception of what dignity requires. A government policy may 'stain' a state's legitimacy without destroying it altogether; but where the stain is "dark and very widespread" and if it is "protected from cleansing through politics" then it is possible for political obligation to lapse altogether.[45]

Dworkin draws attention to the distinction between political rights and legal rights, observing that no nation turns all political rights into constitutional rights or even ordinary legal rights capable of enforcement through adjudicative institutions and processes. He claims that there is an even more basic, because more abstract, right underpinning the general political right to dignity. This more fundamental right, which he refers to as the 'right to an attitude', is the source from which all other rights flow. It is "the right to be treated *as* a human being whose dignity fundamentally matters."[46] This basic human right arises when the interpretive question, used also to determine legitimacy, is asked, namely "Can the laws and policies of a particular political community sensibly be interpreted as an attempt, even if finally a failed attempt, to respect the dignity of those in its power?"[47] Where laws or policies disregard the responsibility to respect dignity either toward their subjects at large or some particular group within them, such laws or policies infringe a human right. For instance, the first principle of dignity, namely that of equal concern, will be breached by acts of racial prejudice that assume superiority of one group over another (the most extreme example of this would be genocide). Similarly, rights to due process of law and freedom of property also derive from the right to equal concern. The second principle of

dignity, requiring full respect for our personal responsibility and ethical independence, buttresses the rights of free speech and expression, freedom of conscience, freedom of religion and political activity embodied in diverse domestic and international human rights instruments. Any legal enactment that forbids women from holding property, exercising a profession or participating in the political process cannot be reconciled with either of the principles of dignity.

Dworkin recognizes that different political cultures may have different views about the manner in which the personal responsibility of individuals is respected. However, some acts of government do not represent an effort made in good-faith to comprehend and enforce that responsibility; rather "they express a denial of personal responsibility altogether."[48] He refers to torture as the most extreme example of this because the individual subjected to torture is reduced to "an animal for whom decision is no longer possible" and this is the most "profound outrage to his human rights."[49] Dworkin's response to the question "Are human rights truly universal?" is both yes and no. He maintains that one must be sensitive to socio-cultural and other differences that affect available interpretations. In this respect he remarks that "a health or education policy that would show good-faith effort in a poor country would show contempt in a rich one."[50] But the abstract criterion derived from the fundamental concept of dignity is considered by Dworkin to be 'genuinely universal'.[51]

Unlike the theory of international law, which has received comparatively little attention,[52] human rights theory has been at the forefront of scholarly debates and political thought in recent years. Charles Beitz, a leading theorist in the fields of human rights and global justice, draws a distinction between three conceptions of human rights: *naturalistic*, *agreement-based* and *practical*.[53] He dismisses the idea of naturalistic, moral or 'top down' principles (such as James Griffin's 'personhood'[54], or indeed Dworkin's concept of human dignity) as a means of identifying and construing human rights and also finds that consensus or agreement models may be too restricted in scope and may thus fall short of the robust set of norms that have come to define contemporary human rights doctrine.[55] Agreement-based theories, also often referred to as 'political' theories, are associated with John Rawls' notion that human rights must be justified by a form of public reason rather than any form of moral reasoning.[56] Following on from Rawls, Joseph Raz declares human rights to be "rights which set limits to the sovereignty of states."[57] According to Raz, the violation of 'important' rights can justify collective international action such as economic sanctions or military intervention. For Raz, the requirement of importance cannot be explained on the grounds of the naturalistic perspective.[58] Beitz proposes that human rights can be identified through interpreting the reasoning implicit in contemporary human rights practice. He also places a temporal limitation on human rights.[59] Dworkin asserts that scholarly attempts at demarcating human rights from other political rights in terms of practice or consensus have proved 'arbitrary.'[60] Far from being derived from prevailing international practice, the fundamental human right that Dworkin talks about operates at the most abstract plane: it is the *right to an attitude*.

The concept of law

In drawing a distinction between law and other key concepts inhabiting the domain of political morality, such as liberty, equality and democracy, Dworkin emphasizes the role of institutions. The rights the law is concerned with may be usefully distinguished from other types of political rights in the context of a political community that recognizes some form of the separation of powers doctrine. A legal right can be enforced as required, without further intervention on the part of the legislature, in an "adjudicative political institution such as a court."[61)]

In so far as democracy is concerned with that aspect of our liberty with respect to which a political community's collective decisions about justice can be coercively enforced, then law is about the best 'moral justification' for the application of the state's coercive power. Democracy and law exist in a state of perpetual tension, and both are grounded on the notion of coercion.[62)] From Dworkin's point of view, law does not operate as a rival system of rules that might be at odds with morality. Rather, he portrays law as itself a subfield of morality that embodies procedural justice, which he defines as incorporating both the morality of fair governance and that of just outcome. Procedural justice is based on what may be referred to as 'structuring fairness principles' that speak to issues of political authority, precedent and reliance. Underlying such principles are the more potent moral arguments concerning human rights, for the law must also be viewed through the lens of human dignity.

International political morality: Dworkin's theory of public international law

If, as Dworkin asserts, convictions concerning the legitimacy of government power and the role of human rights constitute the most fundamental part of political morality at the domestic level, then it is reasonable to assume that this also holds at the level of international political morality. According to Dworkin, the principle of legitimacy places substantive constraints on democracy and gives rise to a continuing obligation to not only abide by the law of the community, but to constantly endeavour to improve the law's treatment of human dignity, in other words, to constantly endeavour to strengthen the legitimacy of the state. In dealing with the issue of international political morality, Dworkin extends the scope of this continuing obligation to enhance the conditions of legitimacy from the domestic state level to the entire international system.[63)] Taking the concept of legitimacy as his starting-point, his aim is to develop a foundational theory of international law, one that accounts for the roots of law in political morality. This approach to international law is a continuation and extension of his work on value more generally. In this respect, a better insight into Dworkin's theory of international law can be gained through an analysis of his work on value from the perspective of international legal theory.

The dominant paradigm of international law has its origins in the so-called 'Westphalian' system of international order, according to which the sovereign power of nation-states

might be limited by the voluntary acts of state institutions (voluntarism). Positivist legal theorists have struggled to find the Hartian concepts of Rule of Recognition and secondary rules in the domain of international law. A solution to this problem has recently been proposed by assuming that the principle of state consent can serve as the basis of an international Rule of Recognition, as expressed by Article 38(1) of the Statute of the International Court of Justice.[64] This Article refers to the rules that are 'expressly recognized by the contesting states'[65], general practices that are 'accepted as law'[66] and 'general principles of law' that are 'recognized by civilized nations'[67] as being the principal sources of international law relied upon by the International Court of Justice.[68] Dworkin accepts that the consent model of international law addresses the paradox of the contemporary state system: a sovereign state can be a subject of law because the state has consented to be bound by law.[69]

According to Dworkin, however, the consent model of international law is 'radically defective',[70] for this model entails the potential to bind states that have not granted consent.[71] One of the principal objectives of international law is to curb the threat some states pose to others and this objective cannot be met unless we discard the 'straitjacket of state-by-state consent.'[72] What then is the key principle of international law that allows us to say that international law cannot be ignored or set aside regardless of consent? Dworkin asserts that the moral basis of international law is grounded in legitimacy and requires states to accept shared constraints on their sovereign power. The justification for coercive political power arises "not just *within* each of the sovereign states who are members of the Westphalian system but also *about* the system itself."[73] The principles that apply to the international system are in fact 'part of the coercive system' that sovereign states impose on their own citizens – hence the standing duty of states to improve their own political legitimacy "includes an obligation to try to improve the overall international system."[74] It is on this basis that Dworkin formulates his structural principles of international law philosophy, namely the *duty to mitigate* and the *principle of salience*.

The duty to mitigate is described by Dworkin as "a duty to pursue available means to mitigate the failures and risks of the sovereign-state system."[75] However, he notes that the duty to mitigate is insufficiently determinative in isolation, as a diversity of international law regimes could potentially serve to support and enhance the legitimacy of the international system and so an additional fundamental structural principle is required.[76] Dworkin puts forward the principle of salience to determine which is the best option. This principle operates where a significant number of states encompassing a significant population have an agreed code of practice, either by treaty or other form of coordination. Then a *prima facie* duty exists for other states to also subscribe to that practice on the proviso that such a general practice, expanded in that way, would improve the legitimacy of both the subscribing state and the international order as a whole.[77]

Dworkin proposes that through the principle of salience, the charter and institutions of the United Nations represent an international order that all states have a moral obligation to treat as law – the moral force of salience is the "route to a satisfactory international order."[78] The norms of such an international order are set out in broad multilateral agreements such as the United Nations Charter, the Geneva Conventions and their Additional Protocols, the genocide agreements and the Treaty of Rome establishing the International

Criminal Court; these are law for all, not just their initial signatories.[79)]

The philosophical shift from the concept of consent to the principle of salience is significant, even though at first glance the salience principle seems to lead to similar sources of law to the positivist consent-based scheme that Dworkin argues against. The main impact of Dworkin's approach, it is submitted, pertains to the interpretation of international law. As Dworkin observes when he discusses the 'major yield' of theories about the grounds of international law:

> If the two jurisprudential accounts end in roughly the same view of the actual sources of international law, does it make any difference which we choose? Have I only marched you up the hill and then marched you down again? No, because, as I said, the major yield of any theory about the grounds of international law is an interpretive strategy for international law. … We should interpret the documents and practices picked out by the principle of salience so as to advance the imputed purpose of mitigating the flaws and dangers of the Westphalian system.[80)]

According to Dworkin, an interpretive strategy for international law should make best sense of the relevant sources in light of the underlying aim of international law to bring about an international order that: (a) protects political communities from external aggression; (b) protects the citizens of such communities from domestic barbarism; (c) facilitates coordination when this is deemed essential; and (d) provides some measure of participation by people in their own governance across the world. The first and second of these goals speak directly to issues of human rights and operate at the level of the citizen. The third goal is relevant to matters of equality, conceived as connected with distributive justice. The final goal is one predicated on the concept of democracy. All goals have their ultimate basis in the requirements of human dignity.

Concluding remarks

As Professor Jeremy Waldron has observed, the value of Dworkin's philosophy of law lies in the "elaboration of a genuine *alternative*" to legal positivism that essentially developed "under its own momentum."[81)] Although he developed his theory at various points by "reference to existing players in the field"[82)], Dworkin sought to construct a free-standing abstract model of law that would operate as a practical tool of interpretation capable of facilitating a better understanding of existing practices and procedural norms. He wanted us to fathom what we are already doing, and to do it better. It is telling that in what he would probably have known would be his final academic journal publication, he chose to focus on international law theory. In many ways it was a natural and logical step to extend his thought on political morality and apply it to the international legal system. It is doubtful whether Dworkin was able to give his most complete account as he died while the article was in its final stages of revision. There is no doubt, however, that the theory sketched out by Dworkin in '*A New Philosophy of International Law*' is part of a continuum of thought and thus there is much to be learned from reading the sum of his work on political morality from the

perspective of international law theory. The theoretical account outlined in the above-mentioned work would be considerably broadened and enriched through this approach. Dworkin's ideas have provoked both sharp criticism and spirited defence, but it cannot be denied that he has been one of the most original and significant legal philosophers of our times. It is submitted that international law theory would greatly benefit from Dworkin's insights on international political morality – his conception of justice on the global stage.

Dworkin has stressed that the 'existential challenge' for international law remains daunting. This is because the question of why certain international legal instruments, such as the Charter of the United Nations or the Geneva Conventions, constitute some kind of legal system influences the manner in which such instruments should be interpreted. The justifications for international law cast an 'interpretive shadow'.[83] Why is this significant at a practical level? Dworkin offers two answers: firstly, even the most powerful nations claim to defer to international law, "they appeal to their conception of what that law requires or permits to justify their actions"[84], and a persuasive account of international law may be relied on to verify or contradict such claim; secondly, a time may come in the not-too-distant future where the need for "an effective international law is more obvious to more politicians in more nations" than presently. Dworkin gives the example of environmental or climate change as a possible trigger for such a need.[85]

Dworkin described international law as "fragile, still nascent and in critical condition."[86] He pointed out that a clear theoretical account of international law's basis was needed in order to determine what international law actually holds on practical questions. The situation where international military action, such as the NATO intervention in Kosovo, could be declared illegal under international law but upheld as a "morally mandatory act of international civil disobedience" was an example for Dworkin of a 'dangerous' outcome of the two systems approach to law and morality.[87] The 'unity of value', or a single-system conception of law views law as a distinct part of political morality because of the requirements of procedural justice or its "special structuring principles."[88] These impose specific moral standards of legitimacy[89] and fairness[90] upon the law, which arguably enhance certainty and accountability for both domestic and international law.[91]

The 21st century so far has yielded much tragedy to sustain the interest of international lawyers and scholars. It is interesting that Dworkin subtitled his discussion of poverty "*Philosophy and Shame*."[92] He acknowledges the potential for abstract theoretical constructions to appear "artificial and self-indulgent" in circumstances of suffering. He stresses however that it remains important to "continue to trouble the comfortable with argument."[93] In a recent statement Catherine Ashton, EU High Representative for Foreign Affairs and Security and Vice-President of the European Commission, declared that in Syria "on the 21st of August 2013 we saw chemical weapons were used to kill hundreds of people, which constituted a war crime and a crime against humanity, running contrary to all values shared by the international community."[94] What are these shared international values? Where can we discover them? How should they operate? It is important that we should endeavour to address these fundamental questions, for this brings us closer to the truth. And as Dworkin has declared: "Truth has been my subject all along."[95]

Notes

1) Dworkin (2013).
2) Dworkin (2011).
3) Ibid., 1.
4) Ibid.
5) Dworkin (2013: 15).
6) Dworkin (2013: 1).
7) Dworkin (2013: 5).
8) Dworkin uses the terminology of Bernard Williams in *Ethics and the limits of philosophy* (1985: 174-96).
9) Dworkin (2011: 2).
10) Dworkin (2011: 418).
11) Dworkin (2013: 22).
12) Ibid., 19.
13) Harris (1980: 16).
14) Hume (1969: 521).
15) Dworkin (2011: 11).
16) Dworkin (1978: 168).
17) Dworkin (2006: 11).
18) Ibid. On the role of history in interpretation Dworkin states that "interpretation engages history, but history does not fix interpretation."
19) Dworkin (2011: 7).
20) Ibid., 12.
21) Ibid. According to Stephen Guest, "In *Justice for Hedgehogs* Dworkin makes it clear how far he intends interpretation to extend – to nothing less than over all matters of evaluative judgment and constituting that part of knowledge that is not science." Guest (2013: 104).
22) Dworkin (2011: 5-6).
23) Ibid., 7.
24) Ibid., 195.
25) Ibid., 201. See also p. 195 where Dworkin applies a distinction between the 'right' and the 'good', giving the 'right' priority.
26) Dworkin (2011: 211-212). Note here that authenticity is not compromised by limitations of nature or circumstance. A person may not have many colours on his palette, but the life he designs with the colours he has may be just as fully authentic, just as firmly the life that he rather than anyone else has designed.
27) Ibid., 263.
28) Ibid., 255. Note that Dworkin terms this 'Kant's principle': "you see the objective importance of your life mirrored in the objective importance of everyone else's."
29) Ibid., 270.
30) Ibid.
31) Ibid. As Stephen Guest observes, "our ethics – our 'living well' – allows competition with others where such competition falls short of harming them." Guest (2013: 24).
32) Dworkin (2011: 327).
33) Ibid., 328.
34) Ibid., 7-8.
35) Ibid., 8.

36) Ibid.
37) Ibid. See also Chapter 8 where Dworkin argues that truth is itself an interpretive concept in moral reasoning.
38) Dworkin believes that a theory of political rights or political morality can only be distinguished from personal moral rights in a community that has a version of Hart's secondary rules which create separate legislative, executive and adjudicative authority and jurisdiction.
39) Dworkin (2011: 320).
40) Ibid.
41) Ibid.
42) Consider on this issue Sreedhar and Delmas (2010: 750).
43) Dworkin (2011: 321).
44) Ibid., 330.
45) Ibid., 323.
46) Ibid., 335.
47) Ibid.
48) Ibid., 336.
49) Ibid., 337.
50) Ibid., 338.
51) Ibid.
52) Consider Besson and Tasioulas (2010: 1-2).
53) Beitz (2009: chapters 3-5).
54) Griffin (2008: 20).
55) See on this Etinson (2010: 442).
56) As John Rawls remarks, human rights "do not depend on any particular comprehensive religious doctrine or philosophical doctrine about human nature. The Law of Peoples does not say, for example, that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to those rights." Rawls (1999: 68).
57) Raz (2010: 327).
58) Ibid., 323.
59) According to Charles Beitz, "International human rights are not even prospectively timeless. They are standards appropriate to the institutions of modern or modernising societies." Beitz (2003: 42-3). Similarly, John Tasioulas notes that "[H]uman rights enjoy a temporally-constrained form of universality, so that the question concerning which human rights exist can only be determined within some specified historical context." Tasioulas (2007: 76).
60) Dworkin criticizes the methodology of Beitz for distinguishing human rights from political rights.
61) Dworkin (2011: 404-5).
62) Consider on this Dworkin (1986: 93).
63) Dworkin (2013: 19).
64) Besson (2010: 180-184).
65) Art 38(1)(a) International conventions both general or particular.
66) Art 38 (1)(b) International customary law.
67) Art 38(1)(c) The law of civilized nations or *ius gentium*.
68) Even the concept of peremptory norms, or *ius cogens*, is brought under the umbrella of consent via Article 53 of the Vienna Convention on the Law of Treaties (1969).

69) Dworkin (2013: 6).
70) Ibid., 6-10, 15.
71) Ibid. 7. This occurs through the medium of customary law and the general principles of law shared by 'civilised nations'. Such an approach has the effect of undermining the 'axiomatic place of consent' and therefore the proposed jurisprudential basis of the entire consent model.
72) Ibid.
73) Ibid., 17.
74) Ibid.
75) Ibid., 19.
76) Ibid.
77) Ibid.
78) Ibid.
79) Ibid., 20-21. Dworkin distinguishes such broad agreements from international 'club' like arrangements, such as, for example, the European Union, whose institutional procedures can only reasonably be used by the 'club' members.
80) Ibid., 22: consent leads to an 'interpretive dead-end'.
81) Waldron (2013:1).
82) Ibid.
83) Dworkin (2013: 13).
84) Ibid., 15.
85) Ibid.
86) Ibid., 23.
87) Ibid.
88) Ibid., 12-14. See also Dworkin (2011: 5, 408, 411).
89) Also referred to by Dworkin as 'fair governance' or 'democracy'.
90) Also referred to by Dworkin as 'just outcome'.
91) Although there is not much detail given by Dworkin, the principle of just outcome is concerned with precedent, reliance, fair play and fair notice. It is interesting to note that Dworkin's structural fairness principles that also place weight on convention, expectation and history bear some resemblance to Lon Fuller's inner morality of law. See Fuller (1969: Part II, The Morality that Makes Law Possible).
92) Dworkin (2011: 351).
93) Ibid.
94) Strasbourg, 11 September 2013 A 453/13 Speech by EU High Representative Catherine Ashton on Syria, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/138726.pdf>.
95) Dworkin (2011: 172).

References

Beitz, C. (2003). What human rights mean. *Daedalus* 132 (1), 36-46.

Beitz, C. (2009). *The idea of human rights*. Oxford: Oxford University Press.

Besson, S. (2010). Theorising the sources of international law. In S. Besson & J. Tasioulas (Eds), *The philosophy of international law* (pp. 163-186). Oxford: Oxford University Press.

Besson, S., & Tasioulas, J. (Eds). (2010). *The philosophy of international law*. Oxford: Oxford University Press.

Dworkin, R. (1978). *Taking rights seriously* (2nd ed.). London: Duckworth.

Dworkin, R. (1986). *Law's empire*. Cambridge, MA: Harvard University Press.
Dworkin, R. (2006). *Justice in robes*. Cambridge, MA: Harvard University Press.
Dworkin, R. (2011). *Justice for hedgehogs*. Cambridge, MA: Harvard University Press.
Dworkin, R. (2013). A new philosophy for international law. *Philosophy & Public Affairs*, 41 (1), 2-30.
Etinson, A. (2010). To be or not to be: Charles Beitz on the Philosophy of Human Rights. *Res Publica* 16 (4), 441-448.
Fuller, L. (1969). *The morality of law* (2nd ed). New Haven: Yale University Press.
Guest, S. (2013). *Ronald Dworkin* (3rd ed.). Stanford: Stanford University Press.
Griffin, J. (2008). *On human rights*. Oxford: Oxford University Press.
Harris, J. W. (1980). *Legal philosophies*. London: Butterworths.
Hume, D. (1969). *A treatise of human nature*. London: Penguin. (Original work published 1739-1740).
Rawls, J. (1999). *The law of peoples*. Cambridge, MA: Harvard University Press.
Raz, J. (2010). Human rights without foundations. In S. Besson & J. Tasioulas (Eds), *The philosophy of international law* (pp. 321-337). Oxford: Oxford University Press.
Sreedhar, S., & Delmas, C. (2010). State legitimacy and political obligation in *Justice for Hedgehogs*: The radical potential of Dworkinian dignity. *Boston University Law Review*, 90 (2), 737-758.
Tasioulas, J. (2007). The moral reality of human rights. In T. Pogge (Ed.), *Freedom from poverty as a human right: who owes what to the very poor?* (pp. 75-101). New York: Oxford University Press.
Waldron, J. (2013). Jurisprudence for hedgehogs. New York University School of Law, Public Law Research Paper No. 13-45. Available via SSRN. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290309. Accessed 27 Aug 2019.
Williams, B. (1985). *Ethics and the limits of philosophy*. Cambridge, MA: Harvard University Press.

(MOUSOURAKIS, George, Associate Professor, Ritsumeikan University, College and Graduate School of International Relations; Professorial Research Fellow, Institute of Comparative and International Law; Fellow, Max Planck Institute and European Law Institute. The first draft of this article was completed at the University of Verona and Charles University, Prague. I am indebted to Professor Donata Gottardi, Dean of the Faculty of Law at the University of Verona, and Dr. David Kohout, Head of the International Office in the Faculty of Law at Charles University, for their hospitality and support during my stay at their Institutions.)

国際法の哲学的基盤を再考する

長い有意義なキャリアの最終段階において、ロナルド・ドゥオーキン教授は重要だが議論が尽くされていないと彼が考えていた国際法理論の領域へ関心を向けた。教授の死後に Philosophy & Public Affairs で発表された論考において、ドゥオーキンは政治哲学に基礎づけされた国際法理論について説明した。国際法理論を一つの国際政治上の道徳として示すにあたり、ドゥオーキンは発展の余地が十分に残された著書である「ハリネズミの正義」の中で行った主張の延長線上で [国際法理論についての] 議論を行っていたが、「ハリネズミの正義」は、過去 50 年に及ぶ彼の数多くの思想の軌跡をひとまとめにした書物であり、彼の哲学について最も明確化された表現を与えた書物でもある。ドゥオーキンのこの論文では、国際法理論は正統性の概念に基礎づけられており、国内法秩序の正当性は国際秩序の正当性に依拠することになる。これは重大な主張であるが、論文では深くは展開されていない。本章は、ドゥオーキンの平等、自由、民主主義、そして法についての著作の中で示された彼の正議論を、責任、援助、危害そして義務についての彼の理解とともに、さらに深く概念的に分析することを通じて、ドゥオーキンの国際法理論のより包括的な説明のために、いくつかの基礎を提供しようとする試みである。

（ジョージ・ムスラキス，立命館大学国際関係学部准教授）