Dworkin’s Philosophy for International Law

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I, María Pascual, certify that the present work has not been submitted for the evaluation of any other subject, either in whole or in part. I also certify that its content is original and that I am the sole author, not including any material previously published or written by other persons except those cases indicated throughout the text.

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Abstract:

Theory of international law has been largely neglected by scholars in the last few decades, but its development is crucial to define the content and scope of international rights and obligations under law. This dissertation aims to further that determination through the analysis of Professor Ronald Dworkin’s jurisprudence. Firstly, it purports to illustrate Dworkin’s theory as presented in his article ‘A New Philosophy for International Law’ (2013), where he identified the popular positivistic grounding of international law in state-by-state consent as the main source of inconsistencies in international law, and suggested the duty of mitigation and the principle of salience as its new philosophical foundations. Furthermore, it seeks to examine weaknesses in the theory, particularly the claims that it is incoherent with Dworkin’s overall philosophy of law, and that it lacks enough cosmopolitanism to present a credible theory of international obligations. Secondly, it argues that Dworkin could have applied his prior ideas in a different direction to the international realm, laying out an alternative that might solve the foregoing issues: the recognition of an international political morality, of which international law is an institutionalized branch. Finally, it identifies ‘the values of the international community’ as those protected by jus cogens norms, and finds the grounds of international law in the duty of each State to protect those values, including through acceptance and recognition of such norms.
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DWORKIN’S PHILOSOPHY FOR INTERNATIONAL LAW

I. INTRODUCTION

Professor Ronald Dworkin was undoubtedly one of the most prolific, innovative and brilliant philosophers of law who influenced the jurisprudence of the twentieth century. His passing in February of 2013 was a massive loss for legal philosophy. As Professor Jeremy Waldron, his pupil and friend, stated ‘he was the one who showed us all how much more you can achieve by taking seriously the nobility of law’s empire than by any corrosive or skeptical detachment from its aspirations.’¹

In his graceful body of work, he defended, partly in contention of the positivistic approach of his contemporary, H.L.A Hart, partly in development of his own alternative legal theory, that legal reasoning is a form of moral reasoning.² Not surprisingly, the so-called ‘Hart-Dworkin debate’ continues to dominate the highest-level contemporary jurisprudential discussions around the world.³ However, similarly to many relevant political and legal philosophers of the past century, international law remained a topic of relative neglect.⁴

It was not until 2013, in an article published posthumously, that what might have been his idea of international law was published in a succinct but dense article: ‘A New Philosophy for International Law’. Notwithstanding the general lack of scholarly engagement with the jurisprudence of international law⁵, Dworkin strongly argued for its relevance: as he asserted, we can only determine ‘what international law holds on particular issues’ through the analysis of its doctrinal concepts⁶. In other words, the enforceable content of the rights and obligations of States and individuals under international law hinge on the question of what theory of the

² See for instance Ronald Dworkin, Justice in Robes (1st edn, Belknap Press 2006) at 234
⁴ Namely, John Rawls, Joseph Raz, and H.L.A Hart.
grounds of international law is widely accepted, because ‘any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers.’

The article is not, at its outset, an exception to the Hart-Dworkin debate’s trend: Professor Dworkin frames his new philosophy for international law by first refuting, in my view persuasively, the positivistic grounding of international law which enjoys much popularity in today’s interpretation of international law. Notably, it was not Hart, but some of his followers, who developed the Hartian theory of international law from his theory of municipal law as enshrined in The Concept of Law (1961) that Dworkin sets out to refute. Hence in the following section (I.1), I will provide a brief account of their philosophical disagreements, to frame discussion in the international law arena.

‘A New Philosophy for International law’ contains two main elements. The first (1) element is the rejection of the popular positivistic basis of international law: state consent. Dworkin does this by proving the circularity and incoherence of mere consent as a basis of law, concluding it is neither sufficient nor necessary to justify the legitimacy of international law, and identifying the need for a deeper principle that allows us to evaluate what international law is and what it ought to be. The second (2) element is his proposal for a new basis of international law, in an explicit attempt to extend his interpretive theory of law as exposed in his previous works to the international realm. His new basis is embodied by two foundational principles: (A) the duty of each state to enhance its own legitimacy towards its own citizens, and (B) the principle of salience.

This project will thus unfold as follows, mimicking the structure above. In section II, I will try to reproduce Dworkin’s deconstruction of state consent as basis of law. I will also attempt to show that his effort is convincing and that the arguments he puts forward may explain the hardship of international Courts, scholars, lawyers and even States, as will be shown, to identify the content and scope of the most basic propositions of international law. In section III, I will give an account of the two new principles he proposes: the duty of mitigation and salience, also acknowledging the main academic reactions to them.

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7 Ronald Dworkin, Law’s Empire, (Belknap Press, 1986) 90
9 R. Dworkin, supra note 6, at 5. See Samantha Besson, ‘Theorizing the Sources of International Law’, The Philosophy of International Law supra note 5, at 178
10 Dworkin applies the most up to date version of his ideas, namely the ones expressed in Justice In Robes (2006) supra note 2 and most importantly Justice For Hedgehogs (Harvard University Press 2013)
Namely, while T. Bustamante has defended the two principles as the only possible derivation from Dworkin’s ‘unity of value’ theory as elaborated in his last book *Justice for Hedgehogs* \( ^{11} \), E. J. Scarffe criticized them as the opposite, suggesting a misapplication of his own theory\(^ {12} \) where a moralized conception of law is ‘conspicuously missing’\(^ {13} \). In a somewhat middle ground, Thomas Christiano has attempted to reconcile Dworkinian philosophy with a legitimate role for state consent in international law\(^ {14} \).

I will argue against, in the same terms as T. Bustamante did, Scarffe’s charge of political realism, acknowledging Dworkin’s coherence in his exposition. I will contest, however, that what Dworkin wrote in his article is the *only* possible derivation of his general theory of municipal law onto the international realm. On that point, I concede to Scarffe’s suggestion that a vast amount of different theories could have arisen from a theory that was envisioned only for municipal law\(^ {15} \). Thus, in section IV, I will expose my own reading of what plausible foundation for international law might flow from another reading of Dworkin. I will try to argue that there exists an *international political morality* that Dworkin failed to perceive\(^ {16} \). My argument will be set out in three parts or premises:

(i) The legitimacy of international law need not be limited to the duty of each State to enhance its own legitimacy towards its citizens, nor do the only obligations of States towards foreign States and peoples flow from the moral acquit of its citizens to help others abroad. Instead, using what Dworkin called the “tree structure” of ethics, morality and law\(^ {17} \), it is arguable that there is another branch that encompasses the common

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13 Ibid, p. 198
15 E.J. Scarffe, ‘A New Philosophy For International Law And Dworkin’s Political Realism’ *supra* note 12 at 196
16 Far from the arrogant assertion that Dworkin failed to apply his own theory, what I attempt to say is that he could have alternatively identified the progress from Westphalia to the present international law as the creation of a new international morality. I don’t think anything I will say here will be incompatible with the radical content of his positions. While he might have not considered this common morality to exist for a large amount of reasons, he did acknowledge that “a time may come, sooner than we suppose, where the need for an effective international law is more obvious to more politicians in more nations than it is now”. Indeed, the time seems to be now - as I will argue, such is the significance of the discussions about *jus cogens* in the Sixth Commission of the General Assembly scheduled to take place from 2016 to 2019. I believe that maybe, if he had seen the current developments of the concept, he might have not dismissed *jus cogens* as yet another source of law but as a key insight into the existence of values of the international community.
morality held collectively by States\textsuperscript{18}: international political morality. Similarly to the way each person has a morality, which branches out into a common political morality shared with other citizens of their State, a further, “third” level can be identified which is international political morality.

(ii) In order to find the branch of that international political morality that is law, we can follow Dworkin’s assertions that:

(a) what differentiates political morality from law is institutionalization, and

(b) that we provide a theory of the grounds of law by posing and answering questions of political morality.

The way he understands (b) is that we need to identify what test is to be applied to identify those grounds, which will be decided depending on the result we are looking for, which shall be what ought to happen\textsuperscript{19}.

I purport that what ought to happen was best worded by the Special Rapporteur of jus cogens for the International Law Commission, Dire Tladi, in his first Report on the topic to the Sixth Commission (Legal) of the General Assembly. He described what he had found to be a consensus among States, Courts and academic literature that jus cogens norms undoubtedly exist, and that they are those that “protect the fundamental values of the international community, and are by their nature hierarchically superior and universally applicable norms”\textsuperscript{20}. As such, the basic ground of international law can be found in the duty of all States to protect the fundamental values of the international community, and legal provisions will necessarily be interpreted against that standard.

(iii) The role of consent in international law is therefore not foundational, but procedural. It fills the gap of (a): the institutionalization as law of the values of more abstract political morality, which are not enforceable on demand, through the mechanisms of Article 38 of the ICJ Statute.

\textsuperscript{18} Such proposition, of course, is made with the disclaimer that States are not people, and that ultimately the common morality of all peoples of the world (however limited that common morality may be) is held by individuals, deriving in certain political moralities both at State level and beyond.


In my view, this gives place to what Dworkin’s imaginary Court with jurisdiction over all States of the world would enforce: legal norms grounded in States’ obligation to protect the fundamental values of the international community. Only through sensitivity to those moral principles may lawyers and judges determine the right answer—the right legal answer—to the questions they face.

1.1 The Hart-Dworkin debate

In order to understand the structure of Ronald Dworkin’s propositions, it is essential to first offer an account of what he believes to be up against. In what follows, I will first characterize the Hart-Dworkin debate, by describing the main tenets of positivism and their application to international law, on the one hand, and Dworkin’s key criticisms to such tenets, as well as his subsequent rejection of their application to the international realm, on the other.

The Hart-Dworkin debate is organized around one of the most profound issues in the philosophy of law: the relation between legality and morality. Dworkin’s basic strategy throughout the course of the debate has been to argue that, in one form or another, legality is ultimately determined not by social facts alone, but by moral facts as well. In other words, the existence and content of positive law is ultimately governed by the existence and content of the moral law. This contention, therefore, directly challenges and threatens to undermine the positivist picture about the nature of law, in which legality is never determined by morality but rather by social practice. Because if judges must consider what morality requires in order to decide what the law requires, social facts alone cannot determine the sole content of the law. As one might foresee, the response by Hart and his followers has been to assert that this dependence of legality on morality is either merely semblant or does not, in fact, undermine the social foundations of law.

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21 R. Dworkin, ‘A New Philosophy of International law’, supra note 6, at 14
22 Namely, the main thesis of positivism: that law is a matter of social fact, separate and prior to its substantive evaluation. The most eminent proponent of this theory, in a revised and modern approach to that of previous authors such as John Austin, was Professor H.L.A Hart, specially in his book The Concept Of Law, supra note 8. Dworkin directs his criticism towards the propositions of his contemporary as representative of the main tenets of positivist philosophy of law.
23 S Shapiro, supra note 3, at 6
Whatever else the Hart-Dworkin debate is about, it is at least about the validity of Hart’s version of legal positivism. To understand the debate, therefore, we must first examine its core commitments. Using the nomenclature by Prof Jose Juan Moreso, the main propositions of Hartian positivism can be explained by three thesis: the social sources thesis; separability thesis; and the limits of the law thesis:

I. The Social Sources Thesis (or Pedigree Thesis): the existence and the content of the law in a certain society only depend on a set of social facts, i.e., on a set of actions by the members of such a society, which can be identified without resort to morality.

II. The Separability Thesis: It is necessarily the case that the legal validity of a norm does not depend on its moral validity.

III. The Limits of the Law Thesis (or the Discretion Thesis): the set of these valid legal rules is exhaustive of ‘the law,’ so that if someone’s case is not clearly covered by such rule then that case cannot be decided by ‘applying the law.’ It must be decided by some official, like a judge, ‘exercising his discretion.’

It is important to notice that the first thesis is in fact a composite claim. The initial part asserts that in any community that has a legal system, there exists a master rule for distinguishing law from non-law. The latter part places an important restriction on this rule: the criteria of legality set out by the master rule may refer only to social facts – in particular, to whether the rule has the appropriate social “pedigree” or source, and not to an evaluation of its content.

The second positivistic thesis holds that the law consists solely in legal rules, separated from any moral considerations. Accordingly, if a case is not clearly covered by an existing legal rule, either because there seems to be no applicable legal rule or because the rule contains vague or ambiguous terms, the deciding judge cannot apply the law but must exercise his or her discretion to resolve the case. Finally, the third thesis is the counterpart of the Discretion Thesis for “legal obligation”: it claims that legal obligations can be generated only by legal rules.

It is relevant to note that when characterizing the first thesis in Model of Rules I, Dworkin clearly intended this Pedigree Thesis to capture Hart’s doctrine of the rule of

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25 José Juan Moreso, ‘In defense of inclusive legal positivism’ Diritto & questioni pubbliche 1 (2001)
26 S Shapiro, supra note 3, at 8
recognition. While there has been discussion of whether Dworkin’s portrayal in fact captures Hart’s thesis, there is relative consensus that indeed Hart’s rule of recognition can be assimilated to his idea of pedigree.

Also relevant is the fact that from the social facts thesis (I) flows the distinction between “primary” and “secondary” rules. The latter, Hart said, would be rules which stipulate how law is created, enforced, and identified, and primary rules, which are created and identified when those secondary rules are followed. The rule of recognition is hence a secondary rule which serves in any legal system as the fundamental test of all the rest of the secondary and primary rules of that system. In other words, one of the main assumptions of The Concept of Law is that legal systems are not only comprised of rules, but founded on them as well.

Subsequently, when applying these basics to a positivistic thesis of international law, proponents will aim to find a Rule of Recognition (“RoR”) on which it is founded – a single and straightforward secondary rule that allows identification of all other rules. Hart, in The Concept of Law, argued that he could find no such rule in international law, and on that basis denied international law the character of a system of law. According to him, it is only a primitive and underdeveloped set of primary rules.

Hart also rejected voluntarist theories of international law which, emanating from the concept of absolute sovereignty, view the basis of international legal obligations in an act of auto-limitation of the state. According to him, proponents of this approach could not offer a compelling explanation or an inquiry into the actual character of international law. And they would fail to explain how an act of self-limitation could generate legal obligations. Finally, international law would not present itself as a legal order comprehensively based on state consent. In some cases this consent was only tacit consent and no more than a fiction. The binding force of international law for newly emerging states or with regard to newly acquired territory would fully escape the conception of legal obligation requiring consent, and thereby challenge the theory of auto-limitation. On the customary law issue, Hart rejected as both normatively and epistemically redundant the rule that “states should behave as they customarily

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27 Ibid, at 39
28 Ibid, at 10
29 HLA Hart, The Concept Of Law, supra note 8, at 94
30 For further explanation on the nature of the rule of recognition see S Shapiro ‘What is the rule of recognition (and does it exist)?’ Yale Law School Public Law & Legal Theory Research Papers Series, paper 181.
31 HLA Hart, The Concept of Law, supra note 30, at 233-236.
32 Ibid., at 223–226
33 Ibid
behave”\textsuperscript{34}. And indeed, no authoritative procedure exists for settling disputes over the existence, content, and scope of customary international legal norms\textsuperscript{35}.

Undaunted by his pessimism, Samantha Besson and many other writers have strived to find a rule of recognition of international law. Following Besson, Article 38 of the ICJ Statute constitutes the most comprehensive RoR of international law\textsuperscript{36}. According to these writers, Hart’s account is obsolete and may be influenced by the historical moment when he published \textit{The Concept of Law} (in 1961), in which the current structures of international law were not as developed, and the Cold War blocked most practical action from international institutions\textsuperscript{37}.

Following with Dworkin’s criticism of Hart’s ‘three thesis’ the first is, in Dworkin’s terminology, that rules are “all or nothing” standards\textsuperscript{38}. When a valid rule applies to a given case, it is conclusive. Because valid rules are conclusive reasons for action, they cannot conflict. If two rules conflict, then one of them cannot be a valid rule. By contrast, principles do not dispose of the cases to which they apply\textsuperscript{39}. They lend justificatory support to various courses of actions, but they are not necessarily conclusive. Valid principles, therefore, may conflict and typically do. Moreover, in contrast to rules, principles have “weight.” Hence because per Thesis I and II law is only made up of rules, and not principles, where legal rules are inapplicable, legal obligations do not exist, and judges by necessity must look beyond the law to decide the case (“use their discretion”). Dworkin begins his critique by arguing that the Discretion Thesis is implausible insofar as it ignores the many cases where judges regard themselves as bound by law even though no rules are clearly applicable\textsuperscript{40}. Similarly, the pervasiveness of legal principles not only falsifies the Discretion Thesis, it also discredits the Pedigree Thesis. This is so because the legality of principles depends, at least sometimes, simply on their content. As

\textsuperscript{34} This proposition was put forward by Hans Kelsen in his attempt to theorize international law, in \textit{Das problem der souveränität und die theorie des völkerrechts} (Tübingen: JCB Mohr). For a review see F. Rigaux, ‘Hans Kelsen On International Law’ (1998) 9 \textit{European Journal of International Law} 325

\textsuperscript{35} For this reason, the International Law Commission is currently investigating ‘The identification of customary international law’, a topic open since 2012. While at first, the name of the topic was ‘Formation and evidence of customary law’, they realized there was not consensus on the previous step (identification) and modified its target. See the mandate in A/66/10 Annex A and Sir Michael Wood, Special Rapporteur’s First Report (A/CN.4/672) on the topic suggesting the change.

\textsuperscript{36} Samantha Besson, ‘Theorizing the Sources of International Law’ in \textit{The Philosophy of International Law} supra note 5, at 181

\textsuperscript{37} Mehrdad Payandeh, ‘The Concept of International Law in the Jurisprudence of H.L.A. Hart’ 21 \textit{The European Journal of International Law} 11

\textsuperscript{38} Ronald Dworkin, ‘The Model of Rules I’ (1967) 35 \textit{University of Chicago Law Review} 1 at 24

\textsuperscript{39} Ibid at 25-27

\textsuperscript{40} Ibid at 17.
he writes:

The origin of [the *Henningsen* principles] as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.\(^{41}\)

Dworkin recognizes that institutionalization does, to an extent, support the legality of principles, but he denies that a positivistic master rule could be constructed that would test a principle based on its institutional support. Institutional principles are supported by very broad principles of political morality with infinite combinations of results that make it impossible to determine specific outcomes from the outset.\(^{42}\)

According to Dworkin, therefore, the Pedigree Thesis must be rejected on two accounts. First, legal principles are sometimes binding on judges simply because of their intrinsic moral properties and not because of their pedigree. Second, even when these principles are binding in virtue of their pedigree, it is not possible to formulate a stable rule that picks out a principle based on its degree of institutional support. Having previously disposed of the Discretion Thesis, Dworkin concludes that legal positivism must be rejected as an adequate theory of law.\(^{43}\)

In ‘A New Philosophy of International Law’, Dworkin reiterates these criticisms very briefly. He uses them to reject, at the very beginning, both the adequacy of using a rule of recognition as basis for international law – for the reasons above – and specifically the adequacy of Article 38 of the International Court of Justice’s Statute (“ICJ Statute”), as will be explained in the following sections.

\(^{41}\) Ibid at 40

\(^{42}\) See ibid at 41 “We might argue, for example, that the use we make of earlier cases and statutes is supported by a particular analysis of the point of the practice of legislation or the doctrine of precedent, or by the principles of democratic theory, or by a particular position on the proper division of authority between national and local institutions, or some-thing else of that sort.”

\(^{43}\) S Shapiro, *supra* note 3, at 15

\(^{44}\) R Dworkin, ‘A New Philosophy for International Law’, *supra* note 6, at 3
II. THE REJECTION OF STATE CONSENT AS BASIS OF PUBLIC INTERNATIONAL LAW

II.1 Consent as the popular basis of public international law

The vast majority of reviews of Dworkin’s New Philosophy for International Law have involved an assessment and critique of the two principles he proposed as a new foundation of international law (the duty of mitigation and salience)\footnote{As will be further elaborated below, such is the case of Thomas Bustamante, Thomas Christiano, Eric J Scarffe, Adam S Chilton and others.}. This has left little space for evaluation of his most radical proposition, on which the rest of his thesis relies: (1) whether indeed consent is today’s widely acknowledged foundation of international law, and (2) whether such foundation does not hold. The answer is far from established in contemporary international law.

The classical accounts of international law, as they were developed in the late 19th and early 20th centuries, were for the most part voluntarist theories of international law. Georg Jellinek, for example, saw the basis for obligations under international law in an act of auto-limitation by states.\footnote{G. Jellinek, Die rechtliche Natur der Staatenverträge (1880), at 2, 48–49.} Heinrich Triepel refined this voluntarist theory surrogating the will of the individual states with the common will of states.\footnote{H. Triepel, Völkerrecht und Landesrecht (1899), at 32, 81.} Lassa Oppenheim’s two-volume International Law\footnote{R. Jennings & A Watts (eds.), Oppenheim’s International Law (9th Edition, New York Longman, 1992)}, which is considered the most comprehensive and world-wide followed manual on the subject, holds a strictly Statalist conception of international law, from which follows a decentralized system of law in the form of anarchy. This voluntarist approach to international law found its expression in the famous Lotus decision of the Permanent Court of Justice (1927) in which the Court held that:

\begin{quote}
‘international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.’\footnote{S.S Lotus, (France v. Turkey) [1927] PCIJ Ser A No. 10. at 18}
\end{quote}

General trends thereby seem to imply not only a strong notion of sovereignty but also a strictly consensual character of international law: no state can be bound by a rule of international law unless it has explicitly or tacitly consented to it. One may think that the consensual view was modified, or at least moderated, after the developments of international law precipitated by World War II and the creation of the UN Charter. However, Article 38 of
the Statute of the International Court of Justice is universally cited as the authority to identify the sources of international law in the most modern manuals on the subject. Following the trend, Ratner and Slaughter have characterized positivism as “the lingua franca of most international lawyers, especially in continental Europe”51.

The article reads as follows:

Article 38
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 52

As Dworkin highlights, all such sources point to state consent as the basic ground of international law.53 “International conventions” within the scope of article (a) will not create obligations or rights for Third States (not parties to the Treaty) without their consent.54 To amount to international customary law, as the International Court of Justice has repeatedly stated, “not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it.”55 Whereas the word ‘belief’ could have been interpreted as identification of a rule by States and not acceptance of a rule, the latter is

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52 International Court of Justice Statute (1945) USTS 993 Art. 38
definitely the most extended reading.\textsuperscript{56} \textit{Jus cogens} norms are ultimately customary rules accepted and recognized to have peremptory character by the international community as a whole\textsuperscript{57}. Additionally, a state may detach itself from complying with an international custom if it has persistently objected to it ("persistent objector rule")\textsuperscript{58}. Finally, the legality of “general principles of law” as expressed in (c) depends on their recognition by a given number of states.

\textbf{II.2. Dworkin’s critique}

Dworkin’s deconstruction of current international law through this logical reduction of treaties, ‘general practice and acceptance as law’, and general principles, to bare ‘state consent’, is one of the key elements of Dworkin’s proposition. An example of its relevance is the fact that while Samantha Besson identified Art. 38 as the most universal RoR of international law, she acknowledged that “the traditional ground put forward for international law’s legitimacy is state consent, an explanation that fails to convince entirely, however, both \textit{per se} and, in international law, for reasons related to the emergence of new subjects of international law and the development of its law-making processes”\textsuperscript{59}. Similarly, the unconstrained will of states has been mostly rejected in the literature as a philosophical foundation in contemporary international law, including by positivists like Hart\textsuperscript{60}, Raz\textsuperscript{61} and Kelsen\textsuperscript{62}.

Nonetheless, as we saw, Article 38 is still the most cited identifier of international norms. The unsurmountable struggles of the international community to identify the content and scope of the most basic of international norms could easily lie in the objections raised by Dworkin to the circularity of Article 38. In his words, its approach as an independent foundation of international law is ‘particularly unhelpful’, and his subsequent rebuttal amounts also to ‘theoretically inconsistent’. He provides up to eight arguments\textsuperscript{63} why that is so:

\begin{itemize}
\item \textsuperscript{57} Vienna Convention on the Law of Treaties (1969), \textit{supra} note 53, Art. 53
\item \textsuperscript{58} North Sea Continental Shelf, \textit{supra} note 55, p. 38-39, para. 63; Fisheries (United Kingdom v Norway) (Merits, Judgment) [1951] ICJ Rep 116 at p. 131.
\item \textsuperscript{59} Samantha Besson, ‘Theorizing the Sources of International Law’, \textit{The Philosophy of International Law, supra} note 5, at 175
\item \textsuperscript{60} H.L.A Hart, \textit{The Concept of Law, supra} note 8, at 233
\item \textsuperscript{61} Raz, J., \textit{The Morality of Freedom} (1st edn, Clarendon Press 1988) at 80–94
\item \textsuperscript{62} Hans Kelsen, \textit{Das problem der souveränität und die theorie des völkerrechts, supra} note 33
\item \textsuperscript{63} R. Dworkin, ‘A New Philosophy for International Law’, \textit{supra} note 3, at 6-7 and 9
\end{itemize}
1. Binding of states who have not consented

Such may be the case even though the axiom of the theory is consent. The first obvious example is source (c) general principles of law: they become binding upon all states if enough civilized nations have recognized them as such, but it offers no guidance to how many states need to agree, what counts as ‘civilized’, or why the other States who have not consented necessarily will be bound. Similarly, customary law at times bounds states who have not consented, because there is no rule to determine how many states must accept a practice as legally required before the practice becomes customary and therefore binding on everyone.64

2. Lack of prioritization

It offers no priority among the different sources it recognizes, making it impossible to decide between treaties, custom and principles when they collide.

3. Indeterminacy

It offers no guidance as to which norms are peremptory, or who civilized States are and how many are necessary for a general principle to become a part of international law.

4. Lack of interpretive background

Because the constrains accepted by a State are the ones that become law for them, the master interpretive question becomes “what is the most reasonable to assume that these nations, whose consent made the principle law, understood that they were consenting to?”. Where the plain meaning of the text could be interpreted in different valid ways, consent leaves nothing to test it against. Dworkin’s example is the extent of Article 2(4) of the UN Charter in regards to humanitarian intervention, where States have substantially differed as to ‘what they actually consented’.

5. Lack of rule of recognition for opinio iuris

If the proposition is that international law is created for nations when they accept that certain constrains on their acts are required not just by decency or prudence but as a matter of law (state practice and opinio iuris, giving rise to custom) what principle, or ‘rule of recognition’, do each of those States supposedly use to decide whether they are acting as a matter of law? Following Dworkin, “it won’t do to say that what they regard as law is law”, and it won’t do to look at

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64 See P. Weil ‘Towards Relative Normativity in International Law’ (1983) 77 AJIL 413
what other countries regard as law – they need some other standard to abide by, because at least there had to be one State which regarded it as law in the first place following certain criteria.

6. **Generational unfairness**

Treaties are signed at particular times with particular governments, but will bind successive generations under completely different leaders and even Constitutions. Indeed, a state would not be bound by international law if it were free, through its domestic legal processes, to unbind itself. So while domestic law can destroy what it creates, international obligations may not be breached by invoking national law. But how is it fair to subsequent generations, who may suffer serious disadvantage?

7. **Undesirable outcomes**

Dworkin identifies two major ways in which a system of unrestricted sovereignty of States fails to address even the most basic concerns. First, it offers no limitation for States which violate the basic human rights of its citizens domestically, and prevents intervention from other States to help those citizens. Second, States are not encouraged to cooperate internationally and constantly face prisoner’s dilemmas, which often exposes the world to large economic, health or environmental disasters.

8. **A theoretical problem**

This is what he thought the most relevant concern. Dworkin compared the issue raised by consent’s philosophical foundation by comparing it to why promises are binding. He accepted Hume’s proposition that promises are capable of creating duties for those who make it, not because it is considered an ‘independent source of a distinct kind of moral duty’, but only because it plays ‘an important but not exclusive role in fixing the scope of a more general responsibility’, which is the duty ‘not to harm other people first by encouraging them to expect that we will act in a certain way and then not acting in that way’. Promising is not a ‘self-contained practice that generates obligations automatically, but is instead parasitic on the much more general duty not to harm others’.

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65 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) Supplement No. 10 (A/56/10), Article 3: “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.” These articles have been said to reflect customary international law, see for instance Gabčíkovo-Nagymaros (Hungary v. Slovakia) [1997] ICJ Rep 7 at para. 50

66 R. Dworkin, *Justice for Hedgehogs* supra note 10 at p. 304

67 Ibid at 305
These issues with State consent show how Article 38 as a basis is circular. According to Dworkin, they stem from the scheme’s ambition to extend the ambit of international law beyond those communities that have explicitly consented to its principles to include those that have not. Otherwise, he says, international law cannot address its purposes in the contemporary world. Accordingly, Dworkin rejects consent as an either necessary or sufficient basis of international law. As T. Bustamante identified, however, Dworkin can accept consent as an institutionally-regulated process for creating new norms in the realm of international law - but it is ‘neither a necessary nor a sufficient ground for the legitimacy’ of international law. To justify the authority of international law we need a theory of legitimacy, and Dworkin believes this theory is located in the terrain of the so-called “associative obligations”, which he used in his earlier writings to ground his theory of legitimacy for municipal law.

III. HIS NEW PROPOSAL: MITIGATION AND SALIENCE

III.1 Law as an interpretive concept and international rights and obligations on demand

After rejecting consent as either sufficient or necessary as grounds for international law, Dworkin takes us through the journey of his own legal theory, interpretivism, and defines international law as an interpretive concept. In Justice for Hedgehogs, he makes a distinction between criterial concepts and interpretive concepts. Criterial concepts are those we share by identifying certain facts about them, such as a triangle: we share the concept of triangle because we identify that it is a figure that must have three straight sides. The test of the three straight sides, that we have all agreed on to apply for the identification of triangles, is what makes us share the concept. Another family of concepts, however, do not have a definitive test that

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69 By “associative” or “communal obligations” Dworkin means “the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbors.” Since people normally conceive of those responsibilities as not necessarily being a matter of choice or consent, special political obligations can be also construed as associative obligations. Ronald Dworkin, Law’s Empire (Cambridge: Harvard University Press, 1986) at 196.
everyone agrees to: and yet, it seems, we share them. These are interpretive concepts, such as justice, equality or patriotism. To quote Dworkin at large,

> We fight campaigns, even wars, about justice, and it is obviously false that if we only reflected on what we mean by the term, we would see that we really had nothing to disagree about. Because we share the interpretive concept of justice, we can recognize the theories of a great variety of political philosophers as competing conceptions of that concept.\(^71\)

How, then, do we define an interpretive concept? How do we find law? Dworkin says the only way to define an interpretive concept is to decide what should turn out of its application, and apply exactly that test. Which test ought we to apply in the case of law?

Again, this can only be understood by reflecting in Dworkin’s larger theory of law. According to him, all things that have value in life are parts of the same unity\(^72\). The way he explains that unity is through the metaphor of a tree. The foundational element of the tree, he says, relies on an ethical question: what it is to live well. From that “question”, each person will derive a personal morality, which will answer that question; and accordingly, in each society, a political morality will form, ultimately with a relatively common conception of what it is to live well. Law, he says, is a branch that flows from that political morality\(^73\). What differentiates law from political values is a certain type of institutionalization – in his words, a legal right is one that is enforceable on demand from a Court, without further political action\(^74\).

Once he has placed us in the tree branch of international law, Dworkin sets out to find what legal rights can be enforced on demand in international law. His conclusion, necessarily embedded in the text, is none: because there is no such thing as a Court with international, mandatory jurisdiction, or a relevant enforcement mechanism, over all countries and individuals of the world. However, Dworkin asks us to imagine that Court hypothetically. He says that whatever norms that Court ought to enforce will be the true basis of international law\(^75\).

And what norms would be legitimate for it to enforce? This is when Dworkin truly applies his municipal political and legal theory to international law. In the classical system

\(^{71}\) R. Dworkin, *Justice for Hedgehogs* supra note 10 at p. 162
\(^{72}\) Ibid at p. 1. The opening line of the book reads “This book defends a large and old philosophical thesis: the unity of value”. He then goes on to explain the title: “Its title refers to a line by an ancient Greek poet,. Archilochus, that Isaiah Berlin has made famous for us. ‘The fox knows many things, but the hedgehog knows one thing’. Value is one big thing”
\(^{73}\) Ibid at p. 405
\(^{74}\) Ibid at p. 406
\(^{75}\) R. Dworkin, ‘A New Philosophy for International Law’, *supra* note 3, at 14
sketched out in Westphalia, he says, international order rested on the political assumption that absolute hereditary monarchies were a legitimate form of government. That explains the divide between what might have seemed legitimate back then, and what seems legitimate now. Since the 17th century and until now, sovereignty has come to rest on a very different assumption: that coercive political power can only be justified if it is exercised well not only in pedigree, but in substance. Such is the source of the duty of each State to improve their own legitimacy towards its citizens. This moral duty, in turn, rests upon associative obligations as explained above.

III.2 The duty of mitigation and the principle of salience

The first step to develop a new philosophy of international law, for Dworkin, would be to accept that the states’ duty to improve their own political legitimacy includes ‘an obligation of each state to improve the overall system’ of international institutions. This requirement, which Dworkin calls the principle of “mitigation” (in the sense, for example, of preventing its own possible future descent into tyranny), provides for him the ‘true moral basis of international law’. 76 If and when States accept the dangers of an unmitigated Westphalian system, they fail their duty towards their own citizens to mitigate such dangers. Additionally, he says, this explains the duties of governments towards citizens in other countries:

“We people around the world believe they have – and indeed 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.” 77

Once this principle is established, Dworkin proposes a second principle, which functions as a ‘fundamental structuring principle’ to facilitate the practical application of the duty to mitigate. He names it the principle of salience, which is stated in the following way:

“If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form 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.” 78

76 R. Dworkin, ‘A New Philosophy for International Law’, supra note 3, at 19
77 Ibid at 18
78 Ibid
While the principle of mitigation, in Dworkin’s opinion, provides an adequate explanation of *jus cogens* norms, the principle of salience offers a superior account of the sources of international law stipulated in Article 38 of the Statute of the International Court of Justice, especially the development of custom and general principles. This sketched philosophy develops an interpretative strategy for international law, which relies on the idea that the goals resulting from the mitigation of the Westphalian model have to be understood in such a way as to make them mutually compatible.

Dworkin tries to demonstrate the comprehensiveness of his approach to international law by offering a fresh interpretation of the “hard case” of the Kosovo intervention. He argues that interpretation of Article 2(4) of the UN Charter should be done in light of the larger responsibility of each state to protect citizens from atrocity (which flows from its duty to help its citizens acquit their moral duty towards other peoples), hence allows for NATO’s “humanitarian intervention” that took place in 1999. That would even preclude the need for Security Council authorization, which would explain the general acceptance of the intervention in the international community, as opposed to the outcry against the invasion of Iraq.

### III.3. Mitigation and salience under attack

Severe criticisms have been articulated against Dworkin’s theory. However, my attention here will not be given to any broad criticism that dismisses his overall theory of law and therefore rejects his theory of international law. I will focus on critics who might be sympathetic to his overall idea of law, but identified flaws in Dworkin’s international law.

Firstly, Scarffe tried to reconstruct a theory of what one might have imagined Dworkin to write if his posthumous article had never been published. He identified that parts of his broader theory, such as his conception of human rights and human dignity, should have been what he identified as foundation of international law, much like they are the basis of rights in municipal law. Thus he argued a more logical derivation onto international law would have

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79 *Ibid* at 21
80 For some reactions from the international law world see B Simma ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) *EJIL*, C Greenwood ‘International law and the NATO intervention in Kosovo’ (2000) 49 *International and Comparative Law Quarterly* 926
82 Eric J. Scarffe, ‘A New Philosophy For International Law And Dworkin’s Political Realism’ *supra* note 12
83 *Ibid* at 5-8
been to say that, insofar as all human lives have equal objective value, regardless of where they happened to be born, states, judges, and legislators have a moral obligation to recognize, and protect, this value. Given the prevalence of circumstances which threaten this most basic value of human beings, states and their legal systems thus cannot remain morally neutral in these cases by saying that such violations are beyond the domain of their jurisdiction, and have both a moral and legal obligation to protect this value.

However, Dworkin’s proposal took a very different direction, which Scarffe characterized as ‘not an argument of political morality, but rather, an uncharacteristic concession to political realism’. Political realism in the sense that ‘it’s not that States have internalized international law, or have a habit of complying with it, or are drawn by its moral pull, but simply that states act out of self-interest’. When Dworkin sustains that states should comply with international law only to the extent that it enhances their own legitimacy, the reason for international obligation would not be a moral argument. Instead, it would be an alignment ‘with a state’s self interest’.

Once the basis of the obligation of international law is entirely derived from the state’s duty to improve its own legitimacy, any other value (including “justice”, “human dignity” and “political morality”) ‘do not extend into the relations between international bodies and states. State interests reign supreme, and the standing duty for states to improve their own legitimacy is the core value upon which all other derive and are interpreted against’. Scarffe’s indignation stems from the fact that the dignity of citizens, which was treated as an indivisible and inviolable right in previous work, suddenly does not constitute a “trump” which supervenes upon all other State interests, but is subjugated to the values of furthering world order and the State’s own political legitimacy.

While I will later argue in favor of an international political morality, insofar as I recognize Scarffe’s claim that mitigation and salience do not account for obligations among States well enough, I believe he fails to realize that for Dworkin, all stages of ethics, morality

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84 Ibid at 12
86 This is a part of Scarffe’s characterization of Dworkin’s article. I disagree that Dworkin sustained this. In fact, since he grounds international law in whatever rules most enhance each State’s legitimacy towards its own citizens, it cannot be said that States only need to comply with international law to the extent that it enhances them: what it means is that only to that extent does international law actually exist.
87 Eric J. Scarffe, ‘A New Philosophy For International Law And Dworkin’s Political Realism' supra note 12 at 16
88 Ibid
and political legitimacy have to be interpreted in order to be compatible and enhancing of each other\(^89\). Thus, a Government can only be legitimate if it respects the dignity of its citizens in the municipal realm, through national mechanisms; but also, in the international sphere, through ‘international mechanisms’ - such as acceding to Human Rights treaties or furthering ‘justice’.

The fact that he doesn’t put humans at the center of international law is coherent with the fact that humans are not the main subjects of international law\(^90\), but it most certainly does not mean that Governments can therefore neglect their basic obligations towards citizens on behalf of world order.

A similar contention was elaborated by Thomas Christiano. It seems to him that States’ duty to enhance their own legitimacy would not be a satisfactory ground for the international obligation to prevent human rights violations that take place beyond their borders and are not related to anything they do to their own citizens\(^91\). As a consequence, Dworkin’s claim that the principle of mitigation can ground the principles of *jus cogens* only fits imperfectly. He also contends Dworkin excludes from the scope of international obligations some problems that are genuine concerns for the international community, such as the eradication of poverty or global diseases, which extend ‘significantly past the domestic legitimacy enhancement thesis’\(^92\). Christiano buys into Dworkin’s claim that we cannot justify the legitimacy of international law without a certain level of citizen participation in making of international law; whereas this aim, for Christiano, does not seem to involve enhancing the legitimacy of domestic institutions at all. Instead, he defends the creation of “a cosmopolitan community of people”\(^93\).

The true moral basis for international law, therefore, could not be captured by the principles of salience and mitigation, since it should include ‘moral concerns beyond state legitimacy’ which should pull us into this different political association. Notably, however, in a further point of his speech Christiano agrees that ‘International society is not capable of providing much in the way of justice for the world as a whole or fulfilling the core

\(^{89}\) That is the sense of his ‘unity of value’ idea in *Justice for Hedgehogs*.

\(^{90}\) While individuals are recognized in international law as both right holders and responsibility bearers, the key distinction in comparison to domestic law “is that their legal existence is secondary and not a constitutive part of the legal system.” Başak Çali, ‘On Interpretativism and International Law’ (2009) 20 *EJIL* 805 at 818. Shaw notices that, despite the proliferation of international human rights instruments, which “have enabled individuals to have direct access to international courts and tribunals”, individual actors “as a general rule lack standing to assert violations of international treaties in the absence of a protest by the state of nationality” Malcolm N Shaw, *supra* note 50 at 233.

\(^{91}\) Thomas Christiano, ‘Ronald Dworkin, State Consent, and Progressive Cosmopolitanism’, *supra* note 14 at 3

\(^{92}\) Ibid at 15

\(^{93}\) Ibid at 59
responsibilities that States fulfill, much as we might hope for it.\footnote{Ibid at 20}

What I gather from these two objectors is that, since grounding of international law arises only from the equal dignity of each person, personal moral obligations are the same towards a fellow national and a non-national. This is an acceptable view, insofar as one takes Kant’s principle of humanity to entail the same level of moral obligations towards all persons:

“If the value you find in your life is to be truly objective, it must be the value of humanity itself. You must find the same objective value in the lives of all other persons. You must treat yourself as an end in yourself, and therefore, out of self-respect, you must treat all other people as ends in themselves as well.”\footnote{This is the depiction of the principle by R. Dworkin, Justice for Hedgehogs supra note 10 at 265; for an extended explanation see Robert Johnson and Adam Cureton, “Kant's Moral Philosophy – the Humanity Formula”, The Stanford Encyclopedia of Philosophy (Spring 2017 Edition), Edward N. Zalta (ed.), URL = \url{https://plato.stanford.edu/archives/spr2017/entries/kant-moral/}}

Personally, I can find myself agreeing with this view. But such was not Dworkin’s. On the contrary, he identified levels of mutual obligation which depend on our level of closeness we have to each person\footnote{R. Dworkin, Justice for Hedgehogs supra note 10 at p. 300}. He argued that Kant’s understanding of moral duty is based on an “ultra-demanding interpretation” of the principle of humanity, which forbids us to have any preferences between persons and requires an absolute indifference between who to rescue or aid. He wrote, as an example of his position, “I do not violate the principle of the equal importance of human life just because I dedicate my life to helping my children while I ignore yours”\footnote{Ibid at 274}. And he also argued that “Politics, in particular, are a fertile source of special relationships: we have distinct obligations of aid to those who are joined with us under a single collective government”\footnote{Ibid at 271}. These are, as we saw above, what he names associative obligations. While one may substantially disagree with this proposition, I believe it cannot be said that Dworkin was incoherent when extending his thoughts to international law. Because of his unitary conception of morality and law, it is plausible that special political communities with distinct associative obligations towards each other than towards other world-citizens, with their specific Governments, have a group status in such law, and act as agents in the international political community. Such will be one of my assumptions in my alternative theory below.

In another line of defense, as will be further explained in the following section, T. Bustamante supported Dworkin’s internal coherence in saying that ‘the principle of mitigation
is established in the same way as Dworkin derived our duty to be moral from the ethical duties that we have towards ourselves.  

He creates an analogy between people and States as moral agents, to identify what States ought and ought not to do morally. He says, ‘once we understand the sources of our moral obligations in this way, it would be a small step to think that we can extend this reasoning into the territory of international law’.

Thomas Christiano also presented a wholly different line of criticism besides the one we saw above. He has provided, before the publication of Dworkin’s theory of international law, an interesting account of the legitimacy of international institutions, which he called the “fair association model”. The fair association model is an attempt to ground the legitimacy of international law in democratic values such as the principles of “equal advancement of interests” and “public equality”, where the legitimacy of international law “derives from the fact that the system of international law and institutions is a system of voluntary association among states”. Accordingly, and in contention of Dworkin, Christiano, believes the voluntary association model “seems to animate the traditional view that state consent is the main source of international law”.

As such, his main criticism of Dworkin is the lack of regard he had for consent as a legitimate process to create international law. He argued ‘the role for state consent consists in making it possible to experiment with different ways of solving the difficult problems of international society and doing so by means of a process that is accountable to the people subjected to it.’ And even further: ‘The process of state consent, when it is among states that represent their peoples and when negotiation is carried out fairly, is the analog of democracy in the process of making collective decisions for domestic societies’. For him, failure to explain why state consent is so important to international law seems a severe lacuna in the picture, because on the one hand, different societies have different interests, and on the other, they will disagree on how to better pursue international aims.

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99 T Bustamante ‘Revisiting Dworkin's Philosophy of International Law: Could the Hedgehog Have Done it Any Other Way?’ supra note 11 at 8

100 Ibid


102 Ibid

103 Thomas Christiano, ‘Ronald Dworkin, State Consent, and Progressive Cosmopolitanism’ at 19

104 Ibid
This defense seems to me in stark contrast with, firstly, his criticism that mitigation and salience do not create a society Cosmopolitan enough where all have duties for all to the same degree; and secondly, the basic proposition in Dworkin’s article that state-by-state consent does not allow for the consecution of greater international aims, because of the relevant incentive not to cooperate on the part of individual States. Indeed, the picture might be different if there was a world parliament with a majority system resembling domestic societies. Even though Dworkin envisioned a democratic-style four-majorities world parliament at the end of his article, he was quick to announce that such is yet imaginary. However, I agree with Christiano that state consent plays a relevant role in the creation of international law. Drawing from his arguments, I will argue below that its role is procedural.

IV. AN ALTERNATIVE

Bustamante was convinced that the solution Dworkin gave was the only possible one in derivation of his theory. He rejected Scarffe’s and Christiano’s criticism that more cosmopolitan ideas of international law were possible, accusing them of deep misunderstanding of some of Dworkin’s basic premises: most specifically, a misunderstanding of what it meant to have “moral duties” in his wider literature. To correctly understand, he reminds us, we need to go back to the tree structure: ultimately, political morality is based in personal morality; personal morality, in turn, is ultimately based on three things: (1) our own human dignity and therefore self-respect; from which flows (2) a duty to respect others as equals (Kant’s principle of humanity); along with (3) certain “special” associative obligations we only have towards members of our communities, such as our family or fellow nationals. These personal moral duties will in turn be represented in broader political morality values, and will play a relevant role in interpreting the law of each community.

Bustamante therefore identifies a good level of egocentrism in the principle of humanity: only out of self-respect shall I respect others. This view would explain that, when transplanted onto the international arena, Dworkin’s theory seems politically realist on the part of States. He would argue instead that principles of non-intervention and sovereignty are based on a deep respect from one State to another, because they each share the same respectable

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106 T Bustamante ‘Revisiting Dworkin's Philosophy of International Law: Could the Hedgehog Have Done it Any Other Way?’ supra note 11 at 18
107 See above p. 22
nature, and as such, their duty to be moral towards other States ultimately flows from their duties towards themselves. The way he puts it, ‘the position of states in international law is analogous to the position of a moral agent in relation to other people who are not under her authority and do not have the special associative obligations that are internal to a special community to which she belongs.’

It seems Dworkin could have agreed with this interpretation: it would explain his rejection of any obligations owed by States in international law that were not grounded on self-enhancement. If such is the case, I find two flaws in this analogy. First, the analogy claims that States do not belong to a special community with associative obligations internal to that community. However, Dworkin is only able to identify the true ground of international law through creating a hypothetical Court with mandatory jurisdiction over all States of the world, simulating a domestic legal system. He says ‘We can identify a general theory of what it would be appropriate for such an institution to enforce as the foundation of international law’. And what is legitimate for Courts to enforce - in his municipal law theory - is grounded in moral associative obligations among nationals by virtue of belonging to the same political community. He thus assumes the existence of a hypothetical community with a political morality in which this Court would ground its enforcement. But then, he changes the subject. I believe the better view is that the Court would require the existence of an international political community in order to identify international law.

Second, within the personal arena, people who do not share special associative obligations (‘strangers’) still have certain moral duties towards each other, even if to a lower standard. In Dworkin’s words,

“People around the world believe they have – and they do have – a moral responsibility to help to protect people in other nations from war crimes, genocide, and other violations to human rights.”

Within the analogy (that States equate moral agents of international law) this would mean that States have a certain basic level of moral duty towards other States. An example would be to prevent their degradation into failed States, or to eradicate extreme poverty in their

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108 T Bustamante ‘Revisiting Dworkin’s Philosophy of International Law: Could the Hedgehog Have Done it Any Other Way?’ supra note 11 at 24
110 As he warrants in p. 14, “Of course, it is an important part of the exercise whether a hypothetical court would be right in endorsing its own hypothetical authority. In the next section, I will explain why I think it is legitimate”. However, he never again goes back to the question of the legitimacy of the Court.
societies, or to comply with treaties. However, this is how Dworkin concludes the above:

“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.”

On this issue, again, Dworkin grounds obligations towards others in self-obligations. It is not, as has been claimed, necessarily inconsistent for him to do so: he is saying that if peoples have moral duties towards foreign peoples, then so do their respective governments. It is not new to find that personal morality has its echo in political morality. However on this point, I believe Dworkin should have taken his theory one step further. To accept his premise that Governments represent Societies in international law (as in the cited paragraph – they are the ones who ‘accept’ definitions of sovereignty) means to accept also that States are the main practical subjects of international law. Indeed, his non-cosmopolitan theory (where nationals of States have stronger moral ties with their fellow nationals) could not have it any other way. However, this assumption begs us to identify the grounds of their obligations as States among each other under international law. In municipal law, Dworkin certainly does not stop in personal morality to justify law: he grounds it in political morality, which is a higher, peculiar and common level of morality, compatible with the previous one. Curiously enough, he grounds a much higher level of obligations – international law – in the floor level – personal morality of each citizen towards foreigners, skipping one step along the way. In my view, he should have strived to identify the different nature of the morality that international law is grounded in.

For that, of course, he would have needed to accept the existence of an international community, which – at least in Bustamante’s view, as above – he did not. But it seems naïve to negate the existence of such community. So I will take it as granted that there exists an international community of States, which represent peoples, as well as a growing number of other complex agents of the international community.

How would we create the third level of international morality? As mentioned above, Dworkin understands moral obligations as layered depending on our level of integration within

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111 R. Dworkin, ‘A New Philosophy for International Law’, supra note 3 at 18
112 R. Dworkin, Justice for Hedgehogs supra note 10 at p. 5
113 As Besson identifies, “International legal subjects have multiplied in the last decades and with them the potential scope of law-makers, thus threatening the legal monopoly of states qua law-makers in favour of international organizations and, to a lesser degree, individuals”. For further elaboration on new subjects see e.g. See e.g. J. Alvarez, International Organizations as Law-Makers (Oxford: Oxford University Press, 2006); R McCorquodale ‘An Inclusive International Legal System’ (2004) 17 Leiden Journal of International Law 477
a community. Thus, an international morality might have a low level of mutual obligation among States, cornered to the basic standards of eradicating atrocity crimes, ensuring basic human rights, and principles of just war. It is beyond the scope of this project to identify what the basic values of the international community are, and if they are indeed low key or include more radical universal duties\textsuperscript{114}.

Some academics have attempted to recreate the most basic standards: T. Christiano identified the increase in wealth or the alleviation of global poverty, which played a serious role in the creation of WTO or in the unanimous 2030 Agenda\textsuperscript{115}. John Tasioulas, for example, employs a Dworkinian interpretive approach to defend an account of customary international law according to which the best interpretation of state practice and \textit{opinio juris} is partly a matter of which interpretation has the “greatest ethical appeal determined by reference to the ethical values it [international law] is intended to secure . . . [which] include peaceful co-existence, human rights, and environmental values, among others”\textsuperscript{116}. John Rawls identifies eight basic principles, among which we can find the duty of non-intervention, the duty to honor human rights, and even the duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime\textsuperscript{117}. However, the key question is not what those values are: but to construct through them a theory that not only accounts for the sources of international law, but also expounds the abstract principles that provide the foundations for these sources.

\section*{V. JUS COGENS}

The International Law Commission, established by the Sixth Commission of the General Assembly of the United Nations in 1947, was mandated to encourage the progressive development of international law and its codification\textsuperscript{118}. Its work has been of notable importance for the identification, codification and growth of international law, as evidenced by

\textsuperscript{114} For arguments on progressive distributive justice duties within the international realm, see for instance Peter Singer ‘Famine, Afluence and Morality’ (1972) 1 \textit{Philosophy and Public Affairs} 229 and Thomas Pogge, ‘Priorities Of Global Justice’ (2001) 32 \textit{Metaphilosophy} 6

\textsuperscript{115} ‘Transforming our world: the 2030 Agenda for Sustainable Development’, Resolution adopted by the General Assembly (A/RES/70/1) on 25 September 2015


\textsuperscript{117} John Rawls, \textit{The Law Of Peoples} (1st edn, Harvard Univ Press 2003)

\textsuperscript{118} A/RES/174(II), 1947
numerous references to its findings by the International Court of Justice\textsuperscript{119}. Remarkably, one of the topics currently under review of the Commission, introduced in 2016, includes the identification and legal consequences of \textit{jus cogens} norms. When including it in the agenda, it was stated by Special Rapporteur Mr. Dire Tladi that “With respect to the nature of \textit{jus cogens}, the Vienna Convention conceptualises \textit{jus cogens} as a norm of positive law, founded on consent.”\textsuperscript{120}

As recently as August 9\textsuperscript{th}, 2016, during its 3342nd meeting, the Sixth Commission of the General Assembly considered the First Report elaborated by the same Special Rapporteur on the subject of \textit{jus cogens}.\textsuperscript{121} After extensive research, the definition he gave of the nature of \textit{jus cogens} (Draft conclusion 3), mostly welcomed by States, was as follows:

“\textit{Norms of jus cogens protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable.”}

We can observe that the strong assertion in favor of consent is gone. To the contrary, the Report struggles to identify the theoretical nature of \textit{jus cogens} after navigating the literature and relevant judgments. In paragraph 59, after giving accounts of the natural law and positivist law theories in their attempt to explain \textit{jus cogens}, the Rapporteur concludes:

“No single theory has yet adequately explained the uniqueness of \textit{jus cogens} in international law, that is, the peremptoriness of certain obligations. It may even be, as suggested by Koskenniemi advancing a general theory of sources, that the binding and peremptory force of \textit{jus cogens} is best understood as an interaction between natural law and positivism.”\textsuperscript{122}

In regards to natural law, he says, it is an attractive basis because it solves the issue of how a norm can be above the free will of the sovereign. Its proponents claim that international

\textsuperscript{120} A/69/10, at para. 14
\textsuperscript{121} First report on \textit{jus cogens} by Dire Tladi, Special Rapporteur (A/CN.4/693) \textit{supra} note 20. Noticeably, the existence of \textit{jus cogens} as a part of international law seems to be no longer contested. Its existence is acknowledged not only in the VCLT, but also countless judgements from the ICJ and other international and domestic Tribunals, and State statements in the General Assembly, the Security Council and other bodies. As pointed out by Paulus, “the concept of jus cogens seems to have lost its controversial character” and “the last consistent opponent among States, France, is said to be willing to make its peace with the concept” in Andreas Paulus “\textit{Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at Re-appraisal}” (2005) 74 Nordic Journal of International Law 297, at 297-298.
\textsuperscript{122} Ibid (report) at para. 59
rules based on ‘morality and values’ are the only possible explanation to *jus cogens*\textsuperscript{123}. But its primary difficulty remains the question of who determines the content of natural law. He cites one of the main representatives of the current, Mary-Ellen O’Connell: ‘Contemporary natural law theory still seems to suffer from the subjective reliance on the opinions of scholars, judges or officials’\textsuperscript{124}. Even further, she states ‘Currently it appears that judges and scholars simply consult their consciences when identifying *jus cogens* norms.’\textsuperscript{125} In regards to the opposite theory, consent-based positivism, the Special Rapporteur acknowledges that ‘it is difficult to understand, if States have the free will to make any rules, why some rules cannot be derogated from by consent.’\textsuperscript{126}

It should come as little surprise that support for both approaches can be found in judicial practice. The judgments of the International Court of Justice themselves have been less than clear on the basis of *jus cogens*. At times, the Court has appeared to advance a natural law approach to *jus cogens*, while at other times the Court has seemed to rely on positivist and consent-based thinking. Individual opinions of the judges of the Court have been similarly diverse. Although the Court in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*\textsuperscript{127} does not describe the prohibition against genocide as jus cogens, it seems to describe the prohibition in terms that suggest it is so and, moreover, in a way that places less weight on the consent of States as an element of law. The Court recognises “genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required in order to liberate mankind from such an odious scourge. …its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality”.

\textsuperscript{123} See, e.g. Mark Janis ‘The Nature of Jus Cogens’ (1987) 3 *Connecticut Journal of International Law* 359, at 361 (“the distinctive character essence of jus cogens is such, I submit, as to blend the concept into traditional notions of natural law”)
\textsuperscript{124} Mary-Ellen O’Connell ‘Jus Cogens: International Law’s Higher Ethical Norms’ in Donald Childress (ed.) *The Role of Ethics in International Law* (2012), at 86-87.
\textsuperscript{125} Ibid at 79
\textsuperscript{126} A/CN.4/693 supra note 20 at para. 53
In another point of the judgment the Court states that the prohibition of genocide has “moral and humanitarian principles as its basis”\(^{128}\). Likewise in *Prosecutor v Jelisić*\(^{129}\), the Tribunal asserts that in the Reservations to the Genocide Convention Advisory Opinion, the International Court of Justice placed the crime of genocide on the level of *jus cogens*. Yet, in perhaps the Court’s clearest invocation of jus cogens, *Questions Relating to the Obligation to Prosecute or Extradite*\(^{130}\) the Court adopted what might be interpreted as a consent-based approach to the identification of jus cogens, at least to the extent that customary international law is seen as consent based (“that prohibition is grounded in a widespread international practice and on the opinio juris of States”). Similarly, the Court’s tentative reference to the prohibition on the use of force as part of jus cogens in the *Military and Paramilitary Activities case*\(^{131}\) is based, in addition to the Commission’s work, on the acceptance of the prohibition by States. There the Court cites, in addition to the Commission’s work, frequent reference of the prohibition being *jus cogens* by representatives of States and the fact that both parties to the dispute accept the prohibition as part of jus cogens.

The jurisprudence of other courts and tribunals is equally inconclusive about the basis of the binding nature of jus cogens norms. In *Furundžija*, for example, the International Tribunal for the Former Yugoslavia linked the *jus cogens* nature of the prohibition of torture to the values underlying the prohibition.\(^{132}\) On the other hand, decisions of that Tribunal have also highlighted the acceptance by States of *jus cogens* norms. The Inter-American Court of Human Rights, in one of its earliest decisions invoking *jus cogens*, adopted an apparently natural law approach, juxtaposing ‘the voluntarist conception of international law’ with ‘the ideal of construction of an international community with greater cohesion … in the light of law of and in search of justice’, with the latter reflecting a move ‘from *jus dispositivum* to *jus después*’.

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\(^{128}\) Ibid at 24

\(^{129}\) *Prosecutor v Jelisić* (IT-95-10-T), 14 December 1999 (ICTY), para. 60

\(^{130}\) *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), Judgment of 20 July 2012, ICJ Reports 2012, p. 422 para. 99

\(^{131}\) *Military and Paramilitary Activities in and against Nicaragua*, supra note 55, at 190

\(^{132}\) *Prosecutor v. Anto Furundžija (Trial Judgement)* (IT-95-17/1), 10 December 1998 (ICTY), para. 153 (‘because of the values [the prohibition of torture] protects, this principle has evolved into a peremptory norm or jus cogens.’). See also *Prosecutor v Galić*, (IT-98-29-T), 5 December 2003 (ICTY), para. 98
However, they say in other judgments, contrary to the immutability of the natural law approach, **jus cogens** norms evolve\(^{134}\).

As Special Rapporteur Tladi writes ‘The theoretical debate is important because from it, the core elements of jus cogens — those elements that are widely shared across the doctrinal perspectives — can be deciphered.’\(^{135}\) Maybe Ronald Dworkin’s exercise of ‘intellectual responsibility’ in 2013 to propose a better theory of international law couldn’t have come at a more practically relevant time. The International Law Commission would include the topic of **jus cogens** in its agenda in 2016. It seems as though the next Report might benefit from looking for an answer in the middle of positivism and natural law, which can encompass at the same time the moral and peremptory grounds of **jus cogens** norms, and their institutionalization by consent, judicial practice, and wide sharing across the doctrinal perspectives of the international community.

Namely, interpretivism might give an answer to how this set of special rules can be grounded in ‘morality and values’ while at the same time evolve depending on the general practices and beliefs of the international community\(^{136}\). It could also explain that judges are not ‘simply consulting their consciences’ when identifying **jus cogens** norms, as we saw above, but identifying and applying law against an interpretive background including moral principles\(^{137}\). A background which would be: to aim at an improved legitimacy of the international governance system, resting on the duty of states to protect the values of the international community, making a rule valid insofar as it pretends to forward such values. This view would explain why **jus cogens** norms are hierarchically superior and universally applicable, becoming, in the frame of the next years of discussion, a solid interpretive basis upon which the system is tested, increasing determinacy of international law, avoiding the theoretical circularity of consent and traditional prisoners’ dilemas.

\(^{133}\) Constantine et al v Trinidad and Tobago, Judgment of 1 September 2001 (Inter-American Court of Human Rights), para. 38.

\(^{134}\) Nadege Dorzema et al v Dominican Republic, Judgment of 24 October 2012, (InterAmerican Court of Human Rights), para. 225

\(^{135}\) Report supra note 20, para. 59

\(^{136}\) R. Dworkin, Justice for Hedgehogs, supra note 10, at 408, describing a “dynamic morality: as pronouncements are made and enforced on concrete occasions, that special [family] morality shifts.”

\(^{137}\) Ronald Dworkin, ‘The Model of Rules I’ supra note 38
It is pertinent on this point to consider the role of state consent might have in this new framework. As mentioned above, state consent it is generally acceptable as a means of creation of international legal norms, so long as there is a stronger and more theoretically coherent basis to explain, justify and interpret that law. Such is necessarily the case because, as Christiano highlights, societies might disagree as to the best way to tackle international concerns, even if such concerns are shared. One might wonder how the discussion of this dissertation is relevant if we are to conclude that ultimately, ‘in practice’, state consent will generate international laws. As has been supported throughout this Project, a theory of grounds provides both an interpretive framework for law and a direction for agents to follow. In practice, this might a duty to ‘accept and recognize’ jus cogens norms, and certain treaties and customs – and to refrain from accepting any norms which imperil the international political morality’s values. In Dworkin’s words, international law’s need for political morality argumentation will grow less prominent as ordinary legal argument takes over, and such will signal its success. That is why now ‘we must nourish the roots, not the twigs, of international law.\(^\text{139}\)

VI. CONCLUSION

From the above analysis I gather that it is possible to reconcile, at once, the definition of jus cogens norms as those that enshrine the values of the international community - which stem from the international political morality of such community - and their institutionalization into law by way of state consent, through the mechanisms of Article 38 of the ICJ Statute and others. Additionally, I gather the Dworkinian approach that judges and lawyers as the ‘working political philosophers of a democratic state’\(^\text{140}\) may solve the impression by naturalists that ‘currently it appears that judges and scholars simply consult their consciences when identifying jus cogens norms’. Lastly, those two elements illuminate the justification of the legitimacy of the international legal system: the duty of all States to protect the values of the international community. That moral duty coincides at three different levels, as it is owed by States towards other States, in the international realm; towards their citizens, in enhancement of their own legitimacy, in the municipal realm; and by individuals towards others, in accordance with the personal morality of all persons across the world, creating unity of value.

\(^{138}\) Thomas Christiano, ‘Ronald Dworkin, State Consent, and Progressive Cosmopolitanism’, supra note 14 at 19

\(^{139}\) R. Dworkin, ‘A New Philosophy of International Law’, supra note 6, at 30

\(^{140}\) R. Dworkin, Justice for Hedgehogs, supra note 10, at 414
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