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Discussion

Dworkin on International Law: Not Much of a Legacy?

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Introduction

In a 2009 article, Başak Çali notices that Dworkin's interpretivism is one of the contemporary theories of law which "has been received with indifference by theorists of international law."[1] She attributes this indifference to the fact that "Dworkin is yet another legal philosopher who has not offered a full-length treatment of international law."[2] It transpired, however, that Dworkin's last piece in legal philosophy, which was posthumously published, concerned exactly the subject matter of international law.[3] This certainly came as no small surprise for both followers and critics of his work, bearing in mind how little Dworkin had previously dwelt on this topic. For example, in his penultimate book *Justice for Hedgehogs*,[4] the very phrase "international law" was explicitly mentioned just three times, and only in relation to the discussion of the nature of human rights.

In this paper, I intend to investigate the legacy of Dworkin's contribution to the reemerged jurisprudential interest in the treatment of international law. Although it remains an open question whether his general interpretivist approach could be profitably used in that project, one thing seems to be clear: if such a project is to be pursued, it would certainly have to go along different lines than the ones proposed by Dworkin himself. This, however, in no way affects the fact that some of Dworkin's general points are of relevance for a fresh beginning in the jurisprudential treatment of international law.

I. Human Rights as "Trump-Over-Sovereignty" Rights

Dworkin left us with a grandiose work in legal and political philosophy, which is easily comparable to some masterpiece of art. By being multifaceted, his work at times appears to a reader to be extremely complex, sometimes even incoherent. However, on a closer look, it seems as if Dworkin could with great certainty

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1. Başak Çali, "On Interpretativism and International Law" (2009) 20:3 EJIL 805 at 805.
2. *Ibid* at 806.
3. Ronald Dworkin, "A New Philosophy for International Law" (2013) 41:1 Phil & Pub Affairs 2 [Dworkin, "A New Philosophy"].
4. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: The Belknap Press of Harvard University Press, 2011) [Dworkin, *Hedgehogs*].

anticipate that his initial steps, made in *Taking Rights Seriously*,[5] would eventually lead him to the ultimate exposition presented in *Justice for Hedgehogs*. To say this is certainly not to imply that his work is free from problematic aspects, such as unsubstantiated claims and internal inconsistencies. Yet, as with any genuinely great painting, a meticulous reader of Dworkin's work can unmistakably trace the ideas and standpoints that, like dominant colors, pervade his entire philosophy. This is probably more than anywhere else the case in *Justice for Hedgehogs*, which Waldron rightly characterizes as "the great synthesis," insofar as this book is "an affirmation of the unity of value, bringing into a single Dworkinian vision an ethic of dignity and a comprehensive legal and political theory."[6]

Dworkin's teachings on human rights are not only embedded in this vision, but also completely congruous with his famous conception of "rights as trumps". According to this conception, rights operate as "trumps over some background justification for political decisions that states a goal for the community as a whole."[7] Legal rights are created and enforced by governments for different reasons. There is, further, a particular sub-class of moral rights, which Dworkin labels *political rights*. These are rights possessed by individuals not against other individuals, but against governments. Political rights mark off and protect certain interests, which are so important that it would be morally wrong for the community to sacrifice them in order to secure an overall benefit. Typical rights of that sort are constitutional rights.[8] Claiming a political right implies asserting a rather strong claim that the government cannot do what might benefit the community as a whole. This claim necessitates an adequate justification. Dworkin finds said justification in the two-pronged ethical conception of human dignity. The first part of the conception concerns a principle of *self-respect*, according to which each person has to take his own life seriously. That is, each person "must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity."[9] The second part pertains to a principle of *authenticity*. It states that each person has a personal responsibility for determining what will count as success in his own life. That is, each person "has a personal responsibility to create that life through a coherent narrative or style that he himself endorses."[10] Dworkin, nonetheless, acknowledges that nations differ

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5. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) [Dworkin, *Taking Rights Seriously*].

6. Jeremy Waldron, "*Ronald Dworkin: An Appreciation*", Public Law & Legal Theory Research Paper Series: Working Paper No 13-39 (Faculty of Law, New York University, 2013), online: SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276009.

7. Ronald Dworkin, "Rights as Trumps" in Jeremy Waldron, ed, *Theories of Rights* (Oxford: Oxford University Press, 1984) at 153.

8. In that respect, a political right "is a *trump* over the kind of trade-off argument that normally justifies political action." Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton: Princeton University Press, 2006) at 31 [Dworkin, *Is Democracy Possible Here?*].

9. Dworkin, *Hedgehogs*, *supra* note 4 at 203.

10. *Ibid* at 204. In his earlier works, Dworkin spoke of "the principle of intrinsic value" and "the principle of personal responsibility". Dworkin, *Is Democracy Possible Here?*, *supra* note 8 at 9-10.

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in their assessments of what particular political rights can be justified and legally recognized on this account of human dignity. For instance, whereas in Europe individuals normally have a legal right not to be publicly insulted because of their membership in a particular ethnic, religious or racial group, no such right exists in the United States. This is what Dworkin characterizes as "a good-faith difference" in understanding what human dignity requires.[11]

Since there is wide agreement that not all political rights have the status of human rights, it is necessary to determine in what sense the latter are distinguishable from the former. In assessing this classificatory question, Dworkin endorses the view which proceeds from the political practice of treating certain rights as human rights. This leads him to the conclusion that human rights are those that not only trump collective national goals but also the Westphalian conception of national sovereignty. That is, "[i]f those who claim authority over any territory violate these human rights of people in their power, then other nations are permitted to attempt to stop them by means that would otherwise not be permitted—by economic sanctions or even military invasion."[12] After finding a more precise classificatory criterion for defining human rights, Dworkin tries to determine what concrete political rights deserve to be classified as human rights. In doing so, he proceeds from the "basic human right", to the right of each individual to be treated by those in power with a specific type of attitude: an attitude that expresses the understanding that each person is a human being whose dignity matters.[13]

This most basic and most abstract human right generates a class of "the baseline human rights", which any nation, regardless of its traditions and practices, must respect. On the other hand, Dworkin acknowledges the possibility of having permissible historically and culturally driven variations in the interpretations of particular human rights, which, nonetheless, have to pass the test of consistency, according to which government is forbidden from acting "in ways that cannot be justified under the conception of dignity that the nation has embraced."[14] This is the line of differentiation between "good-faith mistakes" made by governments that in principle respect the human dignity of their citizens, and acts of "contempt for and indifference to human dignity."[15] This test is interpretative and Dworkin is aware that there will be disagreements between both lawyers and nations about how and where that line should be drawn, but he nonetheless believes that "some judgments—those that match the world's consensus about the most basic human rights—will be obvious."[16]

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11. *Ibid* at 33. Yet, in a highly provocative article, "The Right to Ridicule", regarding the Muhammad cartoon controversy, Dworkin invites the European Court of Human Rights to abandon its practice and surrender to the US-style interpretation of freedom of speech, which apparently captures the best-light meaning of this freedom. See Ronald Dworkin, "The Right to Ridicule" (2006) 53:5 The New York Review of Books.

12. Dworkin, *Hedgehogs*, *supra* note 4 at 333.

13. *Ibid* at 335.

14. Dworkin, *Is Democracy Possible Here?*, *supra* note 8 at 43.

15. *Ibid* at 35.

16. Dworkin, *Hedgehogs*, *supra* note 4 at 336.

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Dworkin's account of human rights faces at least three possible lines of criticism. First, he explicitly states that human rights cannot be distinguished from other political rights according to some inherent foundational criterion, insofar as both classes of rights are morally important.[17] However, while both are grounded in the respect for the two-pronged conception of human dignity, human rights are additionally classified as "trump-over-sovereignty" rights. In that respect, Dworkin self-admittedly follows authors who advance a political conception, driven from their respective human rights practice.[18] One such author is Raz,[19] who also claims "human rights are those regarding which sovereignty-limiting measures are morally justified."[20] Consequently, Dworkin's account is exposed to similar criticisms as those employed against Raz's theory.[21] Griffin, for example, rightly points out that the sovereignty-limiting feature is by no means either the only or the dominant element of the human rights practice. Human rights discourse is employed equally in various intra-national contexts, for instance, "to justify rebellion, to establish a case for peaceful reform, to curb an autocratic ruler, to criticize a majority's treatment of racial or ethnic minorities." Moreover, it is used by the UN and NGOs for periodic reports on the human rights records of individual countries. Finally, human rights are also used for criticizing institutions within a single society. Hence, the claim that "trump-over-sovereignty" is an essential feature of human rights practice is defective as a descriptive factual claim.[22]

Second, if the previous claim is turned into a normative argument, it becomes even less persuasive. While Raz advances the view that we should treat as human rights only those rights in violation of which states cannot block an outsider's intervention by employing the "none-of-your-business" argument,[23] Dworkin seems to endorse a starker test. He claims that only those rights whose violation is capable of triggering at least severe economic sanctions, if not full blown military intervention by other states or the international community, should qualify for the status of human rights.[24] This is what Waldron

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17. *Ibid* at 334.
18. *Ibid* at 333.
19. For other works from authors in this camp, whom Dworkin explicitly mentions, see Charles R Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009); John Rawls, *The Law of Peoples: with "The Idea of Public Reason Revisited"* (Cambridge: Harvard University Press, 1999).
20. Joseph Raz, "Human Rights Without Foundations" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 321 at 329.
21. To be sure, Raz's account is more complex than this. I have offered a more extensive criticism of this approach in Miodrag A Jovanović, *Collective Rights: A Legal Theory* (Cambridge: Cambridge University Press, 2012) at 171ff.
22. James Griffin, "Human Rights and the Autonomy of International Law" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 339 at 343.
23. Joseph Raz, "Individual Rights in the Emerging World Order" (Paper delivered at the 24th IVR Congress, Beijing, 2009), (2010) 1 Transnational Legal Theory 31 at 42.
24. In distinguishing human rights from other political rights, Dworkin says: "Violations of even important political rights do not ordinarily justify other nations' invading the offending nation or deliberately damaging its economy." Dworkin, *Is Democracy Possible Here?, supra* note 8 at 33-34. Cf Dworkin, *Hedgehogs*, *supra* note 4 at 333.

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has recently labeled as the "Armed Intervention View".[25] This view, however, fosters a serious misconception about human rights. Despite the fact that it is possible to find moral, if not necessarily legal, justification for humanitarian intervention in cases of severe and systematic human rights violations, "the mark of a human right is certainly not whether its violation confers on other states, or a coalition of them, a legal right to coerce compliance by violence. Force is a small part of human rights enforcement."[26] Moreover, human rights and sovereignty are not necessarily antithetical values within the realm of international law. This is plainly demonstrated by the UN-endorsed doctrine of the "responsibility to protect" (R2P), which replaced the outdated doctrine of unilateral humanitarian interventions.[27] Paragraph 138 of the 2005 World Summit Outcome document stipulates that the primary responsibility of sovereign states is to protect their populations "from genocide, war crimes, ethnic cleansing and crimes against humanity." Only if a sovereign state fails in discharging this responsibility, may other states resume it through the lawful procedure in the Security Council.[28] Finally, Dworkin's treatment of human rights and sovereignty as irreconcilably opposing values is hardly in line with his general vision of the unity of value. If he is prepared to argue that, when properly understood, constitutional rights reinforce rather than conflict with core democratic values, "[w]hy, then, when it comes to the concepts of sovereignty and human rights, as objective ideals, does *Justice for Hedgehogs* see a conflict requiring the latter to trump the former?"[29]

Finally, Dworkin's conception of human rights reveals some inherent tensions within a theoretical project that was once famously labeled as "parochial"[30]—a designation that he was apparently ready to accept to a certain extent.[31] While striving to classify human rights in a non-foundational manner, according to a relevant political, human rights practice, Dworkin, nonetheless, derives all political rights, including human rights, from the "basic" and

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25. Waldron admits that in its clearest form it cannot be attributed to any of the proponents of a political conception of human rights. Interestingly enough, he does not mention Dworkin's account, and instead focuses on Beitz, Raz and Rawls. He argues that Rawls comes closest to the "Armed Intervention View". Jeremy Waldron, "Human Rights: A Critique of the Raz/Rawls Approach", Public Law & Legal Theory Research Paper Series: Working Paper No 13-32 (Faculty of Law, New York University, 2013) at 4, online: SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745. For Raz's response, see Joseph Raz, "On Waldron's Critique of Raz on Human Rights", Public Law & Legal Theory Working Paper Group: Paper No 13-359 (Faculty of Law, Columbia University, 2013), online: SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307471.

26. Robert D Sloane, "Human Rights for Hedgehogs? Global Value Pluralism, International Law, and Some Reservations of the Fox" (2010) 90 Boston U Law Rev 975 at 1006.

27. See Miodrag A Jovanović, "Responsibility to Protect and the International Rule of Law", online: SSRN http://ssrn.com/abstract=2317153 [Jovanović, "Responsibility to Protect"].

28. *2005 World Summit Outcome*, GA Res 60/1, UNGAOR, 2005, UN Doc A/RES/60/1 at para 139.

29. Sloane, *supra* note 26 at 1007.

30. Joseph Raz, "Can There Be a Theory of Law?" in Martin P Golding & William A Edmundson, eds, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Malden, MA: Blackwell, 2004) 324 at 332.

31. Ronald Dworkin, *Justice in Robes* (Cambridge: The Belknap Press of Harvard University Press, 2006) at 231 [Dworkin, *Justice in Robes*].

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"fundamental" right to be treated with certain attitude of respect for human dignity.[32] All rights, however, including this basic one, are developed within an avowedly *liberal* theory of law.[33] And yet, Dworkin believes that this poses no problem to the development of culturally sensitive conception of human rights. Moreover, he is confident that his value monism is somehow compatible with the need to "take pluralism into account in deciding what account of human rights could possibly be agreed upon in treaties and enforced in practice."[34] However, this is not warranted. Take, for example, his interpretative test for "good faith mistakes" in treating baseline human rights. Dworkin says that this test "cannot be satisfied simply by a *nation's* pronouncement of good faith. It is satisfied only when a government's overall behavior is defensible under an intelligible, even if unconvincing, conception of what *our* two principles of dignity require."[35] Since nations are generally justified in implementing culturally sensitive human rights interpretations, it is not clear whether the "nation's" or "our" view ultimately controls the test, having in mind the possibility that these two views come in conflict.

II. Beyond the Westphalian Conception of International Law

After grounding his theory of human rights in the conception of dignity that has the status of a universal, objective and absolute moral truth, Dworkin makes a step towards a philosophy for international law with the same foundations. Contrary to Thomas Franck's famous announcement that we are living in the "post-ontological era," in which the crucial issue is no longer whether international law is "true" law,[36] Dworkin begins by noticing that "the existential challenge" is still significant, even if often deliberately ignored. The emergence and endurance of this challenge can be attributed to the mid-20th century rise in popularity of legal positivism.[37] Dworkin singles out Hart's theory as developing a *sociological*, *criterial* concept, by asking whether there exists a system of practices that can intelligibly be called international law. Such a theory differs from the one focused on a *doctrinal*, *interpretative* concept, which we share "not by agreeing about tests for application but by agreeing that something important turns on its application and then disagreeing, sometimes dramatically, about what tests are therefore appropriate to its use, given that its application has those consequences."[38] Dworkin notices that some international scholars, like Besson, try to develop a doctrinal account of international law from Hart's version of positivism. They claim that the self-limiting consent of sovereign

32. Sloane, thus, believes that Dworkin's account can be ultimately qualified as "foundationalist". Sloane, *supra* note 26 at 979.
33. Dworkin, *Taking Rights Seriously*, *supra* note 5 at vii.
34. Dworkin, *Hedgehogs*, *supra* note 4 at 339.
35. *Ibid* at 335-36 [emphasis added].
36. Thomas M Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) at 6.
37. Dworkin, "A New Philosophy", *supra* note 3 at 3.
38. *Ibid* at 11.

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states is the basic ground of international law. This is the primary target of Dworkin's new philosophy for international law.

He finds the consent-based positivist theory of international law flawed, because when it comes to treaty law, it is unable to address "the master interpretive question", which goes as follows: "what is it most reasonable to assume that these nations, whose consent made the principle law, understood that they were consenting to?"[39] While the plain meaning of the text of a treaty at times suffices in providing an answer to this question, in many other situations this will not be the case. For instance, one doctrinal, interpretative question is whether the Kosovo intervention was legal under international law, but the answer to it decisively depends upon our understanding of the ban on violating the territorial integrity of states, as stipulated in Article 2(4) of the UN Charter. Put differently, can a humanitarian intervention intended to stop grave human rights atrocities be qualified as the illicit infringement of "territorial integrity or political independence"? When faced with such a question, the consent-based theory of international law can only lead us to an interpretive dead end. Furthermore, this theory is unable to explain the binding nature of international customary law. It is not enough to postulate that states accept certain constraints on their behavior in international relations because and only so long as other states do so. It is necessary to provide some more basic principle that provides, or at least is thought to provide, the grounds of international customary law. Finally, the theory grounded in the positivist tradition is utterly futile in its attempt to elucidate the nature of peremptory norms (*ius cogens*) of international law, from which derogations are not possible, even through norms of treaty law.

After setting the stage for his attack on what he holds to be the dominant positivist account of international law, Dworkin recapitulates the main tenets of his theory of (municipal) law, in order to ask: "How far can we construct an international jurisprudence on the same understanding?"[40] In what follows, it becomes obvious that Dworkin believes a theory of international law grounded on these tenets is feasible. Since he proceeds from the idea that law can be identified by asking what rights courts have the right and responsibility to enforce on demand, Dworkin immediately faces the problem that there is no state-like institutional structure at the international level. Therefore, he invites us to imagine "an international court with jurisdiction over all the nations of the world", which would be easily accessible, and whose decisions would be effectively enforced.[41] Only under these assumptions, says Dworkin, can we "frame a tractable question of political morality". It concerns finding adequate tests and arguments, which this hypothetical court has to adopt in determining which rights and obligations of states and other international actors would be appropriate to enforce coercively.[42] Devising judicial institutions with compulsory jurisdiction and sanctions at their

39. *Ibid* at 7.
40. *Ibid* at 13.
41. Later, he offers the guidelines for the emergence of an "international legislative body with sufficient jurisdiction to solve the great coordination problems that every nation now confronts." *Ibid* at 27-29.
42. *Ibid* at 14.

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disposal is a special issue subjected to proper moral standards of legitimacy and fairness. Dworkin once again imports concepts from his theory of municipal law. Hence, the source of political obligation of both citizens, at the national level, and states, at the international level, is not to be located in consent, but in the more general phenomenon of "associative obligation".[43] On the other hand, the ultimate justification of the coercive power of the state in the human dignity of citizens has now to be put in a larger perspective. That is, the problem of justification "arises not just *within* each of the sovereign states who are members of the Westphalian system but also *about* the system itself: that is, about each state's decision to respect the principles of that system." The reason for this lies in the fact that "those principles are not independent of but are actually part of the coercive system each of those states imposes on its citizens."[44] Consequently, the general obligation of each state to improve its political legitimacy entails also "an obligation to try to improve the overall international system." This is what Dworkin sees as "the true moral basis of international law", as well as "the basic interpretative principle" that the putative world court should employ in deciding what international law requires.[45]

Dworkin identifies four major ways in which states fail their responsibilities to their citizens when collectively adhering to the Westphalian system of unrestricted sovereignty. First, since a coercive government is always illegitimate when violating the basic human rights of its citizens, every state, even one that has so far been just and benign, has to improve the effectiveness of an international order in order to prevent its possible degeneration into tyranny.[46] The second undesirable consequence of the Westphalian model is that states may fail to intervene and help citizens of other states which are subjected to systematic and gross violations of their basic rights. Third, in a system based on unrestricted sovereignty, states are not encouraged to cooperate internationally, which often exposes their citizens to large economic, health or environmental disasters. Finally, this system makes impossible the improvement of democratic legitimacy of particular states, something which is required by the principle of dignity and which consists in "some genuine, even if minimal and indirect" role of citizens in the enactment and administration of their government's policies.[47]

All this leads Dworkin to conclude that the "duty of mitigation" in the unrestricted system of sovereignty is the "most general structural principle and interpretive background of international law." However, since it is not sufficiently determinative, it has to be supplemented with the further principle of "salience", which states as follows:

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43. 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 [Dworkin*, Empire*].

44. Dworkin, "A New Philosophy", *supra* note 3 at 16-17.

45. *Ibid* at 17.

46. *Ibid*.

47. *Ibid* at 18.

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> 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.[48]

While the principle of mitigation, in Dworkin's opinion, provides an adequate explanation of *ius 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.[49] Finally, the 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.[50] Dworkin tries to demonstrate the adequateness of his "moralized approach" to international law by offering a fresh interpretation of the "hard case" of the Kosovo intervention, which is in line with the aforementioned principles.[51]

III. Assessing Dworkin's Proposal—Discontinuity and Utopianism

Dworkin's new philosophy for international law shares all the important features of his latest stage of philosophizing about municipal law: it is an attempt to treat law as a distinct part of what morality requires in the international realm;[52] it is a normative theory of an interpretative concept; it provides an interpretative strategy for the theory of adjudication; and it tries to prove its superiority over the Hartian "sociological" account, by using "hard cases" which involve interpretive doctrinal questions. As a derivative theory, however, it faces not only the same problems as Dworkin's original theory devised for municipal law, but some new ones as well.

The initial problem that Dworkin's proposal faces is one of a general methodological nature and is fairly common of earlier philosophical accounts of international law. It concerns the tendency to simply transplant a municipal model of law into an international one.[53] Çali, in that respect, rightly points out that such theoretical transplantation has, as a rule, negative implications for the final assessment of international law:

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48. *Ibid* at 19.
49. *Ibid* at 21.
50. *Ibid* at 22.
51. *Ibid* at 22-27.
52. For an attempt to further develop this position, admittedly along the lines that sometimes go beyond what was said in *Justice for Hedgehogs*, see Jeremy Waldron, "Jurisprudence for Hedgehogs", Public Law & Legal Theory Research Paper Series: Paper No 13-45 (Faculty of Law, New York University, 2013) at 1-28, online: SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290309.
53. This is what Austin, Hart and Kelsen did in their theories. For more detail, see Miodrag Jovanović, "Revisiting the Concept of International Law:—On Methodological Aspects" (Paper delivered at the Methodology of Legal Theory Conference, Zagreb, 29 November 2013).

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> When the image of the success of a legal system is defined in terms of its domestic characteristics (such as the existence of the sovereign, the existence of a centralized hierarchical system, the existence of legislature, the existence of universal adjudication, or equal concern for individuals) international law is bound to fail constantly. International law requires its own indicators to measure its success as the framework which regulates international conduct.[54]

While Dworkin argues that nobody nowadays seriously challenges that international law is "true" law, he nonetheless believes that it is important to investigate *why* rules and principles set out in documents and customs constitute some kind of legal system.[55] However, his attempt to address this question by using the same theoretical tool kit, leads him to a philosophy for international law that is defeasible on the same accounts as his own theory of municipal law.

When arguing against the Hartian approach and asking for a fresh start in theorizing (municipal) law, Dworkin acknowledges that we have to search for a distinctively legal value, which is embedded in a larger web of political values functioning within the given political community. This value has to be "so fundamental to legal practice that understanding the value better will help us better to understand what claims of law mean and what makes them true or false." Eventually, he finds "legality" ("or, as it is sometimes more grandly called, the rule of law") to be that distinctively legal value.[56] A successful analysis of this value implies devising "an account of *that* value as it exists and functions in a scheme of values we share."[57] In acknowledging similarities between the concept of legality and other political concepts, such as liberty, equality or democracy, Dworkin stresses one important distinctive feature of the former concept: "Legality is sensitive in its applications…to the history and standing practices of the community…because a political community displays legality, among other requirements, by keeping faith in certain ways with its past."[58] Standards of legality are deeply rooted in the institutional history and tradition of a political community and the blatant abandonment of those standards amounts to not less than a revolution. And regardless of how consistent with liberty, equality or democracy revolution may be, it "always involves an immediate insult" on legality.[59]

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54. Çali, *supra* note 1 at 822. Besson and Tasioulas have recently brought an even stronger claim. Namely, that the state-centered features of a legal system that ought to be exhibited at the international level for there to be international law are not in themselves "immune to theoretical challenge." Consequently, if the criteria of the concept of law used at the domestic level are not met at the international level, "it may not (only) be a problem for the legality of international law, but (also) for those criteria themselves and hence for a given legal theory." Samantha Besson & John Tasioulas, "Introduction" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 1 at 8.

55. This question "is crucial because how these rules and principles should be interpreted hinges on it." Dworkin, "A New Philosophy", *supra* note 3 at 3.

56. Dworkin, *Justice in Robes*, *supra* note 31 at 169. "That value insists that the coercive power of a political community should be deployed against its citizens only in accordance with standards established in advance of that deployment." *Ibid* at 172.

57. *Ibid* at 178.

58. *Ibid* at 183.

59. *Ibid* at 184.

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Dworkin's moral reading of international law makes one such revolutionary discontinuity with the developed institutional practices and standards of the international community. It does so in the following ways: 1) by treating individuals as the primary subjects of this area of law; 2) by overemphasizing Westphalian features of the contemporary international law; and 3) by failing to take into account that which international scholars have recently labeled "the fragmentation of international law". This eventually leads him to conclude that different international legal values and principles can be all interpreted as to make them necessarily compatible. Let me elaborate on each of these claims.

First, Dworkin's moralized approach to international law puts individuals in the centre of the discussion. It is important to stress that individuals are given primacy in their capacity as citizens of the existing states, rather than in their capacity as moral units of a cosmopolitan concern.[60] The claim I am focusing on stems from what Dworkin considers "the true moral basis of international law". Since principles of international law, according to Dworkin, are integral to the coercive system each of the states imposes on its citizens,[61] the general obligation of states to improve their legitimacy includes a special obligation to improve the international system. Consequently, all the stated failures and risks of the Westphalian system, which in his opinion have to be mitigated, concern the potential violations of individual rights derived from the ultimate value of human dignity. However, to hold this view is to make a stark disconnect from international law as we know it. A central aspect of this body of law "is that it does not give the same priority to individual human beings as domestic law because of the existence of multiple political communities." 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."[62]

Dworkin is certainly aware of the fact that states and other non-individual actors are at the international stage vested with rights and burdened with obligations.[63] However, Dworkin's state-centered theory is unable to furnish stable grounds for either of these concepts. Take his claim that, just like in the case of individuals, the source of political obligations of states lies in their "associative obligations" to the international system.[64] Dworkin defends his concept of associative or communal obligations of individuals against the backdrop of the already existing political

60. That is, Dworkin's moral concern for individuals is mediated by the role of states in the organization of political life. This is the reason Thomas Christiano in his paper "Dworkin on State Consent" (Paper delivered at the McMaster Philosophy of Law Conference: The Legacy of Ronald Dworkin, Burlington, ON, 2014) charges Dworkin's new philosophy regarding international law for being anti-cosmopolitan.

61. This contentious point seems to imply some sort of legal monism which Dworkin does not elaborate in detail.

62. Çali, *supra* note 1 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, *International Law,* 5th ed (Cambridge: Cambridge University Press, 2003) at 233.

63. Dworkin, "A New Philosophy", *supra* note 3 at 14.

64. *Ibid* at 11.

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community.[65] Accordingly, "mere social expectation is not sufficient to create associative obligations: persons must meet certain psychological requirements in order for their group, be it a friendship, a family, or a nation-state, to be the sort of community such that membership in that community, independent of choice or consent, grounds associative obligations."[66] It is doubtful, to say the least, whether, first, states can meet those psychological requirements, even through their legitimate representatives, and second, whether, even under this assumption, we can meaningfully speak of a sort of international community that generates associative obligations in the Dworkinian sense of the word.

A similar objection can be raised against Dworkin's idea about rights of states and other non-individual actors. Namely, how can these actors become right-holders under his conception of rights as trumps? Dworkin left us only with the passing remarks regarding the possibility that entities other than individuals, for instance, peoples, minorities and indigenous peoples, which are as such recognized in international law, can possess rights. In *Taking Rights Seriously*, he contends that "a political theory that counts special groups, like racial groups, as having some corporate standing within community, may therefore speak of group rights."[67] In *Justice for Hedgehogs*, he basically reiterates this stance, placing it again in a footnote.[68] These comments lead to the conclusion that the idea of states and other non-individual actors having rights requires Dworkin to devise a distinctive supportive political theory, as well as a different conception of rights. Neither of these can be found in his new philosophy for international law.

Second, Dworkin's moralized approach is built in opposition to "the pure unrestricted sovereignty" of the Westphalian system of international law.[69] Dworkin wants us to believe that we are living in a world of irreconcilably conflicting wills of sovereign nations, which is almost by default detrimental to the lives of individual human beings. Only under this far-reaching assumption can "the principle of mitigation", coupled with the "the principle of salience", become "the most general structural principle and interpretative background of international law."[70] Put

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65. These obligations flow from a particular nature of individuals' group relations:

> First, they must regard the group's obligations as *special*, holding distinctly within the group, rather than as general duties its members owe equally to persons outside it. Second, they must accept that these responsibilities are *personal*: that they run directly from each member to each other member, not just to the group as a whole in some collective sense.… Third, members must see these responsibilities as flowing from a more general responsibility each has of *concern* for the well-being of others in the group…. Fourth, members must suppose that the group's practices show not only concern but an *equal* concern for all members.

Dworkin, *Law's Empire*, *supra* note 43 at 199-200.

66. Diane Jeske, "Special Obligations" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), online: Stanford Encyclopedia of Philosophy http://plato.stanford.edu/archives/spr2014/entries/special-obligations/.

67. Dworkin, *Taking Rights Seriously*, *supra* note 5 at 91, n 1.

68. "My own view is that only individuals have political rights, though these rights include a right not to be discriminated against because they are members of some group and may also include a right to benefits in common with other members of their group—a right, for instance, that legal proceedings be available in their group's language. However, I shall not pursue this question here. My argument holds equally for group political rights if there are any." Dworkin, *Hedgehogs*, *supra* note 4 at ch 15, n 1.

69. Dworkin, "A New Philosophy", *supra* note 3 at 17.

70. *Ibid* at 19.

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differently, Dworkin's entire project decisively depends on the accuracy of his initial characterization of the nature of state sovereignty as absolute and unrestricted.

However, his proposal to treat sovereignty, internally speaking, as inherently unfriendly to citizens' fundamental rights, and internationally speaking, as a platform for continuing conflict, is vulnerable to objection. In particular, Dworkin's project, although diametrically opposed to famous Krasner's treatment of sovereignty, is similarly a-historical. Whereas Krasner contends that "the Westphalian sovereignty", which *ought* to be taken to mean "political organization based on the exclusion of external actors from authority structures within a given territory",[71] is eroded to the level of becoming a label for "organized hypocrisy",[72] Dworkin argues that the Westphalian model *is* still functioning as unrestricted, and as such needs to be dismantled in order for a moralized international law to be possible. Both propositions are misleading, insofar as they neglect not only that sovereignty was never pure and unrestricted,[73] but also that it has significantly transformed over time.[74] In Donnelly's words,

> Sovereignty is not a hard shell, an impermeable barrier at the borders of a territory. It does not guarantee the efficacy of the unfettered will of the state. Sovereignty is a complex social practice that allocates jurisdiction, rights, and obligations among sovereigns, actors that recognize no superior. Like all social practices, sovereignty both persists and is transformed over time.[75]

Hence, "human rights, far from undermining or eroding state sovereignty, are embedded within sovereignty."[76] Moreover, a number of authors point out that in the globalized world, characterized by the emergence of various transnational networks of private interest, which tend to occupy the spheres of politics by imposing internal economic and technical vocabularies, "sovereignty articulates the hope of experiencing the thrill of having one's life in one's own hands… Today, it stands as an obscure representative of an ideal against disillusionment with global power and expert rule."[77] Dworkin completely disregards

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71. Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999) at 3-4.

72. He defines this situation as one "in which institutional norms are enduring but frequently ignored." *Ibid* at 66.

73. Laski famously argued as early as 1917 that "there is nothing absolute and unqualified about" sovereignty and that it is "a matter of degree." Harold J Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917) at 17.

74. This is evident from the very titles of recent books in the field, such as, Neil Walker, ed, *Sovereignty in Transition* (Oxford: Hart, 2003); Trudy Jacobsen, Charles Sampford & Ramesh Thakur, eds, *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot, UK: Ashgate, 2008); Hent Kalmo & Quentin Skinner, eds, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2010). Dworkin does not refer to any of these contemporary treatises in his works.

75. Jack Donnelly, "State Sovereignty and Human Rights", online http://mysite.du.edu/~jdonnell/papers/hrsov%20v4a.htm.

76. *Ibid*.

77. Martti Koskenniemi, "What Use for Sovereignty Today?" (2011) 1:1 Asian Journal of Int'l Law 60 at 70. Cf Christopher J Bickerton, Philip Cunliffe & Alexander Gourevitch, "Politics without Sovereignty?" in Christopher J Bickerton, Philip Cunliffe & Alexander Gourevitch, eds, *Politics without Sovereignty: A Critique of Contemporary International Relations* (London: University College London Press, 2007) 20.

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plausible positive aspects of sovereignty.

Third, in dwelling on a new philosophy for international law, Dworkin implies the unity of an international legal order. He argues that there is one, overarching "basic interpretative principle", which should be endorsed by a putative court with universal jurisdiction. However, this underestimates the relevance of the propensity of specialized international legal regimes to function as self-contained. In the widely debated 2006 *Report on Fragmentation of International Law*, the International Law Commission (ILC) came up with rather alarming findings regarding the emergence of new specialized legal regimes and their relation to general international law. According to the ILC, these regimes emerge and evolve with different sets of tasks and objectives on their agenda. In order to become efficient, the new law "often includes new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch." Moreover, it is not uncommon for new rules and regimes to develop "precisely in order to deviate from what was earlier provided by the general law." When such deviations "become general and frequent, the unity of the law suffers."[78]

The "MOX Plant" case exemplifies plausible threats of fragmentation in international law. The case concerned the possible environmental effects of the operation of the nuclear facility in Sellafield, UK. It has been brought before three different international judicial bodies: the International Tribunal for the Law of the Sea, set up under the United Nations Convention on the Law of the Sea (UNCLOS), the Permanent Court of Arbitration, under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), and the ECJ, under the European Community and Euratom Treaties. In discussing the raised issues of jurisdiction and applicable law, the International Tribunal for the Law of the Sea held that the application of even the same rules by different institutions might be different, due to "differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux preparatoires*."[79] In the ILC's words, the Tribunal recognized "that the meaning of legal rules and principles is dependent on the context in which they are applied. If the context, including the normative environment, is different, then even identical provisions may appear differently." However, if this is indeed so, "what does this do to the objectives of legal certainty and the equality of legal subjects?"[80]

One of the key findings of the ILC's study on the perils of fragmentation of international law seems to be that, unlike on the domestic level, the ideal of legality, or the rule of law, in the international realm could hardly operate so as to enable the realization of a uniform set of goals and values. This is, again, in stark contrast to

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78. International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi)*, UNGAOR, 2006, UN Doc at para 15.

79. *The MOX Plant case, Provisional Measures (Ireland v the United Kingdom)*, [2001] ITLOS Case No 10 at para 51, online: International Tribunal for Law of the Sea https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf.

80. International Law Commission, *supra* note 78 at para 12.

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Dworkin's idea that "the correct interpretation" of international documents implies that all the goals of the mitigated system "must be understood in such a way as to make them compatible."[81] The whole idea becomes even more revolutionary by implying that different international legal values and principles, such as peace, justice, legal certainty, political stability, etc., can be all interpreted as complementary and auxiliary to the ultimate moral value of human dignity.[82]

This leads me to the new and final problem of Dworkin's philosophy for international law. This problem is not characteristic of his theory of municipal law. It is profoundly futuristic and utopian. It is no more about the claim that "law as it is" needs to be assessed in light of "law as it ought to be", according to some inherent standards of political morality of the given political community, but in the light of some law that might develop sometime in the distant future.[83] Dworkin does not conceal this feature of his proposal. For example, when urging readers to imagine an effective world court with sanctions at its disposal, he admits that this "is fantasy upon fantasy, at least for the far foreseeable future".[84] He also openly states that he "has been describing a future, so far imaginary".[85] In this respect, Dworkin's account is indeed not a philosophy *of* the existing international law, but, as the title suggests, a philosophy *for* some would-be international law. As such, it fails to pass the test of "a proper 'Realism'",[86] without

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81. Dworkin, "A New Philosophy", *supra* note 3 at 22.

82. Çali, in that respect, notices that an interpretivist theory of international law "has to appeal to different values because of the kinds of concerns it responds to and the kinds of relationships it regulates." Çali, *supra* note 1 at 822.

83. Such is, at moments, Dworkin's interpretation of Article 2(4) of the UN Charter concerning the Kosovo case. Dworkin, "A New Philosophy", *supra* note 3 at 22ff. Moreover, some elements of the proposed alternative interpretation directly contradicts his general concern about the value of legality. Dworkin notices that "it is central to legality" that all decisions of the norm application are "guided and justified by standards already in place, rather than by new ones made up *ex post facto*." Dworkin, *Justice in Robes*, *supra* note 31 at 183. Yet, in the controversy surrounding the Kosovo case from 1999, Dworkin's new interpretative route relies largely on the "generally favorable reception" of the R2P doctrine, which came only after 2001. Dworkin, "A New Philosophy", *supra* note 3 at 24. I have elsewhere demonstrated that the UN adoption of the R2P was considered an act of clear discontinuity with the practice of unilateral humanitarian interventions of the Kosovo style. See Jovanović, "Responsibility to Protect", *supra* note 27. Accordingly, Dworkin's employment of the R2P argument in the interpretation of the Kosovo case can be only qualified as an illegitimate endorsement of *ex post facto* standards.

84. Dworkin, "A New Philosophy", *supra* note 3 at 14.

85. *Ibid* at 29.

86. Dworkin believes that his proposal is not unrealistic, because, first, "even powerful nations now claim to defer to international law", and, second, "a time may come, sooner than we suppose, when the need for an effective international law is more obvious to more politicians in more nations than it is now." *Ibid* at 15. However, Dworkin's proposal may not only be unrealistic, but also be harmful for the future of international law. Chilton warns that if Dworkin's interpretative strategy was taken seriously by international tribunals, "it would run the very serious threat of causing states to be unwilling to negotiate robust agreements in the future." Namely, Dworkin holds that sources of international law are to be interpreted to enable robust checks against state sovereignty, even if states did not initially give consent to that agreement. However, "if states begin to be held to more demanding standards than they thought had previously been agreed upon, in future negotiations those states would have strong reasons to block even weak language in international agreements to avoid it being held against those states later on." Adam S Chilton, "A Reply to Dworkin's New Theory of International Law" (2013) 80 University of Chicago L Rev Dialogue 105 at 113-14.

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which, according to Buchanan, any proposal for moral reform—and that is the real nature of Dworkin's account—is destined to end up as an instance of "futile utopianism".[87]

IV. Conclusion: Interpretivism and International Law

The discussion so far leads to the conclusion that Dworkin left us with a rather disputable legacy in the area of international law. Nevertheless, one can easily subscribe to his initial diagnosis that the standing jurisprudential accounts of international law are unsatisfactory, and that "we have at least an intellectual responsibility to propose a better one."[88] Some crucial features and categories of international law, such as the defining criteria of customary rules or the binding nature of *ius cogens* norms, are certainly in need of a more elaborate philosophical explanation.[89] Moreover, despite flaws in his own philosophical sketch, I believe that Dworkin is generally right when arguing, with a pinch of cynicism, that "[w]e must free the subject from the torpor of legal positivism."[90] Let me briefly explicate this point.

In proposing his alternative, Dworkin unfairly ascribes to all theoretical accounts in the positivist tradition the consent-based explanation of international law. This mischaracterizes at least one well known positivist account of international law, that of Kelsen. He manifestly rejected treating international law as a creation of the sovereign will of states and developed his philosophy along entirely different lines.[91] Furthermore, contemporary scholars, whom Dworkin explicitly mentions as trying to construct a doctrinal account from the Hartian version of positivism, such as Besson, are explicitly opposed to the idea that the authority of international law *tout court* could be justified solely by invoking the principle of consent. Besson says that "many international law norms can no longer be drawn back to state consent in their law-making process anyway". In fact, "they can actually bind other international subjects than states consenting to them", which means that "a consent-based justification would leave a large part of international law unaccounted for."[92]

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87. Allen E Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) at 61.

88. Dworkin, "A New Philosophy", *supra* note 3 at 15.

89. *Ibid* at 7. Cf Miodrag Jovanović, "Interpretation in International Law and International Rule of Law: Any Lesson for Jurisprudence?" in Miodrag Jovanović & Kenneth Einar Himma, eds, *Courts, Interpretation, the Rule of Law* (The Hague: Eleven International, 2014) at 33-55.

90. *Ibid* at 30.

91. Drawing inspiration from the 19th century German tradition in theorizing international law, Kelsen postulated his "identity thesis", according to which the state is nothing more than the central point of imputation for all acts of its organs. It is merely a "personifying fiction" of the prevailing legal doctrine. Hans Kelsen, *Das problem der souveränität und die theorie des völkerrechts* (Tübingen: JCB Mohr (P Siebeck), 1920) at 18. According to von Bernstorff, "[t]he 'identity thesis' became the pivotal point in the sought-after revision of the conceptual apparatus of international law." Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, translated by Thomas Dunlap (New York: Cambridge University Press, 2010) at 50.

92. Samantha Besson, "Sovereignty, International Law and Democracy" (2011) 22:2 EJIL 373 at 377.

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In the introduction to a recent volume on philosophy of international law, Besson and Tasioulas also notice that "the most pressing questions that arise concerning international law today are arguably primarily normative in character".[93] It is at this point that Dworkin's aforementioned remark regarding "the torpor of legal positivism" comes into play. While analytical jurisprudence has some space for offering its services in the subject matter of international law, a normative approach has, for the moment, apparently much more to offer. The only question is whether interpretivism, as one such approach, can be rescued from Dworkin's failures and meaningfully employed in the contemporary debates regarding international law.

Çali had already in 2009 made an attempt of that sort, devising a compelling refutation of the plausible objections against the employment of interpretivism in the realm of international law. Furthermore, she clearly indicated all the wrong moves that one can make in simply transplanting interpretivism from the domestic to the international level. Strikingly enough, Dworkin managed to commit most of the stated mistakes. Çali, for instance, underlines that interpretivist jurisprudence is called upon to identify the key aspects of international law "under the institutional constraints of international law", because this is what "makes international legal evaluation distinctive from moral evaluation *per se*."[94] Furthermore, she believes that interpretivism has to take into account the existence of a multitude of competing international legal values, but that this acknowledgment does not necessarily discredit the use of this approach in the area of international law.[95] Similarly, Çali argues that "[l]egality does go over to international law in form, but not in substance." This, in turn, requires interpretivist jurisprudence to address this value in international law "in the light of a larger web of convictions."[96] Finally, she dismisses the state-centered model, which would, by way of analogy, put international adjudication bodies at the centre of the discussion. Simply put, adjudication at the international level "does not play a central role", insofar as judges do not rely on the state's monopoly of force when deciding individual cases.[97] Consequently, the interpretivist approach to international law should not "focus single-handedly on judges", because state-made law is equally interpreted and implemented by states themselves, as well as by various international organizations, tribunals and domestic courts. Relevant "[i]nternal participants" can be, thus, "more adequately described as agents who have the capacity to affect the terms of international conduct."[98] One of her cautionary remarks, however, is that an interpretative

93. Besson & Tasioulas, "Introduction", *supra* note 54 at 4.
94. Çali, *supra* note 1 at 815.
95. "The call of interpretivism for international legal theorists is to engage in the systematic analysis of the very meaning of the values and procedures to identify the best justification in the face of competing values." *Ibid* at 816.
96. *Ibid* at 819. She further notices that devising an adequate conception of legality requires taking into account "the distinct value of international law as the framework for regulating conduct in international relations." *Ibid* at 822.
97. *Ibid* at 820.
98. *Ibid* at 821.

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account "will have to guard itself from charges of value-favouritism."[99] Having in mind the Dworkinian vision of the unity of value, this will certainly not be an easy task. In short, Çali has offered some important guidelines for a more comprehensive interpretivist account of international law than Dworkin's. Unfortunately, he provided a philosophical sketch with which one cannot do much in area of international law.

99. *Ibid* at 822.

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