
Law Beyond the State: A Reply to Liam Murphy

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1 Between Disciplines

Liam Murphy's article, 'Law Beyond the State: Some Philosophical Questions',¹ presents the reader with a *tour d'horizon* through the possible worlds of a contemporary philosophy of international law seen through the lens of the notorious final Chapter 10 of H.L.A. Hart's *The Concept of Law*.² Murphy also confronts us with the actual debate on this topic, in which only little intellectual effort has been invested. For a continental European scholar, Murphy's introductory distinction between the discipline's 'philosophy of international law' and the blooming field of 'international legal theory' is not only feasible but also part of a wider problem. When 'philosophy' becomes a synonym for analytic philosophy, this disciplinary restriction will be compensated for by the development of 'theory' in other fields from comparative literature to law.³ However, a theory that is detached from philosophy runs the risk of losing its conceptual discipline and rigour. Likewise, a reduction of philosophy to analytic philosophy could be especially detrimental for areas in which contact with institutional realities is required, like the philosophy of law.

This risk becomes reality when philosophical models depart so far from institutional questions that they start to look like just another form of practical philosophy for a non-ideal world or, vice versa, when its institutional assumptions become strong and dominant but remain implicit. In this case, an ad hoc abstract language disguises the simple replication of the peculiarities of a given legal order. To foreign readers, Ronald Dworkin's philosophy looks utterly dependent on American constitutional law and not only because of its examples. And the same should be true for non-German readers of Robert Alexy's work. This is a particular challenge for the philosophy of international law because international law itself is in constant denial of its different national and cultural pedigrees. That is why comparative perspectives on international law are emerging, and they might even become a substitute for a philosophy of international law.⁴

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¹ Murphy, 'Law Beyond the State: Some Philosophical Questions' in this issue, 203.

² H.L.A. Hart, *The Concept of Law* (3rd edn, 2012).

³ The seminal event of this development was Richard Rorty's exodus from a Department of Philosophy to comparative literature.

⁴ A. Roberts et al. (eds), *Comparative International Law* (forthcoming).

Hart's work seems relatively free from this kind of reproach. This may be due to the fact that his intellectual upbringing, especially in ordinary language philosophy,⁵ made him both sensitive to concrete phenomena and rigorous with regard to conceptual clarity. Albeit, this is not true for Chapter 10 of his *The Concept of Law*. In this chapter, Hart applies his lucid definition of law as the unity of primary and secondary rules in a notoriously inconsistent manner – first, by not convincingly assuming that international law lacks a rule of recognition and, second, by even less convincingly deducing that it still constitutes law, though not a legal system.

The reason why all of this should be still of interest for us today is that we share both of Hart's intuitions: that international law is 'law' and that it is categorically 'different' from domestic law. We may also share his further intuition that this categorical difference is linked to the absence of a central legal institution in the international legal order (leaving open the question of which function such an institution should fulfil). But the conundrum really begins when we finally accept another of Hart's major theoretical achievements – his critique of the idea of a sovereign law-maker as a necessary condition for a functioning legal order.⁶ In this case, we are led, like Hart was, to endorse his theoretical critique of sovereign law-making while still sticking to exactly this criterion as a reason (or at least a motive) for feeling uneasy about the state of international law as law.

Why is this relevant? Less, it seems to me, because it could shed any light on the debate of a necessary or possible moral content of law. Here, Murphy seems to have missed the decisive point in the recent development of international law (Section 2), and I am also sceptical of any implications that the philosophy of international law could have for the fragmentation debate in international law (Section 3). But refining the idea of enforcement with Hart's help seems, indeed, to provide us with a trace of where an interesting debate between international law and philosophy of law could take place (Section 4).

2 The Post-Positivism of International Law⁷

I doubt that the distinction between natural law (or, as Murphy puts it more aptly, non-positivism⁸) and positivism can help us to learn anything about the workings of international law, even on the conceptual level. And it belongs to Hart's tragic afterlife that, though he was not very interested in this question (devoting eight of the more than 200 pages of his book to it), he was drawn into this debate by Dworkin late in his days and, more generally, by the quite American habit of talking about morals (if not politics or economics) when the topic is law.⁹ The distinction between positivism and

⁵ N. Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (2004), at 130–146 (for conceptual deviations from what is in *The Concept of Law*, see 225–231).

⁶ Hart, *supra* note 2, at ch. 4, 4.

⁷ This expression is owed to N. Forgò and A. Somek, *Nachpositivistisches Rechtsdenken* (1996).

⁸ *Supra* note 1, at 205.

⁹ For the unfortunate making of the afterword, see Lacey, *supra* note 5, at 349–355.

non-positivism is intellectually worn out. No more interesting answers will come out of it, neither in international nor in domestic legal theory.

While it is conceptually necessary in legal philosophy to juxtapose positivism and non-positivism so that there is no third option available, interesting developments in international law seem to take place in between – in hybrid ways in which legal institutions claim moral reasons. International law's meaning has dramatically changed through the advent of human rights as a central normative argument.¹⁰ And though we do not have a working model of how to integrate human rights into classical international law (which is most evident in the difficulties with humanitarian law)¹¹ or a safe knowledge that the human rights discourse has any practical impact and, if so, a benevolent one, it is clear that the basis of normative arguments in international law has become different through the reference to rights. Normative individualism has become more and more pervasive in a legal order that traditionally starts out with sovereignty.¹²

This is important to the philosophy of law for at least two reasons. First, human rights defy the distinction between positivism and non-positivism. Following the highly plausible model of an inclusive positivist position, one could argue that human rights are specific kinds of moral reasons that have been incorporated into positive international law. But the happy analytical clarity of this reconstruction misses the complexity of the phenomenon. The success of human rights is due to the fact that they work beyond the differentiation of morality and law in both directions. They do not only contribute moral content to international law, but they also receive moral(!) authority from the fact that they belong to a corpus of formalized consensus carried by the international community.¹³ Their authority seems to derive from legal, moral and political aspects at the same time. And arguing with them means switching between, or integrating, these possible references. This is an institutional phenomenon, not a conceptual truth, but, in law, we cannot but think of human rights as part of a human rights regime. For this reason, classical legal philosophy has very little to contribute. And maybe Hart's careful reserve is rather wise in this regard.

The second reason why human rights challenge the philosophy of law lies in their deep moral ambiguity. We observe rights being used as moral arguments by authoritarian states, which pass formalized judgments upon their political adversaries. And we witness their use as a justification for highly problematic military interventions. Legal philosophers may deny this being a problem, qualifying it as a simple abuse or a misunderstanding. Murphy argues that there is often a contradiction between the legal and the moral argument in international law.¹⁴ But the actual problem lies in the

¹⁰ The moment when this happened remains contested. For a relatively late start, see S. Moyn, *The Last Utopia* (2010).

¹¹ Bhuta, 'The Frontiers of Extraterritoriality: Human Rights as Global Law', in N. Bhuta (ed.), *The Frontiers of Human Rights* (2016) 1.

¹² A. Peters, *Jenseits der Menschenrechte: Die Rechtsstellung des Individuums im Völkerrecht* (2014).

¹³ I am grateful to Christopher McCrudden for pointing this out.

¹⁴ *Supra* note 1, at 206–207.

moral value of the moral argument itself, if used in a legal order that is traditionally highly formalistic and that may have achieved some of its gains through its formalism.¹⁵ Therefore, the question is not if we need an introspection of the value of morals for international law but, rather, if legal philosophy can make any meaningful contribution to this kind of self-critique. Hart, the Benthamite, would have been very careful in the first place with the aggressive use of morally loaded rights. Maybe we should reconstruct this scepticism for today's international law.

3 Philosophical and Practical Fragmentation

Is there really a meaningful systematic connection between Hart's doubts about the status of international law as a system, on the one hand, and the contemporary debate on the fragmentation of international law, on the other hand? I doubt it. According to Hart, there is no rule of recognition in international law, reducing it to a customary practice that is unable to distinguish between a meta-rule and its positive norms. Murphy, in his article, as well as others before him, convincingly argues that this is not correct and that we can find a rule of recognition in the international legal order.¹⁶ Nevertheless, even if we accept this reasoning, it is not entirely clear what else can follow from this philosophical level for the doctrinal or institutional argument.

An important point in this regard in Murphy's article is the status of international treaties. According to Murphy, they are legal sources and should, therefore, not be downgraded to mere contracts.¹⁷ However, it is a rare common insight of legal realism and of Hans Kelsen that we should not make too much of the distinction between law-making and law application. Even a contract produces a little piece of new law by concretizing rules to be used by the contracting parties. Indeed, the relevant distinction is one of different procedural inputs – for example, between a rule making deliberative body, on the one hand, and an adjudicating court, on the other hand – rather than one of necessary output – for example, between making or applying law.¹⁸ If this is correct, the difference between a treaty and a contract is only a matter of degree, leaving us still to distinguish between the philosophical and the doctrinal point of view.

This also seems true for the fragmentation debate in general. Murphy assumes that we have to distinguish between positivism and voluntarism and that state voluntarism has been the real challenge to traditional international law.¹⁹ But is that true? Was there any traditional international law without sovereign voluntarism? On the one hand, there was a dialectical process at work. As long, and as much, as international law was the product of voluntarist sovereigns, it was unlikely to become a system in the first place. But in contrast to domestic public lawyers, international lawyers could traditionally not argue in favour of the sovereign actors that produced the law.

¹⁵ M. Koskenniemi, *The Gentle Civilizer of Nations* (2001), Epilogue.

¹⁶ *Supra* note 1, at 207–213.

¹⁷ *Ibid.*, at 211.

¹⁸ C. Möllers, *The Three Branches* (2013), at 80–101.

¹⁹ *Supra* note 1, at 205–206, 229–231.

Instead of promoting political will, they defended systematic reason. Therefore, they could describe themselves as an 'invisible college' or an 'epistemic community' and, in any case, as the guardians of international law.²⁰ Today's fragmentation is a different issue. It is emerging not from the political voluntarism of states but, rather, from the specialization of experts whose knowledge of international trade and environmental or criminal law differs more and more from the knowledge of general international lawyers.²¹

International law developed top down from general law to ordinary regulatory law. Thus, the fragmentation debate laments a fact that is true for all differentiated domestic legal orders: partly uncoordinated differentiation. This does not mean that there is no more need for general international law. No doubt, there is. But three reservations have to be made. First, this need has got nothing to do with the fundamental philosophical question of the identity of a legal order. The debate on fragmentation rather presupposes that there is a more or less systematic international legal order. Second, there is no inherently defined need for a certain degree of systematicity of a legal order. There are legal orders in which system-building is still an ideal, especially in continental Europe, notably France and Germany, whereas this is less typical for the Anglo-American legal world.

So, one might wonder if the claim to be (or to have) a system in international law comes from a universal 'concept of law' or, rather, is due to a very specific pedigree of the international in some domestic discourses. The universal semantic of legal philosophy has to abstract from this particularism, thus taking international law as equidistant to all national legal orders. But, although these fictions make sense as a matter of normative assumptions, they do not help us to understand the muddled asymmetric and decentralized paths in which patterns from some domestic legal orders become international law.

Third, we have to pay more attention to the relation between institutional diversification and the meaning of general arguments and tropes in international law. Fragmentation seems to threaten the relevance of general principles in international law. But it could also work the other way round. Since there is no formal central institution in international law, such arguments could be the best instruments to guarantee a minimal standard of internal coherence. In other words, the low degree of doctrinal coherence in international law as a whole does not inform us about the relevance of general international law. Maybe it would be much worse without it. Another dialectic is at work here, which is missed by the juxtaposition of 'system' and 'fragmentation'. Maybe legal orders always need both: specialists and universalists. And maybe there is no zero-sum game between their respective level of importance.

²⁰ Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern University Law Review* (1978) 217; Haas, 'Introduction: Epistemic Communities and International Policy Coordination', 46 *International Organization* (1992) 1.

²¹ For their constitutive role in trade law, see Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 *Journal of World Trade* (2001) 191.

4 Law beyond Enforcement and Compliance

For me, the most convincing part of Murphy's article addresses the question of enforcement and compliance.²² There is a lesson to be learned from Hart – the identity of a legal order does not depend on coercive enforcement. There is a lesson to be learned (against Murphy's reading) from Kelsen – the identity of a legal order does not depend on compliance.²³ Something like mass illegal action is possible in a given legal order, which may be a grave problem, but it does not imply that the deviant behaviour becomes legal.²⁴ And there is a lesson to be learned from Murphy – a legal order does not need a coercive enforcement structure, but (and this is crucial) we think of legal orders as normative orders that can, or should, be enforced, which is different from manners or morals.²⁵

To spell this point out could be extremely fruitful for our understanding of international law as well as for the definition of a research agenda that includes the philosophy of law. First, it could help to recover the characteristics of law in international law since these characteristics seem to get buried, as Murphy sees it, in theory as well as in practice.²⁶ In practice, they can be lost under diverse forms of soft regulation that may have many practical advantages, yet also serve as instruments to circumvent political decision-making processes through technocratic means that are sometimes clothed in the guise of 'administrative law'.²⁷ In theory, they can be buried under accompanying compliance studies that systematically deny the difference between law and non-law by applying behavioural models to state action and measuring their effects.²⁸ There is nothing to be said against this kind of empirical research as long as it does not reduce the normative structure of the law into a mere means–end relation that is only interested in effects but not at all in the chosen forms of regulation.

To categorically think about enforcement as a possibility of international law could also help us to rethink the status of international human rights law as law since we are not always ready to externally enforce human rights for quite diverse reasons, not the least because there is an intrinsic problem in enforcing freedom and democracy and because the costs in moral goods are so incredibly high. Finally, a renewed theoretical interest in enforcement could help us to solve Hart's dilemma – to accept his concept of law and to accept international law as law at the same time, yet to find conceptual tools to explain why international law remains so peculiar to us.

²² *Supra* note 1, at 217–226.

²³ When Murphy remarks that Kelsen's criterion of effectiveness is identical with 'general compliance', he might refer to the late Kelsen's softening of his otherwise crucial distinction between *Geltung und Wirksamkeit*. The latter is not a criterion for the establishment of a legal order. *Supra* note 1, at 218.

²⁴ In other words, the question is what 'general' means in Murphy's reference to general compliance. Is there a definition that does not beg the question, and in international law, are, e.g., human rights, according to Murphy's criterion, law as long as they are not complied with in China?

²⁵ Murphy, *supra* note 1, at n. 87, makes a reference to Yankah, 'The Force of Law: The Role of Coercion on Legal Normativity', 42 *University of Richmond Law Review* (2008) 1195.

²⁶ *Supra* note 1, at 204.

²⁷ For a short critique, see Möllers, 'Ten Years of Global Administrative Law', 13 *International Journal of Constitutional Law* (2015) 461.

²⁸ A. Chayes and A. Chayes, *The New Sovereignty* (1995).