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# Law Beyond the State: A Reply to Liam Murphy

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When legal philosophers write about international law, they tend to approach their topic from the central questions structuring their field: What are the philosophical ‘foundations’ of the concept of law? How can law be differentiated from other social norms, such as moral rules? These questions are then usually answered for international law in line with the philosophical tradition in which the author would answer the same questions for domestic law. But being confronted with international law traditionally leads legal philosophers to add a further set of questions: Is international law really law? Does it have comparable features to domestic law? Can it be properly enforced in the absence of centralized institutions that play such an important role for (domestic) law? Depending on the presupposed concept of law derived from domestic law, international law, for the legal philosopher, is, thus, law properly so called (Hans Kelsen) or not (John Austin) or not quite yet (H.L.A. Hart).

Liam Murphy’s thought-provoking contribution follows this traditional approach and asks these questions for international law in the 21st century.<sup>1</sup> The overall approach is particularly rewarding in its insightful effort to also address current controversial issues of international legal scholarship such as, for instance, ‘humanitarian interventions’, in light of these classic themes of jurisprudence. By following the Anglo-American jurisprudential canon, Murphy takes Hart’s rudimentary reflections on international law from 1961 as a starting point of this endeavour, contrasting it with a Dworkinian reading of the issues at stake. It is well known that Hart, in his brief international law chapter in *The Concept of Law*, makes two principal points. First, international law is law and not just international morality, and, second, it is formally different from a modern Western domestic legal system. In the absence of compulsory jurisdiction and a system of centralized enforcement of legal obligations, formal domestic law analogies for Hart in 1961 are not convincing; international law is only a set of legal norms and not a legal system.<sup>2</sup>

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<sup>1</sup> Murphy, ‘Law Beyond the State: Some Philosophical Questions’, in this issue, 203.

<sup>2</sup> H.L.A. Hart, *The Concept of Law* (2nd edn, 1994), at 236–237. In a further separate publication, Hart also criticizes Kelsen’s monist theory as untenable, instead suggesting a state-based concept of a plurality of domestic legal systems. For a critique of this approach, see Blix, ‘Kelsen in the United States: Still Misunderstood’ in D.A.J. Telman (ed.), *Hans Kelsen in America: Selective Affinities and the Mysteries of Academic Influence* (2016), at 17.

These two Hartian assumptions need to be relativized at the outset though. The first and main reason is that Hart himself had pointed out in 1961 that international law might develop in the future in a way that would justify the formal domestic law analogy. Fifty-five years of international legal developments later, we cannot assume that Hart would not have found these institutional developments sufficient to grant international law the status of a proper system of law with a rule of recognition.<sup>3</sup> The last paragraph in *The Concept of Law*, which inserts an evolutionary perspective, might even suggest that he would. Moreover, Hart's concession that international legal rules indeed constitute 'law' and not 'only' morality in 2016 seems somewhat like stating the obvious, given that after 40 years of feverish legalization and institutionalization of many issue areas of international relations, a straightforward denial of international legality has gone out of fashion.

What also relativizes Hart's discursive importance is that his remarks on international law must be read as a reaction to the much more comprehensive theory of international law by Kelsen. It arguably cannot be fully understood without a general grasp of the Kelsenian oeuvre. Hart published his perspective on international law 30 years after the heyday of philosophical inquiries into sovereignty and the binding force of international law culminating in the Weimar era and 30 years before the new in-depth structural critique of international law by critical scholars at the end of the 20th century. With hindsight, it seems to be a somewhat belated response to Kelsen's fundamental critique of international legal voluntarism ('*Staatswillenspositivismus*'). Hart agrees with Kelsen's anti-voluntarist stance, without however endorsing his interwar cosmopolitan project of a monistic legal universe, in which international law can take precedence over domestic law, empower international institutions and directly obligate individuals.<sup>4</sup> Hart's legal worldview is pragmatically centred on Western domestic legal systems and is somewhat dismissive of aspirational or utopian approaches to the international legal medium.

As Murphy convincingly states, Hart's iconic book and his rather sceptical view of international law might anyway have obstructed legal philosophers influenced by Hart and Oxford-style jurisprudence from engaging seriously with international law in the second half of the 20th century.<sup>5</sup> Outside of Oxford, the United Kingdom and the USA, however, Hart's impact has been less significant. And arguably Hart also had no sustained influence on the 20th-century discipline of international law neither in those parts of the Western discipline that in a spirit of shallow pragmatism turned their backs on philosophical 'foundations' after World War II nor during the renaissance of international legal theory that has taken place since the 1990s.<sup>6</sup>

<sup>3</sup> Exploring this issue is Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart', 21 *European Journal of International Law* (2010) 967. Murphy dismisses Hart's critique of Kelsen's assumption of the systemic validity of international law, Murphy, *supra* note 1, at 210.

<sup>4</sup> On this project, see J. von Bernstorff, *The Public International Law Theory of Hans Kelsen* (2010).

<sup>5</sup> Murphy diagnoses 'neglect' of international law by legal philosophers Murphy, *supra* note 1, at 204.

<sup>6</sup> Only recently has Hart received more attention from international lawyers. Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart', 21 *European Journal of International Law* (2010) 967; d'Aspremont, 'Herbert Hart in Today's International Legal Scholarship', in J. d'Aspremont *et al.* (eds), *International Legal Positivism in a Post-Modern World* (2014) 114.

Be that as it may, the great jurisprudential topics, such as the role of sovereignty, morality, consent and validity raised in Murphy's article are, of course, still with us today. Through this lens, the article deals with the major international legal debates of the last 20 years, such as fragmentation, global governance, soft law and compliance theories and is much too rich in its analysis and reflections to be comprehensively appreciated in a short reply. I will therefore focus on the foundational issues, in particular, on Murphy's discussion of the role of positivism and naturalism/morality in international law and in the interpretation of international legal norms, such as the prohibition of the use of force.

## 1 Positivism and Naturalism in International Law

Murphy's article sets out to reflect upon 'positivism' in international law, explaining that international legal scholarship traditionally equates positivism with voluntarism. Murphy convincingly points to the differences between a legal philosophy view of positivism, according to which the 'grounds of law' are matters of fact, and international legal positivism, which holds 'that the content of international law flows from states' consent'.<sup>7</sup> With Hart, Murphy criticizes the consent-based approaches for not being able to give an answer to the question of who consented to this assumed rule in the first place, since only consent can create binding obligations.<sup>8</sup> Kelsen had already grasped this paradoxical 'regressus ad infinitum' of voluntarist theories and replaced it by a non-voluntarist theory of positive law based on a hypothetical 'Grundnorm', which was meant to encapsulate the idea of legal validity at the basis of every legal system.<sup>9</sup> In his monograph 'Problem der Souveränität' from 1920, Kelsen deconstructed the late 19th-century voluntarist theories as inherently contradictory and ideological in nature.

Interestingly, the discipline's self-understanding since the early 20th century has been marked by a critical stance on voluntarism as the sole 'foundation' of international law. In contrast, scholars during the 20th century insisted time and again on international law having moved beyond an egoistic sovereignty-based legal order. In this sense, I fully agree with Murphy when he remarks that in international law positivism 'acquired a bad political odour in some circles'.<sup>10</sup> At the same time, however, there are no influential scholars who have actually propagated a return to natural law foundations *sans peur et sans reproches*, which would have included a complete abandonment of voluntarism. Even the most outspoken defenders of the natural law grounds of international law, such as Alfred Verdross, referred in a circular fashion to foundational moral values or norms as being consented to by all states expressed

<sup>7</sup> Murphy, *supra* note 1, at 205.

<sup>8</sup> *Ibid.*

<sup>9</sup> The content of the *Grundnorm* for international law was contested among Kelsen and his pupils, Alfred Verdross and Josef L. Kunz, on this dispute within the Vienna School. von Bernstorff, *supra* note 4, at 104–108.

<sup>10</sup> Murphy, *supra* note 1, at 206.

in treaties and custom.<sup>11</sup> These constant changes of perspective between the one constructing international obligations from the sovereign ‘will’ of the state and the opposing approach regarding international law as a law grounded in subordinated interests of an ‘international community’ had already been criticized by Kelsen in his 1920s monograph as a structural problem rendering contemporary international legal scholarship ‘unscientific’.<sup>12</sup> It took until the late 20th century for the critical legal studies movement, which developed from the insights of US legal realism, through David Kennedy and Martti Koskenniemi, to explore the structural characteristics of contemporary liberal internationalism in a comprehensive fashion.<sup>13</sup> They demonstrated that international lawyers are still caught in a discursive ‘hamster wheel’ of patterned and ambivalent rhetorical oppositions between respect for sovereignty and assertion of an international community.<sup>14</sup>

In light of these insights, the classic controversy between naturalism and positivism raised by Murphy for international law appear in a different light. For better or worse, international legal discourse has incorporated both theoretical perspectives, each in a specific internationalist version, into its argumentative and doctrinal structures. Most doctrinal and scholarly debates can be reconstructed along the dynamic relationship between these opposing theoretical poles. The late 19th-century jurisprudential controversy about the source of obligation with its opposite poles has thus become a structural feature of international legal discourse. What this means for the relevance of sophisticated jurisprudential differentiations, such as those produced by the Hart-Dworkin debate, is difficult to assess. But, for these structural reasons alone, it may well be the case that the idiosyncratic language of international law and the related scholarship can only to a very limited extent be irritated by the classic jurisprudential antagonism between ‘positivist’ and ‘moralist’ approaches to the ‘grounds of law’ of Oxfordian provenance. Or in other words: without engaging with these structural and theoretical insights into international legal discourse, the relevance of these classic Anglo-American jurisprudential debates for international law will remain far from evident.

## 2 Positivist and ‘Non-Positivist’ Theories of Interpretation in International Law

Murphy is to be commended for shifting the focus from foundational issues to questions of interpretation of legal norms by lawyers:

<sup>11</sup> A. Verdross, *Die allgemeinen Rechtsgrundsätze des Völkerrechts*, in: *Gesellschaft, Staat Recht. Untersuchungen zur Reinen Rechtslehre: Festschrift für Hans Kelsen* (1931), at 358.

<sup>12</sup> ‘The theory of international law, in particular, vacillates back and forth uncertainly between the antipodes of a state-individualistic and a human-universalistic perspective. . .’, Hans Kelsen, *Das Problem der Souveränität* (1920), 319–20.

<sup>13</sup> Kennedy, ‘When Renewal Repeats: Thinking against the Box’, 32 *New York Journal of International Law and Politics* (2000) 335, at 407; M. Koskenniemi, *From Apology to Utopia* (2005), at 1–15.

<sup>14</sup> Due to this specific and circular semantic ‘cage’, international legal doctrine in all of its basic manifestations according to this approach sustains an ultimately meaningless discourse lacking any transformative potential. Koskenniemi, *supra* note 13.

There is no 'natural law' theory of the grounds of law; no one thinks that the positive law just is what morality requires, or even that any conflict with morality renders a legal norm invalid. The relevant contrasting view is non-positivism, the view that legal interpretation will always require moral judgment – most plausibly in the manner of the 'moral reading' interpretation developed by Dworkin.<sup>15</sup>

For him, the relevant upshot of the current jurisprudential debate is the irreconcilable 'standoff' between positivists and non-positivists' on the question whether legal interpretation 'will always require moral judgment'.<sup>16</sup> Even though this might be a correct résumé of the late Hart (Raz)-Dworkin controversy over judicial interpretation, the binary categorization seems to be a somewhat simplified description of the various relevant philosophical approaches to the topic. Maybe the positivist–non-positivist distinction is even somewhat misleading when it comes to the problem of legal interpretation in international law. At times when questions of judicial interpretation of an increasingly fragmented and, indeed, ever more powerful international judiciary are at the heart of the debate, it might instead be helpful to develop a theoretical categorization, which focuses on the degree and type of political discretion that courts and tribunals are being accorded by jurisprudential theories. Two famous, and, in this context, relevant, continental approaches to judicial interpretation may serve as examples for theories that already when first put forward went beyond the 'positivist-non-positivist' scope.

For the 'positivist' Kelsen, for instance, judges in interpreting a norm will inevitably be influenced by moral and other non-legal standards:

In applying a statute, there may well be room for cognitive activity beyond discovering the frame within which the act of application is to be confined; this is not cognition of the positive law, however, but cognition of other norms, which can now make their way into the law-creating process, the norms, namely, of morality, of justice – social value-judgments customarily characterized with the catch-phrases 'welfare of the people,' 'public interest,' 'progress,' and so on.<sup>17</sup>

The judge, unlike the legal scholar, is thus free to incorporate personal value judgments, political maxims, and ideas of justice into his decision; according to Kelsen, he could not help but do so. And Carl Schmitt, the committed non-positivist, accorded no role to morality whatsoever in the interpretation of legal norms by law-applying organs. Judges, irrespective of both the text of the applicable norm and moral standards, decide cases in line with professional conventions and routines. The decision is 'right' if it conforms to peer expectations; if, in the words of Schmitt, another judge would have decided likewise.<sup>18</sup> If this requires deciding *contra legem* or outside of

<sup>15</sup> Murphy, *supra* note 1, at 206.

<sup>16</sup> *Ibid.*

<sup>17</sup> H. Kelsen, *Reine Rechtslehre* (1934), at 98–99; H. Kelsen, *Introduction to the Problems of Legal Theory* (1992), at 83; for a current in depth analysis of the general problem of interpretation in international law, see I. Venzke, *How Interpretation Makes International Law* (2012).

<sup>18</sup> C. Schmitt, *Gesetz und Urteil* (2nd edn, 1969) at 71. I have tried to explore Schmitt's early theory of judicial interpretation elsewhere in more detail. Von Bernstorff, 'Specialised Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt', in A. Føllesdal and G. Ulfstein (eds), *The Judicialization of International Law - A Mixed Blessing?* (forthcoming 2017).

accepted moral standards, judges usually will and must do so.<sup>19</sup> As these two examples show, the non-positivist/positivist distinction says little about how various theoretical approaches deal with the issue of internal and external constraints judges face in interpreting norms. An alternative could be the scholarly assumption a sliding scale between idealist and realist theories of judicial interpretation, with Dworkin to be situated at the idealist pole.

Be that as it may, Murphy sides with Dworkin's approach and proposes a 'moral reading' of the UN Charter, which is exemplified by a legal assessment of the North Atlantic Treaty Organization's (NATO) intervention in Kosovo in 1999 and the contested question of 'humanitarian intervention'.<sup>20</sup>

### 3 Kosovo and the 'Moral Reading' of the UN Charter

It is one of the many strengths of Murphy's article that it does not shy away from commenting on those international legal issues and debates that have been uppermost in international legal minds over the last 15 years. The issue of 'humanitarian intervention' certainly is one of them. Murphy suggests that a Dworkinian 'moral reading' of the UN Charter would have come to the conclusion that the 1999 NATO intervention in Kosovo, including the bombardments of Serbian targets in Belgrade and other parts of Serbia, was not illegal despite the fact that it had not been authorized by the UN Security Council:

Taking the overall purpose of the establishment of the United Nations to be the securing of peace, the prevention of slaughter, and the protection of human rights, and acknowledging the legitimacy deficits of the Security Council and so on, it would not be too hard to reach the conclusion that the NATO campaign was legal after all.<sup>21</sup>

Murphy unfortunately does not provide us with more information on the arguments with which he would envisage legally justifying a military intervention, including the killing of Serbian civilians as well as the massive destruction of public Serbian infrastructure, outside of the written exceptions of the prohibition of the use of force in Chapter VII and Article 51 of the UN Charter. Referring to the 'overall purpose' of the United Nations (UN), however, appears insufficient since an important, if not central, purpose of the UN Charter was, and still is, to outlaw unilateral military interventions, which are not justified by self-defence. Of course, if one looks into the literature, a couple of proposals to support 'humanitarian interventions' by interpretation are on offer. A classic proposal to justify non-defensive unilateral military intervention is to interpret Article 2(4) very narrowly as a prohibition that rules out only those unilateral military interventions that serve a cause that is clearly incompatible with the purposes of the UN.<sup>22</sup> This narrow interpretation of the prohibition in Article 2(4) has

<sup>19</sup> *Ibid.*, at 112.

<sup>20</sup> An influential early doctrinal analysis of the NATO-intervention in the Kosovo conflict is Simma, 'Nato, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999), 1–22.

<sup>21</sup> Murphy, *supra* note 1, at 206.

<sup>22</sup> Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes', 230 *Haague Academy Recueil des Cours* (1991) 313; Reisman and McDougal, 'Humanitarian Intervention to Protect the Ibos', in R.B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973) 167, at 177.

been rejected by the International Court of Justice (ICJ) since its very first judgment in the *Corfu Channel* case.<sup>23</sup> The second argument refers to an ‘emerging right to humanitarian intervention’ as a customary exception to the prohibition of the use of force.<sup>24</sup>

Interestingly, in Ronald Dworkin’s article ‘A New Philosophy for International Law’, to which Murphy refers in this particular context, none of these doctrinal arguments is endorsed by the famous legal philosopher.<sup>25</sup> Dworkin considers the narrow interpretation of Article 2(4) only to eventually reject it with a convincing consequential argument: such a narrow reading of Article 2(4), which would allow for unilateral humanitarian interventions, could in his view be abused for aggressive invasions, such as the one in Iraq in 2003.<sup>26</sup> Instead, Dworkin proposes to relaunch the UN General Assembly’s (UNGA) ‘Uniting for Peace’ mechanism for new interventions aimed at ending crimes against humanity. The respective UNGA resolution should request an advisory opinion of the ICJ on the question whether the incident constitutes a crime against humanity. After such a judicial ‘declaration’, military intervention without UN Security Council authorization would in his view be justified by the UNGA resolution. Dworkin argues that this mechanism, if enacted by the UNGA, would not be *ultra vires* in the context of the UN Charter.<sup>27</sup>

While I have a lot of sympathy for the mechanism proposed, I do not think it follows in any way from a jurisprudentially controllable ‘moral reading’ of the UN Charter. Instead, it appears to be just what the late Ronald Dworkin thought would be a good political solution for the dilemmas raised by the issue of humanitarian interventions and the UN Security Council veto. In my view, neither Dworkin’s principle of ‘mitigation’ nor his ‘salience’ principle in any way make this interpretation jurisprudentially preferable to other interpretations of the UN Charter. For Dworkin, states have the responsibility to ‘mitigate’ the negative effects of state sovereignty on other states and their populations (principle of mitigation). Moreover, the ‘salience’ principle allows a ‘significant’ number of states with a ‘significant’ population to move ahead with humane or ‘mitigating’ legislation for all states, even if a minority of states should object to such a move. From a historical perspective, it is hard not to think in this context of the ‘Concert of Europe’ in the 19th century legislating for the rest of the world, including the ‘civilizing mission’ of European nations imposed on the colonies. But that is certainly not what Dworkin had in mind with his postulated ‘salience’ principle.

Dworkin’s utopia is actually still a very familiar one in international legal scholarship – the idea of a strong international legal order obligating states for the realization of community interests, if necessary against their will.<sup>28</sup> The ‘moral reading’ ends up

<sup>23</sup> *Corfu Channel Case (UK v. Albania)*, Judgment, 9 April 1949, ICJ Reports (1949) 4, at 34–35.

<sup>24</sup> Greenwood, ‘International Law and the Intervention in Kosovo’, 49 *International and Comparative Law Quarterly* (2000) 926, at 929–931.

<sup>25</sup> Dworkin, ‘A New Philosophy for International Law’, 41 *Philosophy and Public Affairs* (2013) 2.

<sup>26</sup> *Ibid.*, at 25.

<sup>27</sup> *Ibid.*, at 26.

<sup>28</sup> As a representative of this move, see Tomuschat, ‘Obligations Arising for States without or against Their Will’, 241 *Hague Academy Recueil des Cours* (1993) 195; on international legal doctrine oscillating between concrete consent and normative community interests, see Koskeniemi, *supra* note 13.

being another cosmopolitan (interpretative) theory of governing the world through international legal rules overriding particularistic, non-enlightened state interests. By allowing a core group of states to legislate without acceptance by all legal subjects (the “salience” principle), Dworkin wants to solve the problem of how to bind reticent governments in the absence of a universal consensus on the ‘right’ and most ‘humane’ measures to take in a concrete situation. But the problem of hegemony does not want to go away and leads Dworkin to hastily add ‘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 states and the international order as a whole’.<sup>29</sup> This Dworkinian international categorical imperative, which was intended to tame his empowered core group of states, brings us back to square one: How to come up with a jurisprudential yardstick for a ‘legitimate’ international order in a deeply antagonistic, power ridden and unequal world, irrespective of the interpreter’s subjective preferences?

<sup>29</sup> Dworkin, *supra* note 25, at 19.