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ORIGINAL ARTICLE

Sovereign States and their International Institutional Order

Carrying Forward Dworkin's Work on the Political Legitimacy of International Law

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Abstract
International law's legitimacy has come under serious attack lately, including, and maybe even more so, in regimes considered democratic. Reading Dworkin's *New Philosophy for International Law* in the current context is a timely reminder of the centrality of the political legitimacy of international law. Interestingly, indeed, his account does not succumb to the (however progressive) cosmopolitan ideal of an international political community. Nor is it reducible to a concern for domestic justice in which political legitimacy is only self-regarding. By revisiting seventeenth century international legal theories, Dworkin sends both cosmopolitans and statists back-to-back. He (re-)discovers a third way in which to conceive of statehood today: not on its own, but in a mirror-image fashion and against the background of the international institutional order without which there would be no equal sovereign States, but no individual equality either. Carrying Dworkin's argument forward, this article identifies and discusses three of its crucial contributions with respect to the objects, subjects and institutions of international legitimacy that deserve further attention. It concludes with different proposals regarding the design and organization of other international institutions than States, both public and private, by reference to their relationship to States (and their people). According to Dworkin, this should enable us to improve not only the legitimacy of the international institutional order as whole, but also the political legitimacy of each State therein since both are mutually related.

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1 Introduction

In 2013, one of Ronald Dworkin's later essays was published posthumously with an ambitious title: *A New Philosophy for International Law* (NPIL).[1]

This took many of his readers by surprise as Dworkin had never directly addressed international law issues in his legal philosophy before.[2] His moral–political conception of law was mostly thought to be intentionally devised in domestic or even 'parochial' terms.[3] As a result, Dworkin's jurisprudence was never really considered by those interested in the philosophy of international law, except maybe in the international human rights law context and even so quite recently, after the publication of *Justice for Hedgehogs*.[4] Even more curiously, however, NPIL has given rise to only a few reactions since then, and when so, mostly on the part of legal and political philosophers and not of international lawyers.[5]

In NPIL, Dworkin proposes his 'new philosophy for international law' or 'international jurisprudence' (13) as an answer to the perennial question of whether international law is 'law' (1–2). He revisits it as a distinctively Dworkinian question about the ('basic') 'grounds' ('of legitimacy') of international law or (distinct)[6] 'moral basis' thereof, and hence about its ability to be a 'source of political obligation'[7] (9–11, 17). What he seeks to identify, in other words, is a moral justification for the coercive enforcement of international law by States (and by the 'other international bodies' they constitute; 13) on their people (who all remain to this date the citizens, or at least the subjects of at least one State) (14). Dworkin starts by arguing against what he takes to be the dominant account of the legitimacy of international law (2–15), i.e. State consent, before presenting an alternative proposal (15–27).

In this article, I propose to discuss his rich and nuanced alternative account of the political[8] (and especially democratic) legitimacy of international law (17). Unlike most other commentators, however, I will not be concerned with the internal consistency of Dworkin's argument about international law within his legal philosophy as a whole (pre- and post-*Justice for Hedgehogs*).[9] Nor am I interested in criticizing it from the point of view of other existing

[1] Dworkin (2013).
[2] With a few exceptions in his later work: e.g. Dworkin (2011), 327–339.
[3] See e.g. Raz (2004), 332; Green (2004).
[4] See e.g. Çalı (2009); Letsas (2015).
[5] See e.g. Chilton (2013); Green (2004); Jovanović (2015); Scarffe (2016); Christiano (2016a); Bustamante (2017); Letsas (2018).
[6] See Dworkin (2011), 402–403.
[7] I take Dworkin to be referring here to a *prima facie* or *pro tanto* obligation, i.e. one that actually obtains, although it may be defeated in the context of an all-things-considered judgement, as opposed to an obligation which one has good reason to believe exists, even though it may in fact not do so.
[8] It is not because this article focuses on 'political legitimacy' like Dworkin's NPIL that it excludes the co-existence of other concurrent types and grounds of legitimacy of international law (both instrumental and non-instrumental). Nor does it preclude considering the non-political legitimate authority of international law as varying from one legal norm or source to the other. See also Besson (2009); Besson and Martí (2018).
[9] See e.g. Çalı (2009); Chilton (2013); Jovanović (2015); Scarffe (2016); Christiano (2016a). For a defence, see Bustamante (2017).

(either cosmopolitan or realist) theories of the legitimacy of international law[10] or, at least, not directly.[11]

What I would like to do instead is 'carry forward'[12] Dworkin's argument by developing, in my own voice, some of his illuminating insights about what he refers to as the 'international institutional order' of States. I would like to explore how what he describes as the 'general responsibility' of every State 'to improve the organization of States in which it functions as a government' (27) sheds light upon how we could, and should, solve some of the most pressing political legitimacy issues in international law.

My starting point in this endeavour is the suspicion that Dworkin may not have been entirely well understood by his critics.[13] The crux of NPIL is, as I see it, to pave a third way between the universality of cosmopolitanism and the relativity of statism.[14] It matches the historical and conceptual truth that there could have been no universal requirement of respect for individual equality without the universalization of the State's institution across the world and without the co-existence of equal States therein.[15] In turn, therefore, there could be no universal requirement of States' equal sovereignty without the international order or system and hence without international law.

Accordingly, it would be wrong, on the one hand, to frame Dworkin's argument about the legitimacy of international law as being one of 'domestic justice' and then blame it for being 'agent-relative' and not sufficiently 'independent'.[16] Every time State authorities are concerned about their individual subjects' equality, they are in fact concerned, at one and the same time, about what makes respect for that equality possible in each and every State and hence about the international legal system. However, on the other hand, one would be equally misguided to construe that concern of people (and their States) for the international order or 'world' (from the Latin word for world, i.e. *mundus* or order) they form together with other people (and their States)[17] as a necessarily 'cosmopolitan' moral concern for the equality of all individuals *qua* members of an international political community. That concern cannot and should not be conceived independently of its contextualization in each political community merely because it is universal.[18]

More specifically, there are three central (albeit underdeveloped) contributions in NPIL that this article proposes to carry forward and address in more depth: first, its conceiving of the legitimacy of the international system together and in close mutual relationship to the *political legitimacy* (of States); second, its giving *State sovereignty* a pivotal role in that political account of the legitimacy of international law; and, third, its situating States *qua* domestic and international legal institutions within a broader *international institutional order* whose legitimacy is mutually related to their own.

First of all, Dworkin tells us we should consider the legitimacy of international law as a question of *political legitimacy* (of States), thereby also tying the latter to the legitimacy of the international system or order as a whole, however. Both 'objects' of legitimacy (i.e. States and

[10] See e.g. Christiano (2016a), 64–68; Chilton (2013).
[11] See Besson (2009); Besson and Martí (2018).
[12] This term is borrowed from Waldron (2013).
[13] With some exceptions: e.g. Bustamante (2017), 263 and 277–279.
[14] For an attempt to frame Dworkin's argument into this binary framework, see e.g. Christiano (2016a), 56; Scarffe (2016).
[15] See also Siedentop (1983); Reus-Smit and Dunne (2017).
[16] See Christiano (2016a), 50 and 54; Letsas (2018), 1248.
[17] See also Arendt (1963), 175. See also Besson (2020) on Vico (1744; 2001)'s *jus* and *mundus gentium*.
[18] Contra Christiano (2016a), 54, 56 and 60; Çalı (2009).

their international institutional order) are strongly interrelated in Dworkin's two-tiered account of the legitimacy of international law *qua* both political legitimacy of States and legitimacy of the 'international system as a whole' (19). While (States') political legitimacy is also a domestic matter, it may not be accounted for outside of the international legal order whose principles are part of the domestic political coercive system and from which the latter derives the moral title to govern. As a result, the related albeit distinct legitimacy of the international system itself should also be a concern to States. Interestingly, this makes 'political legitimacy' pivotal in Dworkin's account of the 'legitimacy' of international law, but not exhaustive thereof. For the rest, however, the exact objects, subjects and grounds of the latter (non-political) legitimacy of international law remain indeterminate, and the relationship between the two types of (political and non-political) legitimacy needs to be specified further. That is what the third section of the present article proposes to do.

Secondly, to the extent that a world State or government has not yet developed, it is *States'* political legitimacy and their 'responsibility of equal concern' for their people that matter, according to Dworkin, when accounting for the legitimacy of international law and its 'subjects'. What this means is that an account of the legitimacy of international law cannot be considered complete without due respect for the equality of States in the international system as a whole, and hence for States' equal sovereignty. This explains the importance of the 'principle of salience' in Dworkin's account, but also, as he almost recognizes at some stage (21–22), the potential role of democratic State consent for the legitimacy of international law. Nevertheless, a more normative and especially more positive account of the role of State sovereignty is still missing in NPIL as it stands, and needs to be provided. That is what the fourth section of this article proposes to do.

Finally, Dworkin's two-tiered account of the legitimacy of international law *qua* both political legitimacy of States and legitimacy of the 'international system as a whole' (19) relies on the existence and further development of an *international institutional order* or organization of States. It is an order on whose legitimacy States' own political legitimacy depends with the first-tier duties of mitigation and salience this gives rise to, but also, and for the same reason, an order whose legitimacy needs be ensured for its own sake, thereby generating a second-tier responsibility on the part of States, both of mitigation and salience. Despite that international institutional order's pivotal role in NPIL, the exact nature and organization of those other international bodies and institutions therein remain vague, and so does the ambit of States' responsibility to improve them. Those issues need to be specified further, therefore, in order to ensure both that order's legitimacy and that of States. That is what the fifth and final section of this article proposes to do.

Carrying forward and deepening those three points made by Dworkin in NPIL, this article's argument will proceed in three steps that correspond to three different dimensions of the legitimacy of international law: its objects, subjects and institutions.[19] First, it will assess how Dworkin's account understands the *objects* of international legitimacy (3). Second, it will turn

[19] Of course, and as it will become clear in the course of my argument, when the 'object' of legitimacy is political, it is difficult to disentangle from the 'subjects' of legitimacy and, in turn, from the latter's 'institutions'. And the same may be said about the mutual and tight relationship there is between political 'objects' and 'subjects', on the one hand, and 'grounds' of political legitimacy, on the other (see Thomas (2014) on the distinction). The reason for trying to keep them apart here has to do with the 'independent' kind of legitimacy and 'reasons' to be concerned that seem to apply, at least in part, to the international system and its law in NPIL (19), and the discussion of the latter's relationship to the political legitimacy of States and of international law in those States (see the discussion in section 5, below).

to the *subjects* of international legitimacy therein (4). Finally, it will explore in further detail the *institutions* of international legitimacy (5). First and foremost, however, Dworkin's intricate argument for the political legitimacy of international law needs to be presented in detail (2).

2 Dworkin's Argument for the Legitimacy of International Law

Dworkin's argument in NPIL is two-pronged: he starts by arguing against what he takes to be the dominant account of the legitimacy of international law (2–15), before presenting an alternative proposal (15–27).

The first part of Dworkin's argument is that the dominant (legal positivist) justification for the authority of international law, i.e. *State consent*, is defective. Besides that justification's implausibility in certain practical contexts, it is also the case from a normative perspective. It is so, Dworkin argues, whether State consent is considered as an interpretative principle (it is indeterminate), as a basis for legal validity (consent is regressive and the principle *pacta sunt servanda* needs to be accounted for independently from consent, in a non-circular way) or as a ground of legitimacy (even promising can only bind on grounds of more basic moral principles)[20] (2–10). It is our 'intellectual responsibility' as legal philosophers therefore to provide a better justification for the authority of international law (15). This is even more the case as the time will soon come, he says, where we will need international law to be effective—he mentions climate change and the effectivity of international environmental law, but he may as well have referred to authoritarianism or populism and the effectivity of international human rights law.

Dworkins' alternative proposal, and that is the second part of his argument, is that we must locate the grounds for the legitimacy of international law, as it is the case for that of domestic law, in the more general phenomenon of *political (associative) obligations* (11–15). According to that approach to political obligation and legitimacy, 'a coercive political community must respect the dignity of those over whom it exercizes dominion by showing equal concern and respect for them all' (29).[21] Dworkin understands that approach as being heir to seventeenth century modern theories of political legitimacy, theories grounded in the respect 'of democracy and of the rights of individual citizens in a democracy' (16). As a matter of fact, it is also in that century's 'partially moralized conception of international law' that he locates the 'golden age' of international jurisprudence (13).

This second part of Dworkin's argument regarding the political and especially democratic legitimacy of international law unfolds in two steps: a presentation of the basic interpretative principles of international law (15–27), followed by a discussion of some of their institutional implications (27–29).

In a first step, Dworkin presents *two basic interpretative principles of international law* that correspond to the standing duty of any coercive government to improve its own legitimacy (19): the principle of mitigation and that of salience.

[20] See Dworkin (2011), Ch. 14, 319.
[21] See also ibid., 321–322.

Dworkin argues that each State has, first of all, a *principle, duty* or *responsibility*[22] *of mitigation* of (the negative consequences of) its coercive power. That duty itself is two-pronged. It is, first of all, a State's prima facie duty to improve *its own political legitimacy* by abiding by international law principles, and, more generally, by the 'feasible and shared constraints' weighing equally on each State, because those international principles are not independent of, but are actually part of the coercive system it imposes on its citizen (17). Those shared constraints and principles weighing on every State entail, according to Dworkin, protecting its population against internal (a) and external (b) human rights violations, including against violations of its right to democratic self-determination (c), but also against threats to universal interests and common concerns shared by its population that may only be mitigated by minimal or full coordinated international action (d) (17–18). The duty of mitigation also includes, second, a duty for each State to improve *the legitimacy of the international order* or system itself to the extent that it is that order that grants every State a 'moral title to govern' a given population on a particular territory (17–19).

In light of the circumstances of reasonable disagreement about what principles would best mitigate each State's coercive power and/or improve the legitimacy of the international order, that duty of mitigation is guided, and that is the second basic principle of interpretation of international law according to Dworkin, by the *principle of salience*. That principle places a prima facie duty to subscribe to a collective practice of States around those principles, provided a more general practice of States would improve the legitimacy either of the subscribing State or of the international order as a whole (19). Dworkin then illustrates his interpretative argument with the issue of the alleged lack of legality of humanitarian interventions under international law (22–27).

In a second step of the argument, Dworkin addresses various *international institutional questions* through the lens of his two basic interpretative principles of international law. He reaffirms in this respect the general responsibility of each State 'to improve the organization of States in which it functions as a government' (27).

Dworkin then discusses two proposals for a new 'institutional structure' that could alleviate the grave coordination problems States confront (27–29). First, he explains how international law could be adopted democratically. This would not so much occur through a 'world parliament' and 'worldwide democracy' for lack of a world political community whose population would have equal participation rights in international law-making. What he proposes instead is a 'four-majorities system of international legislation' that could provide greater indirect participation and representation in the making of international law than the world's population currently enjoys (28–29). Secondly, Dworkin briefly turns to the possibility and desirability of a world government (29). He does not rule out the possibility of such an institutional development, including some of its potential benefits. He argues, however, that nothing in his argument about States' responsibility of equal concern implies a duty of States to form such a world government. Nor does it require us to conceive of the political legitimacy of international law in cosmopolitan terms.

In this article, I will not engage with the first part of Dworkin's essay (the part on State consent), even though it will become clear in the course of my argument how democratic State consent matters therein. I have addressed the issue extensively

[22] Dworkin (2013), 17, 19 or 27, uses interchangeably the terms 'reason', 'duty', 'obligation' or 'responsibility'.

elsewhere and my own view does not differ fundamentally from the one defended in NPIL.[23]

In short, my position with respect to State consent and the legitimacy of international law is two-pronged. First, legal positivism need not and should not imply legal *voluntarism* about international law. Dworkin is right about the many difficulties the notion of State 'will' raises. All the same, the historical[24] identification of positivism with voluntarism need not affect the prospects of other newer and better conceptions of legal positivism about international law.[25]

Second, State consent can and should be considered a condition neither of the *validity* nor of the *legitimacy* of international law. Dworkin, like others before and after him,[26] is absolutely right about the many difficulties such an identification with either validity or legitimacy raises. What I think he fails to realize, however, is how important the role of State consent still is in the practice of international law for legal duties to arise (from treaties, of course, and also from States' general and regular practice referred to as custom)—not to mention soft law norms, of course—on the one hand, and how it may be interpreted as a democratic qualification to the legitimacy of international law rather than as ground thereof, on the other.[27] As I will argue in the fourth section of this article, such a reading of the role of State consent in an international institutional order where democracy remains State-based may even be in line with much of Dworkin's argument about international law and the political legitimacy of democratic sovereign States.[28]

3 The Objects of International Legitimacy: Political Legitimacy and the Legitimacy of International Law

The political legitimacy (of States) and the legitimacy of the international system or order as a whole are strongly interrelated in Dworkin's two-tiered account of the legitimacy of international law.

While (States') political legitimacy is also a domestic matter, Dworkin argues that it may not be accounted for outside of the international order whose principles are part of the domestic political coercive system and from which the latter derives the moral right to govern (16–17). The legitimacy of international law is therefore primarily political in NPIL. Conversely, and for that very same reason, the related albeit distinct legitimacy of the international system itself should also be a concern to States whose (political) legitimacy depends on it in a fundamental way (19). In other words, the political legitimacy of States may not be

[23] See Besson (2009); Besson (2010); Besson (2016); Besson (2017); Besson and Martí (2018).

[24] Curiously, Dworkin (2013), 13, seems to think he can find unconditional support for his nuanced argument about international law *qua* distinct part of political morality in all the modern theories stemming from seventeenth century European law and politics. The very identification of legal positivity with States' 'will' that Dworkin criticizes emanated, however, from many authors from that period and the very contrast they drew between historical voluntary facts and universal moral truths, an opposition we owe centuries of sterile opposition between legal positivism and jusnaturalism (see Pons (2015); Besson (2020) on Vico (1744; 2001)'s critique of Grotius and the other 'princes of the Enlightenment' in this respect). It is actually that opposition that could arguably explain the difficulty there has been for Dworkin's philosophy of law itself to be taken seriously for a long time.

[25] On the last remaining minute differences between Raz's and Dworkin's philosophies of law, see Waldron (2013).

[26] See Hart (1994); Murphy (2017).

[27] See Besson (2016); Besson and Martí (2018). See also Christiano (2010); Christiano (2012); Christiano (2015); Christiano (2016b); Christiano (2016a), 61–64.

[28] See Besson (2016); Besson and Martí (2018). See also Green (2004), 2; Christiano (2016a), 62–64; Bustamante (2017), 282–284.

accounted for separately from the international system's distinct kind of (non-political) legitimacy, but the reverse is also true.

Interestingly, this makes 'political legitimacy' pivotal in Dworkin's account of the 'legitimacy' of international law, but not exhaustive thereof. Some of the details of that relationship are in need of further specification, however. It is the case not only of the exact objects, subjects and grounds of that (non-political) legitimacy, but also of the plausibility of the distinction between the two types of legitimacy (3.2). Let me start, however, by explaining why Dworkin's two-tiered account of legitimacy is an important contribution to the general debate about the political legitimacy of international law (3.1).

3.1 The Political Legitimacy of States under International Law

It is common among international lawyers and legal philosophers, with the exception, of course, of those interested in the democratic legitimacy of international law, to approach the legitimacy of international law (and its 'institutions', 'powers' or even, more recently, 'officials'[29]) as such, and independently from that of the polity or political community whose law (and institutions[30]) it is (they are).[31] So doing, those accounts elude the political question entirely or, at least, assume the transitivity of what they argue about law, institutions, powers or officials and its applicability across political and non-political forms of legitimacy.

It is easy to understand why this seemingly innocent focus on the legitimacy of international law *qua* law may be attractive in the absence of a world political community and of the little plausibility of a cosmopolitan account of international law. In fact, it has also become quite common to elude the political question in accounts of the legitimacy of law in the domestic context where we refer interchangeably to the authority of the State, law, institutions, powers and officials. It is, however, precisely in light of the origins of most theories of legitimacy in the context of 'State law' where law and polity were always related and where the legitimacy of law, political institutions and public officials have been merged, that it is important to be aware of the conceptual challenges raised by the disconnection between law and polity. That disconnection should be argued for and cannot simply be taken for granted.[32]

Provided one finds arguments for the disconnection between law and polity, and hence between the legitimacy of law and that of political institutions when applied to international law, there are a few challenges such proposals should be able to meet. Note that I am assuming that those accounts maintain the connection between law and polity in the domestic context and for the purpose of the legitimacy of domestic (State)[33] law,[34] even if coherence and

[29] See Roughan (2018a), 1221–1222; Roughan (2018b); Roughan (2019) on what she refers to as the 'macro' and 'micro' levels among authority claimants and hence between 'objects' of (evaluation of) authority and legitimacy (ranging from 'States' to 'institutions' and 'officials').
[30] For a similar critique, see Collins (2016).
[31] Compare in the same book, Tasioulas (2010); Buchanan (2010), on the one hand, with Pettit (2010); Christiano (2010), on the other.
[32] See Walker et al. (2018).
[33] Nothing in this section's discussion of the relationship between law and politics (and between political legitimacy and the legitimacy of law) implies a necessary conceptual link between statehood and politics (besides a shared conceptual history, of course). Nor does it prevent new forms of political institutions from emerging inside (e.g. cities, regions) or outside the State (e.g. IOs). See Besson (2019b); Besson and Martí (2018); Besson and Martí (2021).
[34] Letsas (2018), for instance, does not clearly endorse the 'disembedding' of law from polity domestically.

continuity could then become yet another challenge for such disconnected accounts of the legitimacy of international law in the domestic context.[35]

The first challenge is that almost all the (Western) concepts we use to theorize law (and its legitimacy) are not only State-based, but also public and hence political (e.g. subjecthood, authority, sovereignty, etc.). Very schematically, this is due in part to the reception of Roman law in the Western legal tradition, and in particular of Ulpian's distinction between the public and the private.[36] There are no easy ways around that conceptual hurdle and what one may therefore refer to as 'methodological publicism'. The conceptual difficulty is enhanced by the fact that the publicness of law, and hence the political relationship underpinning legality has become increasingly difficult to see. This has been the case for different reasons, and not the least because of the development of realist and utilitarian conceptions of statehood in the nineteenth century.[37] The latter have succeeded in reducing statehood to (coercive) 'government' and assimilating its subjects to 'individuals'. The lack of visibility of politics in contemporary law does not make the conceptual connection between law and politics vanish, however, but only makes it more difficult to capture.

A second challenge is that alternative forms of private normativity are developing fast, especially outside of domestic jurisdiction. They pose a real risk of dilution of legality, and especially of international legality. That risk would be increased were the public category 'law' (as it applies domestically and internationally) to be extended to cover any 'norms' developed outside of a political relationship, for instance on the sole ground that those norms could have a 'moral impact' on people.[38] It is precisely because international law is so much 'younger' than domestic law, to quote Dworkin (30), that we need to take care not only of its moral dimension, but also of its political character.

What is remarkable about Dworkin's proposal in NPIL is how closely it coheres with the general account of political legitimacy and associative obligations he has developed for the domestic legal context (11–15). He construes the legitimacy of international law primarily as the legitimacy of a political community's law, albeit not of a cosmopolitan one, but of each State's at once.

Not only is that political monist argument coherent with Dworkin's general jurisprudence and its understanding of the relationship between law and morality,[39] but it corresponds to the best legal monist reading of international law.[40] International law applies indeed primarily to States, and hence to their subjected peoples *qua* true subjects of international law and institutions.[41] Even when it applies directly to the latter, it is coercively enforced by States (for their peoples) as their law. That coercive enforcement of international law can only be justified, however, if it respects those peoples' dignity and equality and may be deemed politically legitimate. Importantly, States' role is pivotal even when the international legal norms at stake emanate from other international institutions, such as IOs or international courts (ICs), and not directly from international treaties or the customary practice of States. Indeed, States(peoples)' authorities are the enforcers of IO law and ICs' decisions as well.

[35] See also Besson (2009); Tasioulas (2010); Besson and Martí (2018).
[36] See Loughlin (2018).
[37] See Skinner (2010).
[38] Contra Letsas (2018), 1250.
[39] See Bustamante (2017), 269–274.
[40] See e.g. Kelsen (1926).
[41] See also Besson (2009); Waldron (2011).

Importantly, this argument for the political legitimacy of international law applies whether the international legal norms in question aim at enhancing States' legitimacy directly, as it is the case with international human rights law or with the international principle of democratic self-determination (17–18), or whether they pertain to any other issue in the life of a political community, such as international economic law in a globalized market or international environmental law protecting domestic and global natural resources at the same time (18). The latter international law norms include issues on which we need shared international positions over which we can coordinate ourselves with other States.[42] In those cases, international law enables each political community to protect its own interests together with those of others and, thereby, State authorities to enhance their political legitimacy at the same time as others'.[43]

The eminently political (State) context in which international law is developed and enforced to date actually also transpires from what Dworkin identifies as the dominant account of the legitimacy of international law: State consent. To the extent that he is proposing an alternative moral basis for international law, it is not a surprise that his proposal be set against the same political background (that of States and their peoples).

All the same, and to the extent that States' (political) legitimacy depends on the legitimacy of the international system as a whole in a fundamental way (19), Dworkin is perfectly aware of the necessarily concurrent need to ensure that system's legitimacy (and that of its institutions) (17–19, 27). He argues that the legitimacy of the international order itself should be a concern, and not only to every State individually, but also generally to any international body in that international institutional order (13).

Of course, Dworkin does not exclude that the legitimacy of the international order could become political in a cosmopolitan fashion (as a world government or even world State's). He actually argues that it could were the conditions of existence of such a political community fulfilled (29).[44] He stresses, however, that it is not yet the case and, even more importantly, that there is no duty for that order to become cosmopolitan, thereby excluding any form of cosmopolitanism (29).[45] Until then, and to the extent that it claims 'coercive authority' (19), the international law system or order and its institutions should be made legitimate in other ways. And it is primarily a responsibility of States (19, 27), but also of the other international institutions claiming to exercise that authority (19), that it should.

It would be a mistake therefore to criticize NPIL for focusing only on political legitimacy and, worse, only on States' political legitimacy, and hence for not being 'independent' enough from domestic politics.[46] The (non-political) legitimacy of the international law system amounts to an integral part of States' political legitimacy, just as the latter's political legitimacy

[42] There are two kinds of coordination at stake in NPIL: coordination *stricto sensu* over matters where collective action is needed (18; i.e. coordination problems), and coordination *lato sensu* among States' practices in areas where they could decide on their own, but where either their legitimacy or that of the international system would be enhanced if they did coordinate (19). See also Besson (2009); Besson (2010).

[43] I fear that this dimension of Dworkin's account may have been misunderstood or missed by Christiano (2016a), 56 and 60; and Letsas (2018), 1249. Both authors seem to think that NPIL only focuses on those international law norms that directly protect democratic processes and human rights domestically and hence directly contribute to enhancing internal legitimacy.

[44] According to Dworkin (1986), 195–206 and Dworkin (2011), 319–322, a political community amounts to a *special* relationship between members of a group (i) that is established *directly between each of them* (ii) and is characterized by a *reciprocity* of concern for the well-being of other members of the group (iii) and an attitude of *equal concern* (iv).

[45] In this respect, Dworkin and Raz (e.g. Raz 2017; Raz 2019) are very close.

[46] See Christiano (2016a), 50. See also Scarffe (2016).

depends on the international law system's distinct (non-political) legitimacy. The one cannot, and should not, be separated from the other.

This mutuality in legitimacy helps in defending Dworkin's argument against the unfair critique of the alleged 'self-regarding' or 'agent-relative' dimension of his account of the legitimacy of international law.[47] This is especially the case with respect to his understanding of international human rights law in NPIL and elsewhere.[48]

Recall that, for Dworkin, human rights are abstract minimal universal versions of political rights,[49] and hence find their more specific concrete justifications in the moral-political circumstances of each political community or State. If States converge around a 'consensus' on such basic or 'baseline human rights' in international human rights law, it is to entrench those rights legally in a way that prevent not only themselves, but also others from falling below a certain threshold of protection and thereby to enhance their political legitimacy at the same time as that of other States. It is only because that legal protection is universal and hence benefit other populations as well that it can play a role domestically. And this applies in a long-term perspective. Thus, it is not because domestic human rights protection has grown above the international threshold over time that the latter becomes dispensable. On the contrary, it is also because of the constant risk of backsliding that sharing a minimal international human rights threshold is important.

It would be wrong therefore to consider the reasons States have to develop such an international system of human rights protection as self-regarding only: they are necessarily 'self-regarding' and 'other-regarding' at the same time. Dworkin mentions the 'mirror-image Westphalian problem' with respect to the mutually negative consequences of absolute sovereignty (17–18). However, that mirror-image dimension of equal statehood should also be considered a virtue when sovereignty is limited as it should.[50] The opposition between an agent-relative account of political legitimacy and a cosmopolitan one is too strong, therefore: people, through their States, engage with one another through international human rights law to enhance their political conditions domestically, and also in every other political community at the same time.[51]

In turn, this explains why nothing in this reading of legitimacy in NPIL is incompatible with Dworkin's remark about people's 'moral responsibility to protect people in other nations' from human rights violations (17).[52] Some international legal norms should also be endorsed by States to enhance their legitimacy when respect for those norms enables their own people to comply with the universal moral reasons those people have to help protect others outside the boundaries of their political community (e.g. in the fight against poverty). This is what successful political representation should be about and how political legitimacy should work.[53] It does not mean, however, that those States owe international legal human rights duties to all people outside of their political community and that they have 'the same responsibilities to citizens of other nations' as they have to their own (17). Dworkin's discussion of the

[47] See Christiano (2016a), 50 and 54.
[48] See Dworkin 2011, 327–339.
[49] See ibid., 333–335. See also Letsas 2015.
[50] On mirrors, equality and international human rights law, see Besson (2018).
[51] For a similar non-agent-relative argument based on Dworkin's principle of 'integrity' for the development of common norms of *jus gentium* across domestic jurisdictions, as part of an 'institutional morality' shared across political communities, see Waldron (2012); Waldron (2017). See also Besson (2020) (L'autorité légitime du droit international comparé).
[52] For this objection, see Christiano (2016a), 60; Letsas (2018), 1249.
[53] See also Bustamante (2017), 278–279; Contra Christiano (2016a), 54.

responsibility to protect only pertains to the endorsement by each State of a collective responsibility because it could also apply to itself in case of grave breach of international human rights law and should therefore be institutionalized further as a (non-necessarily coercive and non-unilateral) 'collective intervention' mechanism (18). It is not meant to be a human rights duty of each State to intervene unilaterally (coercively or not) in another's jurisdiction. This interpretation actually fits what international human rights law requires. It matches the distinction in international law between the individual human rights duties of the State of jurisdiction, on the one hand, and the collective responsibilities for human rights of other States to prevent and assist the State owing human rights duties in case of grave violations, on the other.

3.2 The Complementary Non-Political Legitimacy of the International Order

The three questions that remain to clarify in this respect in NPIL are the exact objects, subjects and grounds of the complementary (non-political) legitimacy of the international system, and also whether such a distinction between political and non-political legitimacy is tenable in the first place and what the relationship between the two types of legitimacy should be.

With respect to the first question, Dworkin is not very specific about the objects of (non-political) legitimacy he has in mind when he distinguishes the legitimacy of the international system from the political legitimacy of States. It is institutional to the extent that he refers to the legitimacy of 'other international bodies' than States (13) and, more generally, of the 'international order' (17, 19) or 'international organization of States' (27). Such institutions certainly include international organizations (IO), but maybe also, as I will argue in the fifth section, other kinds of public institutions, like cities or regions, and private institutions, like multinational enterprises (MNEs) or non-governmental organizations (NGOs), involved in international law-making.

In terms of the subjects of that legitimacy, and to the extent that 'any institution or organization claiming coercive authority' exercises direct coercive enforcement over people or, at least, does so indirectly through States, it should be concerned with its own legitimacy vis-à-vis those peoples (19). Those (States)peoples are the subjects of the international institutional order's legitimacy. However, the international system also grounds States' right to govern and their own political legitimacy, and States are therefore also to be considered as international institutions in this respect. This explains why the legitimacy of the international order as whole should also be an 'independent' concern of every State (19), and this makes them subjects of that general legitimacy as well.

Finally, Dworkin does not tell us much more about the potential grounds of legitimacy of the international order besides a reference to the pivotal role of each States' political legitimacy for the legitimacy of international law and his insistence on the mutual instrumentality between each State's political legitimacy and that of the international order (17, 19). Of course, he refers to grounds of legitimacy of States that are not egalitarian and not strictly political such as coordination (17–18), for instance. It would therefore seem plausible to extend those instrumental grounds of legitimacy to non-political objects such as international institutions. All the same, given the pivotal role of political legitimacy for that of the international order as a whole, political grounds such as political equality, popular control, deliberation and human rights[54] should also apply albeit in ways that take into account the absence of a world political

[54] See on those grounds of democratic legitimacy, Besson and Martí (2018).

community and world political institutions. I will come back to this question in the fifth section of this article.

A second question one may raise pertains to the plausibility of NPIL's two-tiered account of the legitimacy of international law in the first place. Is it plausible to conceive of two types of legitimacy overlapping one another with respect to the same (international) law and (partly) the same subjects, but with different objects: each State's political community as opposed to the international institutional order or system?

Importantly, Dworkin is not the first legal philosopher to entertain this possibility. It has at least already been tried in the domestic context, albeit with respect to the same objects (and subjects), i.e. the State and its law (and its people and legal subjects). Joseph Raz, for instance, now seems to propose to encompass political legitimacy in his account of the legitimate authority of law in general. Importantly, however, he has come to that conclusion from the other (non-political) end and working from an instrumental account of legitimate authority so as to encompass a more political one.[55]

Finally, turning to the third question of the relationship between the political legitimacy of States and the legitimacy of the international system, it is clearly the most difficult ones of the three.

What is at stake here is not, as one may think at first sight, the relationship between domestic and international law before domestic authorities. That opposition does not arise in those terms in Dworkin's account. In the domestic context, indeed, and as I explained before, international law's legitimacy is primarily political and, on that interpretation, there is no disconnection between political and legal legitimacy. A conflict between domestic and international law should therefore be resolved within the scope of each State's political legitimacy and hence by reference to the norms that best respect individual equality and dignity in each case.[56] This interpretation actually fits and justifies the current practice of international law (that claims general primacy over domestic law, but leaves it to domestic authorities to enforce in concrete cases), on the one hand, and the shared or common administrative and judicial practice of most States in this respect, on the other. In case of apparent conflict between international and domestic law norms, indeed, domestic authorities do not usually grant abstract primacy to either domestic constitutional law or international law, whether on substantive or procedural grounds. On the contrary, they rely on the joint interpretation of domestic or international norms that best protect human rights and democracy in each concrete case.

Instead, the question raised here pertains to the relationship between the political legitimacy of States and the non-political legitimacy of the international order, especially in the decision-making processes of other international institutions than States.

As I explained before, what we know from Dworkin's account is that there should be some mutuality in instrumentality between the two kinds of legitimacy. Indeed, the principle of mitigation applying to States regarding their own political legitimacy also gives them an 'independent reason' (19) to improve the legitimacy of the international legal system that

[55] See Raz (2006). See for a critique of what this means for the service conception and the dependence condition, Hershowitz (2011), 3–6.

[56] This is one of the reasons I am not convinced by the role of the 'ideal international court' entertained in NPIL (13–15): it does not quite fit Dworkin's argument about the political legitimacy of international law in each State, unless, of course, its jurisdiction accommodates State sovereignty by respecting (procedural, material and remedial) subsidiarity, and esp. States' margin of appreciation, and does not emulate a State's supreme court in its institutional set-up.

grounds their right to rule and political legitimacy. And so does the principle of salience (19, 27). However, and conversely, the political legitimacy of domestic authorities that the international legal system grounds is just as instrumental to that system's legitimacy in return, and the latter's authority should be justified accordingly. This makes political legitimacy pivotal in Dworkin's account of the legitimacy of international law.

It is difficult to find further explanations about that relationship of mutual instrumentality in legitimacy in NPIL, however.

Relative (legitimate) authority, as it has been suggested by Nicole Roughan,[57] applies well to overlapping or 'nested' political authorities as exemplified by a State and one or many infra- or supra-national political communities. However, it is not that well suited to the overlap between a political authority like a State and an international institutional order that is constituted of States *and* of other institutional bodies that have (entire or parts of) States as members and whose law is primarily the law of (States)peoples *qua* subjects. In this case, indeed, the political communities themselves are not 'nested' into one another. Nor are the officials and subjects of legitimacy. There is only a single political community at stake (each State's) every time from the perspective of its subjects—remember that unlike what would be at stake in a federal State or in the European Union (EU), we are not talking about a world political community of communities or people of peoples.

Instead, therefore, one may consider that those peoples' officials are 'related' to one another to the extent that the international 'institutions' or 'organizations' Dworkin has in mind have States as members or, at least, as representatives, in order not only to enforce, but also to make international law. It is by reference to the political representation of one people at a time by its officials in relation to other States' officials, therefore, that issues of the relationship, and in particular of conflicts, between States and international institutions around international law could be settled. However, this has to be done in ways that take into account the absence of a world political community and of world political officials or representatives.[58]

Of course, those institutional mechanisms cannot solve the difficult substantive questions pertaining to the lack of transitivity of the grounds of political, and especially democratic legitimacy of States such as political equality, popular control, deliberation or human rights when transposed onto non-political legitimacy. For instance, protecting political equality in IOs' law-making processes could be instrumental to protecting people's equality domestically. However, depending on how it is done (e.g. by reference to IOs' Member States' equality with or without demographic corrections), it may threaten their individual equality domestically and their State's political legitimacy.[59] Hence, some of the reform proposals made by Dworkin aim at enhancing the egalitarian representation of people in UN law-making (27–29), and therefore both Member States' political legitimacy and that of the international system at the same time. I will come back to those issues of political representation and

[57] See e.g. Roughan (2019); Roughan (2018a), 1220; Roughan (2016). She does not distinguish, however, between political and non-political legitimacy in her account of relative authority and generally seems to assume equal relativity between all types of (what she refers to as) 'claimants' to authority. For a critique of her argument's applicability to the relationship between domestic and international law, see Besson (2019b).
[58] See Besson and Martí (2018).
[59] See Besson and Martí (2018).

institutional continuity for the legitimacy of international law in the fifth section of this article.

4 The Subjects of International Legitimacy: Sovereign States and the Legitimacy of International Law

To the extent that a world State or government has not yet developed, it is States' political legitimacy that matters, according to Dworkin (29), when identifying the subjects of the legitimacy of international law. As I explained before, Dworkin is clearly not a cosmopolitan.[60] Still, and as discussed in the previous section, States do not live in an institutional vacuum. On the contrary, that international institutional system or order is crucial to States' political legitimacy and the latter have an independent reason to enhance that order's distinct legitimacy.

Based on the political approach to international law and its legitimacy adopted in NPIL, therefore, States(peoples) should be regarded as the relevant political communities.[61] States are at once the 'subjects' and the 'authors' (and hence 'authorities') of international law for their peoples.[62] This is true of the making and enforcement of domestic law as much as it is of international law. Furthermore, and as I explained before, when IOs and ICs contribute to international law-making, it is for their Member States and that law is mostly enforced by the latter as well. (Member) States' officials or representatives domestically also function as officials of their people in international institutions, therefore.[63]

By revealing this, Dworkin rightly reminds international lawyers about the political dimension of statehood not only domestically, but also internationally, and especially about the representation relationship between representatives and represented or governing and governed that lies at its core.[64] He thereby unveils something that has gradually become obfuscated in international law: the political and hence relational dimension of State sovereignty itself.

At this stage, someone may object that this State-based account of the legitimacy of international law is old-fashioned. It is oblivious, they may say, of the international law-making role of other public or private 'subjects' of international law than States such as cities, MNEs or NGOs.

Nothing in Dworkin's account, or in the present reading thereof, should be read, however, as an exclusion of the important role of not only public but also private representation of peoples played by those other institutions, both domestically and internationally. That role is distinct nevertheless from the issue of political representation of those same peoples by States which it merely complements, and somehow corrects by making it more inclusive or

[60] Contra Christiano (2016a), 64 ff.

[61] Importantly, nothing in this reading of Dworkin excludes States from being organized in a federal way, however, or sovereignty from being multiple and shared across different public institutions within each State (e.g. States, regions, cities or other forms of political institutions like the Rojava) or across States (e.g. the EU or other IOs). See Besson and Martí (2018); Besson (2019b); Besson and Martí (2021).

[62] See also Besson (2009); Waldron (2011) on States as (States) people's officials or representatives.

[63] See Besson and Martí (2018).

[64] See also Skinner (2010); Loughlin (2018), 1161. The flattening of that political relation into what has now become the mysterious equation of law and authority may explain the current emergence of (allegedly) new accounts of authority, and their renewed focus on 'people', 'roles' and 'standing': see e.g. Hershowitz (2011), 11–18.

deliberative.[65] Furthermore, most examples usually given of the alleged law-making activity of those 'subjects' of international law are related in one way or another to States *qua* political communities: their legal personality depends on domestic law and their ability to participate in international law-making, either as subjects to law or authors of that law, is conferred upon them by States. More importantly, their ability to ensure public and private representation in international institutions also has to be organized and constrained by States.[66]

In any case, even their quality of 'subjects' of international law, i.e. as entities to whom its rights and duties attach, cannot and should not be defined *exogenously* to legal interpretation and justification, according to Dworkin (15, fn 13). It cannot therefore be understood, currently at least, outside of domestic and international legal processes run by States for their people. The same should be said about those other 'subjects' 'soft law' and about whether the latter amounts to 'international law': the question of legality cannot be determined descriptively and in advance of legal interpretation, and hence outside of an argument about the political legitimacy of that law.[67]

It follows that a non-cosmopolitan account of the political legitimacy of international law cannot be considered complete in a world inhabited by more than one people and more than one State, to quote Hannah Arendt,[68] without due respect for the equality of other States and hence for those States' equal sovereignty. After all, no State is required under the proposed interpretative principles of international law 'to ignore the division of the world into distinct states', says Dworkin (17). The central role of State sovereignty in the international system is also what explains the role of the principle of salience in NPIL in the face of reasonable disagreement among States about how best to enhance their political legitimacy and that of the international order as a whole (19). We would not need such a principle if such disagreements among States were not 'reasonable' in the first place.[69] Nor would we need it if acceptance by sovereign States did not contribute somehow to the legitimacy of international law. In some circumstances, says Dworkin, 'the authority of more concrete principles [of international law] depend on the prospect of wide acceptance' by States (15).

Despite the seemingly pivotal role of State sovereignty in NPIL, a positive account of State sovereignty is still missing from Dworkin's argument. Let me first discuss what it could amount to (4.1), before turning to its relationship to democratic State consent in a complete justification of the authority of international law (4.2).

4.1 State Sovereignty and the Legitimacy of International Law

Starting with Dworkin's account of State sovereignty, it currently reads as mostly descriptive and negative.[70] Descriptive, on the one hand, because he refers repeatedly to the 'Westphalian system' without laying it out in much detail. He seems to assume there was (and still is, and in an unchanged manner) such a 'traditional' system (15). His account is negative, on the other, because he approaches the justification of international law as being about 'mitigating' State sovereignty and coercion that would otherwise be 'unmitigated' (16).

[65] See Besson and Martí (2018); Besson and Martí (2021) (on cities).
[66] See Besson and Martí (2018).
[67] See Besson (2010); Besson and Martí (2018); Besson and Martí (2021). See also, Besson's (2019d) discussion of Alvarez (2017) on IO law and the applicability of various 'rule of law' requirements thereto.
[68] Arendt (1963), 175.
[69] See also Besson (2009); Besson (2010); Christiano (2010); Christiano (2016a), 62.
[70] For a similar critique, see Jovanović (2015), 454–456.

To some extent, this conception of sovereignty should not come as a surprise on the part of a US legal scholar trained in the twentieth century's liberal tradition. However, it does not quite fit his invocation of seventeenth century political theories and the modern conception of the international order as the 'golden age of the subject' (13).

First of all, we know today that State sovereignty was never quite as absolute as the Westphalian myth thereof.[71] Its inherent limitation was part of its value from the very beginning. Constitutional and later international limitations were not an afterthought, but the latest stages of a much longer development.[72] More importantly, second, sovereignty does not only amount to some power to mitigate, but is an empowering right in the first place. There could have been no respect for individual equality (and no 'individuals', as a matter of fact) without States (and their 'subjects'). And there could have been no universal requirement of respect for individual equality without the universalization of the State's institution across the world in the twentieth century, and hence without the co-existence of other equal States in an international legal system that guarantees their equal sovereignty.[73] That connection between the protection of individual equality domestically and that of individual equality universally through sovereign equality is often missed. It explains actually why it is wrong to oppose, like Thomas Christiano,[74] universal moral duties to protect individual equality to our political moral duties to respect individual equality domestically, and to assume that they are either in tension with one another or, alternatively, one and the same set of duties.

As a matter of fact, a more normative and positive account of State sovereignty along the lines I have just suggested would be entirely compatible with Dworkin's NPIL. It would actually enable his argument to counter easy objections to its allegedly 'defeasible' conception of limited sovereignty.[75]

Such an account could, for instance, illuminate some of Dworkin's arguments about international human rights law in NPIL and elsewhere.[76] When read too quickly, indeed, and through the lens of a negative conception of limited sovereignty, his account may sound as if State sovereignty were not necessary to human rights protection and hence to States' political legitimacy in the first place.[77] That would be a mistake, however. Dworkin's political account of the legitimacy of international law is a welcome reminder not only of the political and hence relational nature of human rights that are not owed by anyone to anyone in the world, but are and actually should be concretized as the 'political rights' of the members of a political community in each State of the world. Moreover, and as I explained before, his account also emphasizes the political nature of statehood and State sovereignty that arises from a relationship of representation.[78] Once those two relational faces of the same coin (human rights and State sovereignty) are re-united, it is easy to see how mutually reinforcing they are.

Read in this light, Dworkin's account of the political legitimacy of international law may therefore help us correct the impoverished accounts of human rights currently entertained by

[71] See Krasner (1999).
[72] See also Vincent (1987); Morris (2012).
[73] See Reus-Smit and Dunne (2017); Siedentop (1983).
[74] Christiano (2016a), 58–59.
[75] See e.g. ibid., 53.
[76] See Dworkin (2011), 327–339, on the relationship between 'human' and 'political' rights.
[77] See Christiano (2016a), 60.
[78] On the relational dimension of political obligations, see Dworkin (2011), 319. Importantly, this is a relationship between people, members of the political community instituted as a State through domestic and international law, and not between the State itself and its citizens (contra Christiano (2016a), 54). See also Bustamante (2017), 278.

certain international lawyers. Some of them consider human rights as the rights individuals could hold independently of their membership in any political community and whose corresponding duties would be owed by anyone, individual or institution, capable of harming them independently of their relationship to the right-holders. If we want States to protect our rights against the many other threats we are vulnerable to such as, for instance, those posed by MNEs, certain IOs, the global market or even climate change, States should no longer be reduced to mere coercive governments whose sovereignty needs to be mitigated. Their sovereignty is crucial for protection purposes. In order to effectively protect human rights, State sovereignty is in need of pruning rather than mitigating.

4.2 Sovereign State Consent and the Legitimacy of International Law

Turning to State consent, and without rehearsing what I and others have argued elsewhere, it should be clear by now why the consent of sovereign States should play the role it does in the generation of international legal obligations in practice.[79]

Importantly, State consent should be considered a democratic qualification to the legitimacy of international law rather than as ground thereof. Not only does it protect States' equal sovereignty and their people's equal right to self-determination against imperialism, but it is a useful signal of salience in international law-making. In this respect, provided it is given by States that represent their people and is fair and informed, State consent enables the equal treatment of people subject to international law in the circumstances of pervasive and persistent reasonable disagreement that characterize international law-making. So, just as democratic approval is an essential part of domestic democratic legitimacy on grounds of equal treatment in the face of disagreement and without consent itself becoming a ground of democracy, requiring democratic State consent to international obligations does not ground the legitimacy of international law in State consent. What it does, instead, is secure the equal treatment of the subjects of international law and hence contribute to the overall democratic legitimacy of their States and international law.

Approaching State consent as sovereign exception to the political legitimacy of international law is actually illuminating in another way. It accounts for not only the fundamental difference, but also the complementary tension between legitimacy and sovereignty, be it with respect to domestic or international law[80]: sovereign authority may not always be deemed legitimate, but it is not merely something to defeat or mitigate to the extent that legitimate authority may actually rightly be enhanced by respecting sovereignty in certain cases and should not be identified with it.[81] As I have argued elsewhere, there are limits, of course, to what democratic State consent can apply to legitimately, and in particular the conditions of the political legitimacy of States and of the international order as whole, i.e. basic equality and dignity (*jus cogens*).[82]

In conclusion, therefore, the proposed reading of the role of State consent for the democratic legitimacy of international law in a world where democracy remains State-based is arguably in line with much of Dworkin's argument about international law and the latter's role for the political legitimacy of democratic sovereign States (15).[83] It also explains why Dworkin

[79] See Besson (2016); Besson and Martí (2018). See also Christiano (2010); Christiano (2012); Christiano (2015); Christiano (2016b).
[80] See also Tasioulas (2010).
[81] See also Raz (2019).
[82] See Christiano (2010); Christiano (2012); Christiano (2015); Christiano (2016a), 67; Besson (2016).
[83] See Besson (2016); Besson and Martí (2018). See also Green (2004); Christiano (2016a), 62–64; Bustamante (2017), 282–284.

marvels at how his interpretative principles of international law and State consent happen to point in the same direction and seem to account equally well for art. 38 of the International Court of Justice's Statute and the main sources of international law such as treaties and custom (21–22). They are in fact complementary, and this is not by accident.

5 The Institutions of International Legitimacy: the International Institutional Order and the Legitimacy of International Law

Dworkin's two-tiered account of the legitimacy of international law *qua* both political legitimacy of States and legitimacy of the 'international system as a whole' (19) relies on the existence of what he refers to as the international institutional 'order' or 'organization of States' (17, 19, 27). As I explained before, it is an order on whose legitimacy States' own political legitimacy depends with the first-tier duties of mitigation and salience this gives rise to, but also whose legitimacy needs to be ensured for its own sake, thereby generating a second-tier responsibility, both under the principles of mitigation and salience, and also on the part of States.

Dworkin's discussion of the international institutional order is rightly set against his contemporary reading of seventeenth century international legal theories (20–21). It is indeed in that context that the notion I alluded to before emerged, i.e. the idea of a *mundus gentium* or, literally, a world, universe or order in which equal States (Giambattista Vico's *gentes* and Dworkin's 'nations') are instituted and which they contribute to institute further in return through the international law they develop together *qua jus gentium* (19–20).[84] On this account, each State is an institution of international law as much as of domestic law. It is one of many equal States among the institutions of the international institutional order.[85]

As Dworkin also emphasizes, however, what characterizes the contemporary international order by comparison with the seventeenth century's is its higher degree of both formalization and institutionalization (20). In the course of the twentieth century, on the one hand, major universal treaties codified, and thereby formalized, some of our shared legal principles (albeit not all of them). Some of them, on the other hand, have even led to the creation of new international institutions and especially IOs[86] through which States have deepened their institutional ties including by developing a shared international law of statehood.[87]

Importantly, those two developments also account for the gradual disconnection between States and their international institutional order, both in the practice of international law and in its conceptualization.

The increasing formalization of international law and hence its top-down development, on the one hand, explains why the fundamental role of comparative (domestic) law that had been so important for the bottom-up development of international law *qua* common law or *jus gentium* in the early days of the modern institutional order has become gradually invisible to international lawyers—except maybe in certain areas of international law that are close to State

[84] See also Besson (2020) on Vico (1744; 2001)'s *jus* and *mundus gentium*.
[85] See Besson (2021a).
[86] See Klabbers (2015).
[87] See Besson (2019a).

sovereignty such as human rights.[88] Of course, now and then in the course of international legal history, and we may have precisely reached one of those moments, international lawyers re-discover the role of comparison. They recognize the importance of contextualizing universal principles and values within diverse political communities for their universal legitimacy, but also for pluralism and respect.[89] Overall, however, the attraction of global law and its alleged universality and benefit to individual equality have largely predominated in the post-war era.[90]

On the other hand, the gradual reduction of the so-called institutionalization of international law to the post-war creation of IOs may explain why it has become difficult nowadays to understand States themselves as institutions of international law. Worse, it has made it hard to situate them *qua* primary international institutions against the background of their original international institutional order, and in particular to relate them to IOs as the latter's driving political force.[91] That difficulty has been enhanced by the development of realist and utilitarian approaches to statehood from the nineteenth century onwards and the progressive reduction of statehood to a set of governmental coercive functions therein.[92] In turn, this has paved the way for the predominantly functionalist approach to IOs that emerged in the twentieth century. That approach has since then been applied in return to States themselves by the IOs they have become member of. It has locked those States into what appears today like a fragmented institutional landscape made of diverse functions delegated and re-delegated over, nested into what appears like a plurality of disconnected institutional vessels.[93] From that moment on-wards, international institutionalization has taken a largely technocratic and bureaucratic course especially in the 1980s and 1990s,[94] and this has increased the de-politicization of statehood. For instance, States have been progressively constrained by standards of 'governance' (instead of government) developed by IOs.[95] The public/private divide itself, to the extent that it was ever really part of IOs' institutional organization, has progressively eroded domestically under the pressure to privatize placed by IOs onto their Member States.[96]

In short, what seems to plague the international institutional order today is not a lack of institutionalization.[97] On the contrary, it is a dearth of a certain kind of institutional organization: one that is sufficiently contextualized (albeit not in a relativist way[98]) and sufficiently politicized (albeit not in a cosmopolitan way[99]). So, what is lacking is an international institutional order at the

[88] See also Waldron (2012); Besson (2019c). Importantly, the comparative nature of international law applies in other regimes or areas of international law, such as international immunities law or international environmental law, where common solutions have to apply domestically and are more likely to do so if they are worked out there and then grow bottom-up through common practice rather than imposed top-down. One actually finds customary international law in all regimes or areas of international law. And the same may be said of the evolutive interpretation of international treaties by reference to the subsequent practice of States establishing an agreement.
[89] On the importance of the political contextualization of international law, see Raz (2017); Raz (2019).
[90] See e.g. Koskenniemi (2009); Koskenniemi (2016).
[91] See Besson (2019d).
[92] See Skinner (2010).
[93] See Sinclair (2017); Besson (2019a).
[94] See e.g. Koskenniemi (2009); Koskenniemi (2016).
[95] See also Collins (2016). Dworkin himself refers to States' 'governance' instead of 'government': Dworkin (2013), 22 and 29.
[96] See Eslava and Pahuja (2020).
[97] Contra Raz (2017); Raz (2019).
[98] Contra Çalı (2009).
[99] Contra Christiano (2016a).

service of the political legitimacy of States (and other infranational and supranational political institutions[100]), and hence eventually of their peoples.[101]

It should be clear by now how this third set of institutional issues broached by NPIL is the one international lawyers should be most concerned about in the current age of international institutional inflation and with respect to which they would mostly benefit from Dworkin's argument. Regrettably, however, and despite its pivotal role for the political legitimacy of States and of the international system in general, the issue of the legitimate organization of the international institutional order could only briefly touched upon in NPIL and only towards the end of Dworkin's article (27–29). After a few considerations as to what that order covers (5.1), I will revert to the central question I broached in the second section, i.e. designing international institutions in such a way as to enhance the mutual legitimacy of both States and the international system that grounds the former's right to govern (5.2).[102]

5.1 The International Institutional Order of States

With respect to the institutional contours of the international organization of States, Dworkin refers to the existence of 'other international bodies' than States (13). He also mentions that such bodies may be considered as claiming coercive authority in some cases (19). He adds, however, that they should not be conflated with a world government or State at least until the conditions for a world political community are fulfilled (29).

Such bodies certainly include public institutions like IOs that States constitute as Member States, and Dworkin discusses some of them, and especially the UN (22–29). They also presumably encompass other public institutions like cities, and also private institutions that ensure the private representation of people internationally, such as MNEs or NGOs, even though Dworkin never mentions them—or any role that the international civil society may play for that matter.[103]

Starting with public international institutions, Dworkin distinguishes between the UN and the other IOs which he refers to as 'clubs of signatory nations' based on mutual promises such as the EU or the World Trade Organization (WTO) (20–21). While the former 'set the route to a satisfactory international order', the latter are based on 'institutional procedures that cannot sensibly be used outside that club' (20–21).

What is at stake here does not seem to be the distinction between regional and universal institutionalizations, as there is nothing in Dworkin's argument that speaks against intermediary institutional orders between the State's and the universal order.[104] On the contrary, the deepening of institutional ties between a certain region's States so as to enhance their mutual political legitimacy does not contradict the need, in the background, for a universally shared institutional order, albeit a minimal one, to secure State and individual equality on a universal scale. Nor does it make it redundant once regionalization has taken place.

Rather, what seems to be at play in Dworkin's distinction between IOs is a structural difference between international institutions that are constitutive of the international order of States and others that are not. Although this requires deeper analysis, what Dworkin reveals is

[100] See Besson and Martí (2021) on cities in the international institutional order.
[101] See Besson (2021a).
[102] For a fuller account, see Besson (2021a).
[103] See Besson and Martí (2018); Besson and Martí (2021).
[104] Contra Christiano (2016a), 57–58.

the institutional diversity of so-called IOs. This has been confirmed by the best observers of IOs[105]: the absence of commonly shared organizational features among them and hence the lack of basic institutional unity raise difficulties in regulating them in a general fashion and especially in defining their relations to States, and hence to their peoples, whether they are Member States(peoples) or not. Of course, one may quibble about the classification of the EU in the latter group, especially given its constitutive role in the European order of States and its unique political project.[106] At the same time, however, the 'market-preserving federalism' that international trade organizations like the EU encourage, thereby separating domestic (democratic) politics from international economic governance,[107] clearly deserves to raise our suspicion. It should be the case in general, and also from the perspective of Dworkin's argument about the legitimacy of the international institutional order and its role for the political legitimacy of international law.[108]

There is another public international institution Dworkin imagines, albeit quickly conceding it is a 'fantasy' and a 'counterfactual exercise' he uses to identify his principles of interpretation of international law. That is an IC 'with jurisdiction over all the nations of the world' (14–15). Given the role of adjudication in Dworkin's (US-based) jurisprudence, this is not surprising. It also fits the so-called international judicial proliferation trend of the 1990s, and in particular the mid-2000s world human rights court project. While this starts as a counterfactual in his argument,[109] Dworkin does not exclude that that IC could get enough acceptance on the part of States (15). If that were to be the case, however, and in light of the mixed experiences made with international adjudication in the last 30 years or so,[110] it would be important to make sure Dworkin's IC itself is made to comply with the principles identified in NPIL.[111] This should especially be the case with respect to NPIL's non-cosmopolitan account of the legitimacy of international law and its argument for international law as a way to enhance the political legitimacy of States. As things stand, indeed, ICs have largely contributed to the two challenges identified before: the top-down development of global law at the price of a truly common law of States(peoples), and the de-politicization of statehood.[112]

Finally, and as mentioned above, NPIL does not address private institutions involved in international law-making such as MNEs or NGOs. This should not be read, however, as an exclusion of the important albeit distinct role of representation played by those institutions.[113] When individuals are not, or not sufficiently well, represented by their States internationally, those institutions may endorse a private representation function complementary to public representation by States (and IOs). They may in particular contribute to enhancing political equality and deliberative contestability in international processes. As it would be the case in the domestic context, however, those complementary mechanisms of representation have to be organized and constrained by States so as to be legitimate.[114] And this actually fits the mutuality of legitimacy of States and international institutions Dworkin argues for in NPIL.

[105] See Klabbers (2015).
[106] See Bickerton (2017). As a matter of fact, Dworkin was less critical of the EU's political project in *Justice for Hedgehogs* (Dworkin 2011, 381–382) where he approached it as a 'people' and a 'political community'.
[107] See Harmes (2014).
[108] See Besson (2019a).
[109] I am not concerned here with the validity of this counterfactual, and consider that the principles defended in NPIL may be so independently, as discussed in this article.
[110] See e.g. Koskenniemi (2009); Koskenniemi (2016).
[111] For similar advice, see Çalı (2009).
[112] See Besson (2019a); Besson (2019c).
[113] See Besson and Martí (2018); Besson and Martí (2021).
[114] See ibid.

5.2 Designing International Institutions for the Political Legitimacy of International Law

This brings us to the question of the organization of the international institutional order and of the relations between its different institutions, on the one hand, and between them and States, on the other.

This is where the mutual instrumentality in the political legitimacy of States and the legitimacy of the international order as a whole comes clearly into light. Remember that, according to Dworkin, the political legitimacy of States and the non-political legitimacy of the international institutional order are instrumental to one another: to the extent that each State has reasons to enhance its own political legitimacy, it also has reasons to enhance the legitimacy of the international order that grounds its right to rule and whose legitimacy depends in return on enhancing States' political legitimacy.

Thus, while there may be non-political grounds of legitimacy of international institutions such as coordination, the most important ones are political to the extent that political legitimacy is pivotal in the international system. One may think, among others, of grounds of justification of States' democratic authority such as political equality, popular control, deliberation and human rights. International institutions, public and private, of the kinds just discussed need not only make sure they enhance States' political legitimacy domestically by setting international law norms to that aim (e.g. requiring States to respect human rights and protect the basic democratic right to participation domestically: 17–18). They also need to be organized so as to enable States to represent their people democratically in international law-making, including in all the international institutions and processes they are members of (18). The organization of international institutions so as to comply with democratic legitimacy requirements does not imply, however, that those institutions themselves should be considered as the representatives of an international political community in a worldwide democracy (28–29).[115]

As I mentioned in the second section, however, the absence of transitivity between the grounds of democratic legitimacy of States such as political equality, popular control, deliberation or human rights when transposed to the international institutional order raises difficult issues.[116] After all, what we are considering is an order that is not cosmopolitan, but institutes a multitude of equal political communities in the form of States.

For instance, protecting political equality in IOs' law-making processes by making sure States can represent their people could be instrumental to protecting those individuals' equality domestically. However, depending on how it is done (e.g. by reference to States' equality without demographic corrections), it may also threaten their individual equality domestically and their State's political legitimacy.[117] Hence, some of the reform proposals made by Dworkin regarding voting at the UN General Assembly and the introduction of a four-majorities system (27–29): a majority of members' total populations, a majority of (States') votes in the General Assembly, a majority of votes in the Security Council and a majority of votes among the permanent members of the Security Council.

[115] Contra Christiano (2016a), 59, who considers Dworkin's concern for the equal participation and representation of people in international institutions and processes as suggesting a necessary 'concern with a cosmopolitan political community'.
[116] See Besson and Martí (2018).
[117] See ibid.

The same kind of lack of transitivity issues could be identified with respect to the other grounds of democratic legitimacy, such as deliberation. Indeed, a lot of international law-making is not sufficiently deliberative and is veto-based. One could also mention the lack of mechanisms of domestic control over each State's officials' international agenda by its people when those officials also act as their representatives abroad and outside of domestic politics.

It is here that the multiplicity of representative international institutions and the complementarity between public and private representation could help.[118] For instance, NGOs could instil contestation and organize deliberation in international institutional settings that often tend otherwise to be mere State consent-registration rooms.[119] They may also represent those who cannot be effectively represented by public representatives, for instance because their States are not democratic. That institutional complementarity in representation needs to be organized and constrained properly by the same principles of democratic legitimacy, however, so as to be legitimate and contribute in turn to the legitimacy of the international institutional order and indirectly to that of States. Private representatives like NGOs are indeed often not sufficiently egalitarian with respect to whom is represented, and thereby discriminate between those who are (over-)represented and others who are not even considered. They also often lack accountability mechanisms within their internal organization and cannot be controlled by the people they claim to represent.

What needs to be done from an institutional perspective, therefore, is scrutinize current institutional processes of international law-making, and especially IOs, in order to identify how best to reconstruct them around States (and hence around the people their officials represent). It is only so that one may hope to enhance the latter's political legitimacy in international law-making and that of the international legal order in general.

This requires leaving aside quick analogies between IOs and States, and especially analogies to States' exclusive political features such as 'sovereignty' or 'jurisdiction'.[120] It could be done by organizing IOs in an institutional continuity to States and their people,[121] rather than approaching them as separate institutions 'beyond the State'.[122] This also requires abandoning the many functionalist or technocratic approaches to IOs conceived as sets of functions delegated to them and re-delegated to other public or private international institutions, as those conceptions tend to obfuscate the political link to States and their people. Furthermore, discussions of the 'autonomy' of IOs to relate to other IOs and even to generate further international institutions, public and private,[123] and also of their potential 'equality'[124] should also raise our concern. They are some of the many signals of how the international institutional order is drifting away from the States(peoples)' whose political legitimacy it is about and from which its own legitimacy depends.

Of course, various proposals have been put forward that seem to pull in this direction.[125] For instance, authors who defend a 'public international law' approach, to mention one of

[118] See ibid.
[119] See also Kingsbury et al. (2016).
[120] See Bordin (2018) on those analogies. For a critique, see Collins (2016); Besson (2019a); Besson (2021b).
[121] See e.g. Waldron (2011) for such an approach to the 'international rule of law'.
[122] Contra Roughan (2019), I do not think that we should aim at 'de-emphasizing' the State in the assessment of the legitimacy of law, domestic or international: this has been done a lot already and is precisely the reason why designing international institutions around States (and therefore around their peoples) so as to ensure the political legitimacy of international law has become so difficult.
[123] See Klabbers (2017).
[124] See Dunoff (2012).
[125] See e.g. Collins (2016).

them, insist on the publicness of international law.[126] The difficulty with what they suggest, however, is the manner in which they propose to identify those substantive public law principles allegedly shared by domestic and international public law equally and which they claim exist outside the State. They resort to purely functional criteria of what are public interests and identify those principles independently from political processes. As to so-called global administrative law approaches,[127] they transpose State-based (and mostly US) administrative law principles to IOs (and other private entities) without verifying that the conditions for such analogies are fulfilled. They also curiously dispense from tying international institutions back to the very people being 'administered'. They refer, for instance, to the 'global administrative space' as opposed to the territorial (State) spaces where those people live and should be administered. It is strange to think there could be a legitimate administration without an administered people (as opposed to a random collection of individuals) or, at least, without a set of political institutions representing it.

6 Conclusion

International law has come under serious attack lately, including, and maybe even more so, in regimes considered democratic. It is difficult not to understand some of those critiques in the face of the advanced state of fragmentation of public and private international institutions and in particular when confronted with the lack of popular voice in the making of international law. Instead of blaming 'populists' and other authoritarian forms of domestic withdrawal, therefore, international lawyers may want to start thinking about ways of making those international institutions less 'dis-orderly' and legal processes more accountable to people in the world.

Reading Dworkin's NPIL in the current context is a timely reminder of the centrality of the political legitimacy of law, including of international law. Interestingly, Dworkin's account of the political legitimacy of international law does not succumb to the (however progressive) cosmopolitan ideal of an international political community. Nor is it reducible to a concern for domestic justice in which political legitimacy is only self-regarding. By revisiting seventeenth century international legal theories, Dworkin sends both cosmopolitans and statists back-to-back. He (re-)discovers a third way in which to conceive of statehood today: not on its own, but in a mirror-image fashion and against the background of the international institutional order without which there would be no equal sovereign States, but no individual equality either.

This article has identified and deepened three of NPIL's crucial albeit underdeveloped contributions with respect to the objects, subjects and institutions of international legitimacy. I have done so in my own voice, but in such a way as to carry forward Dworkin's insights where they were in need of further development.

First of all, we need to think of ways to link the grounds of political legitimacy of international law in every State to the related (albeit not directly political) justification of the authority of international institutions and law. Second, this requires, among others, developing a more positive understanding of equal State sovereignty in the international order. Such an understanding could contribute to, at once, enabling and constraining the self-determining role

[126] See e.g. Kingsbury (2009); Kingsbury and Donaldson (2013).
[127] See e.g. Kingsbury et al. (2005). For a more institutional account of GAL, see, however, Fromageau (2016), 204.

of democratic State consent in circumstances of reasonable disagreement, turning it into a qualification to the political legitimacy of international law. Finally, we should concern ourselves with the detailed design and organization of other international institutions than States, both public and private, and of their relations to one another. It is important to organize that institutional continuity by reference to those institutions' relationship to (States)peoples. This should enable us to improve not only the legitimacy of the international institutional order as whole, but also the political legitimacy of each State therein since they are dependent on one another.

In NPIL, Dworkin repeatedly emphasizes the contextualized and comparative virtues of seventeenth century *jus gentium*. Knowingly or not, he also reminds us thereby of our responsibility to preserve and improve the institutional order in which that *jus gentium* can flourish: the *mundus gentium*. It is that international institutional order we should tend to urgently, in order to make sure the world remains inhabitable by all the peoples who make it together.

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