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DUBIOUS PROBLEMS IN INTERNATIONAL LAW: LEGAL THEORY MEETS INTERNATIONAL LAW

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For decades, international law focused primarily on relations between international actors, mainly states but also, to some extent, state-like entities or organizations. Legal theory, operating within this narrow view of international law, emphasized general questions concerning the validity of international legal norms and the sources from which they derive their binding force. Voluntarist approaches to international law, once highly influential, posited that the source of international legal norms lay in the "self-limitation" of states. Whereas Georg Jellinek (1880: 48–49) viewed this *Selbstbeschränkung* as an expression of sovereign will, John Austin (1995: 171) insisted that it resulted in international law not being truly "law." According to Austin, there is no supreme sovereign among international actors capable of issuing sanction-backed commands. Norms contained in international treaties are therefore "laws improperly so called" (Austin, 1995: 123), stemming from voluntary agreements accepted by the parties solely on the basis of moral principles and custom.

H. L. A. Hart, a sharp critic of Austin, famously argued in Chapter X of The Concept of Law that international law can indeed be regarded as law. It does not, however, qualify as a full-fledged legal system; rather, it consists solely of a set of (primary) rules (Hart, 1994: 213–237). Hart thus rejects Austin's general dismissal of the validity of international law. For primary rules to be valid, it is both necessary and sufficient that the relevant actors generally obey them. Compliance with primary rules is a social fact; no sanction, *pace* Austin, is required for obligations to exist. Accordingly, international actors are bound to follow international legal norms even where the likelihood of sanctions is low or non-existent (see, e.g., Payandeh, 2010: 967–995).

Both Austin and Hart are often recognized as key figures in analytical jurisprudence. Although both engaged in fundamental debates concerning the status of international law, perhaps surprisingly, they are today regarded as being of only minor importance within the field of international legal theory. As a result, there appears to be little mutual engagement between international law and analytical jurisprudence. Jeremy Waldron identifies this

as a significant shortcoming of Hartian jurisprudence (Waldron, 2008: 68). He associates this state of affairs with the somewhat dismissive view of international law held by both Austin and Hart. Even though, according to Hart, international law constitutes a primitive set of rules, it remains far removed from what he understands as a complex municipal legal system. This leaves little room for in-depth inquiry for scholars who remain interested in the fundamental constitutive problems of international law. Consequently, scholars working within analytical jurisprudence, perhaps lacking Hart's guidance in this matter, tend largely to neglect ongoing debates in international law.

Waldron finds this "neglect of international law in modern analytic jurisprudence" scandalous (Waldron, 2008: 69), and he is right to observe that analytical jurisprudence could be relevant to numerous disputes within the field, concerning, for example, the nature and status of customary law or, more generally, the character and legitimacy of international law.

Indeed, scholars of international law could still benefit from analytical legal theory, and the advantage would be mutual, as recent developments in international law present numerous problems and cases that may shed new light on canons of legal theory that are somewhat rigid or even petrified. International law thus remains a relatively fertile field in which a wide range of conceptions and ideas can be tested. This issue of *e-Publica* demonstrates how legal theory and international law can be brought together to productive effect.

The emergence of the idea of "robust international law" calls into question the privileged status of municipal legal systems. As Russell Powell and Allen Buchanan observe, robust international law "claims the authority to regulate matters hitherto regarded as the prerogative of the state" (Powell, Buchanan, 2009: 249). Contemporary international law not only seeks to regulate relations among states but, through mechanisms such as human rights conventions, trade agreements, and environmental treaties, also prescribes how states should treat their own citizens within their own territories, thereby limiting the supreme authority of domestic law (Powell, Buchanan, 2009: 249). An illustrative case of the interaction between domestic law and international standards is discussed by Małgorzata

Kuśmierczyk in her article *Implementing International Standards on Prison Food: The Polish Case*.

Robust international law also manifests itself in international criminal law. Vladzimir Astapenka and Pavel Łatushka, in two interconnected articles, examine the limitations of international criminal law and its mechanisms of enforcement. In *On the Referral of the Belarus Situation to the Office of the Prosecutor of the International Criminal Court*, they explore the core issue of how the ICC may exercise jurisdiction, specifically the possibility of referring the Belarusian situation—at the centre of one of Europe's most serious human rights and security crises—to the Office of the Prosecutor. Their paper *The Transboundary Crisis: Forced Displacement and Extraterritorial Persecution* argues that international law enables OSCE participating states to establish expert missions capable of investigating human rights violations and international crimes related to the deportation and persecution of Belarusians.

Oktawian Kuc's paper, *Contracting Decolonization: Implementing the Chagos Advisory Opinion Through the UK-Mauritius Agreement*, examines the Chagos Archipelago in the context of the 2025 UK-Mauritius Agreement. This agreement provides a rare illustration of how international judicial interpretation and diplomatic implementation can work effectively together. It is a direct outcome of the International Court of Justice's 2019 advisory opinion, which stated that "the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible." The Chagos case thus demonstrates how the authority of international adjudication can effectively uphold the international rule of law. As such, it challenges Austinian intuitions and may also serve as an argument against Hart's view that, due to the absence of authoritative court decisions, international law cannot constitute a full-fledged legal system.

The concept of the "international community" is gaining increasing prominence within international legal theory. It is intended to highlight the normative dimension of the international society composed of states and other international actors (see, e.g., Paulus, 2009: 44). Moreover, it reflects a complex network of legal, political, economic, and social factors that shape relations among international actors. A notable feature of the international community is the unequal distribution of power among its members, in contrast to legal communities consisting of individual human beings with roughly equal powers. In her article *Deconstructing the (Im)balance:*

Asymmetry in Emirati-African Relations, Julia Sochacka examines disproportionate relations between the UAE and African states. She argues that this asymmetrical partnership may encroach upon the sovereignty of many African countries, a process that could be mitigated through the introduction of regulatory mechanisms or counterbalancing policies.

H. L. A. Hart rejected the assumption that sovereignty exists above international law. For Austin, sovereignty is incompatible with the idea that a sovereign state could be bound by law. Hart, by contrast, situates sovereignty within the framework of international legal rules, treating it as a legal concept grounded in social facts. Changes to these social facts could lead to revisions of the concept. Traditionally, sovereignty is defined as "supreme authority within a territory" (see, e.g., Philpott, 2024) and is embodied in states that exercise this authority. In her article *A State of Ambiguity: The Meaning of 'State' Across Disciplines*, Eliza Chojecka explores various interpretations of the term "state." She notes that a widely accepted definition requires a monopoly on the legitimate use of force within the territory. However, there are reasons to consider revising the concepts of "sovereignty" and "state." Historically, this focus on physical territory was justified because phenomena attracting a sovereign's attention were primarily physical and territorial in nature. The digitalization of human interactions and the emergence of virtual realities constitute relevant alterations to social facts, which may eventually prompt revisions of legal concepts, including the concept of sovereignty. Another reason can be associated with the unique case of Tuvalu, which in 2023 amended its constitution to address existential threats from climate change. *The Constitution of Tuvalu Act 2023* introduces Section 2, "Tuvalu Statehood," stating that: *(1) The State of Tuvalu, within its historical, cultural, and legal framework, shall remain in perpetuity, notwithstanding the impacts of climate change or other causes resulting in loss of the physical territory of Tuvalu.*
Addressing a potential deterritorialized state presents a significant challenge for international law, one that may benefit from insights offered by analytical legal theory.

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