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Human rights as settled norms: Mervyn Frost and the limits of Hegelian human rights theory

PETER SUTCH

Abstract. This article explores the normative international relations theory of Mervyn Frost. Frost's unorthodox approach to questions of human rights offers a way through the political and philosophical morass that has often threatened to obscure the most pressing issues of our time. Significantly, Frost claims to be able to 'construct' a background justification for international ethics that can unite the demands for sovereign autonomy with declarations of human rights. In doing so Frost attempts to offer a new understanding of universal ethics and thus of the role of human rights in international politics. Acknowledging the importance of this approach, this article examines two issues that arise from Frost's 'constitutive theory' and seeks to offer a signpost for the future development of human rights theory.

This article offers a critical examination of two theoretical problems that stem out of Mervyn Frost's restatement of his normative theory of international relations. Frost's *Ethics in International Relations: A Constitutive Theory*¹ offers many insights into contemporary international relations theory. Importantly he makes convincing arguments that suggest that normative theory is a necessary aspect of any understanding of world politics. He also shows that, contrary to the standard, well worn routes into questions of international justice, international studies does not need grand metaphysical theories or complex social contract doctrines to attack the hard cases that often lead scholars of international politics to abandon or marginalize such concerns.² In cashing out these arguments Frost mixes a theoretically ambitious account of problem solving in international theory (that links the criterion of sovereign legitimacy with the worldwide development of human rights culture, and gives international studies the potential to overcome a theoretical dichotomy that has dogged the progress of ethical theory in the discipline) with examples of his proposed method in action.³ Perhaps the most vivid example is his discussion of the conflict in Bosnia.⁴ His argument that

[a]nyone entering the debate will have to do so in the idiom of moral discourse. In terms of this discourse the realist response, 'we have no interest in Bosnia, let them slaughter one another', will not do.⁵

¹ M. Frost, *Ethics in International Relations: A Constitutive Theory* (Cambridge, Cambridge University Press, 1996).

² Frost, *Ethics*, pp. 1–93.

³ *Ibid.*, pp. 93–159. The potential of Frost's method to overcome the postulated partition of IR theory between those who recognise the importance of sovereignty and that section of the discipline that rejects its validity is one of the most important aspects of his work.

⁴ *Ibid.*, pp. 197–211.

⁵ *Ibid.*, p. 199.

combined with the recent return of ethnic cleansing in the region to our television screens is perhaps enough to encourage even the most battle-hardened observer to engage with the detail of a groundbreaking argument that focuses on the most pressing issues in international studies today.

While the general arguments that Frost presents, his attempts to overcome the dichotomy between sovereignty and human rights, and his graphic use of contemporary example will engage all those interested in world politics, the most important arguments and certainly the ones that carry the major burden of his work are philosophical. In explaining the method that scholars and practitioners should adopt in studying the hard cases of international politics, Frost employs Dworkin's casuistical legal theory that is designed to achieve the right answer in a legal case where no precedent or clearly defined law is available.⁶ In deploying this method (Frost calls it constructing a background justification), Frost argues that we must apply the constitutive theory of individuality drawn from a 'secular' reading of Hegel's political philosophy, for it is only by understanding how the international political arena constitutes the actors and the rights they claim that we can make sense of all of our commitments, our rights and our duties.⁷ Frost goes on to claim that this method recognises the vital role that state-sovereignty plays in world politics, but also provides us with an account of human rights almost as extensive as that drawn from the more conventional Kantian-cosmopolitan tradition.⁸ It is to these two philosophical arguments that I will direct my attention. Despite being presented in an abstract theoretical form these philosophical arguments have immediate practical relevance. They lead to the assertion that not all states (or peoples aspiring to statehood) deserve recognition as such and that actors who do not receive this recognition (principally because they do not conform with norms of international justice and in particular the norms of human rights) may be legitimately challenged by the forces of the international community. This, as Brown notes, is quite a claim as

the first principle of prescriptive international relations, as promulgated by such bodies as the United Nations, is state sovereignty, and this notion is coupled with a refusal to distinguish between different kinds of states ... any attempt to distinguish between those states who have earned the rights to autonomy and those that have not is totally unacceptable.⁹

Frost believes that the political orthodoxy that reifies sovereignty and the philosophical orthodoxy that generates human rights from Kantian predicates can both be challenged. The consequences this has for intervention in human rights black-spots around the world are, quite clearly, immense.

In choosing to orient his argument toward the philosophical/normative background justification of international relations, Frost appears to remove himself from those intellectual traditions that the discipline uses to classify the contribution of 'theory' to its understanding of world politics. In rejecting all positivist, realist, relativist, pluralist, communitarian and cosmopolitan positions it would seem that

⁶ Frost, *Ethics*, pp. 93–103. See also R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1981).

⁷ *Ibid.*, pp. 137–58.

⁸ As the established source of human rights theory cosmopolitanism is a well understood and widely discussed tradition. For the purposes of this article the discussion in C. Brown, *International Relations Theory: New Normative Approaches* (New York and London: Harvester-Wheatsheaf, 1992) offers a very useful outline of the tradition.

⁹ Brown, *International Relations Theory*, p. 121.

there is not a lot left.¹⁰ Frost, for example, rejects the usefulness of the state-based theories of Morgenthau and Bull, the neorealism of Waltz and individualist theories such as that put forward by Donelan.¹¹ Yet he insists that his work finds a place both for the modern state and human rights. A lot is hidden by casting oneself as a post-positivist normative theorist.¹² Theories popularly characterized as post-positivist are critical theory and postmodernism. Frost's post-positivism is 'constitutive theory' (or constructivist normative theory), something he situates within the broader spectrum of international relations theory in a recent special issue of this journal.¹³ The debates Frost is engaged in (and in which he urges the discipline as whole to engage in as a matter of urgency¹⁴), cross disciplinary boundaries to consider the philosophical and political roots of international ethics. Here the work of Nardin on international society viewed as an Oakeshottian 'practical association',¹⁵ Linklater's understanding of the history of philosophy in international relations¹⁶ and Rorty's understanding of a postmodern human rights culture¹⁷ link with Rawls' constructivist account of the basis of a 'Law of Peoples',¹⁸ Walzer's understanding of the reiterative development of universal reasoning and international justice¹⁹ and O'Neill's critical and constructivist 'Kantian' cosmopolitanism.²⁰ The key question is about how far international relations theory can now go toward finding that 'objective' viewpoint from which to answer pressing and very real questions without relying on idealized or theoretically inadequate premises. Frost's original contribution to this vital debate lies not so much in the claim that normative concerns are an important part of international relations (although he has done much to highlight the need for a greater exploration of these issues). Rather it lies in his claim that a secular Hegelian understanding of the way in which we (as human beings/members of states/members of civil society/members of families/or as individuals) constitute each other as rights holders offers the chance to understand the world we inhabit and formulate 'right answers' to contentious questions in international politics. His claim is that post-positivism can offer a universal theory of justice that does not rely upon the 'unjustifiable hope and

¹⁰ See Frost, *Ethics*, ch. 3. Also M. Frost, 'A Turn Not Taken: Ethics in IR at the Millenium', *Review of International Studies*, Special Issue (December, 1998), p. 124–6.

¹¹ Frost, *Ethics*, chs. 2 and 4.

¹² For a detailed introduction to some of these issues, see S. Smith, K. Booth and M. Zalewski (eds.), *International Theory: Positivism and Beyond* (Cambridge, Cambridge University Press, 1996).

¹³ Frost, 'A Turn Not Taken', see especially pp. 126–7. It is worth noting that in political theory this approach would be labelled 'constructivism' with Frost's specifically Hegelian approach further defined by the term constitutive theory. For a wide view of Frost and his relation to current normative theory, see D. Boucher, *Political Theories of International Relations: From Thucydides to the Present* (Oxford, Oxford University Press, 1998), esp. ch. 16.

¹⁴ Frost, *Ethics*, ch. 1. Frost, 'A Turn Not Taken', *passim*.

¹⁵ T. Nardin, *Law, Morality and the Relations Between States* (Princeton, NJ: Princeton University Press, 1983).

¹⁶ See particularly in this context, A. Linklater, *Men and Citizens in the Theory of International Relations*, (Basingstoke and London: Macmillan, 1982).

¹⁷ R. Rorty, 'Human Rights, Rationality and Sentimentality', in S. Shute and S. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures* (New York: Basic Books, 1993).

¹⁸ J. Rawls, 'The Law of Peoples', in S. Shute and S. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures* (New York: Basic Books, 1993).

¹⁹ M. Walzer, *Thick and Thin: Moral Arguments at Home and Abroad* (Notre Dame, Indianapolis: University of Notre Dame Press, 1994).

²⁰ O. O'Neill, *Towards Justice and Virtue: A Constructivist Account of Practical Reasoning* (Cambridge, Cambridge University Press, 1996).

ungroundable but vital sense of human solidarity' of postmodernism²¹ or the discredited metaphysics of liberalism's recent past.

In the cause of brevity I wish to assert that Frost's case concerning the centrality of normative theory to international studies is secure. I also believe that the normative method that Frost advocates (his claim that we need a constructivist background justification) follows on from the successful completion of this central argument. My concern is that I do not think it possible to generate the principles of international justice that Frost claims to have constructed from this theoretical substructure and this affects the close relationship between theory and practice that is one of the most inviting aspects of Frost's work. Given the success of his grounding arguments my principal claim is that Frost's theory shows the current limits of action in international politics that is premised on principles of justice. In order to make my case I intend, in the first two sections, to lay out the basic steps of Frost's argument. Initially I will focus on an exposition of the role of Dworkin's problem-solving method and then on the application of that method, the use of a secular Hegelian account of the constitution of individuality. This done, I argue that both parts of Frost's case need reworking if they are to meet the requirement that they be divorced from their legal and metaphysical heritage that (as Frost acknowledges) would make them inaccessible to the international community. The political consequence of this argument is the claim that the normative order in world politics is much weaker than Frost allows and that this requires the further recognition that liberal constitutional democracies are not entitled to the moral high ground that Frost's theory offers them. Despite the obvious relevance and theoretical power of Frost's position his work has not, bar several reviews, amassed the secondary literature one might have expected. Nevertheless it is possible to begin my argument where one of the many reviews of his book left off, with the statement that 'In the end, Frost's book suggests that projects which situate our contemporary moral constellations in a broad context may best reveal what are the possibilities (and limitations) for change.'²²

Normative theory: constructing ethics from hard cases

Human flourishing, Frost argues, depends upon the creation of normative order and agreement upon the threats to human flourishing can provide the basis for an intra-practice debate on how to construct international ethics. The method Frost believes can be adapted to construct principles of international justice is Dworkin's method for solving hard cases in law. It is, we are told enough to make a right decision even where there is no settled rule of international law or objective and established rule in international ethics. Using the example of chess rather than law, Frost, following Dworkin, shows the procedure a referee would have to go through to settle a dispute between two players where there were no previous rules, conventions or precedent

²¹ This phrase is, of course, Rorty's. See R. Rorty, 'Method, Social Science and Social Hope: Ungrounded Hope, Dewey vs. Foucault', in *The Consequences of Pragmatism* (New York: Harvester Press, 1982), p. 208.

²² R. Price, 'Ethics in International Relations: A Constitutive Theory', by Mervyn Frost: Book Review, *American Political Science Review*, 91:3 (1997), p. 779.

concerning the particular dispute. Such a settlement would, both thinkers argue, be the *right* settlement if the following procedure were followed.

1. The requirement that the decision-maker start by inquiring into the *background-justification* for the *institution* as a whole.
2. In seeking an answer to step 1 he must start with *what everyone knows* as the point or purpose of the institution. This inquiry will reveal certain guiding concepts capable of diverse conceptions. Thus, we all saw that all chess players would agree that chess is an intellectual game, but there is scope for diverse conceptions of just what this implies.
3. He must seek out that conception of the institution's point or character which best accords with the settled rules of the institution.
4. In the event of his being left (after completing step 3) with two or more conceptions which seem to fit the institution's settled practice equally well, he must decide which gives the deepest and most satisfying account of the concept. This may involve him in more fundamental philosophical questions about the nature of the basic commitments of the participants in the practice. But these are only of interest to him in so far as they reveal the character of the institution to which the participants have consented.²³

In this procedure the decision-maker is not free to make *any* decision but is constrained by the shared set of standards that allow us to determine the right answer to hard cases.

For Frost, 'it is possible to settle hard cases (concerning law, chess and international relations), but not without getting involved in 'deep' discussions about the basic justifications for the institutions within which these issues arise'.²⁴ In accepting (albeit temporarily) that this method is fully applicable to international relations, it is clear that the political and philosophical beginning of Frost's moral constructivism, and therefore the only starting point for an analysis of Frost's theory, are the settled norms that are shared within international relations. These settled norms are, he argues, implied by the questions we commonly ask of international relations. Here, following the steps of Frost's argument that cohere with his presentation of Dworkin's argument offers a fascinating insight into Frost's position.

The first step in Frost's procedure is to start with what everybody knows. He thus begins his construction of an international ethics by listing thirteen of the central questions currently facing international relations. The list includes questions as intuitively engaging as:

1. Questions relating to the causes and conduct of war. When may states justifiably go to war? Once at war what are the normative constraints on the belligerents? What are the rights and duties of those states not directly involved in the war *vis-à-vis* other states?
5. When is intervention by one state in the domestic affairs of another state justified? What means may justifiably be employed in such interventions?

²³ Frost, *Ethics*, p. 97.

²⁴ *Ibid.*, p. 98.

12. What kind of international organizations ought to be established? What authority should they have *vis-à-vis* states?
and
13. What human rights are there and how ought they to be protected? Ought states to protect them? If a state fails to protect such rights ought other states to intervene? Should there be international institutions to protect these rights? If so what are states and individuals justified in doing in order to bring about the establishment of such alternative institutions?²⁵

Frost offers no special arguments that place these concerns above others or that would give them privileged ontological status. The claim is simply that most agents agree that these are the pressing questions that beset international relations today. It is simply a matter of fact that we live in a world divided into particularistic entities called states and the list Frost provides simply outlines some of the problems generated by that fact. Yet for Frost 'agreement on the statement of the main issues is of fundamental significance, for by implication it indicates a common basis from which argument towards a solution of these key problems might proceed'.²⁶ For Frost agreement on the fundamental issues of international ethical debate presupposes the existence of a domain of discourse, in this case the 'modern state domain of discourse', a contextually determined yet shared sphere of reference that can ground normative thinking. Herein lies the crux of Frost's argument. Agreement on the issues presupposes shared norms that can form the bedrock of a philosophical 'background justification' that we could have recourse to in time of dispute. There is an important point to be noted here. For Frost post-positivist constitutive theorists do not merely accept norms as they are. To do so would be to move from positivism only to arrive at a toothless descriptivism predicated on a philosophical realism.²⁷ Agents misunderstand each other and even themselves and it is the theorists job to sort out incoherent understandings of 'settled norms'. The utmost care must be taken to ensure that this 'sorting out' is not itself premised on a particular understanding of ethics and politics. While Frost recognizes the importance of this, it will be my contention that aspects of both his secular Hegelianism and his use of Dworkin's legal theory bias his understanding of international ethics in favour of a liberal democratic interpretation of the settled norms of the modern state domain of discourse.

Frost argues that international ethics are to be constructed in relation to the modern state domain of discourse, that is in relation to the state, interstate relations and the role of individuals as citizens of states.²⁸ The questions we ask and therefore the norms we share offer an image of contemporary practices that recognizes the tensions between the remnants of the Westphalian order and a post-Westphalian system.²⁹ Frost explains these tensions by referring to the settled norms that are shared within this practice. Frost lists those norms that he considers settled within the modern state domain of discourse and summarizes them thus:

²⁵ For the full list see Frost, *Ethics*, p. 76–7.

²⁶ *Ibid.*, p. 77.

²⁷ Frost, 'A Turn Not Taken', p. 125, p. 128.

²⁸ Frost, *Ethics*, p. 79.

²⁹ *Ibid.*, p. 79.

It is settled that the following are goods:

- S1. The preservation of the society of states.
- S2. State sovereignty.
- S3. Anti-imperialism.
- S4. The balance of power.
- S5. Patriotism.
- S6. Protecting the interests of a state's citizens.
- S7. Non intervention.
- S8. Self-determination.
- L1. International law.
- L2. *Ius ad bellum*.
- L3. *Ius in bello*.
- L4. Collective security.
- L5. Economic sanctions (under specified circumstances).
- L6. The diplomatic system.
- M1. Modernization.
- M2. Economic cooperation.
- D1. Democratic institutions within states.
- D2. Human rights.³⁰

It is important to remember that this seemingly comprehensive list of norms is (or could be) made up of some strikingly different conceptions of what each of the norms calls for. It is also quite clear that there appears to be (or is commonly thought to be) a certain 'tension' between those goods that concern sovereignty and those that concern the rights of individual persons.³¹ This pressure is itself a product of the development of international politics and leads to the central question of the cosmopolitan/communitarian debate and of international relations theory more generally. Frost shows that 'it may be argued that the primary question for a normative theory of international relations is *whether* the system of sovereign states is a justifiable way of organizing the government of the world'. The problem with taking the cosmopolitan line of reasoning and questioning the settled status and primacy of S1 and S2 (the norms regarding the preservation of the society of states and sovereignty itself as good) is, Frost argues, that

[o]n reflection, what is striking about the forgoing list is the primacy of the first two items on the list. Most of the other settled goods are in some way derivatives of them ... Thus any satisfactory background theory will have to justify the settled belief that the preservation of a system of sovereign states is a good.³²

Cosmopolitanism is rejected on Frost's account because the way it privileges the concept of human rights over sovereignty does not cohere with the general understanding of what is important to international relations. It can be said without too much scope for dispute that such conceptions do not cohere with a conception of the institution's character or point that best accords with the settled rules of the institution. Therefore they do not meet the standards set by step three of Frost's justificatory procedure. Nevertheless it is practically indisputable that much of the contemporary debate in international ethics focuses on human rights and that

³⁰ Ibid., p. 111–12.

³¹ Ibid., p. 137.

³² Ibid., p. 112.

pouring scorn on 'mid-air reasoning' is not in itself a satisfactory way of overcoming the problem and the force of Frost's constitutive theory of individuality is brought to bear on precisely this tension. Essentially Frost's position recognises the importance of human rights issues in contemporary international relations theory but wants such claims to be adequately grounded in the shared discourse of international ethics. Having examined and rejected the claims of contract theory and order and rights based justifications (essentially on the grounds that they cannot make sense of the variety of our commitments in world politics), Frost moves to step four of his procedure.

The constitutive theory of individuality: human rights in the modern state domain of discourse

Frost argues that

constitutive theory ... does not seek to show that the sovereign state is a *device* which protects certain pre-existing rights ... Rather it contends that a person is constituted as a rights holder of a certain sort within the context of a specific social relationship ... I want to argue that neither is prior, but that rights and institutions presuppose and imply each other.³³

Frost's task, in engaging upon the fourth (and final) component of his justificatory procedure, is to make explicit the moral dimension that is already implicit in the simultaneous acceptance of the state and sovereignty norms (norms S1 and S2 on our list) on the one hand, and the rights-related norms on the other hand.³⁴

Frost's insight is that we have not developed the concept of individual right to challenge the authority of the state but that our current range of international political interactions and institutions entail the concept of individual right. The system we mutually participate in relies at all levels on the fact that we respect individuals as rights holders. The rights we claim as individuals are the counterpart of the freedoms we claim in our existence within states. For Frost 'the point is that we would not be the individuals we are, were we not members of a specific set of social arrangements which are based upon specified sets of norms'.³⁵ In filling out the detail of this argument Frost goes on to give a relatively unchanged account of Hegelian individuality that is formed through the institutions of the family, civil society and the state (Frost also focuses on the society of states) arguing that constitutive theory begins by asserting that the person only attains individuality in 'a relationship of mutual valuation'. He continues, following closely Hegel's line of argument, that

[i]t is only in the state that individuality can be fully realized. Both (Hegel and Charvet) support this contention by examining how our individuality is partially constituted by subordinate wholes, like the family and civil society, and by showing how the shortcomings of the subordinate institutions are overcome by subsequent and higher institutions. This dialectical process culminates in the state.³⁶

³³ Ibid., p. 138–9.

³⁴ Ibid., p. 141.

³⁵ Ibid., p. 142.

³⁶ Ibid., p. 142.

For Frost our sense of what it is to be a free individual is tied up with our sense of what it is to be a free citizen. Our everyday claims concerning human rights or self-determination only make sense in relation to these specific modes of existence. Thus, argues Frost, for our individuality and freedom to be fully recognised we require both a fully developed state and recognition of that state by the international community. By a fully developed state Frost means one 'in which the people recognize each other as citizens in terms of the law which they in turn recognize as being constituted by them and constitutive of them as citizens'.³⁷ The basic idea here is that the concept of sovereignty and what we now see as the correlative notions of freedom and individuality makes no sense in relation to autocratic states. If, Frost reasons, we were not the product of democratic states we would not even have the vocabulary to insist on rights. As agents with relatively fixed ideas about how one should treat children within the family or what freedoms one could expect in civil society (property ownership etc) and a recognition that such 'rights' are objectified in the state, we have developed a clear idea of what it is to be a free individual and thus what rights such an individual should be accorded. From this position it is clear that the notion of rights we are dealing with requires the type of state Frost describes and cannot connect with totalitarian or patriarchal societies. Even those agents who do live in autocratic states have a surrogate history of the kind Frost's theory requires. Quite simply it is the history of the United Nations system of international politics that has promulgated the values of democracy and rights and created the global vocabulary of world politics. How justifiable a surrogate world history is thus becomes an important question. Hegel could ignore such questions as he could argue that despite (violent) contingency history exhibits a rational development. Frost has no such leeway. Nevertheless here it is sufficient to note that for Frost individual rights entail democratic rights and democratic rights entail sovereign rights. Hegel's full explanation, which Frost adopts, is more elegant (and far more lengthy) but the point is clear. Constructivist Hegelianism attempts to show that there is no conflict between human rights and the idea of sovereignty because the social practice we are engaged in necessarily includes both. Human rights are associational or political rights of a special sort. Without them the state has no legitimacy and without the state the type of rights we claim make no sense. Frost's claim is that the type of individual freedom we demand reflects all the social institutions that are our history, our present, and all that we can construct in our immediate future. Accepting this argument overcomes the problem of the derivation of human rights and solves the problem of the apparent tension between rights and sovereignty and, Frost argues, carries with it a critical edge that is every bit as sharp as that of the cosmopolitan theory. Continuing to employ secular Hegelian concepts Frost argues that

The point here is that within the autonomous state all individuals are constituted as free citizens, but for their citizenship to be fully actualized their state needs to be recognised by other states as autonomous.³⁸

Again, following Hegel, Frost argues that in order to be recognized as autonomous the state must meet certain specific requirements. Here Frost excludes families,

³⁷ Ibid., p. 152.

³⁸ Ibid., p. 151.

hordes, clans, multitudes, robber bands, liberation movements, tyrannies, oligarchies, patriarchies and any authoritarian or totalitarian state.³⁹ In Hegelian terms they are excluded because they are not 'actual': they do not display the concept of individuality which is in fact, Frost argues, at the deepest root of the shared norms of international society. Frost, as Brown notes, believes that he is justified in reaching cosmopolitan conclusions from what are essentially communitarian premises.

The logic of his [Frost's] position is that the vast majority of claims made by states to have their sovereignty respected are every bit as spurious as Beitz would say all such claims are. The disagreement between these two conceptions of the world is total at the level of theory, marginal at the level of practice.⁴⁰

In essence Frost portrays the development of international relations as the progressive education by developed states of (willing) quasi-states that involves an initial recognition of the quasi-states sovereignty (albeit at a lower level) until the 'novice' becomes fully initiated in the rules of international relations. Returning to the example of a initiate chess player educating a novice chess player Frost writes, casting himself in the role of initiate:

[m]y concern is prompted by the fact that what I ultimately want is for you to become a fully competent player. That you want this too, is indicated by the fact that you actively seek to play with me.⁴¹

Nevertheless Frost emphasizes that we are not to let this conclusion carry us away in a frenzy of constitutional change, we cannot simply ask 'in what type of state (or global system) can individuality flourish?' and expect our answer to prescribe the form of the next constitution (or series of constitutions) that we are to construct. Nevertheless recognizing the importance of human rights to international politics *must* lead to a world of free and self-determining democratic states.

The limits of secular Hegelianism

Frost suggests that

constitutive theory ... draws heavily on Hegel's political philosophy, but it is what may be termed a secular interpretation of his theory. Constitutive theory does not require of us that we understand or accept Hegel's metaphysical system.⁴²

However, while we may not have to accept Hegel's metaphysical system, it is absolutely vital that we understand it because a critical aspect of Hegel's political theory, its justificatory element, is tied up totally with the historical development of the notion of individuality. Before scrutinising Frost's secular Hegelianism let us state the problem more forcefully. Frost argues that

³⁹ Ibid., p. 152–53.

⁴⁰ Brown, *International Relations Theory*, p. 121.

⁴¹ Frost, *Ethics*, p. 155.

⁴² Ibid., p. 143.

individual freedom is not constituted by just any kind of state ... In the *fully developed* state the citizens perceive a coincidence between what the state requires of them and what they require in order to be free.⁴³

Furthermore individual freedom is hampered if one's state is not recognized as autonomous, and if the state is not what Frost calls the *fully developed* state then it cannot truly be recognised as autonomous. What must be kept in mind is the fact that 'despite the connotations of the word *Sittlichkeit*, Hegel's conception of modern ethical life makes strikingly little provision for cultural diversity between states'.⁴⁴ Hegel's argument is generated by his 'Absolute Idealism'. If Frost is to abandon such strategies, yet still insist that the modern democratic state is the summit of ethical life, he must lay out the court before which his conception of ethical life, the state that incorporates or instantiates the constitutive theory of individuality, must answer. My purpose here is not to dismiss Frost's enterprise (which I believe is a very fruitful one) but to charge it with recognizing the consequences of its own *secular* Hegelianism.⁴⁵ Frost's originality consists partially in moving away from the traditional 'Kantian' route into international ethics. Too frequently a Kantian approach reaches universal and cosmopolitan conclusions by ignoring (or abstracting from) the diversity of the international community. The advantage of a secular Hegelian (and hence norm-governed approach) must lie in its potential to work this diversity into its theory.

Brown's examination of 'demythologized' Hegelianism highlights the central problem in this line of reasoning, once in terms of Frost's philosophical predicates and later in relation to current international political practice. Both arguments target the same problem. Firstly Brown argues that

It should be noted that it is at this point that the attempt to provide a secular interpretation of Hegel's politics runs into difficulties. From the non-metaphysical perspective adopted here, this interpretation of the state can only be an 'interpretation'—a more or less plausible account of the salient features of modern states; it cannot be the only possible interpretation.⁴⁶

More importantly it cannot be said to be the only interpretation of the state conducive to individuality and freedom. In terms of how this relates to world politics Brown, as I indicated in the Introduction, contrasts Frost's position with that of the United Nations. Essentially the problem is that in dropping the justificatory element of Hegel's philosophy there arises a problem which is not overcome by simply applying Dworkin's casuistical legal theory to international relations theory. Frost's self imposed task, while Hegelian in character, is not the same as Hegel's project. Hegel's metaphysics and his philosophy of history combine to provide the justification for the dominant norms of contemporary politics. From there Hegel feels himself justified in advancing a constitutive theory of individuality as an explanation of ethical life. In offering contemporary theorists a 'secular' or

⁴³ Ibid., p. 150.

⁴⁴ Allen and Wood, 'Hegel's Ethics', in F. C. Beiser (ed.), *The Cambridge Companion to Hegel* (Cambridge: Cambridge University Press, 1993), p. 229.

⁴⁵ As Brown notes 'a completely demythologized Hegel is impossible. However it is still possible to hold that a secularized Hegelian account of international relations is the best available to us without accepting the full system'. Essentially this is done by recognising that Hegelian theory is 'theory' and not 'knowledge'. See *International Relations Theory*, p. 70–1.

⁴⁶ Brown, *International Relations Theory*, p. 64.

'demythologized' Hegelianism Frost has to justify *both* the settled norms of international politics *and* the constitutive theory of individuality. They are not (in the work of Hegel or Frost) separate arguments. The idea that the 'theme' of history is that of the relationship between the individual, freedom and politics and that the substantive purpose of political philosophy is to overcome the problem of alienation, ideas utilized by Frost,⁴⁷ cannot seek the Hegelian justification that these values exemplify the spirit of an age. The normative order Frost starts from and the background justification that he constructs must receive their vindication from something other than world history or spirit. Without the absolute justification of Hegel's metaphysics we must, at the very least, be prepared to admit that not all problems in international relations stem from dealings with alienated or underdeveloped uninitiates (uninitiated, that is, to what are really the shared understandings of international ethics). We cannot infer the consent of the parties to the present structure of international ethics or the just nature of this ethical structure from the fact that everyone participates in international relations. Frost, of course, does give up Hegelian justification in favour of Dworkin's method but I am not sure that this is acceptable. Here my dispute is not with Dworkin's argument as it pertains to law but with the purchase that his method could have on international relations. Frost makes a case for transposing casuistical legal reasoning from law to international relations and his claim must rest on his illustration of the character of the modern state domain of discourse as an institution comparable to that of a constitutionally supported law. Viewing these two aspects of Frost's thesis as one problem really highlights the central problem that this article aims to explore.

There are some basic points concerning the transposition of Dworkin's legal framework into the sphere of international ethics that must be borne in mind. Firstly, in order to determine the just nature of such a procedure we need to know that the starting point for our constructed morality (i.e. 'what everyone knows' about the institution) is itself just, or at least not radically unjust or partial a matter that Dworkin, writing about a democratically supported legal system, is able to consider settled.⁴⁸ Second: in what sense can it be said that the current participants have 'consented' to take part in the 'institution' Frost describes? One cannot secede from international society as one might choose to play draughts rather than chess. A state certainly cannot secede from the current norms of international relations without incurring penalties and given Frost's rejection of consent and contract theories in ethics it is a little odd that he does not question the relevance of this aspect of his thesis.⁴⁹ The main difficulty here is that in transplanting Dworkin's idea of casuistical problem solving from law to international relations Frost keeps rather a lot of inadmissible justificatory material.

Dworkin tells us that '[i]n chess the general ground of institutional rights must be the tacit consent or understanding of the parties.'⁵⁰ These institutional rights are

⁴⁷ For example, Frost, *Ethics*, pp. 140–1.

⁴⁸ This question is particularly pertinent because Frost claims that some participants may have misunderstood international relations and are therefore 'alienated' from its true point and that this licenses or requires their 'education'.

⁴⁹ 'I conclude that it is not possible to achieve the reconciliation between rights and sovereignty via the defense of contract (explicit or tacit) for most people have never made a contract and the theory of tacit consent is fraught with difficulties.' Frost, *Ethics*, pp. 128 and 130.

⁵⁰ Dworkin, *Taking Rights Seriously*, p. 104.

simply those rights that can be claimed only in relation to the relevant institutional framework. The idea is that in consenting to the rules of chess they also consent to play, as it were, in the spirit of the game, according to its general principles. Frost explicitly picks up on this point (even going so far as to complete the quotation above⁵¹) arguing, with Dworkin, that the known rules (of chess, law and the settled norms of the modern state domain of discourse) can be situated within a coherent background justification which represents the spirit of chess, law, and international relations respectively. Frost must therefore be claiming that actors in international relations share a substantial consensus on the meaning of the norms of the modern state domain of discourse, a consensus as substantial as that between players in a game of chess or voters in a democratic state.⁵² The first point to keep in mind would therefore centre on the notion of consent in international relations. It is not too far-fetched to imagine a state arguing that the current international situation and the norms that govern it are the product of a history in which they have either played no part, or in which they were exploited and given no chance to shape, or in which their most fundamental beliefs have had to be subverted and subordinated to Western liberal beliefs for the sake of continued existence or economic sustenance. The key point here is that it is possible to claim that they are not alienated from current practice in the Hegelian sense (as Frost claims)⁵³ but that the modern state domain of discourse is alien to them.⁵⁴

The second point to keep in mind relates to the 'substantiveness' of the consensus on the rules of the modern state domain of discourse. How seriously can we agree that signing up to international conventions and acknowledging that they are there is more important for considering norms settled than acting upon those conventions. I have some sympathy with Frost's position here. It is certainly not the case that acting contrary to a 'settled norm' always invalidates its settled status. But there are some serious concerns. Korea's antipathy to democracy, Israel's continued use of torture, France's (rather bloody) interference in New Caledonia, Iraq's refusal to obey UN resolutions, Russia's invasion of Chechnya, the rise of religious fundamentalism and even Africa's concerns that the UN declaration on human rights pays less attention than it might to the cultural and legal heritage of this particular group of humans does ask serious questions about the strength of the constitutive role of an international society that stems from a period of liberal domination. Given that the 'here and now' is not sacrosanct and we do not have a unified historical process that necessarily leads us to concur on the meaning of issues such as 'human rights', the process of 'political theory' that both Dworkin and Frost see as essential to the creation of background justifications is going to be more difficult. Frost's Hegelian position leads him to argue that the process he describes is a process of 'seeking to overcome the *alienation* a person might feel with regard to certain aspects of a practice (essential to her full flourishing within that practice) as hostile or detri-

⁵¹ Frost, *Ethics*, p. 96.

⁵² Either this or their understanding of the international system is flawed and they are alienated in the Hegelian sense.

⁵³ Frost, *Ethics*, p. 140.

⁵⁴ I am not here, or in the following exploration of this objection to Frost's position, suggesting a retreat to the 'conflict of ideologies' approach to international relations, there is no claim that actors in the international sphere are in any way 'hermetically sealed off' from one another. All I am questioning is the robust nature of the value system that Frost argues is inherent in his articulation of the modern state domain of discourse (see below).

mental to her well-being'.⁵⁵ The key to the project is understanding individuality (and therefore human rights) as constituted by and not antithetical to the system of states. The problem is justifying the prominence of the leading norms of the modern state domain of discourse at all. Dworkin foresees that the element of political theory that must take place in his procedure is indeed political and I think that it is an aspect of his thesis that *must* be borne in mind when applying his method to international ethics. Dworkin notes that his method of adjudication, what he calls his 'rights thesis' has two aspects. 'Its descriptive aspect explains the present structure of the institution of adjudication. Its normative aspect offers a political justification for that structure.'⁵⁶ In international ethics the political justification for the leading norms must be watched closely for conceptual *lacunae* or the kind of claims that may be justified in a fully Hegelian international relations theory but not in a demythologized one. My point focuses on Dworkin's claim that the background justification itself and the decision-maker's use of that justification must be just. It is well worth allowing Dworkin to make his point at some length. Using the example of Hercules (a fictitious lawyer of superhuman ability who is to make the decision in question) Dworkin argues that

many of Hercules' decisions about legal rights depend upon judgments of political theory that may be made differently by different judges or by the public at large ... It does not matter to this objection that the decision is one of principle rather than policy. It matters only that the decision is one of political conviction about which reasonable men disagree. If Hercules decides cases on the basis of such judgments, then he decides on the basis of his own convictions and preferences, which seems unfair, contrary to democracy, and offensive to the rule of law ... However ... That charge is ambiguous, because there are two ways in which an official might rely upon his own opinions in making such a decision. One of these in a judge, is offensive, but the other is inevitable.⁵⁷

Given that Frost is not claiming that there is a Hercules to make judgments in international relations, we must be aware that the thought experiment he offers us is certainly subject to the charge of partiality (i.e. that the moral judgments used are not universally shared and stem from one dominant tradition). After all, reasonable people disagree considerably about international ethics. In what sense can a charge of partiality be avoided? For Dworkin the answer is simple and relies on the humility of the judges to recognise that they could well be wrong but more importantly upon the 'principle of democracy in political theory'.⁵⁸ Hercules must either make a decision based on his understanding of the existing constitution or, if many people disagree with that interpretation of the constitution he must defer to the democratic process. In a legal system within a constitutionally regulated democracy this is a sound argument. In the international sphere, where certain 'thick' interpretations (what Frost and Dworkin call conceptions) of settled norms are likely to be incompatible with the organizing principles of some sovereign states, we have a more difficult problem. There is no constitution that guarantees a democratic process and

⁵⁵ Frost, *Ethics*, p. 140.

⁵⁶ Dworkin, *Taking Rights Seriously*, p. 123. Frost argues that 'there is no way in which social scientists may legitimately avoid becoming involved in normative theory' and in doing so places the explanation/justification distinction at the top of the agenda. In employing this distinction as the crux of an exposition of Frost's work I am merely fleshing out the consequences of his project and not importing isolated problems from Dworkin's work.

⁵⁷ *Ibid.*, p. 123.

⁵⁸ *Ibid.*, p. 125.

one (sovereign) judge's opinion may be non-negotiable. The point here is not that a deliberative process *could* not resolve the differences between competing world views. This I will leave aside. Rather my point is that there is no reason to suppose that such a process *should* underwrite international ethics. Many of the 'sovereignty' norms confer a special legitimacy upon a state's particular standpoint. The state's legitimacy as part of the constitutive process relies upon it. The ethical relation of a state to its citizens confers a political, legal and moral responsibility on that state to represent its citizens in international relations. Frost (particularly as a Hegelian—secular or otherwise) must recognise that, unlike a citizen in her relation to fellow citizens in a democratic polity, a state has a duty not to sign away its right to legislate for itself. In this sense any international deliberative process could never (or at the very least not yet) claim to be authoritative. This much follows from a constitutive understanding of the development of the settled norms of the modern state domain of discourse. Without an over-riding argument that insists that a state must defer to the will of the international community, a deliberative stalemate is an (ethical) possibility. Either Frost must admit to holding a thinner consensus on the settled norms (a consensus so thin that all existent states can be part of it) or Frost must justify the subordination of certain types of world view.

Dworkin, when delegating the burden of the process of 'political theory' to the electorate, has definite (although not uncontentious) grounds for suggesting that the settled norms of a democratic polity are in some way justified. Hegel, when arguing that the process of historical development justified the settled norms of 'Germanic' (for which read West European) life, has metaphysical (and very contentious) grounds for using the constitutive theory of individuality as the explanation for the summit of ethical life. Frost has to abandon both of these arguments. International relations cannot be thought of as domestic, liberal democratic, politics on a larger scale and Frost sets out explicitly to abandon Hegelian metaphysics. However his use of the constitutive theory of individuality relies on the assumption that liberal democratic politics is morally superior to all other forms of life.

Concluding remarks: a brief restatement of secular Hegelianism

Frost, I believe, has misunderstood the communitarian consequences of secularizing Hegel. Just as in Hegel's theory constitutional monarchy was the ideal of government so Frost's account of a fully developed state is limited to constitutional democracies. The vital point to keep in mind is that for Hegel this fact is only justified through his metaphysical history. Without this buttress his theory must rely upon a more pluralistic conception of sovereign legitimacy. For Hegel the state's right to stand in the international sphere as an individual or as a recognized articulation of freedom is tied up not with the conception of freedom held by what Frost terms initiate states but with the relationship between citizens and their state.⁵⁹ It is

⁵⁹ Because the state as the summit of ethical life (but nevertheless itself subordinate to the concept of freedom) has consciousness in and for itself (*Philosophy of Right*, §322) the relationship it has with other states cannot follow the form of the master/slave relationship and resolve itself in a higher form of ethical life as suggested by D.P. Verene, 'Hegel's Account of War', in Verene (ed.), *Hegel's Social and Political Thought: The Philosophy of Objective Spirit* (New Jersey: Humanities Press, 1980). See also Hegel, *Elements of the Philosophy of Right*, A. Wood (ed.) (Cambridge: Cambridge University Press), §331.

only through the philosophical-historical understanding of the dialectical and necessary development of *Geist* that Hegel comes to the conclusion that the modern state can be thought of as the contemporary summit of ethical life.⁶⁰ It is only his metaphysics that allows Hegel to express his concern that 'people at a low level of culture' or 'the Jewish and Mohammedan nations' may not achieve the kind of ethical existence that they need for their state to be recognized as sovereign.⁶¹ There follows from the fact that we have stripped Hegel's particular understanding of the form that the concept of freedom can take from our justification (by denying the relevance of metaphysical history) a starting point in international affairs that insists that as long as the state exhibits signs of a healthy relationship between citizen and state it must be recognized as sovereign.⁶² What counts as a healthy relationship in this formulation of the starting point is still to be decided.⁶³ Following on from this, and returning to Hegel's account of international relations, it follows that contentious relations between a plurality of states are healthy in the sense that they allow various conceptions of freedom to clash and thereby generate new (and, says the optimism of an Hegelian philosophy, better⁶⁴) transnational understandings of freedom. Unless we have concrete evidence that the conception of justice promulgated by the UN is created by and accessible to all relevant actors (and even the briefest glance through the literature on interdependence and globalization suggests firmly that the jury is still out) we have no right to suggest that all agents be brought to share *our* way of life. The political consequences of this argument are, as Brown rightly notes, 'resolutely communitarian'⁶⁵ and Frost's extension of the argument appears to contradict his own constructivist premises.

Normative theory has neither the theoretical wherewithal or the empirical evidence to claim that the concept of international justice developed and sustained by the Western powers is perfectly just. In adopting Dworkin's method and abandoning Hegelian metaphysics Frost wants to use the developmental aspect of the Hegelian dialectic without adopting the teleological aspect (the notion of the self-actualization of freedom). But the force of Frost's insightful approach to questions of international justice requires the recognition that vindicable principles must be drawn from predicates accessible to all the actors that constitute world politics. This description of the necessary justificatory element in political theory is drawn from O'Neill's constructivist (yet 'Kantian') cosmopolitanism.⁶⁶ Yet this article is not intended as a Kantian critique of a Hegelian project. The need for a constructivist theory that takes account of the norms shared by (and just as importantly the differences between) actors in international relations is paramount

⁶⁰ See Hegel, *The Philosophy of History*, trans. Sibree (New York: Dover Publications, 1956), pp. 19, 79. Also Hegel, *Philosophy of Right*, preface.

⁶¹ Hegel, *Philosophy of Right*, §331.

⁶² Whereas, for example, Hegel's view concerning constitutional politics arises from an understanding of what it means to be free in this day and age.

⁶³ One effect that this might have on Frost's depiction of international society is to force the recognition that there are not only developed states and quasi-states (chess players and wannabe chess players) but also rogue states, states who know the rules but reject them. How would Frost class their legitimacy?

⁶⁴ This faith in the developmental process is articulated (for example) by Brown, 'The Ethics of Political Restructuring: The Perspective of Constitutive Theory', in C. Brown (ed.), *Political Restructuring in Europe: Ethical Perspectives* (London, Routledge, 1994), p. 179.

⁶⁵ Brown, 'The Ethics of Political Restructuring', p. 173.

⁶⁶ O'Neill, *Towards Justice and Virtue*, ch. 2. The scare quotes are O'Neill's.

and that case is made forcefully by Frost. However Frost's concern that he provide more than the 'thin raft of consensus' put forward by other normative theorists⁶⁷ (here I have in mind Rawls' minimal conception of human rights and Walzer's 'thin' universal rights to life and liberty) seems to motivate him to read too much into the shared concepts of the modern state domain of discourse. Rejecting those aspects of Frost's thesis that rest on inaccessible premises commits us, I think, to recognizing that here and now, between the remnants of the Westphalian order and a post-Westphalian system, it is precisely these thin rafts of consensus that are authoritative or that prescribe the content of our background justification. Thus I would argue, as Rawls does, that the list of rights a liberal society would sign up to is far greater than that which many non-liberal states would sign up to⁶⁸ and that it is only the minimal list that can be said to have legitimacy. This requires a reassessment of the present structure and the dominant norms of international politics. The idea that we should look to the international community itself (rather than Kantian philosophy) for the genesis of human rights has a lot of mileage left in it but doing so requires that we redraft our understanding of this important part of international politics. Frost's method, enhanced by this necessary addendum, is full of potential for the future of international ethics. To act conservatively in terms of international ethics is to continue to talk and think in terms of a Western liberal theory of individual rights and to impose it upon those less wealthy and powerful in return for minimal economic aid. To act radically is to attempt to find shared grounds for global justice. There are no short cuts to global justice. Questioning the justification of the modern state domain of discourse does not rule out the possibility of normative theory, it simply ensures that a shared domain of discourse is constructed from impartial propositions. Given this, the right response to the recognition that Frost's approach has not got the foundations to justify its view on international ethics is not to return to the search for a foundation that can support this view (or, *qua* postmodernism, to affirm it regardless). If the development of international ethics is to be a shared enterprise then constitutive, or constructivist reasoning offers the right theoretical map. We must bite the bullet and grasp the opportunity to begin to think in terms of a truly justifiable international justice and not just an enforceable liberal account of justice.

⁶⁷ Frost, *Ethics*, p. 106.

⁶⁸ Rawls, 'Law of Peoples', pp. 227–8, cf. J. Rawls, '50 years after Hiroshima', *Dissent*, 1995 *passim*.