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Is International Law a Legal System?

INTRODUCTION

Denying international law is an easy game. Its subjects are independent states; there is no sovereign threatening to slap sanctions on offenders; the International Court of Justice cannot consider a dispute without the consent of all parties. Detractors of international law cite these differences from municipal law to question its binding nature. Some say international law is only a set of moral rules bent when they diverge from the state's will and trumpeted when they coincide with it.

The doubts about international law impute certain necessary conditions to the legal system. This paper will show that these conditions are not necessary, and that international law meets all necessary or sufficient conditions of the legal system. Along the way, it will weigh several major detractions of the efficacy of international law, such as a theory that international law is a form of politics; a theory of international law as states' rational choice; and a Marxist theory of international law. These theories are not theories of legal systems, but they offer conclusions that can affect any theory of international law as a legal system. Finally, the paper will discuss an application of Lon Fuller's internal morality of law to international law. The internal morality of law can be an alternative method of determining the efficacy of international law.

QUESTION

To answer the question in the title of this paper it is necessary to know what a legal system is. Since this term is commonly used to refer to municipal legal systems, it should be used here in the same sense. Minimum requirements for a municipal and an international legal system must be the same; otherwise, the question should be "what is the difference between international and municipal law". The answer to the question of this paper can be "yes" or "no". Regardless of the answer the question is epistemologically useful, so we should not invent new definitions of the legal system to answer it. This question is just another facet of the great debate about whether international law is really law, whether it is binding on states, whether it is just politics, etc.

I believe all legal theorists refer to the same phenomenon when they use the term legal system. Similarly, philosophers probably refer to the same thing when they say "morality", "law", or "society". They may define these terms differently, or they may have different theories about them, but it is absurd to imagine that they talk about inherently different things calling them the same name. By analogy, physicists can argue about theories of speed, but none of them mean smell or colour when they say "speed". That is why I assume the legal system in the titular question is not a *sui generis* legal system that can be imagined to fit international law to any desired degree. I assume the legal system in question is the legal system philosophers of law talk about.

APPROACH

The question "is international law a legal system?" is a question of a type "is X M?". This question is equivalent to a question "does X belong to N?", where N is a class and M is a member of N. To answer the question "is X M?" the following is required:

- what are the minimum conditions of membership in N?
- does X meet all of these conditions?

Therefore to answer the question "is international law a legal system?" it is sufficient to know what the minimum conditions of being a legal system are and whether international law meets all of these conditions.

However this analytical approach has a serious shortcoming. Can X be M, if it meets all conditions of membership in N intermittently? The response that a minimum fraction of M's lifecycle or a maximum length or frequency of intervals can be necessary conditions of membership in N is inadequate. Such necessary conditions would be arbitrary, unless they are derived from another necessary condition. The parent condition must explain the material difference between the two sides of borderline child conditions such as length, fraction, and frequency. Efficacy of X could be such parent condition.

Suppose all the necessary conditions of "X is M" except F are empirically verifiable (e.g. existence of primary and secondary rules). F (e.g. efficacy) is impossible or more difficult to verify than the other conditions because it depends on disputed parameters such as the ones related to intermittence above or to position in space. How can the truthfulness of "X is M" be verified, if F is difficult or impossible to verify directly?

Can there be such a condition S that if S, then F, where S is more easily verifiable? I believe S can exist, and I intend to show this in my paper. I also intend to test Fuller's elements of internal morality of law for the ability to be S where F is efficacy, X is international law and M is a legal system. I will evaluate claims about the internal morality of international law as a necessary condition of law's efficacy. If the internal morality of law leads to its efficacy, the model proving that international law is a legal system will be complete.

ANALYSIS

The minimum conditions of the legal system

A legal system is a system of law or laws, or a system serving the law. It does not have to be the same thing as law. A legal system can contain law and other elements that are not law but that serve law in the system. For example, consider the rule of recognition — a key part of Hart's concept of the legal system. Hart accepts it that the rule of recognition can be seen alternatively as fact or as law.[1] He explicitly distinguishes the word "law" from the expression "legal system". Conditions for a legal system are not the same as the definition of law, nor does he try to define "law".[2] Consider also legal institutions. Raz argues that norm-creating institutions can be, and norm-applying institutions must be a part of a legal system.[3] Consequently, a legal system is not just law and is more than just law.

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[1] H.L.A. Hart, *The Concept of Law*, 2nd ed. (New York: Oxford University Press, 1997) at 111-112 [*Hart*].
[2] *Ibid*. at 213.
[3] Joseph Raz, *The Authority of Law*, (New York: Oxford University Press, 2002) at 105 [*Raz*].

Hart identifies "two minimum conditions necessary and sufficient for the existence of a legal system": general obedience of primary rules by private citizens and acceptance of secondary rules by officials.[4] Secondary rules instruct officials which rules of behaviour are primary rules, and how primary rules change and are adjudicated. The rule of recognition, which identifies primary rules, is the key element of Hart's legal system. There is a difference between population's obedience of primary rules and officials' acceptance of secondary rules. For a legal system to exist, at a minimum officials must take the "internal point of view"[5] with respect to secondary rules.[6] This is what Hart refers to as acceptance of the rules by officials — their belief that the rules are standards to follow. The general population need not accept the primary rules in this way for a legal system to exist, but it must obey them. Primary rules must give rise to obligations. In Hart's model that means significant social pressure to conform, belief in the vital necessity of rules, and a requirement to sacrifice personal interests conflicting with obligations.[7]

Hart's theory suggests an algorithm of evaluating a claim that something is a legal system. First, the object in question must be a normative system — it must consist of rules intended to give rise to obligations and guide conduct. Second, we must be able to identify members of the society targeted by the normative system. Third, the rules directing the society must pass the triple test of social pressure to conform, vital necessity, and the requirement of sacrifice. Fourth, the population must generally obey these rules. At this point we know

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[4] *Hart*, *supra* note 1 at 116.
[5] *Ibid*. at 89.
[6] *Ibid*. at 117.
[7] *Ibid*. at 87.

what the primary rules are. If we stop here, we will know that this society can be at least a primitive legal order. What distinguishes it from a legal system is the existence of officials and secondary rules.

Officials are those members of the society who follow rules of recognition, change, and adjudication. They are also recipients of powers conferred by secondary rules.[8] The rule of recognition imposes a duty on officials to recognize the system's criteria of validity. However, this obligation is different from the obligation of ordinary citizens to follow primary rules. The duty of officials requires them to treat secondary rules from the internal point of view — accepting them, not merely following them. Ordinary citizens need only follow the primary rules for a legal system to exist. It does not matter whether they regard their actions as obligation as long as they conform most of the time.[9] Anyone who partakes in the coercive authority of the state is an official. Something else is crucial for our discussion of international law, however. Members of the society unaffiliated with the state can be officials too. Secondary rules confer powers on lawyers to argue before a judge on behalf of an ordinary citizen. These rules also enable anyone to represent themselves in court. Most importantly, secondary rules empower anyone to seek remedies for a contract breach, a tort, or a criminal offence. When a member of the society identifies an act unlawful by the rule of recognition and seeks remedies through avenues offered by secondary rules, (s)he acts as an official.

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[8] *Ibid*. at 81.
[9] *Ibid*. at 115.

Raz names three elements of the test for "identity and existence of a legal system:"[10] efficacy, sources, and institutional character. First, for efficacy, "at least certain sections of the population"[11] must adhere to and accept or internalize the legal system. Is this the equivalent of obedience and acceptance in Hart's theory? Let us assume that "certain sections" refer to ordinary citizens and officials, and adherence and internalization refer to obedience and acceptance. Then the answer will be "yes". The second element of Raz's test is the requirement of social sources of law. All law, even law that coincides with moral norms, must come from social sources.[12] A normative system is not a legal system if any of its law comes from a moral rather than social authority. Social authority may choose to create law out of moral considerations, but it never must do so.

Finally, for institutional character, a legal system need have "adjudicative institutions" to resolve disputes around legal norms, and it need have authority to "legitimize or outlaw all other social institutions".[13] This element of the test could be interpreted as a requirement of legal monopoly. The legal system must be the sole legal system in the given society. Rights and obligations originating in its norms must supersede all other rights and obligations, and judgements of its courts must be conclusive and exclusive resolutions of legal debates. Legal system must also be able to regulate any behaviour and turn any norms of any other normative systems into legal norms.[14] Raz also argues that a legal system

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[10] *Raz*, *supra* note 3 at 42.
[11] *Ibid*. at 43.
[12] *Ibid*. at 46-47.
[13] *Ibid*. at 43.
[14] *Ibid*. at 116-20.

must have "certain types" of norm-applying institutions.[15] He defines them as "institutions with power to determine the normative situation of specified individuals, which are required to exercise these powers by applying existing norms, but whose decisions are binding even when wrong."[16] He calls them primary institutions,[17] and considers them a necessary feature of a legal system. They must apply pre-existing legal norms in resolving disputes, and their decisions must not be arbitrary.[18]

Efficacy

The analysis of international law as a legal system in this paper rests on the assumption that norms of international law are generally effective. This assumption does not depend on whether the norms are legal. A determination of whether they are legal presupposes that the norms are effective. The assumption is that states construe international norms as rules. In a contrary case states may interpret such norms as sufficiently loose to be arbitrary, or as irrelevant to state action, or as false declarations. Then a legal analysis of international law is impossible because international law is not a normative system or its efficacy is too low. If international law is not efficacious, it cannot be a legal system.

Several theories of international law dismiss its efficacy. According to one theory, international law is really a political system where rules are not

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[15] *Ibid*. at 105.
[16] *Ibid*. at 109-10.
[17] *Ibid*. at 108.
[18] *Ibid*. at 115.

strict enough to guide conduct.[19] Another theory posits that international law does not restrict state behaviour, but state behaviour restricts international law.[20] Finally, a Marxist theory maintains that international law is an artificial justification of use of force by rich states against poor states according to the class logic. To prove that international law is a legal system, these theories must be substantially refuted.

Martti Koskenniemi writes that "[m]odern international law is an elaborate framework for deferring substantive resolution elsewhere: into further procedure, interpretation, equity, context, and so on."[21] He gives an example of the 1982 Law of the Sea Convention, which, according to him, avoids stipulating rules and instead delegates substantive issues "elsewhere" or relies on "equitable principles".[22] Koskenniemi argues that international law's "success" depends on its avoidance of rules. He assumes that all rules of international law require consensus. Consider disputes where no rule can be conclusively applied. Adjudicators must draw analogies applying existing rules to new facts. These analogies become rules too, but the state found in violation of such a new rule never consented to this analogy. Koskenniemi sees two solutions of this conundrum: a utopian and an apologist. The first will consider the new rule binding regardless of consent, and the second will reject the new rule in deference to the state's sovereignty. Koskenniemi extends this analysis from rules to general principles like *pacta sund servanda*, good faith, etc. He

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[19] Martti Koskenniemi, "The Politics of International Law" (1990) 1 EJIL 4 [*Koskenniemi*].
[20] Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law*, (New York: Oxford University Press, 2005) [*Limits*].
[21] *Koskenniemi*, *supra* note 19 at 28.
[22] *Ibid*. at 28.

denies an external, "naturalist"[23] conception of international justice and believes that each state has its own conception. Therefore, imposition of "any substantive conception of communal life or limits of sovereignty can appear only as illegitimate constraint."[24] Therefore rules of international law are ad hoc, case by case expressions of politics rather than law. Whatever normative nature international law may have is inefficacious.

This argument is not solid. Consider European Union. It is an obvious fact that its rules apply to both present and future conduct of member states. EU courts' conception of both the rule and any applicable general principles and concepts overrides any possible contrary conceptions of state parties. Their jurisdiction is binding. Koskenniemi's theory overlooks the ability of sovereign states to delegate their powers. If several states agree to establish a court and submit to its jurisdiction in certain disputes, it does not mean that the court will apply God's (or someone else's) natural law. The adjudicator will apply norms posited by the states in their treaties or custom. Only if the states grant the court absolute discretion, it will be difficult to characterize their relations as an efficacious normative system. However, in this case and in hard cases not amenable to conclusive rules, judges may still follow legal patterns fitting within a commonly accepted conception of law. This outcome would closely resemble the system of law described by Ronald Dworkin.[25] Koskenniemi appears to reject Dworkin's idea that there are right legal solutions in hard cases in international law. However, if states have the capacity to create courts

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[23] *Ibid.* at 30.
[24] *Ibid.* at 31.
[25] Ronald Dworkin, *Law's Empire*, (Cambridge: Harvard University Press, 1986) [*Dworkin*].

of binding jurisdiction, right legal solutions in hard cases are possible assuming a common conception of justice exists in the international society. In European Union it evidently does.

Another attack on the efficacy of international law comes from Marxism. China Miéville proposes a theory of international law based on ideas of Evgeny Pashukanis, a Marxist legal theorist who lived in the Soviet Union during the 1920s and 1930s in the last century.[26] The basic Marxist theory of law asserts that law is a form that does not favour a particular class. However, the propertied class has the economic means to fill the legal form with content that favours capital owners. The law of contract, for example, may give equal bargaining rights to parties, but their unequal bargaining power will skew the contract in favour of the stronger party. Hence, "between equal rights, force decides".[27] Pashukanis developed a Marxist theory of international law, which states that an international coercive authority is not necessary for international law. According to him, legal norms are a form reflecting economic relations between states.[28] Pashukanis refers to pre-state legal norms that regulated private commodity exchange as an example of how international law works.[29] Miéville finds a paradox in the Pashukanis theory: Pashukanis rejects the necessity of a coercive authority for law but contends that law requires force.[30] Miéville offers a resolution of this conundrum with his theory that "violence

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[26] China Miéville, *Between Equal Rights: A Marxist Theory of International Law*, (Leiden: Brill, 2005).
[27] *Ibid*. at 120.
[28] *Ibid*. at 130.
[29] *Ibid*. at 131.
[30] *Ibid*. at 133.

and coercion are immanent in the commodity relationship itself."[31] International law is "simultaneously a genuine relation between equals, and a form that the weaker states cannot hope to win."[32] Miéville goes on to say that "because there is no superordinate state, the stronger participant in a legal relationship may declare the content of the legal form to be a particular interpretation."[33] The United States, for example, never accepted that its invasion of Iraq was illegal. On the contrary, it vigorously advanced its own interpretation of international law that justified the invasion.

The Marxist conception of international law challenges its efficacy because it renders law indeterminate. The same act can be illegal in one case and legal in another, since the legality depends on the interpretation of the party on the stronger end of the economic relation. Indeterminate law is inefficacious law. It is not amenable to rule-based analysis akin to Hart's theory because ad hoc force replaces rules under this conception of law. Although Miéville denies it, his theory seems substantially similar to critical legal studies theories such as that of Koskenniemi. Both reject any possibility of a sufficient consensus among states able to give rise to lasting legal rules applicable to future facts. The difference between the two theories is in the next step. Koskenniemi believes ad hoc decisions grounded in equity resolve disputes, while Miéville sees coercion rooted in class struggle as the content of legal norms. The European Union example undermines Miéville's theory just like it does Koskenniemi's. States can have relations and interests that are not based

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[31] *Ibid*. at 133.
[32] *Ibid*. at 142.
[33] *Ibid*. at 142.

on commodity exchange. This can lead them to pool authority and give content to common legal norms on a relatively egalitarian basis. Besides, modern capital in the form of trans-national corporations decoupled itself from the state enough to reduce economic competition between states making the Marxist analysis less relevant. However, it does appear that two sets of states have formed in the world: the rich and the less rich. The legal norms operating among the rich states appear to be fairly efficacious. When international law has to cross the line between the two camps, I must admit the critical legal studies and the Marxist analysis seem quite convincing.

Finally, let us consider one more challenge to the efficacy of international law. This challenge comes from a theory that denies the guiding influence of international law on state behaviour.[34] The central tenet of this theory is that international law is a product of state interest limited only by state power. States' actions follow patterns that can be described as "rules". There are four possible reasons for these "behavioural regularities": (1) coincidence — when states' interests coincide; (2) coordination — when states' interests do not coincide, but the cost of change is immediately higher than the benefit; (3) cooperation — when states' interests do not coincide, but the cost of change is higher than the benefit in the medium- or long-term; (4) coercion — when states' interests do not coincide, and some states are sufficiently powerful to impose their interests, so change ensues. The cost of change depends on state power. I will call this theory the state interest theory of international law. It

[34] *Limits*, *supra* note 20.

postulates that "states act rationally to maximize their interests".[35] It also assumes that the content of state interest is irrelevant,[36] although it cannot be in compliance with international law for its own sake.[37]

The state interest theory completely expels any normative nature from international law. It denies the efficacy of international law by concluding that international law does not guide state conduct in any way. Without dispelling this premise, it is impossible to argue that international law is a legal system. The non-influence premise precludes the existence of rules and norms in international law, whether legal or not. Adherents of the state interest theory may argue that "behaviour regularities" are norms. Consider the example of a border between two states Goldsmith and Posner use to illustrate four reasons why state action conforms to patterns. They call this border a rule.[38] In one case the border exists because the states do not care to change it; in the second — because it is too costly for the willing state to change it; in the third — because it is too costly for both willing states to change it; in the fourth — the border changes after one coerces the other. If this border is a "rule", it is definitely not a social rule in the sense of a building block of a normative system. It is not a regular standard of conduct,[39] nor is it essential to the social life of the states.[40] A state massing armies on one side of the river with intention to invade its neighbour in the summer when the river dries out is not following a rule. Yet its refraining from crossing the river in the wet season is definitely a "behaviour

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[35] *Ibid*. at 7.
[36] *Ibid*. at 6.
[37] *Ibid*. at 9.
[38] *Ibid*. at 11.
[39] *Hart*, *supra* note 1 at 85.
[40] *Ibid*. at 87.

regularity" that lends itself well to a cost-benefit analysis. To comply regularly under a threat of force is not necessarily to follow a rule either.[41] Although the state interest theory can correctly explain some state "behaviour regularities", these patterns are not rules or norms. They are either breaches of norms, or they exist outside of any international normative system.

For international law to exist as a normative system, other state action patterns must exist. These patterns would be the same as in the first three cases of the example with the border, but in the fourth case the stronger state would continue to respect the border. If a state with sufficient capacity and interest may forgo change predicted by the state interest theory, that theory is incorrect. The first three cases themselves weaken the theory because they are not falsifiable. It is impossible to know whether a state in those cases failed to act for cost-benefit reasons or due to a social norm. I assume state declarations are not conclusive proof of state motivations. In the fourth case, a possibility of stronger state's inaction will weaken the state interest theory. That requires an assumption about state "interest". A state's "behaviour regularity" is due to its "interest", if and only if it is not due to serious pressure of other states and the state's belief in the essential social value of this practice, and the state does not sacrifice its other interests to follow the practice. Without this assumption, compelled compliance could be declared "state interest" making the state interest theory absurdly broad. The state interest theory itself rests on the premise that non-instrumental[42] compliance with norms cannot be in "state

[41] *Ibid*. at 85. "The gunman situation".
[42] Assuming non-instrumental means "for its own sake" here.

interest". It is necessary to suppose that states can value habitual practices for their own sake to set aside the public interest theory. For example, states can value regular consistent conduct due to belief that it helps manage risks and promote order. I will make an assumption that states can pursue consistent behaviour for its own sake even when contrary to their "interests".

The internal morality of law

The premise of this paper is that a pure analytical approach is insufficient in telling whether international law is a legal system. The analytical approach involves establishing minimum requirements of a legal system and applying them to facts of international law. I explained above how some necessary conditions can be positions on a scale rather than yes or no propositions. Empirical testing of simple true-false conditions like existence of primary rules is relatively straightforward. It is more difficult to evaluate fuzzy conditions like effectiveness of rules or constancy of the normative system. Prerequisites of a legal system include such fuzzy conditions. For example, Hart speaks of a *general* obedience to rules, and Raz cites *efficacy* as a prerequisite of a legal system.

In general, efficacy is the chief and, probably, the only fuzzy characteristic of legal systems. A legal system is a set of elements that work together well. How well the elements work together is the legal system's efficacy. There is nothing to a legal system but its discrete elements and their efficacy, so efficacy consolidates all the legal system parameters with variable values, such as generality of obedience. A society has a legal system, if it has the

necessary elements characterized by efficacy. The analytical method is sufficient to identify a legal system's necessary elements and determine if the given facts contain the necessary elements. However, something more is required to show the sufficient efficacy of norms in question.

I challenged several theories that reject the efficacy of international law in principle. This is the necessary first step in proving the nature of international law as a legal system. Next, I would like to demonstrate that international law is efficacious. Since an empirical proof seems impractical, I propose a theory based on Lon Fuller's ideas[43] and an "interactional theory of international law"[44]. This theory argues that international law is efficacious because it possesses internal morality.

Fuller contends that a legal system "depends upon the discharge of interlocking responsibilities — of government toward the citizen and of the citizen toward government".[45] Citizens have an obligation to follow the law, or, in Hart's words, primary rules. Fuller diverges from Hart past this point because Fuller believes that government — the officials — have an obligation to citizens. Hart's theory provides that the officials need only accept the secondary rules. According to Fuller, citizens have a right to expect the government to make reasonable law. The success of law for Fuller depends on "the energy, insight, intelligence, and conscientiousness" of the government.[46] Lawmakers'

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[43] Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) [*Fuller*].
[44] Jutta Brunnée & Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Transnat'l L. 19 [*Interactional Theory*].
[45] *Fuller*, *supra* note 43 at 216.
[46] *Ibid*. at 145.

aspiration to pursue these goals will endow law with necessary qualities that constitute its "internal morality". Citizens obey the rules in exchange for officials' respect for citizens' rationality in making the rules. Impossible, retroactive, vague, or contradictory laws insult citizens' intelligence and sense of reason, and undermine law's efficacy. This idea of an interactional relationship between officials and citizens necessary for a legal system's efficacy sets Fuller apart from Hart.

Fuller's ideas inspired a theory of international law that its authors called "interactional".[47] It distinguishes law "from other forms of social normativity by the specific type of rationality apparent in the internal processes that make law possible".[48] The theory's central tenet is that the binding nature of law depends on its internal rather than external conditions. Specifically, when law has internal morality, it "will tend to attract its own adherence".[49] The interactional theory of international law borrows Fuller's concept of internal morality and applies it to the law of nations. The soundness of the interactional theory depends on the soundness of Fuller's theory. The interactional theory can potentially be quite powerful because Fuller's theory lends itself so well to international law. The internal morality theory obviates two qualities of law: external enforcement authority and separation of citizens and officials. Critics of international law often cite these two common features of municipal law to deny international law its legal nature. A normative system can be legal if there

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[47] *Interactional Theory*, *supra* note 44 at 43-64.
[48] *Ibid*. at 56.
[49] *Ibid*. at 56.

is no sovereign threatening sanctions for misconduct and if citizens can be officials as long as law is rational under Fuller's criteria of internal morality.

The interactional theory goes a step further, however. Its authors downplay the validity of sources of law and assert that "[t]he primary test for the existence of law is not in hierarchy or in sources, but in fidelity to internal values and rhetorical practices and thick acceptances of reasons that make law — and respect for law — possible."[50] This vision of law as a consensus grounded in past practices accepted as reasonable resembles Dworkin's concept of law as rights and responsibilities that "flow from past decisions of the right sort".[51] Dworkin's theory diverges from international law when he argues that legal rights and responsibilities licence coercion. Still, the interactional appeal to "rhetorical practices and thick acceptances of reasons that make law" and Dworkin's "past decisions of the right sort" seem quite analogous. Dworkin also closely parallels Fuller when he says that "[a]ccording to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice".[52] Admittedly, Dworkin talks about what *the* law is, and Fuller's theory tells what *law* is. Nevertheless, Dworkin evidently acknowledges some minimum body of "principles of justice, fairness, and procedural due process" as a necessary condition of *law*. The interactional theory of law essentially treats international law as integrity without the coercion.

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[50] *Ibid*. at 69.
[51] *Dworkin*, *supra* note 25 at 93.
[52] *Ibid*. at 225.

Although the interactional theory seems quite powerful, it is difficult to accept its premise that sources of law are not necessary. Dworkin's law as integrity does not reject formal sources of law, and neither does Fuller. Law as integrity is the most relevant in "hard cases" when there are no conclusive rules, but it does not deny the existence of conclusive rules. The interactional theory's proposition about sources may be a way around the relative difficulty of identifying rules in international law. However, this approach threatens the very foundation of the interactional theory, since without identifying rules the law can suffer from vagueness or otherwise offend the internal morality. In 1983 Prosper Weil cautioned that the normativity of international law was becoming too "relative".[53] The difficulty of identifying rules of international law caused by its voluntary nature leads to vagueness of the law. It also enables a group of states to posit international norms by drawing analogies or relying on general principles without consent of all states. Weil warns of a "de facto oligarchy".[54] This scenario harms international legality. An alternative view salutes the declining sovereignty of states and predicts the international legal system will become a combination of "systems of rules, partly overlapping but capable of compatibility".[55] Instead of vagueness of rules, MacCormick sees emergence of principles and traditions as normative engines of "communities of principle" similar to Dworkin's law as integrity.[56] Nevertheless, Weil's caution appears more sound, and I believe a full theory of international law must be

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[53] Prosper Weil, "Towards Relative Normativity in International Law?" (1983) 77 Am. J. Int'l L. 413.
[54] *Ibid.* at 441.
[55] Neil MacCormick, "Beyond the Sovereign State" (1993) 56 Mod. L. Rev. 1 at 18.
[56] *Ibid.*

grounded in Hart's union of primary and secondary rules. The interactional theory based on Fuller's internal morality complements Hart's theory and provides means of gauging legal system's efficacy.

CONCLUSION

There are definitely primary rules in international law. They encompass both treaties and norms of customary law. However, international law is more than a primitive customary order. States are both citizens of the international society and its officials. Only states can practice the rule of recognition to determine the validity of international norms. States enter treaties and decide what rules of customary law are. They also determine how their rights and obligations under international law change, and how states emerge and disappear. States can delegate powers to adjudicative organs to resolve international disputes according to procedures that states themselves set. States are clearly the officials of international law. As officials, states have the exclusive power to create and annul legal rules as well as convert any other norms of the international society into legal rules.

Further, I posit that the law of nations is rational, and its rules usually conform to Fuller's internal morality. It is inconceivable otherwise, since the voluntary nature of international law should restrict consensual rules to the will of rational states. According to the interactional theory it follows from this premise that states generally obey primary rules of international law and accept secondary rules from the internal point of view. International law is a legal system.