

HART OR DWORKIN: WHO BETTER ILLUMINATES THE NATURE OF
INTERNATIONAL LAW?

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ABSTRACT

COLTON V. ACOSTA: Hart or Dworkin: Who Better Illuminates the Nature of International Law?

(Under the direction of Dr. Robert Westmoreland)

The purpose of this thesis is to explore two legal theorists' conceptions of law and adjudication and then to use those conceptions to analyze which conception better illuminates the nature of international law. Hart thinks that a mature legal system is composed of primary and secondary rules. For Hart, whether a legal system exists is a matter of value-neutral social fact; a legal system is unified by formal criteria of validity that constitute the fundamental rule of the system. Law in no way relies on moral principles. Hart's theory for international law culminates in viewing international law as decidedly law, but an underdeveloped form of it. Dworkin views law as best explained and justified by introducing the idea that integrity, as a moral principle, gives the best explanation of what unifies a legal system and how judges decide cases. Dworkin conceives of legal claims as being inherently interpretive moral claims, and deciding what the law is in a hard case requires reference to irreducibly moral principles. I will attempt to advance my thesis that after applying both of these conceptions to the field of international law, Dworkin's theory better explains how law is both a social and institutional fact and a normative enterprise. His theory better explains how international law is justified in its normative aims through the principle of salience, and further gives a future, evolved vision for international law which would enable it to acquire a more effective place in the international community. Dworkin's addition of moral principles

(and his model of sovereign states recognizing principles that have moral weight) to a set of rules serves to explain and justify international law as law in the fullest sense, and gives it a more powerful and significant place in the global community.

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II. Introduction

The question I will attempt to address throughout this paper is as follows: given its enormous and perhaps fundamental differences from municipal law, is it possible to consider international law as law at all, and, if so, how and to what extent? I will examine Hart's legal positivist theory and Dworkin's natural law theory to determine which of these better illuminates the nature of international law. My thesis is that not only can we definitively conceive of international law as law, but that Dworkin is right that law is best conceived as a social institution whose various formal features are ultimately united by moral principles, and this better illuminates the nature of international law. Dworkin's conception of the nature and purpose of law, with his conception of salient moral principles that thus have moral weight as the justification for international law, better explains and justifies international law as law in the fullest sense, and furthermore gives a future picture for international law that would give the field a more definite, justified, and effective place in the global community.

This project began in a more general form; that is, I wanted to address the issue of international law, and how it related to the international community as a whole. From there, my interest in legal philosophy encouraged me to combine these topics into one question. To answer the ultimate question above, I will first ask the question: what is law, and how do we both identify and conceive of it? It is important first to understand this

question so as to decide whether international law is really law at all. Once I sketch two conceptions of law, I will apply these conceptions to international law.

The first conception of law that I will analyze is H.L.A. Hart's, who was a prominent legal positivist. Legal positivism asserts that there is no necessary or conceptual connection between law and morality. The question of whether something is a law is wholly independent of whether that law is right or good. Hart's famous work, *The Concept of Law*, was first written as a guide to law for undergraduate students but quickly became one of the foremost works in legal philosophy.¹ *The Concept of Law* sparked debate that continues today, and I will address at least some of these debates in this paper. Hart's conception of law is perhaps most famous for his departure from previous positivists, including John Austin's legal positivism, which involved the notion that "a general habit of obedience" to the commands of a legally unlimited sovereign is the essence of a legal system.² Austin's theory is decidedly non-normative; his concept of obligation is purely predictive. His theory of obligation is, for example: "If you do not do x, you will suffer y," and this is a perfect example of a non-normative predictive analysis. Hart argues that a legal system is a system of primary and secondary rules, where primary rules are duty-imposing rules to citizens and secondary rules are about modifying and recognizing (i.e. the rule of recognition) the primary rules. In addition to making statements of obligation purely predictive statements, Austin's reductive view distorts the function of secondary rules, which in many cases confer powers rather than restrain or constrain. He attempts to find a balance between Austin's positivism and a more refined positivism that accounts for the normativity of law. His view still aims to

¹ H.L.A. Hart, *The Concept of Law* (Oxford, Oxford University Press, 2012), 238.

² H.L.A. Hart, *The Concept of Law*, 24.

reject “natural law” views that hold that law is necessarily connected to morality. Hart also has an interesting section at the end of his *The Concept of Law* simply called “International Law”, which I will explore at length later in this paper.

The other author whose conception of law I wish to address is Ronald Dworkin. Dworkin attacks Hart’s conception of law on numerous occasions throughout his book, *Law’s Empire*. Dworkin’s position is that judges should adjudicate in a manner described as “law as integrity”,³ in which judges interpret cases in a way that allows the outcome to help the legal system be the best that it can be. He makes the claim that this form of adjudication is the best (in a politically moral and legal sense) way to decide cases. Dworkin attempts to show that other conceptions of law are merely imperfect forms of his law as integrity, and that proper interpretation of legal issues and cases will (and should) ultimately result in a decision that best justifies black-letter law. This is obviously different from Hart’s theory, because Dworkin’s conception of law relies on moral principles to identify law. His position is that morality is connected to law through moral principles which should be consulted by each judge and lawyer; what the law is in a hard or controversial case requires reference to established moral principles. His ideas on certainty and objectivity in cases is also important to this topic, and I will address them at length later on in this paper.

Finally, I will analyze several statutes that make up the sources of international law, in order that I might both try to understand the sources of law in this field and to apply Hart and Dworkin’s conceptions of law to these sources. The importance of this analysis is that these conceptions of law may be applied to actual statutes of international

³ Ronald Dworkin, *Law’s Empire* (Cambridge, MA, Belknap Press, 1986), 239.

law, if indeed this field counts as law in the fullest sense. I will attempt to show that Dworkin's view of law, and by extension of international law, is vastly superior to Hart's in that it allows us to better conceive of international law as law at all, and also enables us to better understand law as both a social fact and a normative enterprise. This will allow Dworkin to set up a future for international law which explains how it could become law in the fullest sense, which is to say truly coercive and justified to coerce. This explanation of international law is important for such issues as global cooperation, the practice of international lawyers, and indeed for every member of the global community.

II. Analysis of Hart's Legal Positivism

Hart begins by criticizing the “classical” legal positivism of Austin, who asserts that “law is constructed from commands, threats, and obedience. A sovereign is a person or group who enjoys the habitual obedience of most others but does not habitually obey anyone else. Law is a general command of a sovereign backed by threat of force”.⁴

Austin asserts that sovereignty must be absolute, because a “limited” sovereign would have to be limited by law, and since law is command, there would be something above the sovereign, which must be the real, unlimited sovereign issuing the commands. Hart thought that Austin is right that the question of whether something is law is independent of whether it is good, but he rejects important aspects of Austin's positivism. The nature of law can only be understood if both sets of rules are understood as norms and standards evaluating behavior, rather than merely orders backed by threats. Yet Hart stresses that any connection between law and morality is contingent, not necessary. He thus rejects a natural law theory that purports that morality is necessarily tied to law.

In most modern governments, there is no absolute sovereign that rules with legally unlimited authority; for instance, in America we have a body of legislators who are elected by the population, and are expected to serve the population. Hart makes the important distinction that in modern times we do not have an absolute, legally unlimited sovereign; we instead have a sovereign that is limited in that the officials act in two

⁴ Leslie Green, “Introduction” The Concept of Law (Oxford, Oxford University Press, 2012), xx.

capacities - in a public way, as elected representatives, and in a private way, as citizens.⁵ This leads to his main point, which is that every branch of government can be legally limited. There is no Austinian “absolute sovereign” in Hart’s theory. Thus there can be criteria, recognized by judges, which can limit the power of all government officials and bodies. This is important because it allows us to view our government officials in both public and private capacities, and as being significantly limited, which will be helpful later in this paper when we examine international state sovereignty.

Austin’s law as command model distorts even duty-imposing rules; these rules are not simply predictions of what the state will do in the event of disobedience. Rather, the rules are established social norms. We typically apply these norms as standards of behavior, rather than as a mere commands or predictions, and organize our lives by these standards. Austin’s model further distorts the power-conferring (secondary) rules that are undoubtedly present in a legal system (see below). Austin’s simple command model, therefore, captures little of the scope of legal systems. Hart further departs from Austin in that he distinguishes between an “external” and “internal” point of view.⁶ The external point of view is shared by of someone not bound by the rules of law, and sees them as merely exertions of force. The internal point of view is shared by someone who is governed by the rules and accepts the rules as standards of conduct. Hart attempts to fill *these* gaps in the classical positivist theory with his internal (and thus normative) primary and secondary rules. Thus, we come to Hart’s unique claim and conception of law.

⁵ H.L.A. Hart, The Concept of Law, 75.

⁶ H.L.A. Hart, The Concept of Law, 56-57.

A. Law as Primary and Secondary Rules

One of the main issues Hart takes with past positivists is illustrated above; that is, the issue of all laws being commands. Hart writes that laws conferring the power to make contracts, wills, and marriages are important types of law that are completely and utterly obscured by the notion of all laws being orders backed by threats.⁷ We must recognize other legal rules (such as laws involving the creation and powers of the legislature, those who “make” and “create” laws) that are not mere orders backed by threats. Hart considers the idea, advanced by some Austinians, that these “power-conferring laws” are merely fragments of orders backed by threats. This seems to “distort”, writes Hart, “the ways in which these laws are used in everyday life”.⁸ It is difficult to view a marriage license as a fragment of an order backed by a threat of punishment, since there is nothing in the law that requires our marrying one another.

The other issue with this command model, writes Hart, is with the figure of a sovereign. It is impossible to deny the existence and necessity of some standard for creating and identifying law in a legal system, but Hart takes issue with the figure of a sovereign to do this, as has been advanced in the past by Austin. He writes that Austin’s view creates a problem for the succession of sovereigns. He illustrates these reasons as follows.⁹ In some imagined system of government there is an absolute monarch as a sovereign called Rex, and this system is primitive enough that everyone accepts Rex’s commands as law without question. That is, a habit of obedience is formed between each member of the population and Rex as sovereign. Rex continues to rule with absolute

⁷ H.L.A. Hart, The Concept of Law, 75.

⁸ H.L.A. Hart, The Concept of Law, 80.

⁹ H.L.A. Hart, The Concept of Law, 52.

authority for a very long time until he dies. Before he does, he appoints his successor and son, Rex II, to rule after his death.

The issue here, of course, is what gives Rex II the *right* to rule as sovereign? He is not the same person as Rex I, and is certainly by that logic not the same sovereign. Hart writes, “There is nothing to make him sovereign from the start. Only after we know that his orders have been obeyed for some time shall we be able to say that a habit of obedience has been established”.¹⁰ Hart maintains that what Rex II says, before this habit of obedience is established, cannot be law if we understand that law is orders backed by threats of an absolute sovereign as defined by Austin. For there has been nothing to make him sovereign yet. This is one of Hart’s problems with Austin’s positivism; there must be a standard that identifies Rex II as sovereign, if Rex II’s enactments are to be law from the beginning and the legal system or polity is to have continuity.

The answer, to anyone who intelligently thinks for a short while (or who consults Hart’s argument), is obvious: something like a rule of succession or right to succeed must exist. However, as Hart writes, that is clearly a new element that is introduced into this imagined scenario. Without this, Rex II has no authority to make laws, or even to succeed his father Rex I as sovereign. Another aspect to this, and one which is perhaps more familiar to citizens of modern governments, involves statutes which continue to be law even after those who made the laws are dead.¹¹ Hart cites Thomas Hobbes in reference to his theory: “the legislator is he, not by whose authority the laws were first made, but by whose authority they now continue to be laws”.¹²

¹⁰ H.L.A. Hart, The Concept of Law, 53.

¹¹ H.L.A. Hart, The Concept of Law, 62.

¹² H.L.A. Hart, The Concept of Law, 63.

This particular aspect of sovereignty introduces the idea of what Hart calls *tacit commands*, which are different from explicit commands in that they are merely not overruled by the one who “tacitly commands”, rather than directly given as commands. Take, for instance, the scenario in which a CEO learns that his or her second-in-command is explicitly ordering new associates to work unreasonable hours. Rather than stop these orders, though, the CEO allows them to continue, thus, according to this illustration, tacitly ordering them. Thus the laws given by the government today could count as tacit commands (and indeed, are often viewed as such) from the government who first wrote or enforced the laws. However, Hart writes, laws made by previous members of Congress are not laws because they are tacitly commanded by those present members; they are laws because they issued from a valid source of law. But what is this valid source of law in Hart’s theory? He writes that this is the “rule of recognition”.¹³ The sovereign cannot be the foundation of law; the rule of recognition must act as the foundation for identifying what the law is in a given legal system. In the United Kingdom of Great Britain, for example, the rule of recognition can be as follows: “Whatever the Queen in Parliament enacts is law”.¹⁴ The rule of recognition is vital to a legal system, according to Hart, because it is a customary norm that authoritatively identifies the law for judges in that system. I will illuminate this further in a few pages.

Hart writes that all this requires a revised positivist conception of law, one that encompasses and resolves these difficulties and also explains law as a social practice; he calls his conception of law “law as the union of primary and secondary rules”.¹⁵ Primary

¹³ Leslie Green, “Introduction” The Concept of Law, xx.

¹⁴ Leslie Green, “Introduction” The Concept of Law, xxi.

¹⁵ H.L.A. Hart, The Concept of Law, 79.

rules are those under which people “are required to do or to abstain from certain actions, whether they wish to or not”,¹⁶ while under secondary rules, people are given the power to do or say certain things “[that may] introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations”.¹⁷ In other words, the secondary rules can modify or create new primary rules, and can modify their scope or range. A system of primary rules is indistinguishable from social morality; the secondary rules give us the ability to alter or adapt the primary rules according to society’s changes, in social morality or otherwise. Why are the secondary rules necessary? Is it possible that law could merely consist of primary rules alone, in which primary rules also contain power-conferring rules? Hart denies this for three reasons¹⁸.

In a system with only primary rules, there is 1) *uncertainty*, as there is no criterion for establishing what the rules of the system are. 2) The primary rules are *static*, as there is no means of changing the rules. 3) The primary rules alone are *inefficient*, and a system of only primary rules has no authoritative way of determining when rules have been breached, or of punishing breaches. The solution to all of these problems with the mere “primary rules system” involves incorporation of the secondary rules.

The rule of recognition is necessary because there must be some authoritative way to identify laws. It is a decidedly judicial custom, consisting of criteria that identify valid sources of law. A rule is valid if it is identified by the rule of recognition; if it is not, it cannot be a valid rule. The rule of recognition therefore is the authoritative way of

¹⁶ H.L.A. Hart, The Concept of Law, 81.

¹⁷ Ibid.

¹⁸ H.L.A. Hart, The Concept of Law, 91 - 92.

identifying each rule of law in a given legal system. The rule of recognition cannot be valid or invalid, because it is a judicial custom by which judges identify the law. In the United States, the rule of recognition could be: ‘Whatever bill the President signs is law’ or ‘Whatever the Constitution says is law’, thus identifying several sources of law; there does not need to be only one source of law that a rule of recognition recognizes. This rule of recognition is fundamental to a legal system, as it “provides criteria of legal validity by determining which acts create law”.¹⁹ Therefore laws are created, according to Hart, not on the basis of some moral qualification, or by the will of a sovereign, but because there is a customary rule, already in practice, that recognizes them as such. This aligns with his positivism that asserts that law is law in virtue of certain value-neutral social facts. This is separate from the issue of what is *right* and *wrong*.

B. Law and Morality

This leads to the question of Hart’s views on the relationship between law and morality. Many theorists have critiqued his view that law and morality are conceptually separate from one another, and have thus concluded that he means that morality has no place in law nor does law contain any influence from morality. However, that is emphatically not Hart’s claim, as I shall show in the following section. He instead claims that there is a contingent relationship between law and morality, but emphatically not a necessary one. Hart writes that:

The main theme of this book is that so many of the distinctive operations of the law...require for their elucidation reference to one or both of these two types of

¹⁹ Leslie Green, “Introduction” The Concept of Law, xxi.

rule [primary and secondary rules], that their union may be justly regarded as the ‘essence’ of law, though they may not always be found together wherever the word ‘law’ is correctly used.²⁰

He makes this distinction because he is arguing that the primary and secondary rules are not mere commands, nor do they have a necessary connection to moral rules and principles. Thus he argues against a kind of “natural law theory”, which purports that there is in fact a necessary connection between law and morality. Under “natural law”, it also follows that “law” which is immoral is defective as law, and so is not a central case of a legal system.

Hart works to discredit this view by showing that there are distinct differences between morality and law which must point to morality being a separate entity from law. These are the differences of: 1) importance, as there is a large degree of importance attached to moral claims and moral truths, in the serious social pressure one faces to conform to these truths; this importance, which is essential to all moral claims, is “not essential to the status of all legal rules as it is to that of morals”,²¹ and 2) deliberate change, that is morals are immune from deliberate change, in a way that laws are not. This distinction will prove very important when we come to the next section on international law, as many claims of international law seem to rely on some idea of morality as their justification rather than statutes or past legal decisions.

Before moving on to the next section on international law, however, I want to address Hart’s developed stance on the connection between law and morality. As I mentioned above, many of his critics have claimed that he purports that there is no

²⁰ H.L.A. Hart, The Concept of Law, 155.

²¹ H.L.A. Hart, The Concept of Law, 175.

connection whatsoever between law and morality. He does, however, claim that there is a contingent relationship between law and morality. Hart writes:

It cannot seriously be disputed that the development of law...has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted.²²

This statement establishes his view that there is undoubtedly a contingent connection between law and morality, but morality is not a necessary, inherent part of law. A union of primary and secondary rules is law regardless of its moral qualities; Nazi law is law, that is, if it meets the formal criteria of law (that is, if there is a valid rule of recognition which judges use to decide cases, and the system is efficacious). There is no need to question the legal system as a real legal system; all legal systems meeting the formal criteria of a legal system are law and are social fact. Thus, the iniquity of a legal system does not make it a marginal or defective instance of law; rather, it is a fully-formed and functioning legal system if it meets the formal criteria of law.

Hart writes, therefore, that we must accept as laws those which occur in a “iniquitous”, but nonetheless legal, system, even if we feel that the system is a bad one and condemn it on moral grounds. “Study of its [that is, law as conceived of primary and secondary rules as a specific method for social control] use involves study of its abuse”,²³ writes Hart, and concludes finally:

²² H.L.A. Hart, The Concept of Law, 185.

²³ H.L.A. Hart, The Concept of Law, 210.

A concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them.²⁴

Remember that for Hart, classical positivism misses the normative aspect of law in a way that leaves a gap in the classical positivists' theory. These positivists reduce law to orders backed by threats, but this distorts the legal system in a way that misses many of these normative aspects. The primary and secondary rules are social fact and are also normative. This is a problem for his theory though, because in what sense is it normative divorced from all reference to morality? I will address this further later.

C. Is International Law Law?

Following this discussion on the connection between law and morality, Hart turns his attention to international law. Throughout the book, Hart alludes to international law as being criticized for “lack[ing] a legislature, states cannot be brought before international courts without their prior consent, and there is no centrally organized system of sanctions”.²⁵ Hart addresses these objections in his chapter, “International Law”. Hart first makes the claim that:

The absence of these institutions [legislature, sanctions, courts with compulsory jurisdiction, etc.] means that the rules for states [sovereign states such as the United States or France] resemble that simple form of social structure, consisting

²⁴ H.L.A. Hart, The Concept of Law, 211.

²⁵ H.L.A. Hart, The Concept of Law, 4.

only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system.²⁶

The absence of these institutions, in other words, causes many legal theorists to question whether international law is really law in the truest sense, or if it is merely a farcical organization established to try to keep some global peace and order but that has no legal basis. The question, writes Hart, is not one of mere language, but is one where “what is demanded - no doubt obscurely - is that the principle [of what truly constitutes law] be made explicit and its credentials inspected”.²⁷

Hart sets out to debate two main objections, then, against international law counting as law: 1) that international law lacks obligations and sanctions, which concerns the difference in rules between international and municipal law, and 2) that states cannot be both independent and dependent sovereigns, which concerns the difference between the subjects of international and municipal law. The first will raise a question about the legal sanctions in both international and municipal law, how these sanctions differ, and whether these differences are too great for international law to count as law; the second will address the differences between individuals and sovereign states in municipal and international law, whether states can be both independent and dependent, and question the legal status of international law on that basis.

1. On the Rules of International Law - True, Binding Obligations?

Many theorists critique international law by saying that it cannot be truly binding; that is, that there are no valid rules that create an obligation. What if there are no

²⁶ H.L.A. Hart, The Concept of Law, 214.

²⁷ H.L.A. Hart, The Concept of Law, 215.

obligatory rules in international law? If there are, what if these obligatory rules are not enforceable? Obligatory means that the rules create real obligations; enforceability is the question: can the rules enforce these obligations? These two issues - whether international law is both enforceable and obligatory - is important because the real question is: can international law create and enforce genuine obligations? Is it even possible for there to be obligatory rules that exist within the international legal system? Municipal law is distinctive in that it is coercive and most of its law is enforced. What happens if rules are not enforced in international law? Actually being in force is often cited as a difference between law and morality. Are these rules thus reduced to simply unenforceable moral standards? That is Hart's question here: "can such rules as these [in international law] be meaningfully and truthfully said ever to give rise to obligations?".²⁸

If they cannot (and international law's critics, by showing the discipline's lack of clearly organized sanctions, seem to be implying), then it is clear that international law cannot be classified as law, since obligation is central to law. "All speculation about the nature of law begins from the assumption that its existence at least makes certain conduct obligatory",²⁹ writes Hart. He sets aside an obvious objection to this view that international law does not have real, enforceable sanctions, which is Article 16 of the Covenant of the League of Nations³⁰ and Chapter VII of the United Nations Charter;³¹ he declares that these provisions do not count in the same way as municipal sanctions, since

²⁸H.L.A. Hart, The Concept of Law, 217.

²⁹ *Ibid.*

³⁰ The article in the Covenant of the League of Nations which declares that if any member commits an act of war against one member of the league, it shall be regarded as having committed an act of war against all members of the league, and such sanctions such as trade rights will be revoked from all members. See Appendix for the full text of the article.

³¹ The chapter of the United Nations Charter which gives provisions for the UN Security Council to determine if and when international peace is being disrupted and the measures to be taken in that event. See Appendix for the full text of the chapter.

there is a veto option that too often impairs these provisions. Hart maintains that international law is binding to a certain extent (states accept these rules as binding rules), but there are very limited sanctions for enforcing them. If we accept that international law is not binding, we must accept (and he asserts that these objectors accept) that obligation is dependent on the theory that law is composed of orders backed by threats.³² However, as we have seen, Hart makes a distinction between obligations that are orders backed by threats (Austinian commands) and obligations that are normative in nature and thus guide behavior (you are obligated to do x; if you do not do x, a sanction (y) will follow). Hart's conception of primary and secondary rules eliminates the idea that law is only orders backed by threats, and asserts that instead it is a system of normative standards and rules. If the rules in international law resemble these primary and secondary rules (though without a rule of recognition), and these rules are accepted as being generally binding, then the lack of organized sanctions in international law does not seem such an obstacle to understanding binding rules in international law.

If, though, the opponent of international law's obligatory nature persists in his or her argument by stating that 'sanctions are necessary in municipal law, why not so for international law?', then Hart continues his argument. Municipal law is concerned with the actions between individuals, who, Hart writes, by their nature must be backed by sanctions. Conflict between states, however, is different than conflict between individuals. For one thing, violence between states is always public in nature, "on the world stage", as the saying goes, and though there is no international police force, the violence will invariably not remain between two individuals alone. Individuals, on the

³² H.L.A. Hart, The Concept of Law, 217.

other hand, interact far more often and more privately than states, and therefore the rules for individuals in municipal law must be more direct and individualized than international rules.

If there were no centrally organized sanctions in municipal systems, people would undoubtedly break the law far more often than presently,³³ but years of peace go by between international wars and breaches of international peace. Hart writes that these breaches of peace are therefore different from individual violence but must nonetheless be regulated by rules, albeit different rules than those in municipal law.³⁴ Though these rules are different, there is still significant pressure to conform to the rules, and when the rules are breached, no one (in the breaching states or otherwise) insinuates that the rules are not binding; rather, states act very much as if they are binding, and steps are taken to remedy the breach. This “significant pressure” is undoubtedly different from complete sanctions in that international law does not have the power to forcibly bring states before the international courts, but there is pressure from the international community to abide by the rules. By this standard, the rules are also effective, because states are aware of their breaking the rules and the other states in the international community hold them liable to the breach. So it would seem that, according to this argument, rules of international law are, at least in a limited fashion, both effective and binding.

³³ H.L.A. Hart, The Concept of Law, 219.

³⁴ H.L.A. Hart, The Concept of Law, 220.

2. On the Subjects of International Law - State Sovereignty?

“Great Britain, Belgium, Greece, Soviet Russia have rights and obligations under international law and so are among its subjects”;³⁵ how exactly can we say that this is a true statement? Under the notion that states are sovereign, legally independent, and separate legal systems, how can another legal system have any authority over them? Hart regards this as one of the key objections against the binding force of international law. This is also different than the last objection, because while sanctions could perhaps eventually exist in international law, if sovereignty is inconsistent with being subject to international law, the entire enterprise falls apart at its very conception.

First, how do we understand sovereignty? As explained earlier, in historical jurisprudence a sovereign has been thought of as “a person above the law whose word is law for his [or her] inferiors or subjects”.³⁶ Remember earlier in this paper how Hart mounted a (I think successful) challenge against this notion of absolute sovereignty; in order to understand how international law can be law, it is necessary to leave this notion behind. Instead, we should understand a “state” this way:

First, that a population inhabiting a territory lives under that form of ordered government provided by a legal system with its characteristic structure of legislature, courts, and primary rules; and, secondly, that the government enjoys a vaguely defined degree of independence.³⁷

Hart writes that states such as Great Britain or Brazil have a large, though not total, degree of independence from outside legal or political control, and would qualify as

³⁵ Ibid.

³⁶ H.L.A. Hart, The Concept of Law, 221.

³⁷ Ibid.

“sovereign states” under the discipline of international law. While they have independence, they also (if they have ratified the treaty that binds them as such) are beholden in some ways to international law. Hart draws an interesting comparison between international states and states in our United States. States such as Arizona, Louisiana, and New York, as random examples, possess a large degree of independence even though they are largely subject to the greater nation, the federal authority of the United States, when it comes to matters that concern the entire nation. They are subject as such because they have agreed to be so, through accepting to be part of the United States as a whole. Thus Hart makes the argument that these international states have also consented to the authority of international law.

In much the same way, states such as the United States or Great Britain have a large degree of independence except when it comes to certain matters which concern the entire world. In fact, in international law there is the concept of charters and covenants, in which independent, sovereign states actually give certain bodies such as the United Nations authority, and thereby make themselves dependent upon, and subject to, the rules of international law. Thus these doubts do not invalidate international law on the basis of state independence and sovereignty.

In this section I have argued against the claims that international law fails to create real obligations, and that states are sovereign in a way that makes such law impossible. The rules of international law are sufficiently binding and effective in creating limited obligations, and so that objection fails. Furthermore, individuals are sufficiently different from states so that individuals can be bound by different kinds of

rules, and states can act both in an independent and dependent capacity through their consent, depending on how the legal matter in question affects the world.

3. International Law: Form and Content

Many critics have claimed that international law is just a series of moral claims and principles, and not a system of laws. This argument holds some weight, writes Hart, because international law does not rely on one unifying rule of recognition (like most legal systems), but relies on customary law such as precedent, treaties, and charters, along with moral claims against cruelty and violence.³⁸ But statements under international law are not mere moral statements; when nations disagree or agree, they often make no mention of any qualification of *good* or *bad*; they speak of how their actions comply or do not comply with international law. There are other, separate instances in which states speak of each other as doing something good or bad, but Hart writes that these instances are different from treaties and statutes of international law.

Laws are changed sometimes quite easily and without reference to whether or not it is a good thing to do, but moral statements and principles cannot be repealed or amended by an act of an authority; they evolve over time with a changing community. The point here is that law must differ from morality, because there is no legal difficulty when moral principles or obligations are not enforced, but as we have seen above, there is a problem when a legal system does not govern its subjects' behavior, and thus an effective legal system must contain laws that are binding or obligatory. Morality is not merely an institutional social fact, while according to Hart, law is clearly social fact.

³⁸ H.L.A. Hart, The Concept of Law, 228.

As seen above, there are obvious similarities and differences in form and content between international and municipal law. What other distinctions does Hart draw between these two forms of law? One important difference concerns the notion of the primary norm, or what Hart has identified as his “rule of recognition”. While most modern legal systems possess some ultimate rule of recognition, international law contains a set of customary rules that all attempt to give the sources of international law. International law is, therefore, less a legal system (law is systemic if united by a rule of recognition) and more of a set of rules. So while this is a difference, Hart maintains that it is not an overly damaging one; he writes that there does not necessarily *need* to be a primary norm or one ultimate rule in international law. Remember that this does not contradict his earlier claims; Hart has continually stipulated that his conception of law attempts to capture the essence of law. His sense of the “essence” of law is that he is referring to the features of most advanced, mature legal systems which are the conceptually central instances of law; if international law lacks one unifying rule of recognition, this makes it less of a mature legal system than most mature municipal systems, but a legal system nonetheless. Hart concludes, “It is, therefore, a mistake to suppose that a basic rule or rule of recognition is a generally necessary condition of the existence of rules of obligation or ‘binding’ rules. This is not a necessity, but a luxury...”.³⁹ This luxury, he asserts, is present in advanced systems of law in which the members of that society accept that there is a basic criterion for establishing whether a rule is law or not.

³⁹ H.L.A. Hart, The Concept of Law, 235.

I conclude that Hart's view is that international law is a less developed legal system than municipal law, because it lacks an ultimate rule of recognition and other components such as an international police force. Municipal law has enforceable sanctions and courts with compulsory jurisdiction, and has an ultimate rule of recognition. However, international law still possesses effective rules that give sovereign states standards by which to behave, and this is an essential tenet in a legal system according to Hart's theory. It is, therefore, decidedly a legal system, simply because the rules of the system are accepted as binding on those for whom they purport to have an obligation, and these rules give a normative standard for actions. Hart ends his chapter with a few statements that I shall highlight here, as they concisely summarize his position on international law:

Perhaps international law is at present in a stage of transition towards acceptance of this [a primary norm or ultimate rule of recognition] and other forms which would bring it nearer in structure to a municipal system. Till this stage is reached the analogies are surely those of function and content, not form. Those of function emerge most clearly when we reflect on the ways in which international law differs from morality...The analogies of content consist in the range of principles, concepts, and methods which are common to both municipal and international law...no other social rules are so close to municipal law as those of international law.⁴⁰

Though the quotation is indeed lengthy, I found it extraordinarily helpful for analyzing fully the similarity between international and municipal law. Hart clearly

⁴⁰ H.L.A. Hart, The Concept of Law, 236-7.

thinks the similarities in content and function between the two types of law outweigh the differences in form. It cannot be argued that international law has a true police force or system of organized sanctions, yet the rules that exist under the law are nevertheless recognized as binding and, while they could be more effective through more formal aspects of municipal systems (international police force and courts), are nevertheless accepted by all major members of the international community and are normative in their nature.

What remains to be analyzed, however, are whether Hart's positivist conception of law is the one which better explains how international law functions and how international law can have an impactful place in the global community. At this point, his conception has explained some idea of the essence of law; that is, a system of primary and secondary rules that relies on a fundamental rule of recognition that underlies our system of law. A mature system of law is characterized by a rule of recognition that identifies law; this rule of recognition sets a legal system apart from a mere set of legal rules.

Yet Hart's position, that law is irreducibly normative but only contingently linked to morality, is problematic. There is some problem with the idea of genuine obligation (genuine practical reasons to adhere) completely divorced from moral considerations. Is legal obligation *sui generis* for Hart? Or are there other criteria for establishing international laws beyond rules? Do international judges and lawyers argue, recognize, and interpret cases based on moral *principles*, or do they adhere to Hart's system of obligatory *rules*? Could adherence to moral principles explain the systemic nature of law better than a rule of recognition, and further, could this adherence to moral principles

better explain the nature of international law? In the next section I will address Ronald Dworkin's claims against this positivist approach to law and analyze his conception of law as integrity.

II. Analysis of Dworkin's Interpretivism

More than two decades after Hart's *The Concept of Law* was first published, Ronald Dworkin published his *Law's Empire*, his most systematic work of jurisprudence. Here Dworkin discusses his unique and fascinating conception of law, which has been called "law as integrity", and "law as rule and principle". Dworkin's theory is decidedly a natural law theory, because it argues that legal principles are moral principles of a sort. He sees law as an irreducibly moral enterprise; he claims that all interpretation is necessarily connected to and dependent upon morality and moral principles. In the following pages I will discuss and analyze Dworkin's conception of law, describe how this conception is different from Hart's positivism, and then relate his conception to international law.

The first sentence of *Law's Empire* reads, "It matters how judges decide cases".⁴¹ Also on the first page, he sets out one of his key beliefs: "There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of social injustice".⁴² He argues throughout about the "grounds" of law; that is, on what grounds do we determine what law is, and how to apply it? Dworkin sets out to attack the "plain-fact" view of law, one version of which argues that the law is identified by reference to solely value-neutral facts. Dworkin also aims to denounce the pragmatist theory that in hard cases there is no law at all, but rather the law is whatever judges say it is and that

⁴¹ Ronald Dworkin, *Law's Empire*, 1.

⁴² *Ibid.*

they merely pretend that there is law in hard cases. The pragmatist differs from the “plain-fact” proponent in that some “plain-fact” proponents (like strict conventionalists: more on that later) believe that there is law in controversial cases, and its identification and content is established by objective social fact; the pragmatist is not legally constrained by black-letter law and chooses the outcome that greater benefits the community as a whole. He rejects these theories and others because he believes these conceptions are both false to the facts of legal procedure and are morally unattractive.

Dworkin begins by setting out a real world case⁴³ (*Riggs v. Palmer*) and then analyzing it. A young man called Elmer murdered his grandfather in 1882, knowing that once his grandfather died he stood to inherit a large part of the dead man’s estate. Moreover, he suspected that his grandfather, who had recently remarried, would change his will to include his wife and thereby leave Elmer nothing. Unfortunately for him, his crime was discovered, and Elmer was convicted and sentenced to years in prison. The question is: was he legally entitled to inherit the estate of the man whom he had murdered? Or should the grandfather’s daughters, whom Dworkin names Goneril and Regan and who were entitled to inherit should Elmer die before his grandfather, inherit Elmer’s share of the estate instead? Goneril and Regan sued the administrator of the will, claiming that Elmer should not inherit the money, because they claimed that he had no legal right to it. The statute of wills, under which the creation and administration of wills is subject, specified nothing about this instance, and therefore Elmer’s lawyer argued that he should inherit. If the court went against this position, he argued, not only would it be

⁴³ Ronald Dworkin, Law’s Empire, 15-20.

changing the will, but it would be acting from moral convictions rather than applying law.

None of the judges denied that, if the statute was read acontextually, the statute of wills plainly gave the inheritance to Elmer. They disagreed, however, on what the law actually was in the given instance and how the pertinent statute should be read. Here Dworkin draws a distinction between two senses of what a statute is: 1) a physical entity, as in the paper text of the document, or 2) the law created by enacting the document. The judges disagreed about the second; that is, they disagreed about the law as pertaining to the legal rights of Elmer, Goneril, and Regan.

The dissenting opinion, written by Judge Gray, argued for the acontextual analysis of the statute. He argued that the statute should be read with no given regard to the context or the original intention of the statute of wills. This entailed that the statute should be read without any exception given for murderers of the deceased; he argued that as a matter of *law*, Elmer should receive the inheritance. In an acontextual analysis, the black letter of the law should be upheld and there should be no circumstantial basis for denying this. Thus what the statute actually said (and nothing more) should be followed in this case. The majority opinion, written by Judge Earl, drew upon the statute authors' intentions instead. "It would be absurd, he thought, to suppose that the New York legislators who originally enacted the statute of wills intended murderers to inherit, and for that reason the real statute they enacted did not have that consequence".⁴⁴

Importantly, this issue is not about what the lawmakers would have said if asked about this particular instance, but what a reasonable lawmaker would have replied if asked. It

⁴⁴ Ronald Dworkin, Law's Empire, 19.

is too complicated and subjective to try and determine each past lawmaker's would-be intention. Notice the difference between observing a strict, literal interpretation of a statute and observing the legislators' reasonable intention over the letter of the law, when it has "consequence[s] the legislators would have rejected if they had contemplated it".⁴⁵ The court's reasoning for this opinion involved what it called "general principles of law: ...judges should construct a statute so as to make it conform as closely as possible to principles of justice assumed elsewhere in the law".⁴⁶ The court thus decided for the plaintiffs, Goneril and Regan.

Following the Elmer case, I find it important to relate one further case⁴⁷ that Dworkin analyzes, as it pertains to several of his later arguments. He refers to this as the *McLoughlin* case of 1973, in which a woman's husband and four children were injured in a car accident in England. *McLoughlin* differs from the previous case, *Riggs*, in that it is a common law and not a statutory case; the court decides this case by applying precedents, not canonical rules (like the statute of wills). Upon her arrival to the hospital following the accident, and learning that her daughter was dead and her other family members were in critical condition, Mrs. McLoughlin went into nervous shock. After this, Mrs. McLoughlin sued the other driver, as well as other people who were involved in other ways, to compensate for her emotional suffering. Her lawyer referenced earlier cases in which close friends or relatives had recovered (received compensation) upon seeing serious injury to their loved ones. However, these people had all either been at the

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ronald Dworkin, *Law's Empire*, 23-29.

scene of the accident or had arrived minutes later. Mrs. McLoughlin's lawyer nevertheless relied on these past cases as precedents.⁴⁸

Judges can read precedents in two ways; they can either choose to follow each precedent exactly without regards to circumstance, or they can follow past decisions to the extent that the decisions are sufficiently wrong in the particular instance to warrant a different decision. The trial judge in this case thought that Mrs. McLoughlin's seeing her family later on was an important difference from past precedents because it meant that her emotional injuries were not "foreseeable" as were the others.⁴⁹ Therefore, those particular past precedents did not truly apply to this decision. The judge instead relied on the circumstances and the doctrine of foreseeability. Foreseeability is the idea that "people who act carelessly are liable only for reasonably foreseeable injuries to others, injuries a reasonable person would anticipate if he [or she] reflected on the matter".⁵⁰ The judge therefore decided not to award compensation to Mrs. McLoughlin. When she appealed the case, the British Court of Appeals did not overturn the judgment, but disagreed and said that it was foreseeable that a mother would rush to the hospital and be emotionally damaged by seeing some of her family dead and some injured. They did not award damages, though, because they held that it would set a precedent which would lead economically to an inadvisable end; too many people would receive damages for things in which they were not directly involved.⁵¹

When she appealed the decision once more to the House of Lords, though, their lordships reversed the decision and ordered a new trial. While their decision was

⁴⁸ Ronald Dworkin, Law's Empire, 24.

⁴⁹ Ronald Dworkin, Law's Empire, 26.

⁵⁰ Ibid.

⁵¹ Ronald Dworkin, Law's Empire, 27.

unanimous, they ordered a new trial on different grounds. Some said that it was not a sufficient reason to withhold damages simply because of the increased liability, as the Court of Appeals had held. Two of them, however, had a different thought. They held that it was wrong for the court to withhold damages for the kinds of reasons⁵² the lower courts had given; they held that “the precedents should be regarded as distinguishable...only if the moral *principles* assumed in the earlier cases...did not apply to the plaintiff in the same case”.⁵³ Once it is allowed that it is foreseeable that a mother would be emotionally damaged by seeing her family in such a state, then it naturally follows that “no difference in moral principle can be found between the two cases”.⁵⁴ It would be wrong, they maintained, however much the outcome may cost the community as a whole, to decide a case which conflicted with enforcing individual rights and duties as judges of the law.

This distinction here sets up Dworkin’s belief that principles articulate rights, while policies articulate collective goals. Dworkin sets up a distinction between a policy and a principle, which I shall summarize briefly in this short paragraph. A policy is “e.g. a measure to increase GDP or decrease carbon emissions”. A principle, in contrast, is a standard that should be observed because there is a moral requirement that demands it, e.g. “each citizen has a moral right to live without fear of unwarranted search or seizure”. A case should not be decided by policy (more on that later), but by reference to moral principles. Policy should be enacted by legislatures, not courts. This distinction is crucial to Dworkin’s concept of law as integrity, which I will sketch shortly.

⁵² Ronald Dworkin, Law’s Empire, 28.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

I explain these cases here in this section, before moving on to Dworkin's conception of law, for the same reasons that Dworkin does in the beginning of his book. He wanted to show that there are many cases in which judges certainly decide in accordance with principle, not policy. Dworkin argues that this better describes actual judicial practice than either any plain-fact view of law or any view that says that policy guides judges. Furthermore, he says that law as integrity is better morally. Both of these points are at the core of law as integrity, which I will discuss below.

A. Law as Integrity

As I mentioned earlier, Dworkin sets out to prove that his conception of law is a normative one; it is morally and politically the best one, and in order to do this he addresses two other conceptions of law. In this section I will sketch his arguments against conventionalism, and then proceed to his argument for law as integrity. I will leave out Hart's replies to Dworkin's criticisms until later, as these will prove interesting in my analysis of international law.

In order to analyze these rival conceptions of law, Dworkin begins his analysis of "interpretive concepts".⁵⁵ He writes that all interpretation, whether literary, artistic, or scientific, is normative and "strives to make an object the best it can be, as an instance of some assumed enterprise, and that interpretation take different forms in different contexts only because different enterprises engage different standards of value or success".⁵⁶ Dworkin addresses the objection that this view of interpretation is absurd, particularly in reference to artistic interpretation, because artistic interpretation is like conversational

⁵⁵ Ronald Dworkin, Law's Empire, 45.

⁵⁶ Ronald Dworkin, Law's Empire, 53.

interpretation of an author. What matters, if that view of interpretation is correct, is not that the judgment or item in question is the best that it can be (which would reflect from the interpreter), but rather the actual, historical intention of the authors.⁵⁷

Dworkin argues against this by showing that even when one tries to discover an artist's actual intention, inquiry into intention shades into normative construction. Say, as Dworkin does,⁵⁸ in the treatment of a film, the director notices that there is a particular portion which could have a reference to a known legend at the time of the film. The original filmmaker is dead, but the reference made explicit in the director's interpretation would certainly make the film better, and it is not absurd that the reference would have been intended by the original director anyway if he or she had considered it. Furthermore, this reference may actually help the original director discover part of the meaning of his work, which is more than simply trying to find his intentions. This small example shows how Dworkin argues against even artistic interpretation as being only about original intention, and not about the work being the best that it can be. When determining how to make a work the best it can be, the interpreter must take into account intention, but also other principles which improve it aesthetically.

When we interpret something, writes Dworkin, we have three stages of interpretation that must be met along with different levels of consensus within a given community for interpretation⁵⁹ to succeed. There must first be a "preinterpretive" stage, in which the rules and principles providing the content of the practice are identified.⁶⁰ This is like identifying the text of say, *The Merchant of Venice*, as distinguished from the

⁵⁷ Ronald Dworkin, *Law's Empire*, 34.

⁵⁸ Ronald Dworkin, *Law's Empire*, 36.

⁵⁹ Ronald Dworkin, *Law's Empire*, 65.

⁶⁰ *Ibid.*

texts of other plays. Dworkin maintains here that some amount of interpretation is necessary at this stage as well; the community must agree to recognize *The Merchant of Venice* as what it is, and so some consensus must be reached. Next, there is an interpretive stage “at which the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage”.⁶¹ This stage will consist of reasoning for why the practice is worth pursuing, if it turns out to be so, and it must fit the practice well enough that the interpreter can justify his interpretation without inventing a new practice altogether. Finally, there is a postinterpretive or reforming stage,⁶² in which the interpreter reforms his or her ideas as to what the practice requires so as to serve the justification he or she gave in the interpretive stage.

Dworkin argues that this structure of interpretation is integral to the judicial process, and that “law is an interpretive concept”.⁶³ Furthermore, the purpose of law, according to Dworkin, is to justify coercion, because law claims to create obligations, not mere threats. Hart claims that law does not exist to justify coercion, but Dworkin (and other natural law theorists) take issue with this and claim that Hart’s theory does not comprehend the full consequences of insisting that obligation is a normative concept. Without justification, obligations simply become threats. Thus each concept of law he evaluates, including law as integrity, must have an answer for why coercion is justified, or else the law is simply a method of threatening people to do something, rather than creating real, effective, and most importantly, justified obligations.

⁶¹ Ronald Dworkin, *Law’s Empire*, 66.

⁶² *Ibid.*

⁶³ Ronald Dworkin, *Law’s Empire*, 87.

Following this explanation of the interpretive stages, he gives his argument against conventionalism. Dworkin argues that a conception of legal interpretation must answer three questions. They are as follows: “First, is the supposed link between law and coercion justified at all? Is there any point to requiring public force to be used only in ways conforming to rights and responsibilities that “flow from” past political decisions? Second, if there is such a point, what is it? Third, what reading of “flow from” - what notion of consistency with past decisions - best serves it?”⁶⁴ Conventionalism, Dworkin writes, gives a definitive answer to the first question, by accepting law and legal rights.⁶⁵ It responds to the second question by saying that “the point of law’s constraint, our reason for requiring that force be used only in ways consistent with past political decisions, is exhausted by the predictability and procedural fairness this constraint supplies...”⁶⁶ Finally, conventionalism addresses the third question by stating that these rights and responsibilities can flow from past decisions only when these rights are made explicit through them (as in, through the black letter of the law) or through some accepted legal practice as a whole.

Conventionalism is the theory that “the law is the law. It is not what judges think it is, but what it really is. Their job is to apply it, not to change it to fit their own ethics or politics⁶⁷”. Conventionalism follows the “plain-fact” view of law introduced earlier, and adheres to value-neutral fact in deciding cases. Since a proper conception of law, as Dworkin writes, is about the justification for the use of force,⁶⁸ he argues that

⁶⁴ Ronald Dworkin, Law’s Empire, 94.

⁶⁵ Ronald Dworkin, Law’s Empire, 95.

⁶⁶ *Ibid.*

⁶⁷ Ronald Dworkin, Law’s Empire, 114.

⁶⁸ Ronald Dworkin, Law’s Empire, 109.

conventionalism as a conception says that collective force should not be used on an individual or group without some past political decision that explicitly (with no room for disagreement among competent lawyers and judges) gives license for that force.

Conventionalism asserts that every legal system has conventions that describe what the law really is, and how judges are to make decisions based on that fact. Conventions should be easily identifiable practices that give clear guidance.

An important aspect of conventionalism is that it denies that the law is complete and there is an answer for every legal issue. In fact, Dworkin describes it as “discretionary in the strong sense”,⁶⁹ since judges are required to look beyond the law to justify the decision they make in a controversial case when convention runs out.

Discretion in the strong sense means that judges are not bound by any authority or any one decision, because the law has run out; they are allowed to choose any decision that they choose at the time. Dworkin, in contrast, insists that *legal* principles are moral standards that articulate rights that are not merely conventional. Yet, to be *legal* principles, these principles must fit the body of black-letter law well. Dworkin argues against this type of strong discretion, and argues that his judge (as we will see later) uses weak discretion to interpret (rather than invent) the law when he or she makes a controversial decision about what principle best fits the existing body of law (legal decisions and principles).

Dworkin says that conventionalism, like his law of integrity, aims to show what judges do in the best light possible and best explain the legal practice. In order to do so, conventionalism makes two postinterpretive claims.⁷⁰ The first is that judges must

⁶⁹ Ronald Dworkin, *Law's Empire*, 115.

⁷⁰ Ronald Dworkin, *Law's Empire*, 116.

respect the established legal conventions in their communities except on very rare occasions. The second is that there is no law (or right flowing from past political decisions)⁷¹ besides the law drawn from past political decisions and conventions of the legal community, and so in those occasions mentioned above there really is no law either way. In *McLoughlin*, for example, no past judge had granted emotional damages to a loved one who came to the scene hours later, thus there was no law in the situation. The judge had to rely on those extralegal standards we mentioned a moment ago to decide the case, and after doing so the case would become precedent and become a convention.

An important note to understand about Dworkin's conceptions of law: these conceptions do not claim that all lawyers and judges adhere to any given conception, nor do they claim that every decision made adheres to them. Instead, any of these conceptions (e.g. conventionalism) counts judgments that violate conventionalism as mistakes, but asserts that enough decisions are made and enough behavior from judges exhibits to make it the true, prevailing conception of law. Therefore Dworkin's point is to show that enough of the legal practice does not conform to that particular legal conception as to undermine its credibility.

Conventionalism starts, then, on a positive note: almost everyone understands the concept of precedent and past judicial decision as being a driving force of established law and future legal decisions. However, conventionalism orders judges to look at past, established conventions for their sources of law, and oftentimes judges disagree as to what the law really requires in that instance.⁷² In the *Elmer* case, for example, the judges did not disagree about what statutes applied to the case, but about what the statute really

⁷¹ Ibid.

⁷² Ronald Dworkin, *Law's Empire*, 122.

said, because they held different theories of statutory interpretation. The majority opinion of the court decided that it was not right for Elmer to inherit according to “established principles of justice”. It is here, Dworkin asserts, that judges must *interpret* past law using moral principles and not just interpret what the law is from conventions, and there conventionalism falls apart. This “soft” form of conventionalism is different from strict conventionalism, since strict conventionalism asserts that there is no authority for legal decisions beyond uncontroversial conventional understandings of past legal decisions. There is no room in strict conventionalism for interpretation at all. The problem arises when judges cannot decide what past legal decisions dictate in a particular case. Thus, judges must interpret the law in some way, which leads away from the “plain-fact” conventional interpretation, reverts to normative considerations (e.g. reasonable intent), and soon this interpretation becomes “soft conventionalism”. Dworkin finally concludes that “soft conventionalism”⁷³ is really just an underdeveloped form of law as integrity, because it interprets by other standards than conventions - *moral* standards.

This form of soft conventionalism, or as I shall hereafter refer to it, conventionalism is different from law as integrity in certain distinct ways. Conventionalism “rejects consistency in principle [i.e. moral principle] as a source of legal rights”.⁷⁴ Law as integrity asserts that there must be consistency in principle, not just in strategy, in adjudication,⁷⁵ and claims that there must be a stronger consistency in principle than consistency in legal conventions (statutes and existing legal practices, for

⁷³ Ronald Dworkin, Law’s Empire, 127.

⁷⁴ Ronald Dworkin, Law’s Empire, 134.

⁷⁵ Ronald Dworkin, Law’s Empire, 135.

example). Consistency in strategy is consistency to achieve some goal other than the enforcement of existing legal rights or duties, such as maintaining predictable conventions. Conventionalism does not take principle into account when deciding cases; instead, it strives to decide cases based on consistency in strategy. Dworkin makes the claim here, in fact, that anyone who accepts that stronger consistency in principle is the right thing to do has already rejected conventionalism. Conventionalism cannot accept consistency in principle over consistency in strategy.

Law as integrity, on the other hand, claims that people are entitled to consistency in principle of past political and legal decisions. Law as integrity “insists that the law - the rights and duties that flow from past collective decisions and for that reason license...coercion - contains not only the narrow explicit content of these decisions but also...the scheme of principles necessary to justify them”.⁷⁶ Law as integrity, furthermore, claims that the principles of justice, fairness, and procedural due process have a definite place in judges’ decisions, and that a consistency in these principles is necessary to discern what the law *is*. It strives to make the law the best it can be by asserting that “present practice [the law] can be organized by and justified in principles sufficiently attractive to provide an honorable future”.⁷⁷ This concept of an honorable future will come into play in our discussion of Dworkin’s view of international law. Law as integrity says that in both legislation and adjudication, those responsible have a *duty* to create laws, enforce laws, and decide what the law is in a coherent way, as understood by law as integrity. The judge’s task in a case is to determine the existing legal rights and

⁷⁶ Ronald Dworkin, Law’s Empire, 227.

⁷⁷ Ronald Dworkin, Law’s Empire, 227-8.

duties of the parties before him or her in a hard case by reference to the most attractive moral principle that fits the relevant precedents or statutes.

In *McLoughlin*, for example, Dworkin uses his “perfect judge” Hercules, who operates under law as integrity, to apply six moral and legal principles to the case. Hercules considers these possible principles that would explain and justify the court’s decision, ultimately ruling three out on the fact that they do not interpret the legal decision to be the best it can be because they employ an arbitrary principle (such as “People have a right to compensation for emotional injury suffered at the scene of an accident against anyone whose carelessness caused the accident but have no right to compensation for emotional injury later”)⁷⁸ or are pragmatic, i.e. the fate of the parties in the case is at the mercy of a court’s policy preferences. Hercules evaluates the next three, and asserts that “law as integrity...requires a judge to test his [or her] interpretation of any part of the great network of political structures and decisions of his [or her] community by asking whether it could form part of a coherent theory justifying the network as a whole”.⁷⁹ While Dworkin concedes that no one judge can evaluate the entire legal practice at once, the judge can in a limited fashion evaluate how his or her decision fits in with the larger scope of the legal practice, and evaluate whether it helps make the practice justified in the best way it can be. Dworkin writes that Hercules has infinite time and wisdom, and can therefore do this to the fullest capacity. Hercules therefore chooses the legal principle which best fits in with past legal decisions and the legal practice as a whole, and helps to make the legal practice the best it can be.

⁷⁸ Ronald Dworkin, *Law’s Empire*, 240.

⁷⁹ Ronald Dworkin, *Law’s Empire*, 245.

Choosing this principle means choosing to abide by integrity (consistency in principle) over the other three dominant principles (see below).

Dworkin writes that in a perfect world, integrity would not need to be set apart as a separate virtue from these other principles of justice, fairness, and procedural due process. In a utopian society, consistency in principle would be guaranteed, because the officials would always do what is just and fair.⁸⁰ In our society, however, we must recognize that sometimes a judge may decide for justice over fairness or fairness over justice. “Fairness in politics [for example] is a matter of finding political procedures - methods of electing officials and making their decisions responsive to the electorate - that distribute political power the right way,”⁸¹ writes Dworkin, while “justice [in politics], on the contrary, is concerned with the decisions that the standing political institutions, whether or not they have been chosen fairly, ought to make”, regardless of popular opinion.⁸² So the principles of fairness and justice can be distinguished as an official acting under the former would strive to be fair in power and the politically moral wishes of the electorate, while an elected official under the latter would strive to make the correct decisions for the best “morally defensible”⁸³ outcome for the community.

Strict conventionalism, as we have seen, makes fairness of a sort - conforming to popular expectation - its first priority, and disregards individual rights or circumstances, since conventionalists would strive for fair, equal treatment of everyone regardless of circumstance or some individual right. One form of pragmatism, on the opposite end of the spectrum, values justice over fairness, and declares that judges have the ultimate

⁸⁰ Ronald Dworkin, Law's Empire, 176.

⁸¹ Ronald Dworkin, Law's Empire, 164.

⁸² Ronald Dworkin, Law's Empire, 165.

⁸³ Ibid.

strong discretion. For these pragmatists, judges are merely policymakers in robes. Judges can choose whatever they like, since pragmatists deny that there is really law at all, as long as their decisions make the future community the best it can be. Furthermore, legal pragmatists, according to Dworkin, pretend that there is law in order to advance their claims of justice, and in order to make the best outcome for the community possible for the future. But there is no reason that black letter law must be respected when adjudicating; rather, these pragmatists assert that whatever outcome is best for the community in general (thus disregarding individual *legal* rights by holding justice, or whatever the judge considers the best outcome, above those rights) should be law.

Law as integrity strives to make consistency in principle (not policy) reign. Parties in a case come to discover what their individual rights and duties were when the contested acts took place, rather than judges making ex post facto law.

Law as integrity relies on the concept of the community personified in order to recognize that the community as a moral agent is behind the concept of integrity. For Dworkin, the best moral principle might not fit the black-letter law well enough to count as a legal principle of the legal system. That is why integrity matters; the judge applies the best principle that fits the black-letter law. Dworkin uses the concept of a chain novel⁸⁴ to illustrate these ideas: many authors write the chain novel, and each writes his or her chapter constrained by the chapters he or she is handed, in accordance with the general outlines of plot, character development, and genuine aesthetic and literary merit. Dworkin argues that this manner of adjudication is not only morally best, but most accurately reflects the nature of the accepted legal practice. The best interpretation of the

⁸⁴ Ronald Dworkin, Law's Empire, 228-232.

legal practice should reflect the right answer to the question, “What does the law require in this case?”

His response is that law as integrity gives us the best answer (through past legal decisions and moral principles), far better than conventionalism or pragmatism. The author in this situation would be interpreting the law and applying the decision that best fits in with the existing body of law, rather than inventing law, as would take place in both conventionalism and pragmatism if pushed to their extremes. Strict conventionalists must interpret eventually, and would still attempt to choose a decision based on consistency in policy. Dworkin asserts that pragmatist judges invent law constantly, and decide what the law is based on the outcome for the community as a whole. A judge operating under law as integrity, by contrast, takes into account the existing legal practice and attempts to interpret (not invent) the law to make a decision based on the most attractive moral principle, in order to determine what the rights and duties of the parties were and are in that case.

The next question, then, is as follows: does law as integrity connect with Dworkin’s argument that a true conception of law justifies coercion? Dworkin argues that citizens do have genuine obligations under the law, for the simple reason that “no general policy of upholding the law with steel [coercing] could be justified if the law were not, in general, a source of genuine obligations”.⁸⁵ He argues that these obligations are decidedly moral ones, because they are obligations that a citizen has a moral duty to perform. Dworkin argues that a state that recognizes law as integrity has a much better case for legitimacy than one that does not.⁸⁶ In systems which do not justify coercion

⁸⁵ Ronald Dworkin, Law’s Empire, 191.

⁸⁶ Ronald Dworkin, Law’s Empire, 192.

(such as truly evil systems like the Nazi government), no decent principle fits into the black-letter law, and thus these systems should be understood as degenerate cases of law, by reference to the conceptually central as well as morally superior systems that are united by attractive moral principles. Under these systems, citizens do not have moral obligations under the law. Yet even Nazi law pretends to create genuine obligations, not just mere threats. Even that legal system claims legitimacy, which suggests that the central case of law is one that really does create obligations.

In morally superior systems - which are conceptually central - Dworkin argues for genuine communal obligations.⁸⁷ He writes that within a group, the members of the group must regard the group's obligations as: *special*, meaning that they have certain obligations to the other members that are not owed outside of it; *personal*, that these obligations run from person to person and not just to the group as a whole; genuine *concern* for one another's well-being; and finally *equal*, so that each individual member has and is aware of equal obligations toward each individual member. These criteria are representative of a community that Dworkin calls a "true community".⁸⁸ Dworkin asserts that this true community - where members are obligated to have these four traits - best legitimizes a legal system.

From this form of true community which recognizes true obligations for each individual member to each individual member, and thus is an equal and recognizably principled community, Dworkin writes that we arrive at the principle of integrity. This is so because the community is founded on principles and so strives to uphold these principles, and chief among them is the principle of integrity. This principle of integrity

⁸⁷ Ronald Dworkin, Law's Empire, 196.

⁸⁸ Ronald Dworkin, Law's Empire, 201.

upholds the consistency of principle the community supports, and the community treats integrity in politics as an integral part of their successful community.⁸⁹ So then, how does integrity function in law?

In deciding cases (which is Dworkin's chief concern), law as integrity instructs judges to "identify legal rights and duties...on the assumption that they were all created by a single author - the community personified - expressing a coherent conception of justice and fairness".⁹⁰ Integrity in principle, where cases are decided according to a uniformity in principle and strict adherence to individual rights over either strict conventionalism or pragmatism, is in Dworkin's view most representative of our legal system. "According 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";⁹¹ it is clear that law as integrity is a unique conception of law, and is certainly different from Hart's law as primary and secondary rules.

Under Hart's theory law consists of rules, while Dworkin's theory asserts that legal rules are united by principles. In Dworkin's "The Model of Rules",⁹² he sets out his distinction between legal rules and legal principles. Legal rules exist and are a major part of both Dworkin and Hart's legal conceptions. A rule would be something like, "No cars may park in this designated area," while a principle would be, "People have a moral obligation to obey traffic and street ordinances". Yet Dworkin asserts that rules apply in

⁸⁹ Ronald Dworkin, Law's Empire, 211.

⁹⁰ Ronald Dworkin, Law's Empire, 225.

⁹¹ *Ibid.*

⁹² Ronald Dworkin, "The Model of Rules" (Web, Yale Law School Legal Repository, 1967).

an “all or nothing fashion”,⁹³ meaning that there is less flexibility for individual rights and circumstantial decisions, whereas principles have weight (they can apply in a case yet not prevail) in a way that rules do not (if a rule is applied, it will prevail) and compete against each other, and the judge should take care to apply the best principle for the case. In this way principles act like moral reasons. Furthermore, principles unify rules; they keep rules from being disjointed, atomic statements, such as the principle “people have a right to privacy”, which would unify various precedents or constitutional provisions. As seen earlier, Hercules picks the best and most attractive principle that applies to that case in order that the case can best fit the legal practice and be the best that it can be.

Integrity that comes from the community personified allows judges to decide from commonly accepted moral principles, while also paying close attention to past legal decisions. Dworkin argues that this is what makes law as integrity so representative of our own legal practice: in it judges pay attention to legal history, but understand it in light of moral principles. “Law as integrity”, claims Dworkin, “is both the product of and the inspiration for comprehensive interpretation of legal practice”.⁹⁴ A common law judge operating under law as integrity pays attention to history in that he or she examines the history of the legal practice as expressed by the community personified, and then decides a case in the way that best justifies past judicial decisions in terms of principles of justice.

B. Right Answer Thesis

One of the best objections to Dworkin’s arguments is undoubtedly that different judges will have strikingly different answers to questions about which principles best fit

⁹³ Ronald Dworkin, “The Model of Rules”, 25.

⁹⁴ Ronald Dworkin, Law’s Empire, 226.

the law. There are many instances in which many principles might fit a given case. Why, any reasonable person may inquire, does this form of adjudication make any practical sense? If all judges decide according to differing moral principles, will not almost every decision made be different from one another? Each judge could decide on a different moral basis, and this would result in conflicting legal decisions and practices. Even if these decisions are somehow not drastically different, how can they be said to be properly justified, or right in the moral or correct sense? Furthermore, are there objectively true principles at all? Dworkin states the objection thus:

Hard cases are hard because different sets of principles fit past decisions well enough to count as eligible interpretations of them. Lawyers and judges will disagree about which of two is fairer or more just, all things considered, but neither side can be ‘really’ right because there are no objective standards of fairness and justice a neutral observer could use to decide between them. So law as integrity ends in the result that there is really no law at all in hard cases....⁹⁵

Dworkin’s answer to this objection is perhaps even more interesting than his original legal conception. In *Law’s Empire* and also in his *Objectivity and Truth: You’d Better Believe It*, Dworkin argues that there is a right answer in virtually every case. This is so, according to his theory, because an ideal judge (Hercules), given enough time, can potentially come to the objectively right conclusion. But again, why think that there are objectively right answers to hard normative questions?

Dworkin distinguishes external from internal skepticism in Chapter 2 of *Law’s Empire*, where external skepticism can be understood as being outside a practice, whether

⁹⁵ Ronald Dworkin, *Law’s Empire*, 266.

it be law, morality, or otherwise, as a whole and judges that nothing external to the practice (like metaphysical principles of justice that are “part of the fabric of the universe”) objectively grounds it. Internal skepticism, on the other hand, applies the standards of the practice and says that the practice cannot yield right answers. External skepticism is not an interpretive or moral position, but is rather a metaphysical theory⁹⁶ asserting that there are no fundamental moral principles out there in the universe that can be proven, and thus there is no reason to believe in objective moral truth. Dworkin rejects external skepticism because it is irrelevant to the discussion of interpretation and hard cases; it is outside interpretation and yet claims that no interpretation can be correct. Dworkin asserts that external skepticism’s point, that there are no tangible moral principles out in the universe, is nonsensical. We can make no sense of the difference between making a *moral* argument that “slavery is unjust” and its being really unjust in virtue of some metaphysical claim about justice.⁹⁷ He further asserts there are in fact ways to interpret cases and other things that the discussion of external skepticism has no hope of truly challenging.⁹⁸ External skepticism is completely outside of the practice of interpretation, and so evaluating claims of principle by external skepticism is, to Dworkin, an absurd and nonsensical claim.

Instead, Dworkin finds the arguments of internal skepticism much more pressing for this issue of right answers in cases, because it attacks integrity at its core. He addresses a type of argument from internal skepticism where his opponent asserts, “...legal practice is too deeply contradictory to yield any coherent interpretation at all”.⁹⁹

⁹⁶ Ronald Dworkin, *Law’s Empire*, 79.

⁹⁷ Ronald Dworkin, *Law’s Empire*, 80-81

⁹⁸ Ronald Dworkin, *Law’s Empire*, 85-86.

⁹⁹ Ronald Dworkin, *Law’s Empire*, 268.

While Dworkin understands that the law is often far from consistent in matters of principle, he still believes that the contradictions inherent in some areas of law are not so complete as to render the question of right answers a contradictory or hopeless one, i.e. *McLoughlin*. In fact, Dworkin makes the claim that when we make moral judgements like “Genocide is wrong” or “Slavery is evil”, these are not subjective opinions because they make sense of many particular moral judgments. This can be applied to hard judicial decisions, which employ the most attractive principles that fit the legal corpus. If pressed, writes Dworkin, his theory must claim that those moral opinions are true, and that this has powerful consequences.¹⁰⁰ One of these consequences, of course, is that there is one right answer that can be reached if the legal case in question is interpreted properly.

This is partly a response to a question he asks in *A Matter of Principle*: “Shall we say that the judge must look for the right answer to the question of [whether the contract in question was valid], even though the community is deeply divided about what the right answer is? Or is it more realistic to say that there simply is no right answer?”¹⁰¹ This does not mean that everyone who interprets the law will reach the same answer, or if they did that it would be justified by the same reasoning. Rather, it means that if a perfect judge applied himself or herself for an undetermined but perfect amount of time, he or she would reach the correct interpretation, and thus the correct answer. This position accurately portrays Dworkin’s startling belief that there is a correct interpretive answer to virtually every legal question, and given enough time a judge could always reach that

¹⁰⁰ Ronald Dworkin, “Objectivity and Truth: You’d Better Believe It” (Web, Philosophy Public Affairs, 1996), 128.

¹⁰¹ Ronald Dworkin, *A Matter of Principle* (Cambridge, MA, Oxford University Press, 1985), 119.

decision. This conclusion lends itself to three central findings: 1) that the practice of adjudication presupposes that the judge is looking for a right answer (and Dworkin's theory has an answer for what that is), 2) that external skepticism is toothless (or nonsensical), and 3) that we can at least in some cases plausibly claim to make a decision required of us by the task of putting legal history in its best light. In the next section I will discuss Hart's response to Dworkin's claims against positivism, which in some important ways is grouped with conventionalism.

C. Response to Hart

A large part of Dworkin's influence comes from his critique of legal positivism, and in particular, of Hart's version of it. Popularly called the "Hart-Dworkin" debate, their rival conceptions of law have inspired numerous essays and books. Because this debate has been contested throughout many arenas and many times over, I will not claim to give a precise and comprehensive view of the debate; rather, I will try to address certain points at which they diverge in order to show how their legal conceptions differ in ways relevant to this paper. In this section, then, I will attempt to show how Hart replies to Dworkin's critique and the various problems with his reply in defense of positivism.

First off, I must remind the reader about the three main questions a conception of law must answer in Dworkin's thinking.¹⁰² Dworkin claims here that a conception of law

¹⁰² "First, is the supposed link between law and coercion justified at all? Is there any point to requiring public force to be used only in ways conforming to rights and responsibilities that "flow from" past political decisions?

Second, if there is such a point, what is it?

Third, what reading of "flow from" - what notion of consistency with past decisions - best serves it?" (Ronald Dworkin, Law's Empire, 94).

must answer the three main “interpretive” questions reviewed earlier to properly address the legal practice. Dworkin also writes that it is necessary, in order to provide justification for a legal system’s use of force, to be an “insider” in that system,¹⁰³ which I will address shortly. He objects to Hart’s theory, saying that it is purely descriptive and that Hart is wrong in asserting that his theory adequately accounts for law’s normativity, including the “internal aspect” of rules, better than Austin. Dworkin strongly objects to Hart’s claim that he finds a balance between Austin’s command model and natural law theory, and that he adequately accounts for normativity.

Hart replies, in his highly anticipated and posthumous reply to Dworkin in his second edition of *The Concept of Law*, that his account of law is both “general” and “descriptive”, and therefore he does not try to justify the use of coercion or force. Rather, he gives a general descriptive account of law and legal practice.¹⁰⁴ Hart portrays Dworkin as viewing this kind of account as “meaningless and useless”,¹⁰⁵ and I think that Dworkin agrees with this portrayal. Dworkin asserts that one cannot give an adequate account of the nature of law and obligation without interpreting law from an insider (someone who accepts the laws as legal duties and obligations) standpoint. Hart rejects this. He replies that “there is nothing in the project of a descriptive jurisprudence...to preclude a non-participant external observer from describing the ways in which participants view the law from such an internal point of view”.¹⁰⁶

However, there is certainly a point at which the descriptive legal theorist cannot go further in giving a full and accurate account of *why* the internal participants view the

¹⁰³ Ronald Dworkin, *Law’s Empire*, 13-14.

¹⁰⁴ H.L.A. Hart, *The Concept of Law*, 242.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

law the way they do, and for what purpose. The question of how these participants view and identify the law (or with what institutions or attitudes they view and identify it) may be answered easily enough; it may make reference to coercion and legislative bodies and constitutions. Yet it cannot fully explain *why* the law functions as it does, or why judges should decide cases on certain criteria. If Hart truly seeks to give some account of the normativity of law (which is his issue with Austin), how does his conception of law do this? Law by its nature claims to create genuine obligations; both theorists assert that point. Does Hart's purely descriptive account of law make that clear, or even possible? It seems to me that genuine obligations must be understood through some normative viewpoint, and a commitment to being inside that system and evaluating it from that standpoint. A purely descriptive analysis of law cannot reach a full understanding of the normative enterprise of a legal system that creates genuine obligations. This relates to Hart's theory of international law, because he says that international law is a less developed form of law because it cannot enforce its standards and lacks a rule of recognition. Hart must use normative considerations to explain how international law does or does not resemble a fully developed legal system, and since he does not, his theory cannot accomplish what it attempts to do.

Furthermore, Hart's theory does not elucidate law as a *system*, which is what Dworkin is so strongly urging that a legal conception must do. Hart may again urge that a descriptive, general theory does not need to defend or justify law, and indeed is not trying to do so, but I feel then that I must side with Dworkin. If Hart continues to remain outside of the legal framework as a descriptive observer, his theory eventually turns into observations that, though they describe the legal practice, cannot fully understand it.

Dworkin asserts that Hart's observer cannot fully understand the nature of law because it does not grasp its normative demands on its subjects. This understanding of normativity requires reference to a system that actually generates obligations and rights by being grounded in sound moral principle. Law is an essentially normative enterprise; it tells us what we should or should not do, and what we can and cannot do if we so desire. Hart's method of remaining above this enterprise serves to make his theory non-normative, and so goes against his claim to capture the normativity of law.

Dworkin rejects Hart's positivism partly because he claims that Hart "insists that law and morals are made wholly distinct by semantic rules everyone accepts for using 'law'".¹⁰⁷ Furthermore, in Dworkin's view Hart (and his predecessor, Austin) says that propositions of law are matters of social fact and thus they make no claim about what the law *should* do or *ought* to do. Dworkin insists as well that grounds of law - those considerations that determine what the law is - are controversial in ways that exclude mere linguistic analysis. They are contested partly on moral grounds.

Hart replies that his arguments are not about some semantic understanding of the word 'law', but instead advance the description about what goes on in a legal system, including primary and secondary rules and a rule of recognition. Hart rejects Dworkin's criticism that Hart's legal conception does not give adequate justification for the use of force in a legal system. This, Hart replies, was never one of his aims in his descriptive conception, and indeed he writes, "It certainly is not and never has been my view that law has this as its point or purpose".¹⁰⁸ Hart writes that like other positivists his theory does not try to identify or explain the point of law and legal practices, and he further

¹⁰⁷ Ronald Dworkin, Law's Empire, 98.

¹⁰⁸ H.L.A. Hart, The Concept of Law, 248.

elaborates, “I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct”.¹⁰⁹ While it claims that the rules are normative, the theory itself is not normative. Hart’s theory is an essentially non-normative theory that makes non-normative claims about normative legal rules, in a normative legal system. Hart claims that he has remedied Austin’s purely predictive, empirical analysis of obligation with his normative primary and secondary rules.

Hart therefore makes no claim to when (if ever) the law is justified at all; he merely describes the fundamental features of a mature legal system. Dworkin’s claim that one of the key tenets of law is to provide justification for coercion is therefore irrelevant to Hart’s theory, apparently, which is only to describe law and legal systems and to identify certain important components of these social phenomena. Coercion, according to Hart, serves a sort of secondary function where its purpose is to remedy the situations in which its primary function of guiding human behavior has failed. Hart writes, therefore, that justifying coercion cannot be its main point or purpose. Yet when a system is using coercion without any obvious justification, Hart’s theory falls short in that it cannot account for e.g. international law maintaining authority over some states without their consent. I will address this point later on in this paper.

Finally, returning to the issue of morality, Hart replies to Dworkin’s conception of law by stating that the greatest difference between their theories is how they identify the law. This particular line of argument will be most illuminating as we proceed to the next section on actual international law. Hart writes that according to his theory, the law can

¹⁰⁹ H.L.A. Hart, The Concept of Law, 249.

be identified by referencing the existing social sources of law, among which are the legislation, judicial decisions, social customs, and statutes prevalent in a given legal system¹¹⁰, through a rule of recognition. This theory does not reference morality except where the law has incorporated some moral principle as part of the law itself. Dworkin's theory on the other hand, Hart claims, purports that:

Every proposition of law...necessarily involves a moral judgment, since according to his holistic interpretive theory propositions of law are true only if with other premises they follow from that set of principles which both fit all the settled law identified by reference to the social sources of the law and provide the best moral justification for it".¹¹¹

So Dworkin's theory, Hart writes, serves to identify the law and to provide some moral justification for it. Even if the legal system is seemingly evil, we can claim that that legal system is law in the preinterpretive sense. Hart claims that this is merely changing the language to fit Dworkin's theory, and that a positivist could find some other reasons for describing the Nazi system as law, for instance, because except for morality it contained all of the relevant features generally found in legal systems. He maintains that Dworkin's theory tries to find a reason why a morally iniquitous system is still a legal system even though it is morally flawed. As we shall see in the next section, both seem to come to the idea that international law is some form of underdeveloped law fairly quickly, but the manner at which they reach this conclusion is markedly different.

¹¹⁰ H.L.A. Hart, The Concept of Law, 269.

¹¹¹ Ibid.

IV. Analysis of International Law

At this point in this project I have covered the both of the legal conceptions of H.L.A. Hart and Ronald Dworkin, in order to evaluate from each perspective whether international law is law at all, and, if so, how and to what extent. It is my position that international law, while not fully developed as is a mature municipal system, is not mere moral custom, but instead is a set of binding international legal rules. These rules are better explained, justified, and united, however, through principles. In the section on Hart, the writer covered international law so well that I think that his opinions on how his conception of law relates to international law are best left in that section, and I will reference his arguments rather than summarizing them again here. Remember how I addressed the concern that Hart's theory does not address the bulk of international law which concerns the enforcing of decidedly moral principles against cruelty and human rights. It seems that his theory, in accepting these as established rules of international law, accepts that some things are illegal under international law because they are wrong in some moral sense. This comes perilously close to his theory being (as Dworkin asserts) an underdeveloped form of law as integrity, because he seems to think certain norms of international law are law because of their moral quality rather than a rule of recognition identifying them as such. Remember that he allows that there is no rule of recognition in international law. So Dworkin's theory on law becomes more relevant in the discussion of international law, as his theory says that there is no hard and fast

distinction between legal and moral principle, and that moral principles often figure in determining what the law is.

I will begin with the discussion of the sources of international law as outlined by Article 38 (1) and (2) of the Statute of the International Court of Justice. Throughout this discussion I will use Dworkin's theory to examine whether international law is law proper, and how and to what extent international law can be conceived as law at all. These articles in the statute aid Dworkin's argument in considerable ways, as I will show shortly.

Article 38 (1) of the Statute of the International Court of Justice gives the sources of international law succinctly, though there is always room for interpretation of these statutes. It reads:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹¹²

These four sources of international law declare what the international law is in regards to any case or decision. Article 38 (2) though, gives an interesting addendum to

¹¹² International Court of Justice, "Statute of the Court", ICJ Statute Article 38 (1).

Article 38 (1): “This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto”,¹¹³ which is the stipulation that gives the Court the right to decide a case according to what is “right and fair”, *as long as the parties (or states) agree to it*. This addendum is interesting because it addresses the issue of state agreement and consensus, which Dworkin argues cannot be the true justification for international law’s force in the following pages. Following this quick glance at the sources of international law, I will now address Dworkin’s claims in regards to international law and how these claims relate to these statutes.

A. Dworkin on International Law

Hart gave perhaps more attention to the issue of international law than anyone in his time. He devotes an entire chapter of his book *The Concept of Law* to the evaluation of international law and the objections made against it. In Hart’s view, as we saw above, international law is clearly law, but it seems to lack some important aspects such as legislation, courts with compulsory jurisdiction, and sanctions. So while we easily reach the point that international law is law according to Hart’s positivism, we reach a point where Hart’s theory asserts that international law is an underdeveloped form of law. International law lacks certain aspects in form (a rule of recognition, an international police force, etc.) that prohibits it from being completely developed.

Is a similar obstacle present in Dworkin’s theory? He writes that people really doubted if international law was law at all when positivism was more popular. They (including Hart) unfavorably compared the rules of international law with those of

¹¹³ International Court of Justice, “Statute of the Court”, ICJ Statute Article 38 (2).

municipal law. Since Dworkin asserts that principles, and not some rule of recognition, unite a legal system, his theory does not depend on finding one in international law. His theory instead focuses on the justification of coercion, and so he must explain how force is justified in international law. In more recent years, Dworkin writes, there is no longer a question of whether international law is law; it is commonly accepted that it is. The real question, which is the question we are wondering in this particular scholarship, is why international law is accepted as law, and to what extent it qualifies?

Dworkin writes that modern legal positivists declare that the above Articles are the closest thing to a “rule of recognition”. Indeed, one of the reasons I cited these Articles was to recognize that this is the most widely accepted view of the sources of international law available, and undoubtedly those looking for a Hartian rule of recognition would look there for their rule. While this is acceptable to an extent, it really cannot count as one, because these Articles themselves would have to be declared valid by a rule of recognition, if there were such a rule. While this is a candidate for a rule of recognition, it does not seem to fit. While modern international law does indeed cite certain *ius cogens* or “peremptory norms”¹¹⁴ as established standards, most tenets of international law still refer to these norms as requiring consent of the states and parties working with them, which would be different from a well-established (and therefore universally accepted) rule of recognition. The Vienna Convention on the Law of Treaties stipulates this exact fact:

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international

¹¹⁴ Ronald Dworkin, “A New Philosophy for International Law”, (Web), 6.

community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹¹⁵

These norms so cited as a rule of recognition, then, still stipulate that the states must agree and recognize these norms as accepted in this form of law. As Hart has noted, though, his theory is descriptive of most developed and sophisticated legal systems, and does not claim that a system cannot be law at all without certain components like the rule of recognition. This takes us back to Hart's general conclusion that international law is an underdeveloped or more primitive form of law than municipal law. International law seems to be, in Hart's theory, less of a legal system and more of a collection of states agreeing to a set of rules that stipulate certain standards of behavior and punishment if they breach these standards. This agreement of states seems to make the set of rules less like Hart's idea of law (non-moral criteria identified by a rule of recognition), and more akin to customary morality that is inherently part of law. I will ask the question of whether Hart can account for this morality shortly. This agreement of states seems reminiscent of an aspect of Dworkin's theory, though, but with a twist: Dworkin's theory has the potential to save international law from being merely a collection of states agreeing to these rules by uniting these rules with principles, and these principles can account for the normative aspects of law better than Hart's theory.

The aspect I am referring to in Dworkin's theory is his concept of a true community. Remember that he emphasized that the community must agree to of these standards of law, must treat them as special standards that they would not agree to if they

¹¹⁵ Ibid.

were not in the community, personal standards that they accept for each member of the group, responsibilities to treat each other with genuine concern, and equal standards for each member of the group. Is the international community representative of this true community? In some ways, I think so; in others, perhaps not. Certainly in accepting treaties and standards of behavior these consenting states seem to regard these standards as special, else if one state broke the treaty there would not need to be action filed against that state. The states are also generally accepted as equal, for the criteria for ratifying a treaty and accepting standards is accepting that all states will be equally worthy and be bound by the same responsibilities. The genuine concern is perhaps lacking in this analogy, but later Dworkin shows how states do have an obligation to have a concern for one another. This analogy in general is most illuminating in seeing how much this particular aspect of Dworkin's theory gets us closer to recognizing international law as a justified legal system.

This is my goal, after all: reaching the best understanding of international law and recognizing which legal conception better illuminates its nature. I agree with Dworkin that a legal system that gives norms of behavior must be justified, and so in my view his theory seems to take us closer to that justification. Hart's, on the other hand, seems to stop at the fact that international law is a primitive form of municipal law, or something like it, that suffers from certain defects in form. This aspect of community helps us get closer to accounting for some of the more formal features of law (e.g. how customs can be law, independent of a rule of recognition) as well as justifying international law as an established legal system.

The next problem to face is that international law does not limit itself to state-by-state consent.¹¹⁶ This means that international law does not limit its rules to bind only those states that have consented to or ratified the statutes or treaties. In the above statute, the International Court of Justice makes it clear that the “contesting states” can recognize the rules as being binding on them in whatever claim they bring forward.¹¹⁷ This matters because if they had already accepted these rules as a binding legal norm, they would not need to recognize them (another term for legally agreeing to it) when they bring the case to the court. Yet international law claims to bind these states even if they do not already recognize these articles or statutes. So it must be that not all states accept the statute as a binding, universal social norm, and instead shows that international law attempts to make its laws binding beyond those states which have explicitly agreed to its authority through treaties, customary law, and established conventions and statutes. So there is a problem with international law’s authority, and the true obligatory nature of its laws; if these laws are not justified, binding laws creating genuine obligations, they can only count as law in a very limited sense, if at all.

So, Dworkin asks, how is this possible? And, more importantly, how can it be justified? By what justification should states accept as law that which they have not agreed to, or that which is not part of accepted customary law? As I specified earlier, these are the most important questions to ask in regards to understanding and analyzing international law. My view on this issue aligns with Dworkin’s; our conception of law, and by extension international law, must present a case for law’s justification; if not, the alternative is a purely descriptive account which cannot illuminate the binding force of

¹¹⁶ Ronald Dworkin, “A New Philosophy for International Law”, 7.

¹¹⁷ International Court of Justice, “Statute of the Court, ICJ Statute Article 38(1) a

international law. A system justified through Dworkin's approach better explains how this system of international law can be a legal system without a rule of recognition to identify the law. Dworkin writes that Hartian positivists claim that states' consent is what justifies international law, but Dworkin asserts that this is not sufficient. If the justification for international law depends upon state-by-state consent, this argument cannot prevail. As seen above, not all states supposedly bound by international law have consented to the treaties or conventions that bind them. There must be another source of justification, and Dworkin aims to find it.

In order to answer this question of international law's justification, Dworkin makes a reference to Article 2(4) of the United Nations Charter, which provides: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".¹¹⁸ From this, he asks, what can we understand from the humanitarian intervention by NATO in Kosovo to stop genocide and other human atrocities?¹¹⁹ Did not NATO in this instance violate 'territorial integrity' to invade Kosovo in order to halt the genocide? The short and literal answer would be, 'of course', but this seems to lack an important component of the way in which we understand the right and wrong thing to do in the situation. But clearly a body enforcing international law, such as the Court of International Justice, should not be able to do anything that it wants, even if they think that their actions are just or right, without justification. So far, the consent argument has been applied to account for

¹¹⁸ Ronald Dworkin, "A New Philosophy for International Law", 8.

¹¹⁹ For more information on this historical reference, follow the NATO link in the Reference page.

international law's justification, but it is fairly obvious that states would never give the ICJ, for example, the right to do whatever it wants under the consent argument alone. Even a positivist, protests Dworkin, who believes in strong discretion for judges, could not admit at this stage that they should have that much power on a global scale by justification through states' consent to rules alone.¹²⁰ Andrew McCarthy illustrates international law's need for justification in his article,¹²¹ as he points out that under the Constitution, President Obama must get any treaty or international act approved by Congress before it is ratified under international law. He points out that international law does not have the power to act on the President's word alone, because this action by the international community would violate United States federal law if it accepted the President's word without Congress' agreement. McCarthy insists that in this unjustified view international law "is politics masquerading as a system governed by rules rather than power",¹²² and thereby illustrates that as the rules currently stand under the consent argument, international law is not justified in enforcing any authority that has not already expressly been given by the sovereign states. So there is a definite need a better case for the justification of international law, else it continues to be, as Mr. McCarthy asserts, "politics masquerading as a system governed by rules rather than power".

Dworkin takes a very different approach to this, and returns to the question of justification shortly. He asks first: if some mechanism were in place that could enforce international law, how would nations acknowledge it as justified, binding law?

¹²⁰ Ronald Dworkin, "A New Philosophy for International Law", 9.

¹²¹ Andrew McCarthy, "Obama Can't Force his Iran Deal on the Country without Congress' Consent" (Web, National Review, 2015).

¹²² Ibid.

Dworkin asks: “what principle - what rule of recognition - do they supposedly follow in making that discrimination [nations decide for themselves whether some constraint they accept is imposed as a matter of law and not just decency]”?¹²³ Perhaps they follow the principle that whatever other nations accept as law is law. Ultimately, this will need further backing, because those other nations still need some basis to determine the law. The process cannot continue *ad infinitum*; there must be some other explanation. Customary law and treaties do not work well, either, because the representatives of states can change over time and their treaties that they ratified can conflict with their national beliefs or stances after a while. This means, for example, that President Reagan could have ratified a treaty that the current citizens of the United States now oppose, and thus these treaties cannot give the basis for international law as an established set of rules and principles. Dworkin concludes earlier that state consent (state agreement to ratify treaties and statutes) is not enough either: “we cannot take the self-limiting consent of sovereign nations to be the basic ground of international law”.¹²⁴ Something even more basic than that must provide justification for international law. Remember that the purpose of law is to give justification for its use of force in Dworkin’s theory. Just as Dworkin justified the use of force in municipal law, the justification of force must figure in a view of international law as law.

He begins on much the same note as Hart. There is no structure as yet in place in international law as to properly understand it in the normal terms of courts, legislation, and effective sanctions. But before giving up (and conceding that his position results in the same conclusion as Hart’s), Dworkin, ever the philosopher, again draws upon a

¹²³ Ronald Dworkin, “A New Philosophy for International Law”, 9.

¹²⁴ Ronald Dworkin, “A New Philosophy for International Law”, 10.

thought experiment to illustrate his claims. Imagine that there is an international court with jurisdiction over the entire globe; cases can easily be brought before this court, and effective sanctions can be enforced through an international police force. “If we can imagine such a court...then we can frame a tractable question of political morality”,¹²⁵ writes Dworkin, and proceeds to lay out ways in which this could be possible. His thought experiment is decidedly based on moral questions, such as what laws this court can “appropriately...enforce coercively”.¹²⁶ A government is illegitimate, he asserts, if it violates the basic human rights of its own citizens, or when it cannot protect those people within its borders from attacks from outside.¹²⁷ A state would therefore, he claims, “improve its legitimacy if it helped to facilitate an international order that would help itself and others do this, and so if this were so would have a political obligation to do so”.¹²⁸ Furthermore, states fail their citizens when they accept an international organization that makes it harder for the international community to assist in economic, commercial, medical, or environmental disasters,¹²⁹ since he writes that individuals have a basic desire to help others during these crises. This, Dworkin writes, is in his view “the true moral basis of international law”¹³⁰, that states have the same responsibilities and moral duties, to a feasible extent, to other governments (citizens in the international community) as they do to members of their own communities. This calls for a more

¹²⁵ Ronald Dworkin, “A New Philosophy for International Law”, 17.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ronald Dworkin, “A New Philosophy for International Law”, 18.

¹³⁰ Ronald Dworkin, “A New Philosophy for International Law”, 17.

complex system of international law that allows for this truly global system of intervention.¹³¹

Since a coercive municipal government has a standing moral duty to improve its legitimacy, it seems to be the case that a system of international law does as well, and this can only be accomplished by individual sovereign states working together. This could potentially be a legitimate background reason for improving international law. However, there would undoubtedly be disagreement as to what principles should prevail in making international law the best it can be. Dworkin thus introduces the principle of *salience*; that is:

If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole.¹³²

Therefore, “the general principles of law recognized by civilized nations”¹³³ must grow more prevalent, and thus can align with other nations. Dworkin uses the example of the Universal Declaration of Human Rights¹³⁴ to show that if a humane set of principles gains wide acceptance, other nations have a duty to embrace and abide by those principles. “As more nations recognize a duty to recognize and follow widely

¹³¹ Ronald Dworkin, “A New Philosophy for International Law”, 18.

¹³² Ronald Dworkin, “A New Philosophy for International Law”, 19.

¹³³ Ronald Dworkin, “A New Philosophy for International Law”, 21.

¹³⁴ The Universal Declaration of Human Rights was adopted by the United Nations on 10 December 1948. (www.un.org)

accepted principles, those principles...have greater moral gravitational force”.¹³⁵ This theory goes along with Dworkin’s principle of law as integrity, and the importance of consistency and adherence to general moral principles. On this account, the sources of law above in the Article flow from moral demands, and are taken to be more fundamental than consent, which Hart cites as his view of how states accept international law as law.¹³⁶ Dworkin writes that “the charter and institutions of the United Nations are best understood not as arrangements binding only through contract or on signatories but as an order all nations now have a moral obligation to treat as law”.¹³⁷ This obligation does not result from consent, but by the moral force of salience as a way to a justified social order. Dworkin thus concludes that this principle of salience is fundamental in establishing the justification of international law; it is justified through the moral force of salient principles. This makes the principle of salience different from mere consent; salient principles carry moral weight, and have greater weight as they grow more salient. Therefore, Dworkin uses the principle of salience to rescue international law from a lack of justification. Salient moral principles added to mere rules illustrates this better explanation of the justification of international law.

At this point, we have reached a somewhat different conclusion than Hart through our analysis (with Dworkin’s help) of international law from an expanded view with rules *and* principles. Through examining the moral legitimacy of international law, and not merely its formal structure, we have reached a different theory for the present and future of international law. There is very little possibility, under Hart’s theory, that the

¹³⁵ Ronald Dworkin, “A New Philosophy for International Law”, 20.

¹³⁶ Ronald Dworkin, “A New Philosophy for International Law”, 22.

¹³⁷ Ronald Dworkin, “A New Philosophy for International Law”, 20.

sovereign states would ever consent to an international police force, courts with compulsory jurisdiction, and enforceable sanctions. A descriptive theory like Hart's lacks the development to account for law, and cannot fully account for the formal differences between municipal and international law. Dworkin's theory, however, better accounts for these differences and shows how international law can lack certain formal characteristics, yet still be law, and shows how international law can be justified. It shows how it could eventually evolve toward those formal features and institutions. The content of the norms of international law can be explicated and justified by reference to moral principles, particularly salient principles such as the Universal Declaration of Human Rights. States recognize the prominence of these institutions and conventions, and could recognize (after some time of course) the importance of the formal characteristics of municipal law (a police force, enforceable sanctions, etc.) as part of international law, particularly if they understood this importance through the established, salient moral principles of other countries. This helps get our theory of international law to explain and justify coercion on a global scale.

Presently in international law, the global legal community is seemingly powerless to enact real change, and even more so is seemingly unjustified through solely the popular consent argument. Though some critics (including McCarthy) assert that international law is not law at all, I agree with Hart that there is enough binding force in international laws for international law to qualify. Yet it is a small victory, because I also agree with Dworkin that there must be more to law than just rules, and there must be some justification for these rules in principle. If international law can be said to be justified through salient principles, and the future of international law can look like

Dworkin describes (with states accepting as salient a justified international police force and courts with compulsory jurisdiction), this view of international law provides a more powerful and effective view for international law in the future as well as the present.

Dworkin's theory thus (after a fashion) gets us to a better understanding and justification for international law than Hart's, and gets us to a point at which international law acquires a more dominant and altogether better place in the global community.

V. Conclusion

I have questioned whether international law is really law, and if it is, how and to what extent we can understand it as such. Through my analysis of Hart and Dworkin's conceptions of law, I have reached their answers to these questions, and have drawn my own final conclusion. My conclusion is that while Hart and Dworkin both rightly conclude that international law is indeed law proper, though not fully realized, Dworkin's theory and its incorporation of salient moral principles better explains how international law can have fundamental formal differences from municipal law and yet still be both law proper and justified law. Under his theory, in a futuristic evolved landscape where nations accept these institutions as salient, international law can acquire the more formal characteristics of municipal law. Salience is different from mere consent in that salient principles have moral weight. Without the incorporation of these principles, Hart's theory seems to fall short of ever reaching what seems to be an ever-increasingly important goal: the creation of enforceable sanctions, courts with distinct and defined legislation, and other components of a system that is closer in form to municipal law. While he would perhaps argue that he is not trying to reach that goal, I would respond that his purely descriptive theory falls short of fully accounting for the normative nature of law, and of accounting for international law's status as a system of laws today, and thus Dworkin's theory better explains the nature of international law.

Now, I wish to conclude the project by summarizing both Hart and Dworkin's arguments, once again showing (in an abbreviated fashion) how they reached their conclusions about international law. Hart began by arguing that Austin failed to account for basic legal phenomena like rules, obligations, and rights of citizens under the law, and instead claimed that law was simply orders backed by the threats of a legally unlimited sovereign. Therefore, Hart developed the idea of citizens acting in both private and public capacities, thus comprising a legally limited government. Instead of law as a system of commands issued by an unlimited sovereign, Hart introduced the concept of law as a system of primary (rules issuing commands) and secondary rules (power-conferring rules and rules to allow for the modification of the primary rules). Hart also discussed his influential and ultimate secondary rule, the "rule of recognition", which would be a rule which identifies valid sources of law.

Hart showed that while international law lacked a rule of recognition (among other formal components), it was not necessary for the system to have these components; though he argued that international law was a more primitive system than municipal law because of this. Hart argued that international law was still law, though underdeveloped, because international law covered different subjects (sovereign states), which behave differently than private individuals. There is nevertheless significant pressure to conform to the primary rules of international law, and though there are extremely limited enforceable sanctions or international police forces, this pressure is enough to make international law binding and thus obligatory. International law, in the end, can most certainly be understood as law, but it must be understood as a legal system that is more

primitive and underdeveloped than municipal law. At this point, Hart's theory runs out, and he cannot help us further.

Dworkin argues against Hart's "model of rules". Instead, Dworkin argues that there are important, fundamental principles (justice, fairness, and procedural due process) that must be incorporated into judicial decisions, and that these principles must be moderated by the principle of integrity. Law as integrity stipulates that legal decisions should be consistent in principle to be *legally* correct, and that through this consistency in principle judges should decide cases in order that their decisions will continue to make the legal system the best that it can be. In using the chain novel illustration, Dworkin shows how law as integrity helps the legal system be the best it can be, as long as judges rely on their moral convictions and the principle of integrity. The question of how judges can and should rely on their own convictions was answered by his right answer thesis, in which he maintained that there is always an objectively right answer, and that given enough time and the proper interpretation, a perfect judge would reach it. This was a questionable doctrine, but it showcased Dworkin's views on objective truth and the importance of principle in adjudication.

In Dworkin's view of international law, he maintained that the real question is not whether international law is really law (he said that of course it is, even though it lacks some formal characteristics), but what is the justification for international law? He said that mere consent is not satisfactory for justification because it violates those states that have not consented but are still under the jurisdiction of international law. Indeed, this lack of justification from consent proves (from critics like McCarthy's perspective) that international law lacks some necessary component to be effective law. Therefore,

Dworkin argued using a thought experiment for a principled, justified approach to international law in which states recognized salient moral principles. This salience differs from mere consent in that these salient principles have moral weight, and the more states that accept these principles, the greater is the duty states have to embrace and adhere to them. This thought experiment further enabled Dworkin's arguments to go beyond the underdeveloped, unjustified form of international law that Hart conceived and into a system of international law that is justified through salient principles, and one which in the future could contain the components of coercion we listed above, and the justification for them. Dworkin's theory helps to explain how these principles (such as integrity) and past legal decisions fully work together to justify international law (through states' working with established, salient moral principles).

Thus, Dworkin ultimately came to a conclusion which was different from Hart's. International law could claim legitimacy and justification for its coercion of states which have not ratified or become parties to treaties and conventions that allow for such coercion, because they (like citizens in Dworkin's view of a municipal legal system) are part of a legal system that has accepted these salient moral principles as combined with rules of law. Ultimately, Hart's arguments lead to the conclusion that international law seems to be limited binding guidelines rather than a developed legal system, and does not account for the normativity of such a system or its justification for coercion, while Dworkin's arguments (which incorporate salient moral principles with rules) seem to conclude that salient international laws have moral weight and thus are an effective and justified part of the global community. I agree that, in order for international law to reach the point at which it is both necessarily influential and justified, there must be salient

moral principles justifying its coercion and the laws that follow from it. I agree with Dworkin that genuine law involves the justified enforcement of certain publicly identified norms, and that it is impossible to separate the nature of law from the justification of the institution. In this view, international law would end in a global organization which could bring about real change and powerfully maintain world peace and equality for all human beings.

APPENDIX

“Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.” - *Article 16 of the Covenant of the League of Nations, 28 April 1919*

“CHAPTER VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

Article 48

The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” - *Chapter VII of the United Nations Charter, 26 June 1945*

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