
On Interpretivism and International Law

Başak Çali*

Abstract

This article argues for the relevance of interpretivism within theoretical and normative debates about international law. To do this, the article carries out two tasks. First, it draws out the central features of interpretivism that make it a theoretically distinct contribution to understanding the nature and theory of law. Secondly, it identifies four important objections, two external and two internal, to the relevance of interpretivism to international law. External objections stem from positivism and anti-essentialism about international law. Internal objections, on the other hand, stem from the view that international law does not suit the application of interpretivism. I show that it is possible to counter all four and conclude by pointing to the nature of future work that needs to be undertaken to develop a substantive interpretivist account of international law.

1 Introduction

Interpretivism¹ as a general theory of law has been received with indifference by theorists of international law.² A principal reason for this, according to Beckett, is that the work of Ronald Dworkin, the pioneer of legal interpretivism, concerns the attributes of law in a single political community and, therefore, does not have anything to say

* Lecturer, Department of Political Science, University College London. Email: b.cali@ucl.ac.uk.

¹ R. Dworkin, *Law's Empire* (1986) and R. Dworkin, *Justice in Robes* (2006).

² Aspects of Dworkin's interpretivism have been applied to particular sectors in international law: e.g., the adjudication at the European Court of Human Rights: Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *EJIL* (2004) 279; and customary international law: Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaraguan Case', 1 *OJLS* (1996) 85; Tasioulas, 'Customary International Law and the Quest for Global Justice', in A. Perreau-Saussine and J.B. Murphy (eds), *The Nature of Customary Law: Philosophical, Historical and Legal Perspectives* (2007), at 307. These works, however, do not concern the relevance and applicability of interpretivism to general international law.

about international law.³ This is correct in the literal sense. Dworkin has not written a full-length treatment of international law. His views refer to single political communities as background conditions for his substantive views on law.⁴ Dworkin, however, has written on the nature of law as a normative social practice and the adequacy and weaknesses of rival doctrinal philosophical camps such as legal positivism, pragmatism, natural law, legal realism, and anti-foundationalism in accounting for that normative nature.⁵ Given that all these doctrinal philosophical camps have extended to discussions on the normative nature of international law, irrespective of the fact that their roots are in the jurisprudence of domestic law,⁶ it is surprising that interpretivism has not received a comparable amount of attention.

The central aim of this article is to supply an argument for the relevance of interpretivism to the theoretical and normative debates about international law and its central claim that law is an interpretive concept. While I draw liberally on Dworkin's discussion of interpretivism, my argument is certainly not a second-guessing of Dworkin's views on international law.⁷ More importantly still, my aim is *not* to advocate a transfer of the substantive views that Dworkin has on the meaning of law in a single political community onto international law.⁸ That would be a different project all together. My aim is to identify what insights interpretivism could provide to international lawyers in understanding international law.

This article is composed of two parts which correspond to the two key tasks that have to be completed in order to show the relevance of interpretivism to the general theory and practice of international law. The first task is to draw out what the central features of interpretivism are which make it a theoretically distinct contribution to understanding the nature of law. This will be done in the second section of the article by giving an account of the central assumptions of interpretivism and how it goes

³ Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law', 12 *EJIL* (2001) 627.

⁴ Dworkin's defence of liberal egalitarianism in political philosophy, too, fundamentally concerns itself with principles as to how sovereigns ought to treat their citizens. See generally R. Dworkin, *The Sovereign Virtue* (2000); J. Burley (ed.), *Dworkin and His Critics* (2004); R. Dworkin, *Is Democracy Possible Here?: Principles for a new Political Debate* (2008).

⁵ See in particular Dworkin, *Justice in Robes*, *supra* note 1.

⁶ On positivism see generally Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413; Nardin, 'International Pluralism and the Rule of Law', 26 *Rev Int'l Studies* (2000) 95; Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', 93 *AJIL* (1999) 302. On Pragmatism, see A. M. Slaughter, *A New World Order* (2004). On anti-foundationalism see M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, 2006); D. Kennedy, *The Structure of Legal Argument* (1986). See also Çali, 'How would You Like your Change Done Today, Madame?', ESIL Inaugural Conference International Legal Theory Agora Paper, available at: www.esil-sedi.eu/english/pdf/Cali.PDF; and T. Nardin, *Law, Morality and the Relations of States* (1999).

⁷ Indeed at some crucial points my conception of interpretivism may take a different direction from Dworkin's.

⁸ On an attempt to transfer some of the views in Dworkin's account of law onto the international plane see T. Franck, *Fairness in International Institutions* (1995); M. T. A. Brus, *Third Party Dispute Settlement in an Interdependent World: Developing a Theoretical Framework* (1995); and Tasioulas, 'International Law and the Limits of Fairness', 13 *EJIL* (2002) 993.

about identifying law as a unique social practice. The second task is to identify the possible objections to interpretivism's relevance to international law, assess how successful these objections are, and illustrate how they may be countered. This is done in the third section by identifying two types of objections to the relevance of interpretivism to international law: external and internal. External objections dispute interpretivist premises by invoking alternative premises. Internal objections stem from the view that Dworkinian interpretivism is not a suitable theory to apply to international law. I conclude by showing why interpretivism is an important and worthwhile approach to the central questions of international law. I also sketch out the nature of work that needs to be undertaken in the future to develop a substantive interpretivist account of international law.

2 Interpretivism and the Nature of Law

Interpretivism, as I shall understand it here, is a theory on the nature of law.⁹ This means that it is committed to an understanding of the very concept of law rather than its particular manifestations in different times and places.¹⁰ Asking *what is law* is different from asking *what is the law on a particular issue in a particular place* because the former specializes in whether the idea of law has a nature, whether it has certain features by its very nature, and whether it has those features wherever it exists. Propositions on the nature of law, however, have an effect on how the law is identified on a particular issue because they make general claims about the procedure that needs to be followed in order to identify the law. A key problem to which theories on the nature of law have to respond is the problem of how to differentiate law from non-law phenomena. Law co-exists alongside other concepts, most notably morality, politics, and habit, and the way in which its relationship with these other concepts is conceived is integral to setting out what law means. Any theory on the nature of law has to show which space law occupies and what function it serves that other concepts do not.

The central premise of interpretivism in responding to the issues above is to assert that law is an interpretative concept as opposed, significantly, to a neutral concept.¹¹ The key distinction between these two is that neutral concepts do not rely on contestable premises, whereas interpretive ones do.¹² A contestable premise is a premise that people agree is important, but disagree about where that importance lies. Neutral

⁹ Stravropoulos, 'Interpretivist Theories of Law', *Stanford Encyclopedia of Philosophy*, available at: <http://plato.stanford.edu/entries/law-interpretivist/> (accessed on 1 May 2008); A. Marmor, *Law and Interpretation: Essays in Legal Philosophy* (1995).

¹⁰ Theories on the nature of law in this respect are categorically different from theories of explanation of how law operates or how it constrains behaviour or when it is effective. Examples of the latter genre of scholarship are generally produced in the field of international relations or by international law scholars interested in theories of explanation. See representatively A. M. Slaughter, *A Liberal Theory of International Law* and J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (2007). Theories of explanation, however, inevitably have assumptions (implicit or explicit) on the nature of international law.

¹¹ Dworkin, *Law's Empire*, *supra* note 1, at 12.

¹² Dworkin, *Justice in Robes*, *supra* note 1, at 10–11.

concepts, on the other hand, can be reported. People may disagree about the accuracy of the reporting, but they would not disagree about what the thing is that is reported.

When a concept is identified as interpretive a number of characteristics of that concept are revealed: 1. there exists a shared practice in which a group participates; 2. participants in the group treat the concept as interpretive by disagreeing about what the practice *really* requires; 3. interpreters assign value and purpose to the practice and they form views about what particular propositions about the practice are true or false in the light of the values and purposes of the practice;¹³ 4. the interpreter is constrained by the history or the shape of the object of the practice in understanding its purpose.¹⁴

Dworkin argues that law fits all four characteristics and is, thus, better understood as an interpretive concept. Whether propositions about law are true or false cannot be a neutral description of a legal practice because interpreters have theoretical disagreements about what the practice requires.¹⁵ Even the statement that ‘we must simply describe the law’ does not escape from the general claim that this is yet another interpretation of the practice. This means that anyone who is involved in the practice of identifying the law does not merely describe the practice, its texts, and conventions, but states that he or she engages in a justification of it by identifying the object and the purpose of the practice. This is why interpretation, from the perspectives of its participants, has a constructive quality.¹⁶ Justification, as opposed to description, is necessary because a group of interpreters of law disagree about what the practice *really* requires. Even in the case of full agreement on the empirical facts of a situation, there is disagreement about what the law says.¹⁷ This disagreement, however, is constrained by the history of law.

Interpretivism defines this disagreement as one about what values lie *at the heart* of the law.¹⁸ The values that lie at the heart of law refer to propositions about practices that people are obliged to accept, rather than propositions people just happen to find valuable.¹⁹ International humanitarian law on targeting, for example, could be regarded as valuable because it helps, for instance, soldiers to predict the behaviour of their enemies, journalists to report hostilities more safely, and the International Committee of the Red Cross to operate. The values at the heart of rules of targeting, however, are to save lives (of civilians) and to reduce the suffering of those targeted (combatants).²⁰ The values at the heart of a practice, therefore, serve the purpose of

¹³ *Ibid.*, at 11–12.

¹⁴ It is for this reason that the interpretation is constructive. See also Dworkin, *Law's Empire*, *supra* note 1, at 52.

¹⁵ Dworkin, *Justice in Robes*, *supra* note 1, at 140.

¹⁶ This view is closely connected to earlier philosophical works on interpretation by Heidegger and Gadamer as it puts responsibility onto the shoulders of the interpreter for the very existence and sustainability of the object of inquiry: H. Gadamer, *Truth and Method* (trans. J. Weinsheimer and D.G. Marshall, 1989); M. Heidegger, *Being and Time* (trans J. Macquarrie and E. Robinson, 1962), sect. 32.

¹⁷ For an illustration for this position see Rodley and Çali, ‘Revisiting Kosovo: Humanitarian Intervention on the Faultlines of International Law’ 7 *Human Rts L Rev* (2007) 275.

¹⁸ Dworkin, *Justice in Robes*, *supra* note 1, at 141.

¹⁹ I am indebted to S. Meckled-Garcia for drawing my attention to this distinction.

²⁰ T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989).

making sense of the key aspects of a practice. The argument about what value(s) lie at the heart of law indicates that without that value at work, one cannot talk about law in any meaningful way at all. The values at the heart of law need to be able to perform a number of tasks:

1. They have to show that the values are distinct to law.
2. The values must be widely accepted as 'real' values in the practice of law.
3. They should provide guidance on which propositions about what the law is on a particular issue are true.
4. They have to be comprehensive enough to justify sources of law and reasons to follow the law.²¹

Dworkin argues that even though there are substantive values which underlie different interpretative conceptual cases, the procedure for identifying the value(s) remains the same.²² The interpretivist method demands that one first has to identify the type of practice in which one is engaged and then, given its type, to present this practice in the best possible light. An oft-cited quotation from *Law's Empire* makes this point by defining constructive interpretation as 'a matter of imposing purpose on an object in order to make the best possible example of the form or genre to which it is taken to belong'.²³ Dworkin uses the heuristic concepts of 'fit' and 'justification' in order to explain the relationship between the practice and the value at its heart.²⁴ The value or the scheme of values has to *fit* and *justify* the practice in the sense that without that value we lose our claim to talk about that particular practice.

What constitutes fit between the value and the practice itself has to come in the form of an argument explaining the significant aspects of the practice and what makes sense of these aspects in terms of a value. Dworkin does not develop a list of necessary and sufficient conditions for fit. From Dworkin's overall discussion, however, it seems that such conditions will have to include (a) the role the practice plays in the domain it operates; (b) the point of having the practice; (c) the differences of the practice from other practices that seem similar (or the distinct contribution or added value of the practice).²⁵

Interpretivism as a method applies to all interpretive conceptual cases, and when Dworkin applies it to law he addresses his interpretive theory to a particular legal culture where the key concern is the justification of monopoly of state coercion over individuals. Dworkin argues that the most significant aspect of law in a single political community is that it demands that state conduct *vis-à-vis* individuals is in accordance with standards which are established in the right way before the conduct takes place.²⁶ This key aspect of law has a dual character: there is the duty of conduct according to a

²¹ Dworkin, *Justice in Robes*, *supra* note 1, at 169, although Dworkin does not address point (4) in an explicit way.

²² *Ibid.*, at 145–162.

²³ Dworkin, *Law's Empire*, *supra* note 1, at 52.

²⁴ Dworkin, *Justice in Robes*, *supra* note 1, at 169–171.

²⁵ *Ibid.*

²⁶ *Ibid.*

set of standards and there is the requirement that these standards precede the conduct and are established according to some correct procedure. This dual characteristic is something that law does not share with other concepts, and it is hard to talk about law *per se* without it. Dworkin argues that the value which makes the most sense of this dual notion is legality. Legality is a value unique to law and gives law its fundamental character.

Dworkin believes that the idea of legality in its abstract formulation is uninformative and remains to be specified. Specifying it requires finding what legality *really* is by confronting the question of legality's value.²⁷ Dworkin proposes that a value's value can be identified by 'locating that value's place in a larger web of conviction'.²⁸ Dworkin's point is that political values, such as legality, justice, or democracy, exist because they make a contribution to some other independently identifiable deeper value.²⁹ Precise meanings of values emerge by identifying that very contribution. It is for this reason that values exist in a web of conviction and a value cannot be fully understood without taking into account where the place of that value lies in a constellation of values.

What, then, is legality's value? Dworkin argues that the real value of legality lies in its contribution to the coherent treatment of individuals by the state. Legislators ought to keep law coherent in principle, and past decisions which are decided in the correct way ought to bind future ones because law aims for equal concern and respect for individuals. Dworkin calls this 'law as integrity' and argues that this is the best way to make sense of legality in a single political community.³⁰ The reason to demand application of equality in the application of standards is to be able to show equal concern for all individuals in a community. Integrity is a function of a genuine community which shows equal concern for all individuals.³¹

The central thrust of Dworkin's argument about the point and purpose of law then is an invitation to conceive law in a particular way: a branch of moral and political philosophy with a commitment to fit the shape and history of legal practice as understood in a specific context. Dworkin, furthermore, insists that this is the correct way of conceiving law. It is the correct description of what participants in the position to interpret the law do. On the substantive value of legality and its significance, the value of equal concern for the individuals who make up a community is centre-stage in Dworkinian interpretivism.

3 External Objections

External objections to interpretivism are those which are sceptical of interpretivism as a jurisprudential approach and its success in accounting for the nature of law by

²⁷ *Ibid.*, at 156.

²⁸ *Ibid.*

²⁹ *Ibid.*, at 159.

³⁰ Dworkin, *Law's Empire*, *supra* note 1, at 225–258, 410.

³¹ *Ibid.*, at 188.

declaring it an interpretive concept.³² Positivist and anti-essentialist conceptions of law, dominant also in contemporary international law discussions, harbour strong external objections to interpretivism³³ This is because they hold rival accounts of what specific domain law – and international law – occupy in human relations.³⁴ In this section of the article, I identify two possible strands of external objections. The first strand doubts whether interpretivism is really a theory about what the law is. The second gives voice to pessimism about the interpretive method and whether it is possible to identify a coherent value system underlying international law which would receive general acceptance.

A Interpretivism is Not about lex lata, but about lex ferenda

The first objection doubts whether interpretivism offers any insights about what the law is. Moreover, it asks if the theory should be more appropriately viewed as belonging to the zone of what the law ought to be. If interpretivism is one type of natural law theory in disguise, it does not bring any new insights into international law. Objections to natural law theories apply to interpretivism, the central one being that it compromises the neutrality and distinctiveness of law by conflating it with ‘natural reason, moral principles and political ideologies’.³⁵

This objection, therefore, is, in its essence, a standard positivist objection to theories which call for moral judgement to figure in legal propositions.³⁶ International legal positivism, classically defended by Prosper Weil, holds that the content of law is derived from phenomena which can be accounted for in the real world in order to maintain the distinction between law and ‘law as it should be’.³⁷ Conflating law and morality is an undesirable attitude, given that every single interpreter may have a different set of moral values which she or he thinks makes the practice meaningful. This would not lead to an adequate interpretation of international law; rather, it

³² On various strands of positivists attacks on Dworkin’s interpretivism see J. Coleman, *The Practice of Principle: In Defense of a Pragmatic Approach to Legal Theory* (2001); J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994). On whether interpretivism and critical legal studies address the same type of theoretical concerns see Waldron, ‘Did Dworkin Ever Answer the Critics?’ and Dworkin ‘Reply’ in S. Hershowitz (ed.), *Exploring Laws Empire: The Jurisprudence of Ronald Dworkin* (2006), at 155 and 298. On the anti-essentialist claim to impossibility of objectivity see Dworkin, ‘Objectivity and Truth: You’d Better Believe It’, 25 *Philosophy and Public Affairs* (1996) 87; N. Stavropoulos, *Objectivity in Law* (1996).

³³ Here, I do not treat positivism and anti-essentialism about international law as singular and unified theories. There are indeed different versions of both and internal disagreements within them. I, however, assume that there are some overarching views which are shared enough by members of these approaches to qualify some objections as positivist or anti-essentialist.

³⁴ Unlike positivism and anti-essentialism, legal realism, which has strongly influenced the process school of international law, shares a number of similarities with interpretivism. Both doctrines hold that the practice of international law is sensitive to values. See, e.g., McDougal, ‘Some Basic Theoretical Concepts about International Law: A Policy Orientated Framework of Inquiry’, 4 *J Conflict Resolution* (1960) 337.

³⁵ Simma and Paulus, *supra* note 6, at 304.

³⁶ The classic defence of this positivist objection to moral values has been famously defended by Prosper Weil: see Weil, *supra* note 6, at 421.

³⁷ *Ibid.*, at 414–418.

would undermine interpretation. When morality is called on to determine the content of international law there is an important danger: the views of the mighty may win over the views of the weak. This would undermine the equal application of law to all cases, and law will lose its appeal to law's followers as a distinct entity from morality.³⁸ In the context of international law this is particularly worrying, as the discrepancy of power (material and resource based) between states is significant, and there is a real danger that the substantive moral views of a handful of states will determine what the law is.³⁹ The de-centralized character of international law is vulnerable to strong individual states asserting their own views as the law.⁴⁰ This objection identifies the solution to this problem by objecting to views that encourage moral judgement to figure in legal judgment. What is required is to define law by reference to social facts describable as such – for instance: intentions, secondary rules, and practices rather than moral reasoning.⁴¹

This objection can be countered in two different ways. First, the legal positivist solution to the moral judgement problem suffers from internal difficulties. The largest of these is that legal positivism is not clear how a social fact by itself can bind anything,⁴² especially in the de-centralized system of international law. Even if we identify that there is a social fact that is widely valued in the real world, we still cannot explain why that binds anyone. By basing law on social facts, legal positivism aims to steer clear of moral judgement and makes an intuitive assertion that morality is not a necessary condition for law to exist. It, however, takes the argument too far and ignores the fact that a degree of moral judgement is required even for basic tasks such as deciding which social facts are more significant in a particular case to determine how the law applies to those facts. One does not need to believe that morality determines law in order to hold that law and morality interact with one another in subtle ways in our everyday practice of law application.⁴³

Secondly, for this objection to succeed we must concede that there is not a significant difference between interpretivism and moral theories of international law. Interpretivism, contrary to this positivist objection, does not aim to establish moral foundations for an entity by treating the practice of that entity as merely contingent.⁴⁴ It requires an account of which values best justify an *existing* practice. It, therefore,

³⁸ Nardin, *Law, Morality*, *supra* note 6, at 15–16.

³⁹ For a radical defence of this view see H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1948).

⁴⁰ On strong state unilateralism see M. Byers and G. Nolte (eds), *United State Hegemony and the Foundations of International Law* (2003).

⁴¹ For a full account of law as a description of social convention see H.L.A. Hart, *The Concept of Law* (1961).

⁴² Traditional positivism, developed by Austin, explains the binding nature of law by defining law as the 'command of the sovereign'. This view still does not explain why social facts bind anyone. It argues this binding nature is derived from coercion or the power of the sovereign, as opposed to moral obligation: J. Austin, *The Province of Jurisprudence Determined* (ed. W. Rumble, 1995), Lecture 1.

⁴³ For an interactive view on law and morality see P. Cane, *Responsibility in Law and Morality* (2002), at 12–15.

⁴⁴ For approaches in this genre see, for example, F. Teson, *A Philosophy of International Law* (1998); A. Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (2004).

stays in the messy business of establishing what the law is through a heuristic cycle of studying the practice and asking what the point of the practice is. This is what Dworkin calls a 'theory embedded view of practice'.⁴⁵ Interpretivism accepts that law emerges from the activities of authoritative institutions, but also holds the view that 'the law these activities create is not fixed by the crude function of these activities'.⁴⁶ It insists that the establishment of what the law is requires a more complex form of analysis. Interpretivism, in this respect, also has a historically-embedded view of the practice. This is because what is meant by practice is not an isolated instance of it, but an analysis of practices 'over time and in continuous interaction'.⁴⁷

In the context of public international law the objection that interpretivism imposes individual morality on law collapses, as interpretivism would insist that the need to fight morally dubious views of individual states is a concern that the interpreter has to take into account in identifying the value system of international law. Such views cannot claim to be the values at the heart of international law as they fail to fulfil the necessary condition that the value of the system cannot be something that happens to be valuable to some. Indeed, one may even go a step further and argue that constraining individual political units (i.e. states) so that they do not take matters into their own hands is one of the key aspects of de-centralized international law. In other words, the value of legality at the heart of Dworkin's interpretation of law has significance in international law in the sense that it captures the strong intuition that no state can determine what international law is based on its subjective assessments.

B *Interpretivism and Value Pluralism*

The second objection concerns the desirability and feasibility of interpretivism. It raises doubts about whether imposing purpose on a practice, such as international law, is desirable or feasible. Such a project may not be desirable because imposing purpose on a practice necessarily opens a Pandora's Box. There may be a number of values that can be imposed on this practice which may be hard to reconcile. Here, another level of concern is that every interpreter can impose his or her own purpose or different purposes to the practice.⁴⁸ This would mean that agents are not interpreting the law, but inventing it based on their substantive views and preferences.⁴⁹ This may further bar international law from providing normative guidance to all states.⁵⁰

We can construct two versions of this scepticism about value pluralism: positivistic and anti-essentialist. The positivist version is sceptical about the very idea of imposing a value on the practice of international law as it views this as undermining the objectivity of international law. The objectivity of international law can be attained only by following procedures which authoritatively produce law. The positivistic

⁴⁵ Dworkin, *Justice in Robes*, *supra* note 1, at 51.

⁴⁶ *Ibid.*, at 384.

⁴⁷ *Ibid.*, at 384–385.

⁴⁸ Beckett, *supra* note 3, at 630.

⁴⁹ Weil, *supra* note 6, at 441.

⁵⁰ *Ibid.*, at 440–441.

understanding of treaty and custom is a manifestation of this view. Treaty and custom are legally binding sources of international law because they are validated by state consent. Treaties enable this by the creation of a convention through formal procedures. Customary norms exist because state practices converge with the intention to follow a legal norm. Authoritative procedures themselves can be messy because of the political nature of law-making, and it is possible that some international laws are not just. They are, however, objective. They do not serve the interests of any single political community as such.

The problem with this type of defence of the objectivity of international law is that it is not clear why any of these processes are value-free in the first place. It is clear that this account puts a great deal of emphasis on the participation of states in law-making processes, on the history of past practices of states, and on the importance of following the correct procedures. An interpretivist theory of international law does not have a reason to dispute these emphases because they are central to understanding international law. In other words, the insistence on authoritative decision-making procedures can also be viewed as reflective of values which we identify as important in the practice of international law. Positivism as a normative defence of state consent, in this respect, is not an external objection to interpretivism: it is an interpretive theory of international law.⁵¹

The positivistic value-free claim on the content of law also faces problems of coherence. Some of the central doctrinal questions of international law owe their presence to such incoherences.⁵² At what point does the practice of a number of states harden into customary international law? What happens when half of the states violate a rule and the other half follow it?⁵³ These questions are not answered only by looking at the authoritative practices of states. Even when it is possible to document and have a view about what the great number of states did in case X with respect to the hardening of a customary international law, the problem remains. Consider the case of NATO intervention in Kosovo in 1999 which lacked authorization from the United Nations Security Council. Some states carried out or supported the intervention, while others strongly opposed it. This information on its own cannot establish what effects this mixed practice had on customary international law on humanitarian intervention. In the case of half of the states following and the other half violating the rule, neither side of cumulative convergent state behaviour on its own can tell us what the customary law is. We still need a theory on the relationship between treaty law and customary international law, what constitutes general practice in customary international law, and whether the violation of a treaty provision constitutes practice in the context of customary law. The proposition that international law is made by state consent without inquiring into what role consent plays in a large web of convictions about the value of international law cannot adequately provide answers to these questions.⁵⁴

⁵¹ On this point see also Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', 13 *EJIL* (2002) 401, at 402.

⁵² Rodley and Çali, *supra* note 17.

⁵³ Akehurst, 'Custom as a Source of International Law', 47 *BYBIL* (1974–75) 1.

⁵⁴ Indeed 'modern positivism about international law' approaches consent as a means rather than an end in itself in international law: Simma and Paulus, *supra* note 6, at 307–308.

Some positivist scholars explain such problems which stem from applying a positivistic understanding of sources doctrine not as problems of legal theory, but as problems of the vagaries of politics.⁵⁵ Instead, the evaluative nature of (international) law is at the heart of these problems. A purely descriptive solution to the sources of international law ignores that there are competing sets of (legal) principles which inform legal positions. This disagreement requires making sense of the key aspects of international law in order to identify what the law is.⁵⁶ International lawyers have to identify those key aspects under the institutional constraints of international law. The necessity to pay due regard to authoritative decision-making procedures, and to do so in a coherent and consistent way, makes international legal evaluation distinctive from moral evaluation *per se*.

The non-essentialist version of this view does not take issue with the desirability of identifying which values international law serves, but with the feasibility of reconciling these values. In fact, a non-essentialist agrees that there is indeed a plurality of values that international law may serve.⁵⁷ This is, however, part of the problem of international law. International law is a patchwork, made up of many diverse and conflicting principles and agendas. It is not simply politically messy, as positivists claim; it is also conceptually messy. The anti-essentialist, however, takes this conceptual messiness a step further and asserts that it runs so deep in the nature of (international) law that it makes it impossible to assert in an essentialist sense what the law is.⁵⁸ Instead of a singular international legal system, we simply have subjective preferences of international actors dressed up in international legal language.⁵⁹ In other words, (international) law does not have procedures internal to its own functioning which can determine what makes propositions of law true or false. The very nature of international law is that it is made up of contradictions.⁶⁰

These statements are metaphysical in the sense that they claim to hold some deep knowledge about the very nature of law rather than ordinary disputes. They are removed from how international lawyers argue and establish international law in everyday discussions. In this respect, they impose an external point of view on the nature of international law and treat instances of agreement on what the law is. The anti-essentialist view on irreconcilable values is not reached through working out the relationship between values in ordinary situations. It is a general

⁵⁵ Raz, 'The Relevance of Coherence', in J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994), at 277, 298–300.

⁵⁶ This does not mean that this is an easy task and that there is a clear answer for every single international legal problem.

⁵⁷ In non-essentialist writings on international law, Koskeniemi identifies a number of binary oppositions – such as those between facts and norms, between concreteness and normativity, and between apology and utopia – which he regards as irreconcilable: Koskeniemi, *supra* note 6, especially at 58–69. See also D. Kennedy, *The Structure of International Legal Argument* (1986), who argues that sovereign autonomy and international autonomy pulls international legal argument in opposite directions.

⁵⁸ Koskeniemi, *supra* note 6, at 590.

⁵⁹ *Ibid.*, at 616.

⁶⁰ *Ibid.*, at 61–67. It is important to note that this statement itself has an essentialist feature.

statement based on a deep assumption that values conflict. Interpretivism would not deny the possibility that in some very difficult cases the analysis of the scheme of values that best justifies the practice can be inconclusive. It, however, does not follow that in some philosophical sense international law is unable to provide the right answers to competing legal claims.⁶¹ In ordinary discussion many international lawyers or stateswomen/statesmen are able to reach a determinate international legal decision by using international law's resources, and without using personal or political preferences as the essential feature of the basis of the decision. We can say, for instance, that Israel, as a matter of international law, had a right to self-defence in the immediate aftermath of the attacks on its territory from south Lebanon in 2006. However, when it used its right to self-defence the conduct of its military operations was disproportionate, contrary to international law.⁶² In the face of such agreement, the anti-essentialists have to state that 'contrary to ordinary lawyers' opinions, it is a legal mistake to think that there are right answers in hard cases'.⁶³

Interpretivism, therefore, is able to counter both the positivist and anti-essentialist objections to imposing a purpose on the practice of international law. With respect to the positivist challenge it shows that international law cannot do away with the values which enable us to make sense of the practice. With respect to the anti-essentialist challenge, it questions the premise of making mystical philosophical claims about international law by insisting on deep contradiction as an organizing value. The call of interpretivism for international legal theorists is to engage in the systematic analysis of the very meaning of the values and procedures to identify the best justification in the face of competing values. Positivism and anti-essentialism attack this project even though their position too can be traced to some value scheme they support with respect to international law.

4 Internal Objections

Internal objections do not challenge interpretivism as a jurisprudential approach, but argue that the conditions for Dworkinian interpretivism to apply to the special case of international law are not met. This is because the larger web of conviction within which Dworkin locates law in the domestic case does not transfer to international law. International law is not law in the sense that interpretivism would have it be as it lacks the key aspects and characteristics that make sense of law as a social practice. I will focus on two versions of this internal objection in this section. The first is what I shall call the lack of community objection. The second is the lack of centrally-organized coercive institution objection.

⁶¹ Dworkin, *Justice in Robes*, *supra* note 1, at 41–42.

⁶² See, e.g., Kirgis, 'Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon', 10 *ASIL Insights* (2006), available at: www.asil.org/insights/2006/08/insights060817.html (accessed 1 June 2008).

⁶³ Dworkin, *Justice in Robes*, *supra* note 1, at 43.

A *There is No Genuine Value in the Community of States*

This version of the objection holds that interpretivism as a theory of law relies on the very existence of community, and more importantly a community which is aimed at (not necessarily successfully) equal concern and respect for individual lives. Equal concern for its members is what gives a community its very meaning.⁶⁴ In international law no such community exists. More importantly, international law allows for political communities which do not show equal respect and concern for individuals to have rights and obligations.

This objection rests on an integrated understanding of how the procedure of interpretivism applies to the case of law. In order to apply interpretivism one has to believe that, for a body of practice to be law, there has to be coherence about how members of a community are treated by the legislative and the judiciary in the creation and application of laws.⁶⁵ This conceptual demand of law is its value. Integrity, in turn, implies a specific type of community: one which aims at equal concern and respect of its individual members. Without the idea of equal concern and respect the whole point of integrity is lost. Dworkin confirms this view in *Law's Empire* by holding that 'integrity holds within political communities, not among them'.⁶⁶ In fact, international society, if there is one, negates that very value by permitting membership to states which display no such aim towards individuals.⁶⁷

This objection needs unpacking as it hosts a number of complex ideas. First, there is the idea that interpretivism as a substantive theory or method makes sense only when a community exists which is defined in a particular way.⁶⁸ A central feature of this community is that it is made up of individuals. As opposed to this, international law is a practice which invites a debate about whether there is any community, in any sense of the word, at all. In other words, the question is whether there is a unifying thread to bring the interpreters together in the first place. This view invokes the schematization offered by Dworkin in *Law's Empire* when he describes the interpretive process. According to this scheme the process has three stages: (a) pre-interpretive; (b) interpretive; (c) post-interpretive.⁶⁹ The objection then holds that international law does not successfully meet the conditions of a pre-interpretive stage, let alone an interpretive stage. In order to assess this objection, therefore, the qualities of a pre-interpretive stage must be established.

Dworkin proposes two conditions in order to talk meaningfully about a pre-interpretive stage of a certain practice. The practitioners should share an attitude to the effect that (a) the practice does not *merely* exist, but it has some purpose, and (b) the behaviour it calls for is sensitive to that purpose.⁷⁰ The 'background noise' charge against international law, then, must show that it is not possible to pin down a point

⁶⁴ Dworkin, *Law's Empire*, *supra* note 1, at 188–190.

⁶⁵ *Ibid.*, at 167.

⁶⁶ *Ibid.*, at 185.

⁶⁷ For a contrasting view see Brus, *supra* note 8.

⁶⁸ Beckett, *supra* note 3, at 634.

⁶⁹ Dworkin, *Law's Empire*, *supra* note 1, at 65–68.

⁷⁰ *Ibid.*, at 65–66.

of international law and that the practice of international law is, at best, only insignificantly linked to any value it may have.

A few problems with this objection are now easier to spot. This objection overplays the distinction between Dworkin's use of community versus any other conception of community to settle the question whether international law is pre-interpretive or not. According to the conditions set out by Dworkin it is perfectly possible for a practice to have 'pre-interpretive' qualities without being a practice representative of a community aimed at equal concern. What is required is that practitioners share a common understanding of the purpose of the practice.

Consider this bare formulation of the key purpose of international law: It is to establish a framework to enable the conduct of international relations.⁷¹ This is not merely a subjective view, but a shared understanding about what international law does or aims to do. This purpose is not a trivial part of the practice. The central disagreements revolve around what constitutes 'conduct' in the international sphere, and where the boundaries of the framework lie, as opposed to domestic conduct of individuals, and how these rules of conduct are established. A central aspect of international law is that it does not give the same priority to individual human beings as domestic law because of the existence of multiple political communities. Individuals do, of course, exist in international law as right holders and responsibility bearers (i.e. in international human rights law, international refugee law, international humanitarian law, and international criminal law). The difference, however, with domestic law is that their legal existence is secondary and not a constitutive part of the legal system.⁷² According to Dworkin, such debates are the very subject of the interpretive stage, when practitioners provide a justification of the practice.

If we agree that international law is not merely background noise, we can consider the deeper objection that it may well be that international law is an interpretive practice, but not one of law. I believe that the core of this objection is the argument that the value of integrity, which is a function of a special community aimed at equal concern, does not go over to international law. Integrity is a value which is achieved in a community and not between communities.⁷³

I agree with this objection. Integrity cannot do the work in international law that it does in domestic law because it responds to the circumstances of law in a single political community. The value of integrity is equality of respect for individuals. Solely focussing on equal respect for individuals in the case of international law does not take us far as the circumstances of law are different: there are multiple political communities, each made up of individuals who belong to a single political community. It does not follow, however, that interpretivism has no contribution to make to our

⁷¹ J.L. Brierly, *The Law of Nations: An Introduction to International Law of Peace* (1963), at 6.

⁷² I do not mean that individuals are not important or secondary to something else in international law. It is simply that international law does not directly regulate individuals *qua* individuals. They have to qualify as a 'victim' under international human rights law, to commit an 'international crime', to claim refugee status, or to find themselves in the midst of an international armed conflict. It is only then that they become rights holders or duty bearers in the international sphere.

⁷³ Dworkin, *Law's Empire*, *supra* note 1, at 185.

understanding of the nature of international law. The way in which Dworkin represents integrity is the best conception of legality in the domestic case.⁷⁴ It is the more abstract value of legality which offers the distinct meaning to law as an interpretive concept.⁷⁵ Legality does go over to international law in form, but not in substance. The restatement of integrity as the best conception of legality in the domestic case makes it possible to counter the objection that interpretivism does not transfer to international law. It does not, however, answer the more fundamental question of what is the best conception of legality in the light of the key and significant aspects of international law. This is an ambitious task, which will have to address the value of legality in international law in the light of a larger web of convictions.⁷⁶

B Interpretivism is Not a Theory of Law Proper, but a Theory of Adjudication

This objection, originally raised by Beckett, is based on the characterization of Dworkinian interpretivism as a theory of adjudication rather than as a systematic theory of law.⁷⁷ Once this premise is accepted the objection follows that, given that adjudication is so peripheral to our understanding of international law, Dworkin's theory is largely irrelevant to the problems with which theorists of international law are struggling to grapple. The lack of central authority in international law and its decentralized institutional identity, therefore, require a less adjudication-focussed and a more source- and obligation-focussed account of the nature of international law.⁷⁸

The central issue with this objection is whether it is accurate to equate interpretivism solely as a theory of adjudication, in the sense that its scope is limited to being a handbook for judges in deciding cases and that it is silent on issues of legislation and compliance. This objection is based on the assumption that how judges decide cases is a much more limited and specialized question than that of what law is. Beckett, for example, holds that international law is in need of 'pre-adjudicative' theories on the existence and identification of law.⁷⁹ Does interpretivism only deal with the question of how to interpret the law and not at all with the questions of how law is made and who should interpret the law and why it should be obeyed? If the answer to this question were yes, then it would follow that the remit of interpretivism is limited and that it is not a theory of law as such. It may be a helpful way for judges to think about cases, but it is not a way of understanding what we mean by the law. Law is a wider notion than adjudication, and it needs to respond to questions beyond how judges should decide on cases. Interpretivism then does not explain the practice of law as a whole and has almost no significance for international law.

⁷⁴ See in particular how integrity is compared with alternative conceptions of legality, namely accuracy and efficiency, in Dworkin, *Justice in Robes*, *supra* note 1, at 171–176.

⁷⁵ *Ibid.*, at 178.

⁷⁶ There have been works of international law theory which have focused on the rule of law as one manifestation of legality as a central aspect of international law. See, e.g., Nardin, 'International Pluralism', *supra* note 6.

⁷⁷ Beckett, *supra* note 3, at 634–645. See also A. Marmor, *Interpretation and Legal Theory* (2005).

⁷⁸ Beckett, *supra* note 3, at 635.

⁷⁹ *Ibid.*

The central problem with this view is its treatment of how judges should decide cases as a separate and significant category from that of law. It is correct that a general theory of law begs questions beyond how judges should decide cases. How judges should decide cases, however, is a function of a general theory of law. In other words, it is not possible to develop a theory on the truth conditions of a proposition of law which is divorced from questions of who is entitled to make the law and who should enforce it.

In Dworkin's domestic case there are a number of basic assumptions in place about the key aspects of the practice of law. First, Dworkin has in mind a 'reasonably decent democracy' comprising the background facts of the domestic case.⁸⁰ The division of labour between a parliament which legislates and a judiciary which deploys the monopoly of a state's coercive power towards individuals is a basic fact of the domestic case. Dworkin defends his focus on judges in *Law's Empire* by his aim to offer a theory of the structure of the legal argument and what counts as a good or bad argument *within* the practice of law. His theory of law is from the internal participant's point of view because it aims to understand law as an argumentative social phenomenon with practical consequences in ordinary life.⁸¹ There is good reason to focus on judges in the domestic case because their decisions embody the deployment of the state's coercion *vis-à-vis* individuals. Dworkin also assumes in the domestic case that there is a duty to obey the law, and this is related to the basic function of the law in the community: equal concern towards all members of the community.⁸²

The realm of adjudication is amplified in Dworkinian interpretivism, not because interpretivism aims to offer only an understanding of adjudication, but because the practice of domestic law makes the focus on adjudication meaningful. The realm of adjudication in this respect flows from foundational questions and doctrinal questions about law and the central features of the practice of domestic law.⁸³

In the international case, adjudication does not play a central role. This does not mean, however, that it plays no role. In specific sectors, such as, for example, international human rights law in Europe adjudication is highly relevant.⁸⁴ But even in cases where adjudication is relevant, it is not relevant for the same substantive reasons as it would be in the domestic case. International judges do not deploy the state's monopoly of coercion in individual cases when they decide. International adjudication has to receive its substantive significance from an understanding of the basic facts of the international case, and this will require linking theories of adjudication in the international case to theories of legislation, compliance, and enforcement.

⁸⁰ Dworkin, *Justice in Robes*, *supra* note 1, at 18.

⁸¹ The internal point of view stands in contrast to the external point of view which is interested in identifying patterns of legal argument which develop in different times and places. Dworkin points out however that these perspectives on law have to take each other into account: Dworkin, *Law's Empire*, *supra* note 1, at 13–14.

⁸² Dworkin, *Justice in Robes*, *supra* note 1, at 19.

⁸³ *Ibid.*, at 9–21.

⁸⁴ It is also perhaps for this reason that Dworkinian interpretivism was first applied in a sectoral way to supranational adjudication of human rights in Europe: see Letsas, *supra* note 1.

Interpretive procedure, therefore, is not limited to adjudication in the domestic case. Its proper boundaries are determined by its aim to understand the law as an argumentative practice and not from the point of view of a sociologist or a historian. In the case of international law, the correct question to ask is which agents constitute the most significant internal participants. Given that international law is made by states, but interpreted and implemented by states, international organizations, international and domestic courts, and quasi-judicial bodies, it is not adequate to focus single-handedly on judges. Internal participants are more adequately described as agents who have the capacity to affect the terms of international conduct.

5 Conclusion

My aim in this article has been to supply an argument for the relevance of interpretivism in international law and examine the reasons for its current unpopularity by considering possible central objections to it. I have aimed to show that a number of misconceptions about interpretivism as a substantive theory and as a method can be identified as obstacles to developing fuller accounts of interpretivist theories of international law. I have also argued that the direct application of interpretivism to international law as 'law as integrity' does not fit the practice of international law. I have not aimed to develop a full interpretivist theory of international law in this article. Mapping out what exactly such a theory requires in terms of purposes and their relationship to practice needs to be the subject of a separate study.

The analysis of the positivist objections has shown that positivism draws a different picture of interpretivism altogether. A central concern of positivist takes on interpretivism is that it will lead to the imposition of values by individual actors rather than telling us anything about the very meaning of international law. A common thread which runs through these objections is that international law is such a fundamentally different domain that introducing moral judgement will seriously impede the functioning of the system. I have argued, however, that this view itself voices a moral consideration: the necessity of controlling unilateral conduct, conviction, and action. I have further aimed to show that the anti-essentialist argument on the deep disagreement about values remains highly abstract and does not show on what basis ordinary international lawyers or diplomats are able to agree when they do agree.

Internal objections to the application of interpretivism raise a number of complex issues about whether the values at the heart of law make sense in the international case. I have aimed to argue that legality is a value which goes over to international law in form, but not in substance. Legality *really* matters for international law practice because without legality it is not possible to make a claim about the point of having an international law framework which guides international conduct. The very practice of international law has for its aim the constitution of an international community independent of the images that different political entities have of that community by setting standards to guide international conduct. There is, however, further work which remains to be done to show which conception of legality best fits the practice of

international law, what these standards are, and what the correct procedure to establish these standards involves. It is clear, however, that such a conception of legality will have to start by taking into account the distinct value of international law as the framework for regulating conduct in international relations.

In a non-centralized legal order law does not function to distribute coercion, but to provide a framework within which everyone knows how their conduct falls under its scope and what it means. The definition of conduct in this context will have to depart significantly from its definition in the domestic case and has to focus on what is meant by international conduct, what acts in what kinds of circumstances fall under international conduct, and what the key aspects of that conduct are. Further work also needs to be done to clarify what an international framework is, how it operates in filtering out which goals are acceptable, and how it enables co-operation towards achieving goals.

An interpretivist theory of international law, in this respect, will not appeal to values which are less important, less ambitious, or less virtuous than those of domestic law. It has to appeal to different values because of the kinds of concerns it responds to and the kinds of relationships it regulates. We also have to consider that values will have different implications in domestic law and international law, such as in the cases of human rights law, criminal law, and tort law. Any model of law transferred from domestic law to make sense of international law will run into a similar kind of challenge.⁸⁵ When the image of the success of a legal system is defined in terms of its domestic characteristics (such as the existence of the sovereign, the existence of a centralized hierarchical system, the existence of legislature, the existence of universal adjudication, or equal concern for individuals) international law is bound to fail constantly. International law requires its own indicators to measure its success as the framework which regulates international conduct. A systematic analytical approach to the values at the heart of international law is integral to such a project. This approach will have to guard itself from charges of value-favouritism. The good news is that the complex practice and conduct of international law, at least since 1945, are on the side of the interpretivist.

⁸⁵ On this point see R. Falk, *The Status of Law in International Society* (1970), at 9.