

The Authority of International Law

A study in international legal positivism

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Abstract

This thesis analyses the authority of international law from the perspective of international legal positivism. The traditional approach that takes the state's will as the foundation of international law is problematic as it results in the voluntarist dilemma. For international law to have objective power, a state should be incapable of escaping its authority by its own will even though this will is what constituted international law in the first place. The incompatibility of this would mean that international law's authority is actually based on a 'special' will that is external to the wills of states. Georg Jellinek devised a theory of international law that supposedly accounts for international law's objective authority while maintaining the state's will as its foundation. His theory is built on what he calls "the normative force of the factual", but falls short as it cannot withstand Hume's law. Herbert Hart's theory of law is more promising as it leaves the state's will out of the equation and focuses on legal practice to understand the necessary features of a legal system. International law, however, is "law" but not a legal system. This thesis challenges Hart's understanding of international law as "law" and argues that there is an international legal system consisting of primary and secondary rules.

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General Introduction

On August 2nd 1926, a collision occurred between the French steamer Lotus and the Turkish steamer Boz-Kourt. As a result, the Boz-Kourt sank and killed eight Turkish nationals on board the Turkish vessel. The surviving passengers were taken aboard the Lotus and taken back to Turkey. Back in Turkey, the officer of the watch on board the Lotus at the time of collision, M. Demons, was charged with manslaughter. The League of Nations' Permanent Court of International Justice (hereafter: PCIJ) was confronted with the question as to whether Turkey had violated "the principles of international law by instituting criminal proceedings in the present case" and taking jurisdiction to prosecute.¹ In response to this question, the PCIJ argued as follows:

"International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."²

Through this reasoning, the PCIJ argued that Turkey did not violate principles of international law as the crime was committed within the territory of Turkey. Although international rules govern the relations between co-existing independent communities, it does not go as far as limiting state sovereignty within its own territory. It emanates from the free will of states, but it cannot demand authority within the state's territory.

Even though *The Case of S.S. Lotus* is rather outdated and nowadays international law is generally regarded as more developed than back in 1926, questions of its authority are highly relevant. What does it mean if one claims that international law holds authority over states? How should we understand international law's authority? The very structure of international law — which consists of political concepts such as sovereignty, territoriality and the nation-state — makes answering this question troublesome.

In this thesis, I inquire how international law's authority is to be understood. My method for doing so is by analyzing Georg Jellinek's psychological positivism and Herbert Hart's soft-positivism. Jellinek developed an international law theory founded upon the state's will that set out to overcome the so-called 'voluntarist dilemma'. This dilemma flowed from the international law theories of Immanuel Kant and Georg Wilhelm Friedrich Hegel. Kant argued for

¹ The Case of S.S. "Lotus", PCIJ, 2

² The Case of S.S. "Lotus", PCIJ, 48

international law as a system of omnilateral willing founded upon the principle of freedom, while Hegel argued for international law as 'external state law' whose applicability was contingent on the individual wills of states. However, both notions of international law's authority are incapable of generating objective international law. As put by Karl Viktor Fricker:

"Either the wills of individual states stand above the common will, that is, the latter is in no way detached as a special, objective will from the individual wills – in which case an objective law of nations is unattainable; or the common will, once it has taken shape, stands above the wills of the individual states with its own objective authority – in which case one does arrive at an international law, but the latter is a special will that is distinct from the will of the state."³

For international law to have objective power, states should be incapable of escaping its authority through unilateral acts even though this unilateral act is what constituted law in the first place, unless, as Fricker argues, international law is the product of a 'special will'.⁴ This dilemma has been the starting point of Jellinek's theory of law.

Contrary to voluntarism, Hart's theory of law leaves the concept of the will out of the equation. His concept of law is focused on the social practice of legal officials and understanding the necessary features of a legal system. International law, however, is underdeveloped in Hart's theory of law.

"There is a whole chapter devoted to international law at the very end of *The Concept of Law*, but that chapter is (...) quite unhelpful. (...) Those international lawyers who do bother to read Hart's chapter on international law usually come away with the impression that Hart, like Austin, did not believe there was any such thing as international law."⁵

Hart argued that international law was to be regarded as "law", but not as a legal system. His methodological approach to assessing the legal quality of international law, however, is inconsistent.

³ Fricker, K.V., 1878, p. 377; "Ich halte es nicht für möglich, folgendem Dilemma zu entrinnen: Entweder stehen die Einzelstaatswillen über dem gemeinsamen Willen, d. h. es löst sich dieser als ein besonderer objectiver Wille von dem Einzelwillen überhaupt nicht ab - dann ist ein objectives Völkerrecht nicht zu gewinnen, oder der gemeinsame Wille steht mit eigener, objectiver Autorität über den Einzelstaatswillen - dann ergibt sich zwar ein Völkerrecht, aber dasselbe ist ein von dem eigenen Willen des Staats unterschiedener besonderer Wille."; Translation by Jochen von Bernstorff in Von Bernstorff, J., 2014, p. 60;

⁴ Fricker, K.V., 1878, p. 382

⁵ Waldron, J., 2009, p. 68-69

Chapter 1 discusses the international law theories of Kant and Hegel and why they have led to the voluntarist dilemma. Chapter 2 discusses Jellinek's international theory of law and his attempt to overcome the voluntarist dilemma. In Chapter 3, I will deviate from the state's will as the foundation of international law and discuss Hart's concept of (international) law which focuses on social practice. Chapter 4 inquires whether Hart's concept of law can give us an understanding of, and account for, international law's authority. At the heart of this thesis lies the question: "How should we understand international law's authority?"

Chapter 1 – Kant and Hegel on international law

This chapter discusses the international law theories of Kant and Hegel. The differences in interpretation concerning international law's authority have led to the voluntarist dilemma that lies at the heart of Jellinek's theory of law. Kant and Hegel's views on international law provide us with a good understanding of the problems that occur when grounding the authority of international law either on a will transcending the state's will or the subjective wills of states.

1.1 Kant on moral and legal rules

Before engaging in Kant's theory of law, I will briefly discuss the general nature of Kant's formal deontological ethics and the role Kant assigns to legal rules in regulating external conduct in society. For Kant, the only thing that can be held as truly good and possessing inherent moral value in the world is the 'good will'.⁶ In terms of human actions, only those actions that are motivated by the good will can be deemed as good. In *Groundwork of the Metaphysics of Morals*, Kant argues that the moral duties people have can be derived solely from reason, irrespective of empirical observations; whether a certain action is morally right is not dependent on the outcome, but is determined by the motivation underlying the action (which is respect for the moral law). Actions must be prescribed by practical reason and survive the test of the supreme principle of practical reason: the categorical imperative.⁷

How people act is determined by the subjective foundation coined by Kant as maxims.⁸ They provide individuals their own general rules (or principles) on how to act specifically in certain situations. Maxims differ from person to person. On the opposite side of maxims is what Kant calls imperatives⁹: imperatives are objective practical laws that provide individuals with objective reasons for action. A large part of *Groundwork* is dedicated to explaining the difference between *hypothetical* imperatives and the *categorical* imperative. Hypothetical imperatives can be best explained as instrumental imperatives focused on a specific goal and providing individuals with those maxims — in terms of means — that are required for achieving those goals.¹⁰ For example, Kant states that happiness is a universal goal of all human beings, but it is to be seen as a hypothetical imperative since it is impossible to determine a universal objective principle determining how to achieve happiness.¹¹ What happiness requires differs from person

⁶ Kant, I, 2017, 4:393

⁷ Kant, I, 1997, 4:416

⁸ Kant, I, 1997, 4:400

⁹ *Ibid.*, 4:414-416

¹⁰ *Ibid.*, 4:414

¹¹ *Ibid.*, 4:418

to person. The categorical imperative on the other hand provides individuals with the duty to “act only according to that maxim by which you could also will that it would be a universal law,”¹² treating human beings as ends in themselves instead of as means to an end. Stated by Kant as the imperative of morality, it is concerned with what is good in itself irrespective of the instrumental or material content of a specific will that underlies an act.¹³

What the categorical imperative requires from human beings can be derived *a priori* from reason.¹⁴ *A priori* refers to reason which underlies the will of individuals that is devoid of external (or empirical) influences, providing them with practical moral laws on how to act in a morally right way in accordance with the good will. Nevertheless, moral laws themselves are insufficient to refrain people from acting in those directions they see fit. In pre-legal society — the *a priori* state of nature — people standing in relation to others are, by definition, capable of mutually influencing each other.¹⁵

“However well-disposed or law-abiding men might be, it still lies *a priori* in the rational idea of such a condition (one that is not-rightful) that before a public lawful condition is established individual human beings, peoples, and states, can never be secure against violence from another, since each has its own right to do what seems right and good to it and not to be dependent upon another’s opinion about this.”¹⁶

This situation according to Kant is one that is *a priori* not-rightful: without law — however well-disposed people are — they can never be secure from ‘violence’ and ‘coercion’.¹⁷ As people are free to do ‘what seems right and good’ to themselves, there is necessity for legal rules limiting the freedom of people to act as they seem fit in order to gain freedom from violence and coercion of others.

1.1.1 The civil condition

The starting point of Kant’s construction of society is the idea that people are free in their choices of action. This requires a system with the authority to impose rights and duties on individuals through universally binding rules safeguarding such freedom.¹⁸ For Kant, an individual has to

¹² *Ibid.*, 4:421

¹³ *Ibid.*, 4:416

¹⁴ *Ibid.*, 4:412

¹⁵ Kant, I., 2017, p. 237; Kant, 2006, 8:289

¹⁶ Kant, I., 2017, 6:312

¹⁷ *Ibid.*, p. 237

¹⁸ Mertens, T. in Kant I., 2013, p. 25

“unite itself with all others, subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law and allotted to it by adequate power (not its own but an external power); that is to say, it ought above all else enter into a civil condition.”¹⁹

To eliminate arbitrary external influences and establish freedom of action individuals enter into the civil condition and subject to a system of coercion that is regarded as public and lawful. The authority of such a system does not depend on the singular wills of people. That would require all individuals to subject to it individually for its rules to be binding.

For Kant, its authority is to be derived from what he believes to be the only innate right of human beings: freedom.²⁰ In *The Metaphysics of Morals*, Kant illustrates this by explaining how property is justly acquired by individuals through their external power of choice while not infringing on other peoples’ freedom. An individual “cannot bind another to refrain from using a thing, an obligation he would not otherwise have”²¹ by a unilateral act of willing. Such an act is only in relation to the thing itself and not to other people.

Property rights in the state of nature then are merely provisional; no agent has the authority to enforce them in such a way that is to be regarded as fully justified. Rights and duties can only be established under a civil constitution — a system of ‘omnilateral’ willing — that is to be regarded as *a priori*.²² External actions are right if they can

“coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.”²³

The innate right of freedom makes entering into the civil constitution necessary as a duty so that any external acquisition is subjected to the principle of freedom. Such a system is established by an omnilateral will that transcends individual wills. Only the omnilateral will in conformity with reason can make external actions binding upon all in accordance with freedom: the authority to legislate and impose rights and duties can only belong to the united will of all people.²⁴

¹⁹ Kant, I., 2017; 6:312

²⁰ Kant, I., 2017, 6:238

²¹ Kant, I., 2017, 6:261

²² Kant, I., 2017, 6:264; For Kant, only a system that is constituted by the *a priori* will is one that is in accordance with the freedom of all.

²³ Kant, I., 2017, 6:231; This is Kant’s categorical imperative for the law.

²⁴ Kant, I., 2017, 6:314

1.1.2 Law as 'minimal ethics'

Law is to be regarded as a system of reciprocal coercion in accordance with the universal principle of freedom establishing equality of action and reaction:²⁵ "right is (...) the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."²⁶ The authority that precedes the law is derived from natural law, but the duties people have relative to the law are different from the moral duties people have derived from *a priori* reason to cultivate their individual wills to the "purest virtuous disposition".²⁷ Law is to be regarded as 'minimal' ethics;²⁸ it is concerned merely with the external conduct of people in society and lacks the authority to interfere in peoples personal lives and enforce the virtuous duties they have towards themselves and others in accordance with the categorical imperative. 'Legality' (lawfulness) differs from 'morality'.

Legality is concerned with whether an external action is in conformity or nonconformity with law, irrespective of its incentive. Morality refers to whether the internal incentive of an individual is in conformity with the Idea (what reason prescribes) of law (legal as well as moral laws).²⁹ Kant makes the distinction between acting in accordance with the duties derived from rightful lawgiving (*Pflichtmäßig*) and the Idea of duty (*aus Pflicht*) derived from reason itself. Lawgiving for Kant cannot be ethical, since it is only concerned with external conduct.³⁰

Another distinction is between legal rules and moral rules.³¹ Legal rules are concerned with governing external conduct to achieve an equal distribution of freedom in society. Moral rules, on the other hand, are concerned with those duties individuals have prescribed by practical reason and the categorical imperative. What provides legal rules their authority is the omnilateral will of all to leave the state of nature and live in a situation of lawful coercion by the state. In this situation the principle of freedom is safeguarded by the law and people have limited freedom of action as long as it does not infringe on the freedom of others. The principle of freedom is vital for Kant's theory of law and, as will become apparent in the next section, also for his international theory of law.

²⁵ Kant, I., 2017, 6:232

²⁶ Kant, I., 2017, 6:230

²⁷ Kant, I., 2017, 6:387

²⁸ Mertens, T. in Kant. I, 2013, p. 27

²⁹ Kant, I., 2017, 6:218-6:219

³⁰ Kant, I., 2017, 6:219

³¹ Fletcher, G.P., 1987, p. 534

1.2 Kant and international law

To follow up on the previous section, it is important to understand that the established public lawful coercive system in the civil condition takes the institutionalized form of the republican state. The republican constitution for Kant is guided by the principle of freedom, in which all individuals depend on a single common legislation and all are equal.³² Similar to individuals in the state of nature, the republican state finds itself in a situation in which it stands in relation to other states and is subject to arbitrary influences as long as there are no laws governing international external conduct. In this state of war, states are under a constant *facto* threat of hostilities due to the mere existence of other states.³³ The state of war

“like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition, before this happens any rights of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely provisional.”³⁴

A state, for Kant, can “require of him (another state) that he either enters into a state of common civil law or removes himself from my vicinity.”³⁵ This is important for a state to be able to pursue its rights. Without a common constitution, they are merely provisional.³⁶

“Although states can pursue their rights only through war, and never by means of a trial before an external tribunal, war its favorable conclusion – victory – never determines right. And while a peace treaty achieves an end to the present war, it does not achieve an end to the state of war.”³⁷

To recall, unilateral acts are incapable of binding others. So while war might be able to guarantee peace on a state’s territory for a short period of time, there is no external norm prohibiting others to make a claim on a state’s territory. A system of laws determining what the right to territory holds is absent.³⁸ The international civil condition provides those maxims through which states can lawfully go to war with each other; war is ‘just-war’.³⁹

³² Kant, I., 2006, 8:350

³³ Capps, P. & Rivers, J., 2010 p. 241; Kant I, 2006, 8:349

³⁴ Kant, I, 2017, 6:313

³⁵ Kant, I., 2006, supra note 2, p. 73

³⁶ Kant, I., 2006, 8:354

³⁷ Kant, I., 8:355

³⁸ Capps, P. & Rivers, J., 2010, p. 241

³⁹ Kant, I., 2006, 8:356-357

Analogous to the national legal system, the international legal system is established by an omnilateral will transcending the individual wills of states. While international legal rules provide states with the means to achieve their rights through just-war, it is in the nature of the republican state — that regards people as ends in themselves — to refrain from doing so. War infringes on the freedom of other states and its peoples. The principle of freedom as its *telos* is directed towards peace rather than war.⁴⁰

The principle of freedom is not merely confined to the internal, but also to the external legal order. The omnilateral will of the state is directed towards eliminating external threats that infringe on the freedom of itself and its people. Kant sees it as a moral duty for states to enter the international civil condition in order to eliminate war and direct itself towards establishing peace.⁴¹ International law as a system of omnilateral willing safeguards the principle of freedom.

1.3 Hegel's critique on Kant

The most prominent critique on Kant's theory of international law was made by Hegel. His argument is built from his idea of people their conscience and how norms in society come into existence. Contrary to Kant, Hegel claims that conscience consists of two separate components: individuals have a 'true' conscience comparable with Kant's categorical imperative focused on the absolute good and another conscience as "the formal side of the activity of the will."⁴²

For Hegel, acting morally is contingent on the content one has chosen by conscience.⁴³ Hegel believed that by engaging in social relations in civil society — or the ethical community — people are capable of acting from their 'true' conscience. The ethical community provides "objective determinants and duties" for an individual to identify oneself with.⁴⁴ Contrary to Kant, it is not reason itself that determines what morality requires, but it is the relationships people engage in that determine what is morally permissible.⁴⁵ Moral conscience without the ethical community is reduced to formal subjectivity alone, potentially elevating the self-will of individuals (the formal side of the activity of the will) above the objective duties of civil society.⁴⁶ Social relations between people in the ethical community provide individuals with norms.⁴⁷

Civil society is not to be conflated with Kant's civil condition and the republican state. Civil

⁴⁰ Kant, I., 2006, p. 74

⁴¹ *Ibid.*

⁴² Hegel, G.W.F., 2001, § 137

⁴³ Mertens, T., 1995, p. 668

⁴⁴ Hegel, G.W.F., 2001, § 137

⁴⁵ Mertens, T., 1995, p. 669

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

society is comprised of individuals regarded as ends in themselves who are self-sufficient beings “occasioned by their needs”⁴⁸. These beings are satisfied by engaging in relations with others to achieve the whole of their ends.⁴⁹ The state functions to unify these individuals⁵⁰ and provides rules enabling individuals to participate within civil society. Individuals can seek what is right according to their ‘true’ conscience in the duties, laws and principles that govern the ethical community. They recognize these as their own.⁵¹ Kant’s version of the state is of no additional value in society as what the state does actually takes place in civil society.

The function of the state is most apparent in times of war. For Hegel, every state is to be regarded as an individual⁵² that becomes aware of its own existence and autonomy by confronting itself with other states.⁵³ The state confirms its unity not only in relation to other states, but also towards all the separate groups, institutions and individuals that are part of the state.⁵⁴ It has a unifying power. War is not an evil that is to be avoided at all costs, but serves an ethical purpose that unifies the political community and establishes a bond between people and the state.

It is the autonomy of states and their particular wills that serve as the foundation of international law.⁵⁵ Treaties are normative contracts that “ought to be kept”, but rights of states are actualized in their particular wills and not in an omnilateral (universal) will with constitutional powers over them. The “universal proviso” of international law is, according to Hegel, merely an “ought-to-be.”⁵⁶

“International law springs from the relations between autonomous states. It is for this reason that what is absolute in it retains the form of an ought-to-be, since its actuality depends on different wills each of which is sovereign.”⁵⁷

⁴⁸ Hegel, G.W.F., 2001, § 157

⁴⁹ *Ibid.*, § 182

⁵⁰ *Ibid.*, § 257

⁵¹ *Ibid.*,

⁵² *Ibid.*, § 324: “But the state is an individual, and individuality essentially implies negation.”

⁵³ *Ibid.*, §§ 321-322

⁵⁴ *Ibid.*, § 324: “War has the higher significance that by its agency, as I have remarked elsewhere, ‘the ethical health of peoples is preserved in their indifference to the stabilisation of finite institutions; just as the blowing of the wind preserves the sea from the foulness which would be the result of a prolonged calm, so also corruption in nations would be the product of prolonged, let alone ‘perpetual’, peace.’”

⁵⁵ *Ibid.*, § 332

⁵⁶ *Ibid.*, § 330

⁵⁷ *Ibid.*

A continuous approximation of world peace founded on *a priori* moral reasoning is not possible as Kant's state of war is necessary for states to maintain their unity and autonomy. Hegel's notion of international law is that of a system of laws external to the state's legal order whose existence depends on the singular wills of states. This is diametrically opposed to Kant's notion of international law as a system of omnilateral willing that is part of the internal legal order.

1.4 Conclusion

If Hegel is correct, then international law lacks authority as its normative force is contingent on the particular wills of states. The authority of international law is to be understood as the aggregate of sovereign wills of states and cannot be regarded as having objective authority. If Kant is correct — and international law and national law both have the same *telos* (freedom and equality for people as ends in themselves) — then international law as a system of omnilateral willing supplements national law and is applicable both in the external as well as the internal legal order. Conflicts between states as Hegel proposes are impossible for Kant in an international community consisting of republican states guided by the principle of freedom.

Voluntarist theorists have tried to explain the authority of international law from these Kantian and Hegelian notions of international law's foundation by either vouching for the sovereign will as a "self-obligating will,"⁵⁸ or as a "common will."⁵⁹ Pre-legal entities such as the 'state's will', 'the state', 'sovereignty' and 'power' have been used as devices with the power to provide international law its authority and validity without recourse to ethical or moral considerations.⁶⁰ By using this method, Georg Jellinek constructed an international law theory founded upon the subjective wills of states that maintained a notion of international law as objective in the Kantian sense. The next chapter discusses Jellinek's international law theory and whether his conception is viable.

⁵⁸ Jellinek, G., 1890, p. 7

⁵⁹ Triepel, H., 1899, p. 27-32; "Only the common will of many states, joined as a unity of will through unification of will, can be the source of international law." (Translation by Kammerhofer J. in Kammerhofer, J. & D'Aspremont, J., 2014, p. 91; Bergbohm K., 1892, p. 18-21

⁶⁰ Kammerhofer, J., 2014, p. 90

Chapter 2 – Jellinek’s psychological positivism

Georg Jellinek was one of the most influential legal positivists in the late 19th century. His theory of law incorporated both the objective and the subjective element into the authority of international law and was supposed to overcome, what he believed to be, the merely apparent contradiction of the voluntarist dilemma.⁶¹ Following Hegel who claimed that the rights of states “are actualized only in their particular wills and not in a universal will with constitutional powers over them,”⁶² Jellinek believed that the only possible source of international law could be found in the particular wills of states. Only the will of a state can be regarded as law.⁶³ Nevertheless, that did not mean that international law was to be regarded as “external state law” in the Hegelian sense. For Jellinek the singular will of states served as the basis of the validity of all law, both national and international, while still having objective authority over its subjects irrespective of whether the singular will coincided with these objective rules. Authority is to be derived from what he calls the “normative force of the factual”: the inherent capability of human beings to elevate factual circumstances into normative expectations.⁶⁴ This chapter discusses Jellinek’s theory of international law and discusses whether it can account for the objective authority of international law. Just as in the previous chapter, I will first analyze Jellinek’s general theory of law before engaging in his theory of international law. In the final section, I will discuss whether this theory can account for the authority of international law.

2.1 The self-binding will

According to Jellinek, only those laws that emanate from the will of a state can be regarded as law. The first step for Jellinek was to show that a state is capable of binding itself internally through its own norms:

“It must be shown that a reflexive element exists within national constitutional law – that there are legal norms that emanate from the State and bind the State. Should this demonstration succeed, the legal basis of international law will have been found.”⁶⁵

So in accounting for the binding nature of the law a construction of the free will was necessary which is capable of creating law as well as binding itself the moment it has come into being. In order to do so, Jellinek first explains what the entity of state consists of.

⁶¹ Von Bernstoff, J., 2014, p. 63

⁶² Hegel, G.W.F., 2001, §333

⁶³ Jellinek, G., 1890, p. 3; Von Bernstoff, J., 2012, p. 664

⁶⁴ Van Klink, B. & Lembcke, O.W., 2016, p. 208

⁶⁵ *Ibid.*, p. 6-7 (Translation by Von Bernstoff in Von Bernstoff, J., 2012, p. 669)

Law served for Jellinek as a connecting feature between what he called the social (factual) and the legal (normative) reality of the state. On the one hand, a state has a social reality as “the unitary association of resident persons with original sovereign power”⁶⁶ as a “function of the social relations between men”.⁶⁷ It is concerned with the maintenance of the social order. On the other hand, a state has a legal reality in which it is a “corporation of resident people with original sovereign power” which is concerned with maintaining the legal order.⁶⁸ The social side of the state, the sovereign political order, stems from an agreement of wills that accepts the order that it is able to establish. This established sovereign order is capable of imposing a hierarchical structure and enforcing its will against every other social organization within the state. Sovereign power is ‘original’ in the sense that it cannot be derived from another source but the state itself: “all ruling power of state can only emanate from the state itself.”⁶⁹

By creating law — which Jellinek regarded as an empirically verifiable act — the state enters from the social into the legal. Since the state is not a separate entity, but originally the “unitary association of resident persons” holding “sovereign power,” a state can speak on behalf of the people to create laws that are directed towards its residents, while at the same time binding “the unitary association” that constitutes the state. By having sovereign power — which is “the quality of the state through which it can be bound legally only by its own will”⁷⁰ — a state is capable of binding itself and its people through laws and determine as to how far this power extends itself. Law in this sense is to be regarded as ‘self-obligating’ and ‘self-limiting’ and has normative force due to the ‘expressed binding will’ of states.⁷¹ After a state organ with law-creating power creates instances of law, a state believes that it has bound itself by that expression. Issued laws, which are empirically verifiable acts, are supported by the ‘feeling to have obliged oneself’ of subjects of laws.⁷²

Jellinek’s theory of law revolves around his two-sided concept of the state. The state has the power to command as well as the power to constitute an autonomous legal order by creating

⁶⁶ Jellinek, G., 1914, p. 180 (translation by Van Klink, B & Lembcke O.W., 2016, p. 206)

⁶⁷ Kelly, D., 2004, p. 522

⁶⁸ Jellinek, G., 1914, p. 183 (translation by Van Klink, B & Lembcke O.W., 2016, p. 206)

⁶⁹ Jellinek, G., 1914, p. 180; “Alle Herrschermacht im Staate kann nur vom Staate selbst ausgehen.”

⁷⁰ Jellinek, G., in Wagner, N.B., 2015, p. 315; “Souveränität ist demnach die Eigenschaft eines Staates, kraft welcher er nur durch eigenen Willen rechtlich gebunden werden kann.”

⁷¹ Domingo, R., 2009, p. 1561; Von Bernstorff, J., 2012, p. 68; Jellinek, G., 1890, p. 27; “Daher ist jeder Act staatlichen Wollens eine Beschränkung des Staatswillen und zwar, das diese Beschränkung dem Staate nicht von Aussen her aufgedrungen ist, sondern aus der inneren Natur seines Willen hervorgeht, eine Selbstbeschränkung.”

⁷² Jellinek, G., 1890, p. 17

legal rules. These two separate notions are linked: the state has original sovereign power to rule, but at the same time is legally limited by the constitution and its own laws. According to Jellinek, “law is legally limited power:”⁷³ it limits the original sovereign power of states. Breathing Hegel, Jellinek claimed that such self-limiting power is not to be seen as arbitrary as it is disclosed by the entire antecedent process of history.⁷⁴ Jellinek explained this by invoking “the normative force of the factual”.⁷⁵

2.2 The “normative force of the factual”

The normative force of the factual provides Jellinek with a method to overcome the gulf that exists between “Is” and “Ought”, between descriptive and normative issues. According to him, there are certain socio-psychological elements inherent to human beings capable of creating normative situations. Jellinek explains this by looking at how children develop in the world and become socialized through human interaction.⁷⁶ He provides us with two examples:

(1) A child demands a story to be told over and over again, seeing all deviations from the original story as a wrong. The story has given rise to normative expectations within the child.

(2) A child having *de facto* possession of a toy believes he has the right to it. If this toy is taken from the child, it is seen as an infringement on his or her right. Being in possession of the toy has created normative expectations.

According to Jellinek, the psychological attitude of a child that derives norms from such facts proves that there are psychological elements within human beings that can elevate facts into norms.⁷⁷ Such norms come into being in an unconscious manner. Comparable with Hegel, Jellinek believed that factual states of affairs (such as human interaction and human relationships) were able to give rise to legitimate and legally valid normative expectations and convictions.

Law, for Jellinek, can be regarded as a product of the psychological phenomenon inherent to all human beings that elevates facts into norms. On a factual state level, such norms come into being comparable to customary law. As explained by Van Klink and Lembcke:

“Normative expectations arise from factual relationships in a similar way as customary law, in which a certain custom, habit or established practice (*usus*) in due time is

⁷³ Jellinek, G., 1914, p. 386

⁷⁴ *Ibid.*

⁷⁵ Van Klink, B. & Lembcke, O.W., 2016, p. 208; Loughlin, M., 2010, p. 218

⁷⁶ Jellinek, G., 1914, p. 338

⁷⁷ *Ibid.*

accompanied by opinion, widely held in the legal community, that what is usually done, ought to be done legally speaking (*opinio iuris*). Jellinek attributes to custom or habit ('*Gewohnheit*') the transformative potential to elevate the factual to the level of the normal."⁷⁸

Because factual relationships give rise to normative expectations, legal structures endowed with law-creating power can be established within societies. Such legal institutions are regarded as normal.⁷⁹

It is important to note that — although there is a strong Hegelian influence in Jellinek's theory of law — Jellinek merely describes how actual states of affairs lead to a normative legal system. He does not claim that such a system is morally or ethically 'good' or whether it serves an ethical purpose. His theory of law does not concern itself with natural law, although natural law can provide people with 'higher normativity'. Transcending existing law, such normative convictions and principles on how things ought to be are capable of amending and improving existing law, but it does not describe law's existence in the first place.⁸⁰

In short, in Jellinek's description of the binding force of national law the verifiable subjective will of the state serves as that which provides law its formal ground and the underlying feeling of 'being obliged' as its psychological normative ground. Furthermore, the sovereign will has the power to express itself thanks to the underlying practices, or customs, within the state that constitute its 'original' sovereign power. Concrete binding laws issued by the state are regarded by people as legitimate and authoritative due to the underlying factual states of affairs that has given rise to the normative system. The problem on an international level is that such a hierarchical normative system is absent.

To recall, Kant vouched for an international legal system with objective laws based on the principle of freedom and the moral obligation of states to treat people as ends in themselves. In line with Hegel, Jellinek claims that on an international level it is the subjective will of the state that serves as international law's foundation. However, contrary to Hegel, international law does hold objective authority over its subjects and is not contingent on the singular wills of states. How is it possible for norms that are constituted by the singular wills of states to be independent of, and resilient to, individual changes in the will? I will now turn to Jellinek's concept of international law.

⁷⁸ Van Klink, B. & Lembcke, O.W., 2016, p. 208

⁷⁹ *Ibid.*

⁸⁰ Jellinek, G., 1914, p. 344

2.3 International law and the demands of nature

Jellinek explains the objective authority of international law by pointing towards the formal process of treaty-making. By entering into a treaty, a state binds itself and limits its powers for the duration of the treaty until the moment it is terminated.⁸¹ However, for treaties to have this binding force, Jellinek believed that there has to be a justification for them that guarantees its objective authority among separate states:

“Treaties between states can have the character of law only when there exist norms that stand above the treaties, and from which the treaties receive their legal validity.”⁸²

In other words, on an international level the ‘feeling of being obliged’ is insufficient for granting international law its legal validity. This is puzzling, as Jellinek claims that the reflexive element that exists within national constitutional law capable of creating norms that bind the state itself was supposed to serve as the basis of international law. For Jellinek however, that which serves as the principle granting international law its objectivity is not the binding will of the state, but “the nature of relations among people that require legal normatization”⁸³. Jellinek introduces a universal principle, the demands of nature, that supposedly transcends the singular wills of states and is immune to individual changes in the will.⁸⁴

Similar to Kant, Jellinek believes that states can be regarded as individuals having subjective wills engaging in relationships with others. As states operate in an international community together with other states, it is in the interest of the state to enter into treaties guiding conduct and governing international relations.⁸⁵ This is regarded by Jellinek as a necessary goal (*nothwendige Zwecke*) for the state to safeguard its own existence. Refraining to do so is similar to ‘digging your own grave’.⁸⁶

The demands of nature contain two elements: ‘nature’ refers to human relations and ‘demands’ to the underlying requirements of these human relationships. The binding free will of the state that expresses to be bound by a treaty is merely a subjective moment of the will confirming these objective demands.⁸⁷ In these subjective moments, states are to respect the

⁸¹ Von Bernstoff, J., 2014, p. 69

⁸² Von Bernstoff, J., 2012, p. 670

⁸³ Jellinek, G., 1890, p. 43: “Dieses Princip, welcher wir nun bezeichnen müssen, ist die Natur der Lebensverhältnisse, welche der rechtlichen Normirung bedürfen.”

⁸⁴ *Ibid.*: “Diese Natur steht dem Staatswillen ebenso unantastbar gegenüber, wie die Natur dem Willen überhaupt.”

⁸⁵ *Ibid.*, p. 45

⁸⁶ *Ibid.*, p. 44

⁸⁷ *Ibid.*

“other state’s personhood, extend the right of legislations and fulfill their obligations arising from treaties.”⁸⁸ Hence, it is the binding free will of states affirming the objective demands of nature that creates international rules governing state conduct and state relations.

When international rules are in effect, Jellinek claims that there are two rules of objective nature that provide international rules their binding character⁸⁹: ‘*pacta sunt servanda*’ and ‘*clausula rebus sic stantibus*’. The first generally holds the idea that once entered into, a treaty has to be kept. The latter is concerned with the content of international rules: if circumstances occur that change the fundamental objective nature of treaties, a treaty no longer has to be kept.⁹⁰ Hence, Jellinek considers international law as having the character similar to that of a contract entered into conferring rights and duties on the parties of that contract: states recognize their duties towards other states as “bearers of rights”.⁹¹ By entering into the treaty, states incorporate the rights and duties held by the treaty into their own public law system. International law is part of the internal legal order. As long as these two rules of objective nature are applicable to an existing treaty, states cannot act in accordance with their own free will contrary to the content of a treaty.

Nevertheless, “even though it is the demands of nature that prescribe states to develop rules governing relations with other states, it is the free will of states that eventually conforms to this necessity.”⁹² By legally cooperating on the international plane, states freely acknowledge the fundamental norms of the demands of nature: using the language of international law, states recognize this objective nature expressed by rules governing the co-existence and co-operation between states.⁹³

So even though there exists an objective principle that forces states to enter into a treaty, it is still the subjective binding will of states that serves as the normative foundation of international law. Jellinek’s theory of international law establishes a system in which international law is to be regarded as operating on the same level as national law. Since international rules and national rules stand on the same level, there is no need for an authorized institutionalized international legal order with coercive power over states. By maintaining the

⁸⁸ Von Bernstoff, J., 2014, p. 71

⁸⁹ Jellinek, G., 1892, p. 321; “Für das öffentliche Recht der Einzelnen gelten nun genau dieselben Grundsätze wie für das Privatrecht (...).”

⁹⁰ Von Bernstoff, J., 2014, note 107 at p. 72

⁹¹ *Ibid.*, p. 48

⁹² Jellinek, G., 1890, p. 45; “Wenn auch sein Wesen es ist, welches ihm die Aufstellung bindender Normen für den Verkehr mit anderen Staaten vorschreibt, so ist es doch sein freier Wille, mit dem er dieser Nothwendigkeit nachkommt.”

⁹³ Bernstoff, J., 2012, p. 671

free will as the source of all laws, Jellinek denies Kant's claim that international law is to be regarded as a product of the omnilateral will of states standing above national law⁹⁴, but also denies Hegel's claim that international law is to be regarded as external state law. By deriving the norms that govern international law from the demands of nature, Jellinek was able to defend an international legal order constituted by the singular wills of states in which, after it has come into existence, its validity and authority were independent of particular state interests.

2.4 The viability of Jellinek's theory of international law

Jellinek's theory of international law is founded upon the idea that the binding free will of the state is capable of establishing a normative system of laws. In this section, I will argue that such a conception of the normative force of law is unable to account for the authority of international law. My argument is founded upon two separate components: (1) the problem of the changeable free will and its implications for the objectivity of international law and (2) that normative expectations can spring from factual states of affairs, but that these are not to be regarded as norms.

2.4.1 The changeability of the 'free will'

Firstly, I will discuss the problem of the changeability of the free will and its implications for international law's objective authority. In Jellinek's social reality of the state, factual states of affairs can give rise to a normative hierarchical structure capable of binding the state and its people by issuing laws. This Hegelian notion of norms requires actual practices to be in place before norms can come into being; the validity of such norms is secured for the period of time it takes new practices to be established. Nevertheless, the validity of laws can be challenged by people if a change in the social reality of the state takes place and the need arises to change existing legal rules. The legal system is not resistant to change and can even be radically changed if 'better' laws can be properly defended.⁹⁵ A state then is deprived of its original sovereign power; binding decisions supported by the binding free will on behalf of the people are no longer legitimate as the hierarchical structure no longer represents the current state of affairs.

In what sense can international law be binding even though the will that bound itself to a treaty is no longer supported by the actual state of affairs in a given state? For Jellinek, *pacta*

⁹⁴ Jellinek, G., 1890, p. 45; "Normen sind nicht das Product einer über dem Staate stehenden höheren Macht (...) welche ihm dieselben etwa aufdränge, es ist das Völkerrecht kein überstaatliches Recht, sondern es entspringt formell derselben Quelle, wie alles objective Recht: dem Willen des rechtsetzenden Staates.

⁹⁵ Jellinek, G., 1914, p. 340

sunt servanda and the self-obligation of a state by entering into a treaty cannot be regarded as absolute.⁹⁶ If a radical change in the underlying will occurs in a given state, *pacta sunt servanda* in itself is not enough to guarantee international law its general applicability and objectivity. *Clausula rebus sic stantibus* is meant to supplement *pacta sunt servanda* in such a way that, even though a change in the will occurs, international law remains applicable as long as the objective elements underlying a certain treaty haven't changed. But the problem lies in the fact that international law's applicability depends on the incorporation within the internal legal order and the extent to which it is enforced by individual states as there is no coercive institutionalized international legal order in place. Hence, if there is a change in the will of a given state and it no longer recognizes the objective elements underlying the treaty as one of its own purposes, there is no incentive to act in accordance with international law even though the objective elements have remained the same. Such a situation requires a coercive international legal order with the authority to enforce international rules against the will of a state. But in that case, the singular will of a state can no longer be regarded as the foundation of objective international law as there is a special will that stands above that of the state. Jellinek claims to have solved the voluntarist dilemma by introducing his idea of the binding free will of a state, but it is not entirely clear what guarantees international law's authority and objectivity after it has come into being and is incorporated in the internal legal order.

2.4.2 The problem of deriving norms from facts

The second problem I wish to discuss is the problem of deriving norms from facts and Jellinek's violation of Hume's law. Hume's law generally holds the idea that such derivations are prohibited.⁹⁷ Normative judgments cannot exclusively be derived from descriptive premises, but requires a normative input for the normative judgment to be justified. Jellinek claims that people have a psychological tendency to derive normative expectations from factual states of affairs. This is 'the normative force of the factual'. His assumption is founded upon the analysis of developing children in the social world making social norms their own through human interaction. To recall Jellinek's second example:

- A child having *de facto* possession of a toy believes he has the right to it. If this toy is taken from the child, it is seen as an infringement on his or her right. Being in possession of the toy has created normative expectations.

In this example, the child derives his right to ownership of the toy and the duties of others to respect this right from the fact that he has possession of the toy. Hence, the child derives a

⁹⁶ Jellinek, G., 1890, p. 40

⁹⁷ Hume, D., 1896, p. 469-470; Shapiro S.J., 2011, p. 48

normative judgment about rights and duties from a descriptive fact. Jellinek's claim can be brought down to the following:

1. A child has *de facto* possession of a toy.
2. *De facto* possession leads the child to believe that he has the right to the toy.
3. A child believing that he has the right to a toy creates the normative expectation towards others to respect this right and, *vice versa*, creates the duty for others to respect this right.

But although it is possible for a child to have normative expectations, this does not mean that norms are in place conferring rights and duties on the child and others. For this to be so, a norm already has to be in existence determining that the actual possession of a toy is enough to confer these rights and duties. What is considered as a valid norm by a child does not mean that it is also valid for someone else. A rule already has to be in existence granting these rights and duties their validity. Factual states of affairs could lead to normative expectations, but norms do not necessarily flow from factual states of affairs. The 'normative force of the factual' does not contain the powers Jellinek attributes to it.

2.5 Conclusion

Jellinek's theory of international law attempts to explain and defend a notion of international law's authority that is resilient to the voluntarist dilemma. While some elements of his method can be traced back to the influences of Kant and Hegel, he theoretically distinguishes the existence of international law from ethical or moral considerations by explaining its existence from positivist premises. While the free will of the state serves as that which provides national law its binding character, international law finds its normative character in the underlying demands of nature that call for norms to govern international relationships.

This chapter analyzed Jellinek's general as well as his international theory of law. I argued that Jellinek fails to solve the voluntarist dilemma as the changeability of the free will derives international rules of their normativity and objectivity, unless there is an institutionalized international legal order with coercive powers to enforce international rules. This would require — what Fricker⁹⁸ would call — a special will standing above that of states. But that would mean that the singular will cannot serve as the foundation of objective international law. Furthermore, Jellinek's 'normative force of the factual' cannot account for the normativity of laws. Factual states of affairs can lead to normative expectations, but they cannot lead to norms such as Jellinek suggests. For this to be the case, actual norms have to be in place already deciding that certain factual states of affairs give rise to rights and duties.

⁹⁸ Fricker, K.V., 1878, p. 377

In the next chapter, I deviate from international law theories taking the state's will as its starting point and discuss Hart's general theory of law. Hart's concept of law overcomes the defects and limitations of voluntarism by focusing on social practice. He was concerned with finding those essential features in social practice that constitute the legal system, rather than grounding the authority of law in a pre-legal entity such as the state's will. International law, however, was underdeveloped in Hart's theory of law. As we will see later on, this had much to do with a flaw in his method for assessing whether international law is to be regarded as a legal system.

Chapter 3 – Hart’s legal system

Herbert Hart’s theory focuses on developing those properties that, taken together, constitute the essential features of a legal system. If the status of legal system can be granted to international law, the state’s will as the foundation of international law is superfluous. As long as this status is absent, restrictive attitudes towards international law as a result of particularized wills can be qualified as legitimate.

According to the 19th century legal philosopher John Austin, law created by an institution that needs sovereign states to subject themselves for it to be legitimate and hold authority⁹⁹ — meaning that the sovereign is by definition no longer a sovereign since it habitually obeys to another sovereign — is not to be regarded as law, but merely as an opinion or morality:

“The body by whose opinion the law is said to be set, does not command, expressly or tacitly, that conduct of the given shall be forborne or pursued. (...) The so called law or rule (...) is merely the sentiment which it feels, or is merely the opinion which it holds, in regard to a kind of conduct.”¹⁰⁰

As the international community lacks a sovereign with the ability to command, international law can be seen as merely international morality.¹⁰¹ This might seem shortsighted, but the fact that states can deviate from conduct prescribed by international norms makes this conclusion credible if one conflates legal validity and the foundation of the law with the will of the sovereign. Luckily, Hart’s refutation of Austin’s command theory and his construction of the legal system have provided us with the building blocks for determining the legal quality of national law. This chapter analyzes Hart’s theory of law and whether his notion of a legal system is applicable on an international level. If this is possible, then international law is a system with positive legal rules having legal quality, in the sense that it is regarded as an institutionalized positive system of laws.

3.1 Legal systems

For a long time, the analytical tradition in the jurisprudence of international law was influenced by Austin’s command theory. For Austin, law consisted of rules issued by a sovereign. These rules have the character of coercive orders — or wishes backed by threats — meaning that subjects abide by the law due to being “liable to evil” from the sovereign in case of non-

⁹⁹ D’Aspremont, J. in Kammerhofer, J. & D’Aspremont, J., 2014, p. 145

¹⁰⁰ Austin, J., 1996, p. 124

¹⁰¹ *Ibid.*, p. 175

compliance.¹⁰² The duties citizens have correspond with the desire a sovereign expresses in his command: “wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed.”¹⁰³ What typifies the Austinian sovereign is that it is someone who can oblige others to comply with its wishes, is habitually obeyed by the bulk of society, does not have another human superior and citizens are inferior subjects who are “obnoxious to the impending evil.”¹⁰⁴ In the command theory, the law is a system of imperative rules¹⁰⁵ issued by the sovereign and enforced by the physical power of the sovereign.

According to Hart, the command theory oversees the importance of rules directed towards the sovereign defining what ought to be done in order to legislate. This becomes apparent when one takes into account the problems that arise in the case of succession of power. The Austinian sovereign enjoys the habitual obedience of its subjects, but it is not clear how such a habitual obedience can account for the sovereign power of its successor. For the successor to be the sovereign it has to be habitually obeyed and this requires regular uniform behavior by the bulk of society. Such regular uniform behavior requires a certain timespan to be in place. Hence, the successor cannot obtain sovereign power the moment the sovereign dies.

This insight led Hart to believe that there have to be rules in place governing the succession of a sovereign which are not contingent on habitual obedience that safeguard the “continuity of law-making power.”¹⁰⁶ Mere habits are not enough to create such rules and lack normative force: “if there is to be this right and this presumption at the moment of succession there (...) must have been somewhere in society a general social practice more complex than any that can be described in terms of habit or obedience.”¹⁰⁷ The Austinian model is incapable of accounting for the rights the successor holds.

The fact that the successor holds authority presupposes that there is a system of rules, or method of entitlement, determining the rights of the successor which cannot be explained by the mere habit of obedience. Another indication that such a system is in place is that when a sovereign dies, the law does not die with him: the successor is not required to acknowledge any pre-existing laws for them to be in effect as laws are persistent. Furthermore, the Austinian model is unable to account for the fact that there are also rules that constrain the power of the sovereign: constitutions are designed to limit the power of the sovereign, contradicting the assumption of Austin that the sovereign holds unlimited legal power. If sovereignty is

¹⁰² *Ibid.*, p. 22

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, p. 30

¹⁰⁵ Salmond, J.W., 1902, p. 52

¹⁰⁶ Hart, H.L.A., 1961/2012, p. 53; Shapiro, S.J., 2011, p. 74

¹⁰⁷ Hart, H.L.A., 1961/2012, p. 54

constituted by habits of obedience and not by norms, there cannot be any rules defining the legal power a sovereign holds, since the sovereign by definition cannot be subject to rules standing above him.¹⁰⁸ Rules directed towards the legislature defining what ought to be done in order to legislate — conferring the power and authority on him to do so — means that there are rules in existence pre-existing the sovereign defining its law-creating power.

The existence of such rules led Hart to believe that a system of law contains two types of legal rules: primary and secondary. Primary and secondary rules have the character of social rules. Hart notices three key features of social rules that cannot be found in habits:¹⁰⁹

(1) Deviations from social rules give rise to criticism and the imposition of sanctions (there is pressure for conformity),

(2) Such criticism and impositions of sanctions are regarded as legitimate and justified

(3) Social rules contain a certain 'internal' aspect in the sense that agents look upon the behavior the rule governs as a general standard that must be followed by the group.

Primary rules are the basic rules of society concerned with duties, laying down what conduct subjects are required to do or abstain from. Secondary rules are power-conferring rules granting subjects powers they were unable to do without the existence of these rules. They grant the power to modify existing rules, extinguish them or determine existing primary rules. For example, the Austinian sovereign is not the sovereign due to habitual obedience, but because secondary rules of a legal system grant him the power to rule.

Hart illustrates the necessity for secondary rules by considering a primitive society comprised of primary rules, but lacking a legal system. Typically, a primitive society has certain basic customary rules imposing duties on its subjects, such as the forbearance from hurting or killing each other. Although certain duties based on customary rules exist, such a society typically lacks the institutions with the authority to change and determine these rules or settle disputes among people concerning the content of primary rules. As primitive society grows and becomes more heterogenous, it becomes apparent that customary rules are insufficient for guiding conduct on such a large scale. Doubts arise about the content of rules, existing rules are incapable of changing as quickly as dynamic society does (customary rules are a result of a long period of certain types of conduct) and rules are not applied uniformly due to the fact that society simply gets too big. In such a growing society 'uncertainty' leaps in, the system becomes 'static' and the rules 'inefficient'.¹¹⁰

¹⁰⁸ Shapiro, S.J., 2011, p. 74-75

¹⁰⁹ Hart, H.L.A, 1961/2012, p. 55-56

¹¹⁰ *Ibid.*, p. 92-94

Secondary rules function to supplement and remedy the defects that occur in a primitive society that is guided by primary rules alone. According to Hart, there are three types of secondary rules designed to remedy these defects: uncertainty about the content of rules is remedied by the (1) 'rule of recognition', the static character of primitive rules by (2) 'rules of change' and (3) 'rules of adjudication' determine who has authority to settle disputes concerning primary rules.¹¹¹ The rule of recognition is the ultimate rule of a legal system determining which rules are valid legal rules. It serves as a validating source to account for the 'systemicity' of legality: the system is facilitated by a common validity under the rule of recognition.¹¹²

3.1.1 The rule of recognition

For Hart, the validity of the rule of recognition does not depend on itself as it exists merely as a social fact.¹¹³ If someone claims that a specific rule is to be regarded as legally valid, this person is implicitly making use of the rule of recognition he or she has accepted as a device for identifying valid laws.¹¹⁴ The normative attitude that regards rules as guides for future conduct and standards for criticism is what Hart calls the 'internal point of view'.¹¹⁵ Normative judgments express the acceptance of the rule of recognition while at the same time presupposing that the rule of recognition is generally accepted and complied with by the members of society.¹¹⁶ This behavior of rule acceptance is observable from the 'external point of view', making it a social fact: "its existence is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers."¹¹⁷ Hence, legal rules are regarded as norms by legal society from the internal point of view that accepts the rule of recognition, but the rule of recognition exists in virtue of the observable behavior of its being practiced by the legal community.

The rule of recognition distinguishes primitive society from a legal society by pinpointing which rules are to be regarded as valid and establishing a union between primary and secondary rules. It lies at "the heart of a legal system."¹¹⁸ As Hart continues, he notes that although the rule of recognition is the foundation, the existence of a legal system depends on two minimum conditions: (1) valid primary rules have to be generally obeyed by the public and (2) secondary

¹¹¹ *Ibid.*, p. 93-99

¹¹² Shapiro, S.J., 2011, p. 91

¹¹³ D'Aspremont J. in Kammerhofer, J. & D'Aspremont, J., 2014, p. 122

¹¹⁴ Hart, H.L.A., 1961/2012, p. 108

¹¹⁵ *Ibid.*, p. 98

¹¹⁶ Toh, K., 2005, p. 88

¹¹⁷ Hart, H.L.A., 1961/2012 p. 101

¹¹⁸ Hart, H.L.A., p. 98, 151

rules have to be “effectively accepted as common public standards of official behavior by its officials.”¹¹⁹ The first condition is one directed at the public that needs to be satisfied. An obligation to comply with the law — irrespective of individuals’ motives or preferences — has to be in order for primary rules to be effective in a legal system. Such obligations do not exist for the second condition, the acceptance of secondary rules; officials either conform or fail to conform to the secondary rules they have accepted, but speaking of ‘obeying’ or ‘disobeying’ said rules seems, according to Hart, inappropriate:¹²⁰

“[The Rule of Recognition] if it is to exist at all, must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something each judge merely obeys for his part only. Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards. This is (...) a necessary condition to speak of the existence of a single legal system. If only some judges acted “for their part only” on the footing that what the queen enacts is law, and made no criticisms of those who did not respect this law, the characteristic unity of a legal system would have disappeared.”¹²¹

As legal philosopher Joseph Raz points out, Hart wants the rule of recognition to be interpreted as a customary duty-imposing rule existing within a subgroup of legal officials in legal society.¹²² The rule of recognition imposes the duty on legal society to apply and endorse the rules of a legal system that are identified as valid. If one could merely ‘obey’ or ‘disobey’ the rule of recognition it would have the characteristics of a primary rule lacking the requirements of the internal point of view that establishes a normative legal system. Obedience does not require a person to “think of his conforming behavior as ‘right, ‘correct’, or ‘obligatory’”, it does not require acceptance.¹²³

For Hart, legal authority and legal rules come into existence at the very same time. As explained by Scott Shapiro:¹²⁴

“Once we have determined that a given body has the ability to create rules, we can claim that such a body is a court, for a court is an entity that has been successful in having its claims to authority treated seriously.”

¹¹⁹ *Ibid.*, p. 116

¹²⁰ *Ibid.*, p. 115

¹²¹ *Ibid.*, p. 116

¹²² Raz, J., 1984, pp. 130-131

¹²³ Hart, H.L.A, 1961/2012, p. 115

¹²⁴ Shapiro, S.J., 1998, p. 474-475

Once it is possible to observe that a certain institution has the power to create rules we can claim that this institution is the lawgiver, since the rules it has created are generally regarded as legally valid rules having authority and treated as standards of conduct. In creating rules, the lawgiver lends its law-creating power from the fact that the act of creating law generates and maintains the rule of recognition. By devising the authority and validity of law on social practice, Hart was able to develop a system in which there was no need for a pre-legal or moral justification for the authority of law.

Having laid down the basic concepts of Hart's theory of law, I now wish to turn to Hart's discussion on international law. Unfortunately, international law was not a topic Hart concerned himself too much with in *The Concept of Law*. The relatively brief discussion of the legal validity of international law in Chapter X was more concerned with whether international law was to be regarded as law or whether it had to be approached as international morality. It is not until the final paragraph that he asks himself whether there exists something as an international legal system.

The question whether international law is to be regarded as 'law' is a different question from whether it is a legal system. Scott Shapiro gives us a helpful explanation as to what the distinction is. 'Law' refers to a particular social organization: "law does not refer to an indefinite collection of legal norms but rather to an organization that creates, applies, and enforces such norms."¹²⁵ International law is "law" if authoritative institutions exist with the power and means to create, apply and enforce international rules. "Legal system" refers to a particular system of rules constituted either by norms or either by people.¹²⁶ An international legal system in the Hartian sense then would require it to be a union of primary and secondary rules with the rule of recognition at its heart determining criteria for the legal validity of international rules. In the next section, I assess whether international law can be regarded as a Hartian legal system.

3.2 The concept of international law

This section addresses the question whether there exists an international legal system with a union of primary and secondary rules and a rule of recognition. Following the structure of Chapter X of *The Concept of Law*, I will ask two questions: (1) 'is international law "law" or rather 'international morality?' and (2) 'can a sufficient analogy be made between the characteristics of a national legal system and the international system to regard it as an existing legal system?'

An important insight of Hart's construction of a legal system lies in the fact that authority

¹²⁵ Shapiro, S.J., 2011, p. 5

¹²⁶ *Ibid.*

and legal validity are independent of any pre-legal concept such as the state's will, but depends on the rule of recognition lying at the heart of the legal system. In chapters 2 and 3, it became apparent that when accounting for international law's authority while reasoning from state sovereignty and the state's will one falls back within the voluntarist dilemma. If international law is regarded as objective, it cannot be based on the singular wills of states and, in turn, if international law is dependent on the singular wills of states it cannot be regarded as objective. Since Hart sees legal authority as granted by the rule of recognition there is no need for a pre-legal entity such as the state's will as long as an institutionalized system exists with a legal community confirming the existence of the rule of recognition in legal practice. With this in mind, I will now turn to the two questions.

3.2.1 Is international law "law"?

According to Hart, the question "is international law really law?" has not been troublesome in legal theory simply

"because a trivial question about the meaning of words has been mistaken for the serious question about the nature of things: since the facts which differentiate international law from municipal law are clear and well known, the only question to be settled is whether we should observe the existing convention or depart from it; and this is a matter for each person to settle for himself."¹²⁷

So an inquiry into whether international law really is "law" requires a deeper understanding of the nature of international law and its binding force, apart from the question of what the word "law" means. In understanding the nature of international "law", Hart discusses two sources of doubt that have governed international legal thinking and have questioned its character as law: the first is connecting the binding force of international law with sanctions and the second is connecting international obligations with the sovereign state's will.

Hart tackles the first source of doubt by examining whether the absence of centrally organized sanctions divests international law of its binding character. To recall, Austin regarded international law as morality due to the fact that there is not an 'international' sovereign capable of issuing commands on its subjects backed by sanctions such as on a national level. Such issues are better regarded as expressions of opinion. But international law is not devoid of sanctions: the UN Charter holds law enforcement provisions providing the Security Council the power to impose sanctions on states. But such a system lacks compulsory jurisdiction, sanctions merely

¹²⁷ Hart, H.L.A., 1961/ 2012, p. 209

exist on paper.¹²⁸ Each member of the Security Council in turn has the “power of veto”, meaning that imposed sanctions can be annulled by individual states.¹²⁹ On the 4th of April 2017, for example, a gas attack in a rebel-held area in northern Syria killed 87 people, of which many were children. The UN Security Council made an attempt to condemn these acts even though the government of Syria denied all responsibility. The attempt was blocked by Russia, using its veto to shield President Bashar al-Assad’s government from intervention by the West. The last couple of years, six more of such attempts have been blocked by China. In solving conflicts, the Security Council lacks compulsory jurisdiction and depends on the collaboration of states.

Nevertheless, this does not necessarily pose any problems for the binding force of international law: identifying ‘having an obligation’ or ‘being bound’ with the likelihood to suffer sanctions in case of disobedience is the same as Austin’s principal claim in the command theory. For Hart, the external statement ‘I (you) are likely to suffer for disobedience’ has to be separated from the internal normative statement ‘I (you) have an obligation to act thus.’¹³⁰ The threat of sanctions does not reflect the internal point of view which takes the rule as a standard for conduct.¹³¹ Whether sanctions are supported by the rule says nothing about the validity of the rule under which an individual has an obligation or duty. The binding force of international rule is not derived from the existence of sanctions.

Furthermore, sanctions have a different role on the international level than they have on a national level. People in society are generally regarded as equally strong and there is a bigger likelihood of people injuring one another as there are more opportunities to do so. Such injuries are most of the time confined to the private sphere. In aggression between states, however, material power and strength play a major role:

“Aggression between states is very unlike that between individuals. (...) The use of violence between states must be public (...) and there can be very little certainty that it will remain a matter between aggressor and victim. (...) To initiate a war is (...) to risk for an outcome which is rarely predictable with reasonable confidence.”¹³²

Hence, the knowledge that violence could lead to such grave results serves as a deterrent from engaging in violence on an international level.¹³³ The existence of sanctions would be of little to no benefit in terms of motivation for states to act in accordance with international rules.

¹²⁸ Article 27 Charter of the United Nations

¹²⁹ *Ibid.*

¹³⁰ Hart, H.L.A., 1961/ 2012, p. 218

¹³¹ *Ibid.*

¹³² *Ibid.*, p. 219

¹³³ *Ibid.*

The absence of sanctions does not deprive international law of its binding force. Rules governing the international community, although supported by sanctions, receive their binding force because they are thought and spoken of as obligatory. There is general pressure for conformity, claims and admissions are based on the rules and when a rule is breached, demands for compensations, reprisals and counter-measures are justified.¹³⁴ However, these characteristics are applicable both to legal rules as well as moral rules. What Hart tries to show is that Austin's reasons for coining international law as international morality do not hold as sanctions are of no additional value for the binding force of international law. Its absence does not deprive it of its character of "law".

The first indication that rules are legal rather than moral is how "claims, demands, and the acknowledgements of rights and obligations under rules of international law" are different from the moral pressure underlying moral rules.¹³⁵ Moral pressure for Hart consists in "appeals to respect for the rules, as things important in themselves, which is presumed to be shared by those addressed."¹³⁶ Disputes in international law on the other hand are characterized by referring to precedents, treaties, and juristic writings, often without recourse to morality in claiming that the other has committed a wrong.¹³⁷ Furthermore, rules of international law — such as those governing territorial waters — are often created for reasons of convenience or necessity for guiding conduct, without any moral importance for the existence of such a rule. There is no reason as to why a particular rule is created to govern conduct while other rules might have been equally capable in doing so: the content of rules is arbitrary and capable of changing.¹³⁸ Hart's claim is not that international law is devoid of morality, but that moral rules are incapable of having the formal, arbitrary character of legal rules.¹³⁹

The second source of doubt is concerned with connecting international obligations to the sovereign state's will. Hart rejects the proposition that sovereign states cannot be legally bound by external rules. According to Hart, "one of the most persistent sources of perplexity about the obligatory character of international law has been the difficulty in accepting or explaining the fact that a state which is sovereign may also be 'bound' by, or have an obligation under, international law."¹⁴⁰ This difficulty is based on a radical inconsistency. The tendency to associate the word 'sovereign' with the idea of an independent entity standing above the law,

¹³⁴ Hart, H.L.A., 1961/ 2012, p. 220

¹³⁵ *Ibid.*, p. 228

¹³⁶ *Ibid.*, p. 180

¹³⁷ *Ibid.*, p. 228

¹³⁸ *Ibid.*, p. 230

¹³⁹ *Ibid.*, p. 231

¹⁴⁰ *Ibid.*, p. 220

with the authority to create laws, results in great confusion when dealing with the binding force of international law.

For Hart, the 'sovereign', or state, refers to the population living in a certain territory whose government is provided by a legal system with the "characteristic structure of legislature, courts, and primary rules."¹⁴¹ Such states are autonomous, but that does not mean that autonomy is unlimited.¹⁴² For Hart, it is a misconception to equate sovereignty with independency: a state is merely sovereign in those areas in which it has certain types of control, meaning that sovereignty is limited to those areas of conduct in which it acts autonomously.¹⁴³ International law determines and limits the extent to which states can act autonomously. For example, if a new state comes into being it is generally regarded to be bound by general obligations of international law, or if a state acquires new property — e.g. a coastline — it is generally regarded as subjected to the international rules governing territorial waters and the sea.¹⁴⁴ Such rules are already in existence determining to which extent a state can act autonomously and questions the requirement of consent. Proponents of voluntarist approaches fail to explain the relationship between absolute sovereignty and international law's limiting effect on sovereignty.

Can international law be regarded as "law"? The previous sections show that Hart regarded international law as consisting of binding legal rules even though sanctions merely exist on paper. Sanctions are not necessary for the binding character of international law as the existence of sanctions says nothing about the validity of legal rules. The question whether international law can be regarded as morality is refuted by Hart by pointing to the character of international rules and how claims on the international plane are made. Rules are generally arbitrary and subject to change, characteristics which are incompatible with moral rules, and claims and demands by states are supported by references to legal sources rather than moral sources. Furthermore, conflating the binding force of international law with the sovereign will is a misconception since practice shows that states bind themselves to international law while still having autonomy to the extent international rules allow. International law then is "law": its legal validity does not depend on the support of sanctions or the state's will and rules of international law are legal rather than moral.

¹⁴¹ Hart, H.L.A., 1961/ 2012, p. 221

¹⁴² *Ibid.*, p. 223

¹⁴³ *Ibid.*, p. 223

¹⁴⁴ *Ibid.*, p. 226

3.2.2 The international legal system

I will now turn to the second question: 'Can a sufficient analogy be made between the characteristics of a national legal system and the international system to regard it as an existing legal system?'. To recall, for a legal system to exist Hart requires an institutionalized society consisting of primary and secondary rules with the rule of recognition as its nucleus. Applying this construction on an international level is, according to Hart, problematic: the international community lacks institutions with the power to legislate, settle disputes and enforce international rules. International law "not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules."¹⁴⁵ The lack of such rules led Hart to believe that the international community could not be regarded as a legal community, but had to be treated as a primitive society consisting of primary rules of obligation.

Concerning the power to legislate, Hart does not see any structure of international legislation that resembles that of national legal systems: "one of the salient differences between municipal and international law is that the former usually does not, and the latter does, recognize the validity of agreements extorted by violence."¹⁴⁶ Ending war by treaty is on an international level essentially regarded as a legislative act with an imposed legal change on both parties, but it is different from a legislative act by a legislator authorized by secondary power-conferring rules.¹⁴⁷ Although such an act is similar in function and content, it differs in form.

Concerning the power to adjudicate and enforce rules, Hart notices that on an international level a system with compulsory jurisdiction is absent. Even though the International Court of Justice has jurisdiction, it cannot be regarded as compulsory due to the fact that no state can be brought before the court without prior consent. National courts have compulsory jurisdiction to investigate rights and wrongs while international courts lack similar jurisdiction. The same could be said for decentralized sanctions in international law: there is no comprehensive system governing the right to resort to war or other forms of "self-help" after the state's rights have been violated.¹⁴⁸ One might say that much of these defects are remedied by the formation of the United Nations and the obligations under the UN Charter, but the ability of states to use their power of veto undermines the strength of the prohibitions of the Charter.¹⁴⁹

¹⁴⁵ Hart, H.L.A., 1961/ 2012, p. 214

¹⁴⁶ *Ibid.*, p. 232

¹⁴⁷ *Ibid.*, p. 233

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

Most importantly, international law does not have the appropriate institutionalized system necessary for the existence of a rule of recognition. Hans Kelsen proposed the ‘pacta sunt servanda’ rule as the basic norm determining the validity of international law, but Hart rejects this claim since not all obligations under international law arise from contractual relationships.¹⁵⁰ The ability to assign a basic norm to a legal system is only possible if an advanced legal system has already come into existence. The claim that ‘pacta sunt servanda’ is the ultimate rule governing international law is an internal statement which cannot be made unless a system is already in place. The binding force of international rules does not depend on the existence of such a basic norm, but merely on the acceptance of them as standards of conduct with the appropriate forms of pressure characteristic of social rules.¹⁵¹ Hart questions whether there is need for such an ultimate provision as a necessary condition for the existence of rules of obligation or ‘binding’ rules. The existence of such an ultimate rule is a luxury, rather than a necessity.¹⁵²

However, the absence of an ultimate rule of recognition does not mean that international law cannot be regarded as binding: international rules are binding if they are treated as standards for guiding conduct. If international law would develop in such a way so that it is capable of binding states to treaties simply through a legislative act, international law could be regarded as a legal system containing a rule of recognition.¹⁵³ For Hart, international law is “law”, but it cannot be regarded as a legal system.

This conclusion could be troublesome for the authority of international law. If international law is to be considered as merely a set of rules rather than a system of valid legal rules it has the potential to be regarded as inferior to national legal systems. Hence, if certain rules of international law conflict with national interests, states could be inclined to disregard international rules under the justification that it is merely a set of rules in comparison with their advanced legal systems. In the next chapter, I will argue that international law is not only “law”, but is to be regarded as a legal system consisting of valid legal rules. Before doing so, I will briefly discuss a weakness in Hart’s methodology in his assessment of the character of international law.

3.3 The problem with Hart’s methodology

One of the problems with Hart’s methodology is that he measures the extent to which it can be regarded as a legal system by comparing it with national legal systems. By taking the

¹⁵⁰ Hart, H.L.A., 1961/ 2012, p. 233

¹⁵¹ *Ibid.*, p. 235

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, p. 235-237

national legal system as a measuring-device for the international legal system, all deviations from the national legal system are regarded as an indication that international law lacks the characteristics necessary for it being a legal system. But do these differences necessarily mean that international law is not a legal system?

According to Hart, the absence of secondary rules indicates that it is to be regarded as a primitive society. Secondary rules function to remedy the defects of primitive society, namely uncertainty, inefficiency and its static character. Primitive society transforms into legal society if there are rules remedying these three defects. Interestingly though, these criteria are not treated by Hart in his assessment of the international legal system. He is more concerned with the obligatory character of international rules, rather than the system that is actually in place. It might be true that international law lacks institutions with the power to legislate, settle disputes and enforce rules, but it is not entirely clear why these institutions are necessary to remedy these defects. It would make more sense to analyze whether these defects are remedied rather than whether national and international legal systems are similar in form. Hence, Hart's refusal to attribute the status of legal system to international law is founded upon the wrong premises. He measures the extent to which international law is a legal system against the end-product of his construction of the national legal system (the union of primary and social rules), rather than analyzing whether the defects of primitive society are remedied.

Another puzzling feature of Hart's theory of international law is his understanding of international law as "law" lacking secondary rules, while his conception of "law" on a national level is the 'union of primary and secondary rules.'¹⁵⁴ It seems inconsistent with his concept of law to claim that international law is to be regarded as 'law' simply due to the fact that rules are accepted as standards of conduct. According to Hart, as there is no rule of recognition on an international level, only those rules that are accepted and practiced are to be regarded as valid legal rules. But international law consists of rules that exist even though they are never practiced.¹⁵⁵ If international law was a primitive society, such rules would not be regarded as legally valid without a rule of recognition accounting for its legal validity. The existence of rules that are part of international law even though they are not practiced indicates the rule of recognition.

It would make more sense to assess whether a rule of recognition exists determining legal validity by analyzing whether international legal practice shows that international rules are regarded as legally binding and whether the defects of primitive society are remedied. It

¹⁵⁴ Hart, H.L.A, 1961/2012, p. 94; Payandeh, M., 2011, p. 993

¹⁵⁵ Payandeh, M., 2011, p. 993

is not entirely clear why international law has to reflect national legal systems in form to be granted the status of international legal system.

3.4 Conclusion

On an international level, Hart's construction of a legal system based on the union of primary and secondary rules facilitated by the rule of recognition is a useful device for accounting for law's normative force while leaving the concept of the will out of the equation. It is confusing however that law on a national level is the union of primary and secondary rules, while at the same time international law is regarded as "law" even though it consists merely of primary rules. If the rule of recognition is the device for determining the validity of these primary rules, then the validity of these rules indicates the existence of the rule of recognition on an international level. As the rule of recognition is what ultimately serves as the criterion for determining legal validity and providing law its authority, the existence of an international rule of recognition could help us understand the authority of international law. In the following chapter, I will analyze whether international legal practice indicates the existence of a rule of recognition and what this would mean for the authority of international law.

Chapter 4 – The international rule of recognition

“Bentham, the inventor of the expression ‘international law’, defended it simply by saying that it was ‘sufficiently analogous’ to municipal law. To this, two comments are perhaps worth adding. First, that the analogy is one of content not of form: secondly, that, in this analogy of content, no other social rules are so close to municipal law as those of international law.”¹⁵⁶

Hart’s principal claim concerning international law is that it cannot be regarded as a legal system due to the differences in form between national law and international law. In paragraph 3.3, I argued that Hart’s methodology for assessing whether we can speak of an international legal system with a rule of recognition at its heart reasons from the wrong premises. In this final chapter, I will discuss the execution of international law by domestic courts and its meaning for the existence of an international rule of recognition. The starting point for this is Hart’s claim that the existence of the rule of recognition “is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers.”¹⁵⁷ If such practice shows that international law is considered legally valid, there should be an international rule of recognition as a validating device. Before doing so, I will discuss whether the internal perspective and the rule of recognition can serve as a device for identifying legally valid international rules. This will be done by discussing Shapiro’s claim that the internal point of view is unnecessary in understanding the normative force of legal rules.

4.1 The rule of recognition and Hume’s law

Even if practice were to indicate that an international rule of recognition exists, there is the question whether it can serve as a device for identifying legally valid international rules. In Chapter 3, I argued that Jellinek’s theory of international law founded on the binding free will of states and the ‘normative force of the factual’ was a violation of Hume’s law and that it could not account for the normative force of legal rules. In this section, I will first briefly explain why the rule of recognition and the internal point of view is capable of withstanding Hume’s law before turning to Shapiro’s critique on Hart’s internal point of view. According to Shapiro, the internal point of view is unnecessary to understand the normative force of legal rules.

Shapiro gives us a helpful explanation as to how normative judgments by legal officials are to be understood in Hart’s theory of law. According to Shapiro, a distinction has to be made between legal facts and legal judgments. Legal facts are descriptive facts about social groups, while normative judgments are a result of and express a practical orientation towards these

¹⁵⁶ Hart, H.L.A., 1961/2012, p. 237

¹⁵⁷ *Ibid.*, p. 101

social facts.¹⁵⁸ Hart's theory of law is best understood as 'expressivist'¹⁵⁹, meaning that normative judgments function as expressions of a state of mind, instead of the state of the world.¹⁶⁰ Normative judgments by legal officials express a commitment to a given rule that regards official actions as standards of conduct. According to Shapiro: "when one claims, say, that one is obligated to keep one's promises, one is expressing one's commitment to the social-promise keeping rule, not asserting the existence of a normative fact requiring to keep one's promises."¹⁶¹ Internal statements then — or normative judgments legal officials issue based on social rules — are an expression that support the normative attitude legal officials have towards the practice of taking certain rules as standards of conduct. Since the internal point of view is the normative attitude towards practical engagement with descriptive facts¹⁶², Hume's law is not violated. Legal reasoning takes normative judgments as the starting point for normative judgments, meaning that it follows a normative in – normative out pattern. This internal point of view is necessary for Hart to be able to make normative judgments, something which can never be done by taking a strict external point of view. The external point of view takes the descriptive legal fact as the starting point and lacks the normative attitude of the internal point of view.

However, Shapiro claims that rules can be rewritten from the external point of view so that even a person without the internal point of view towards the law can understand what is expected from him or her by the law.¹⁶³ Shapiro invokes Holmes' bad man to illustrate the external point of view.¹⁶⁴ The bad man is not concerned with acting in a morally right way, but makes careful calculations as to what a rule allows and operates on the limits of it. For Shapiro, Holmes' bad man would be perfectly capable of understanding what law requires from him without taking the internal point of view, but by taking a 'legal stance' towards the law:

"(...) The bad man is able to recharacterize the law using an alternative vocabulary. While the bad man may describe the law in the same terms that he would use vis-à-vis a mugging — "I was obliged to hand over the money" — he can also accurately *redescribe* the former

¹⁵⁸ Shapiro, S.J., 2011, p. 100

¹⁵⁹ *Ibid.*, 2011, p. 99; Joseph Raz already described Hart's theory of law as expressivist (although not specifically) in Raz, 1993, p. 148

¹⁶⁰ This is supported by Hart himself, see Hart, H.L.A., 1961/2012, p. 102

¹⁶¹ Shapiro, S.J., 2011, p. 99

¹⁶² Shapiro, S.J., 2011, p. 99-101

¹⁶³ *Ibid.*, p. 112

¹⁶⁴ Holmes, O.W., 1897

using the language of obligation. He might say not only that the law obliges him to pay his taxes, but also that he is *legally obligated* to do so.”¹⁶⁵

Hence, it is possible to ‘redescribe’ the content of rules from the external point of view using normative terminology without taking the internal point of view. Rule acceptance is not a necessary feature for law’s normativity. The bad man is just as capable of understanding law ‘legally’ as a legal official is. According to Shapiro, Hart cannot account for the derivation of the normative content of rules by Holmes’ bad man without him taking the internal perspective towards the social practice of rule acceptance. Shapiro’s argument can be brought down to the following propositions:¹⁶⁶

- (1) The bad man does not accept the rule of recognition and
- (2) The bad man can utter genuine normative judgments about what the law requires.

Although Shapiro’s arguments are persuasive, the ‘redescribability’ of the law by Holmes’ bad man from the external point of view does not necessarily pose any problems for the necessity of Hart’s internal point of view. To understand this, I will briefly discuss the difference between statements made from the internal and the external point of view.

In *The Concept of Law*, Hart describes the observer’s perspective in the following way. The observer may, without accepting the rules at all, refer from the outside to how people are concerned with rules from the internal point of view. Such an observer is content with merely recording the regularities of observable behavior in conformity with the rules. After a given time, the observer is capable of predicting in what sense deviations from these rules result in hostile reactions from the social group. Such predictions might enable the observer to act in accordance with the rules of a social group without the unpleasant consequences that could occur to someone without such knowledge.

However, such an observer’s perspective does not give a proper account of the manner in which people in the social group view their own regular behavior: “his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notion of obligation and duty.”¹⁶⁷ From the observer’s point of view, it is hard to understand whether a person acts in a certain way because he was obliged to or because he had an obligation. The first is acting out of fear for the possible consequences of deviations from rules; the second is acting in a certain way because the rule said so. For example, when people are asked why they wait for the light to turn green before crossing the street even though the possible fine is

¹⁶⁵ Shapiro, S.J., 2011, p. 112

¹⁶⁶ Papayannis, D.M. in Canale, D. et al., 2013, p. 100

¹⁶⁷ Hart, H.L.A., 1961/2012, p. 89

relatively low, they might say “because it is the law.” The second position takes the rules as standards from the internal point of view.

One of the salient differences between Holmes’ bad man and the observer keeping the ‘extreme external point of view’ is that the former does not reason from this extreme position. For example, a sociologist observing an intersection might be able to deduce from behavior of people that there are regularities of conduct and predict that people will cross the road if the traffic light turns green. The bad man, however, differs from the sociologist in the sense that he is in on the intersection being part of the game. He might not accept the rules of traffic, but nevertheless waits until the light turns green before crossing the street to avoid getting a ticket. The bad man takes a practical perspective towards the social practice of street-crossing which is governed by rules. Without the practical perspective, he is unable to make careful calculations as to what a rule ‘minimally’ requires of him so as to avoid getting a ticket. The bad man is in some sense committed to the rules that govern crossing on an intersection. To be able to legally *re*describe the content of rules from the external point of view by Holmes’ bad man presupposes an internal point of view in some sense.

But this would be too easy a conclusion. To recall, the bad man makes careful calculations as to what a rule requires and acts on the limits of it. He might act in a certain way because “it is the law that...”, but he might also explain his conduct by saying that the rule governs specific conduct because “In England they recognize as law.... whatever the Queen in Parliaments enacts.”¹⁶⁸ The former is an internal statement concerning an obligation, the latter an external saying that one is obliged to act in a given way and the rule serves as a reliable prediction of what will befall him at the hand of legal officials in case of disobedience.¹⁶⁹ There is not a clear reason as to why the bad man is necessarily limited to the first statement when describing his choice of action.

4.1.1 The bad judge

One might object that Shapiro’s argument does not necessarily pose any problems for Hart’s theory of law as long as legal officials take the internal point of view towards the law. The bad man crossing a street in accordance with the rules — even though he does not accept them — does not prove that the internal point of view is unnecessary when accounting for the normativity of laws. To recall, for a legal system to exist valid primary rules have to be generally obeyed by the public and secondary rules have to be “effectively accepted as common public standards of official behavior by its officials.”¹⁷⁰

¹⁶⁸ Hart, H.L.A., 1961/2012, p. 102

¹⁶⁹ *Ibid*, p. 82

¹⁷⁰ *Ibid*., p. 116

Let us imagine the bad man to be a bad judge who doesn't accept the secondary rule of recognition and is merely there to enrich himself at the citizens' expense. For Shapiro, such a judge is capable of issuing normative judgments by using normative 'legal' terminology without the appropriate internal perspective towards the practice of rule recognition. If this is true, it poses serious problems for Hart's theory of law. For example, if the bad judge decides that in accordance with the rules one of the parties is obligated to pay a fine for tax-avoidance, he is also capable of *redescribing* his judgment legally without accepting the rule of recognition while still issuing the same judgment with. The bad judge is capable of deciding which rules are applicable in a given case and engaging with them critically without taking the internal point of view towards the law. But is this possible from the external point of view? Can understanding the fact that other judges accept the rule of recognition provide the bad judge with a reason for action without accepting that rule himself?

Legal judgments made by a bad judge from the external point of view about the applicability of legal rules in a given case are to be understood as describing the beliefs and attitudes of legal officials. If the bad judge is asked whether he accepts the rule of recognition and answers negatively, but at the same time claims that he believes that a person has a genuine legal duty to pay a fine for tax-avoidance, he either does not understand what acceptance of the rule of recognition is or what having a legal duty means.¹⁷¹

To make such a statement, the bad judge needs to engage with the rules practically for them to provide him a reason for action.¹⁷² If the bad judge is confronted with a case of tax-avoidance, he is supposed to apply the rules of tax law and decide how the content of these rules correspond to the facts of a given case. His judgments have to be properly justified, meaning that his reasoning is limited to the criteria as laid down in legal rules and other legal sources. He cannot base his judgment on, for example, someone's appearance or the temperature outside. Handling cases and issuing judgments is a rule-governed practice itself. Even if the judge does not endorse the content of the rules, he still needs to accept the practice of rule recognition to some extent to be able to know which rules are applicable in a given case. This cannot be done from the external point of view. It is not necessary that he expresses the acceptance of the rule of recognition; the practice of judging itself and treating the rules as public standards of official behavior by the bad judge presuppose the internal point of view.

If Shapiro's claim is true and Holmes' bad man is capable of *redescribing* the law in such a way that normative judgments can be derived from strict positivist descriptive premises

¹⁷¹ Papayannis, D.M. in Canale D. et al., 2013 , p. 102

¹⁷² *Ibid.*, p. 101

without taking the internal point of view, there is no need for Hart's internal point of view to account for law's normativity. However, the practical perspective the bad judge takes in order to understand which rules are applicable in a given case presupposes the internal perspective in some sense towards the practice of rule recognition in his behavior. In the following section, I inquire whether the internal perspective can be found in international legal practice.

4.2 The international/domestic nature of the international legal system

A salient difference between international law and national law is between those judicial actors with law-applying authority. National law is applied and enforced by institutions part of a given state, while the application of international law largely depends on the willingness of national institutions to put these international rules into effect within the domestic legal order. Conflating law-applying authority with an international institution having compulsory jurisdiction poses problems for the identification of an international rule of recognition as most international law is enforced by national courts. Brian Tamanaha suggests that we should interpret law-applying authority as 'whomever, as a matter of social practice, members of the group (including legal officials themselves) identify and treat as 'legal' officials.'¹⁷³ Broadening the method for identifying law-applying authority makes sense in an international community that lacks the hierarchical authoritative structure characteristic of national legal systems and provides us with the building blocks for assessing the existence of an international rule of recognition within domestic legal practice. I will briefly discuss two possible objections to the existence of an international rule of recognition: (1) legal practice lacks the appropriate devices for international rule-identification and application and (2) international law does not have the appropriate devices for determining a hierarchy of norms.

4.2.1 Direct effect and inefficiency

Concerning the first objection, the concept of *direct* effect plays a major role in international law in determining the identification and application of international law in the national legal order. This concept generally holds the idea that courts are allowed "to secure performance of international obligations, without being dependent on the legislative or executive branch — the very actors that they are to control."¹⁷⁴ In *Foster v Neilson* for example, Chief Justice Marshall argued that the "constitution declares a treaty to be the law of the land. It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of

¹⁷³ Tamanaha, B., 2001, p. 142; D'Aspremont J. in Kammerhofer, J. & D'Aspremont, J., 2014, p. 122

¹⁷⁴ Nollkaemper, A., 2011, p. 117

itself without the aid of any legislative provision.”¹⁷⁵ Direct effect allows international law to become incorporated within the constitution of a state and be applied directly by national courts.

However, international law does not require states to implement international law in their legal systems. It leaves room for discretion by domestic courts. In *Avena*, for example, direct effect was defined by the International Court of Justice (hereafter: ICJ) as follows: “the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of Mexican nationals.”¹⁷⁶ This judgment nowhere implied that direct effect had to be given to the international rules under dispute even if direct effect would have been allowed by domestic law.¹⁷⁷ It is still left to the discretion of states how such rules should be enforced and interpreted. Unlike European Law, where direct effect means that European law has supremacy over domestic law, international law is neutral on whether it has direct effect or not.

Even so, the fact that domestic courts can deviate from judgments issued by international courts, reasons for doing so are not necessarily concerned with the legal validity of these judgments. In *Medellin*, the reason for not honoring the ICJ’s judgment was that the US Supreme Court found that it was the duty of the legislature instead of the court to take appropriate action.¹⁷⁸ Hence, not giving effect to the judgment in the domestic order does not mean that it was not regarded as legally valid. Although there is a connection between effectiveness and validity, these two concepts cannot be conflated.

While international law does not require the incorporation of international law by states, a significant number of states have a constitutional rule establishing the automatic incorporation and direct effect of international law in their domestic legal systems.¹⁷⁹ The Dutch Constitution, for example, contains Article 93 of the Dutch Constitution determining: “provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.”¹⁸⁰ This provision allows for the judicial reviewing of the conformity of domestic norms with legally binding norms of

¹⁷⁵ *Foster v. Neilson*, n. 25

¹⁷⁶ *Avena and Other Mexican Nationals*, 153 (9)

¹⁷⁷ Request for Interpretation of the Judgment of 31 March 2004 in *Avena and Other Mexican Nationals* (n 1) [44].

¹⁷⁸ *Medellin v. Texas*, n. 32

¹⁷⁹ Nollkaemper, A., 2011, p. 73

¹⁸⁰ Further examples: Constitution of Czech Republic (1992), article 10, Constitution of the Dominican Republic (1994), Article 3, Constitution of the French Republic (1958), Article 55, Constitution of the Arab Republic of Egypt (1971), Article 151

international law. Whether international rules are applicable in the Netherlands is a matter of interpretation. It depends on whether the international provision can function as an objective rule in the national legal order.¹⁸¹

Automatic incorporation and direct effect show that the applicability and validity of international law depends on the relationship between international and national law and to what extent international law is incorporated in domestic legal systems. Taking compulsory jurisdiction of international institutions as the starting point for assessing whether an international rule of recognition exists does not make much sense as most international law is applied within domestic legal systems by domestic courts. Constitutional incorporation of international law by states and treating international law as binding norms by domestic courts, however, are an indication of a normative attitude towards international law. International rules are regarded as valid legal rules from the 'internal point of view', but they do lack the authoritative power to override national law irrespective of domestic considerations simply by it being international law. But this does not say much about the legal validity of these rules. According to Jean d'Aspremont: "what matters is simply that law-applying authorities, sharing some sufficient social consciousness and making use of similar law-ascertainment language, do actually recognize some norms as constituting international legal rules."¹⁸² If law-applying authorities treat international rules as valid rules, an international rule of recognition is in existence.

Another problem with international law is inefficiency. Hart attributes to secondary rules of adjudication the power to overcome inefficiency by identifying those persons or bodies with the authoritative power to settle disputes concerning violations of primary rules through procedures that identify these violations. According to Mehrdad Payandeh, international law has developed mechanisms to cope with this problem of inefficiency even though compulsory jurisdiction is absent.¹⁸³ The International Court of Justice requires the consent of states in order to have jurisdiction over a given dispute, but the international judiciary consists of many more courts with specialized jurisdiction on a universal and regional level. Decisions of international arbitration tribunals in international investment protection law are generally regarded as authoritative judgments as to whether rules have been violated.¹⁸⁴ The system of adjudication

¹⁸¹ Nollkaemper, A., 2011, p. 127; *Nederlandse Spoorwegen*, Supreme Court, The Netherlands (30 May 1986), NJ 1986/688; *Hansa Chemie v. Bechem Chemie*, Supreme Court, The Netherlands (16 May 1997), NJ 1998/585

¹⁸² D'Aspremont J. in Kammerhofer, J., & D'Aspremont, J., 2014, p. 140

¹⁸³ Payandeh, M., 2011, p. 985-986

¹⁸⁴ *Ibid.*

differs from that on a national level, but this does not mean that its system is to be regarded as that of a primitive society lacking a rule of recognition.

4.2.2 Hierarchy of norms

I now wish to turn to the second objection that held that international law does not have the appropriate devices for determining a hierarchy of norms. As the rule of recognition determines the relationship between different sources of law, there is no reason to deny the existence of an international rule of recognition. Article 38 (1) of the ICJ Statute states, for example, the general sources of international law. These are (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states, (b) international custom, as evidence of a general practice of law and (c) the general principles of law recognized by civilized states. Hart recognizes that in a domestic legal system a plurality of sources can co-exist (statutes, precedent and custom), as long as the rule of recognition operates as a validating device.¹⁸⁵ International law consists of such a plurality of sources.

There are rules of international law that determine which rules are applicable in a specific case. For example, the Rome I Convention (hereafter: Rome I) governs the law applicable to contractual obligations. Rome I determines that parties can decide for themselves which domestic law is applicable when breaches of contracts occur. Absent such a choice of law the contract is either governed by Rome I¹⁸⁶, or by the United Nations Convention on Contracts for the International Sale of Goods (hereafter: CISG) if contracting parties reside in states outside the scope of Rome I. The CISG in turn declares that rules of private international law (such as Rome I) can divest it of its applicability when such rules “lead to the application of the law of a contracting State.”¹⁸⁷ Such provisions are generally regarded as determining a hierarchy of norms. Domestic courts interpret such conventions to decide which law is applicable if parties to a contract reside in different states.¹⁸⁸ There are rules of international law that determine a hierarchy of norms.

The incorporation of international law in domestic legal systems, the interpretation of the relationship between international law and national law by domestic courts, the increasing use of international law in domestic cases and the jurisdictional power of international courts and tribunals in specialized areas indicate that there is a more sophisticated system in place than

¹⁸⁵ Hart, H.L.A., 1961/2012, p. 212

¹⁸⁶ Article 4 Rome I Convention

¹⁸⁷ Article 1 (B) United Nations Convention on Contracts for the International Sale of Goods

¹⁸⁸ See for example: *Facchi v. Metapol B.V.*, Court of Overijssel, The Netherlands (18 September 2015), n. 5.4; C/08/162745; *Proteinfabriken AS v. C.D. Sport Internationaal B.V.*, Court of Rotterdam, The Netherlands (19-04-2017), n. 4.3; C/10/493214

that of a primitive society. The use of international law as valid legal rules indicates the existence of an international rule of recognition at its core whose function is the identification of criteria for the validity of primary international rules and the relationship between different sets of rules.

4.3 Conclusion: the authority of international law

The question that remained was whether the rule of recognition itself is capable of accounting for law's normativity while reasoning from strict positivist premises. According to Hart, judges take the internal perspective towards the social practice of rule recognition by the legal community which leads to the derivation of a normative judgment from practice engagement with descriptive facts. Shapiro argues that the internal perspective is not necessary for understanding law's normativity, since Holmes' bad man is perfectly capable of 're-describing' the law from the external point of view using normative language. While Shapiro's argument seems persuasive, I argued that the bad man necessarily takes a practical perspective towards the law in order to be able to 're-describe' the law in the first place. This practical perspective presupposes the internal point of view.

By expanding the concept of law-applying authority to whomever, as a matter of social practice, are identified and treated as legal officials, the possibility emerges to analyze the existence of an international rule of recognition in domestic legal practice without international law having compulsory jurisdiction. The use of international law by domestic courts indicates the existence of such a rule. Furthermore, international courts and tribunals with jurisdictional power in specialized areas indicate that there is a more comprehensive system than that of a primitive society.

The rule of recognition serves as a validating device for international law, since legal officials take the internal point of view towards international law. Although international rules are generally regarded as legally valid in domestic legal practice, its application is still contingent and depends largely on the application by domestic courts in those areas where international law does not have compulsory jurisdiction. The nature of international law is best characterized as an on-going relationship between international and national law in which the rule of recognition determines the validity of rules in specific cases.

Conclusion

The starting point for this thesis was Fricker's objection to understanding international law as having objective authority while maintaining that it was founded on the subjective wills of states. For international law to have objective power, states should be incapable of escaping its authority through unilateral acts even though this unilateral act is what constituted law in the first place. The incompatibility of this should mean that international law's authority was actually based on something that is external to the wills of states.

Kant argued that international law and national law both have the same *telos* (freedom and equality for people as ends in themselves) and that this goal generates an omnilateral will transcending the subjective wills of states. Hegel claimed that such an omnilateral will is incomprehensible as the state — for it to be an ethical unity — requires conflicts with other states. Hegel argued that international law was to be regarded as 'external state law' whose applicability depended on the subjective wills of states.

Voluntarist theories have tried to explain the authority of international law from these Kantian and Hegelian notions of the will by vouching for the 'self-obligating' will of states or 'common will', by analyzing pre-legal concepts such as the 'will', 'power' and 'sovereignty'. Jellinek, who believed that the contradiction was merely an apparent one, constructed a theory of law based on law as a psychological phenomenon inherent to human beings. As this norm-creating power (the normative force of the factual) was part of human nature, Jellinek reasoned from strict positivist premises, diverting from moral or ethical considerations for the authority of law. The normative force of the factual, however, cannot account for law's normativity. Normative expectations concerning rights and duties can arise from facts, but there is no reason as to why these rights and duties can be invoked towards others and why others should respect these. Hart's internal point of view, however, can account for the existence of such rights and duties. Hart's internal point of view and the rule of recognition serve as a useful device to account for law's normative force while leaving the concept of the will out of the equation. However, when it comes to international law, Hart claimed that it could be regarded as "law", but not as an international legal system. I argued that this conclusion was confusing as he himself argued that "law" is the union of primary and social rules. He claimed that international law had the characteristics of a primitive society with primary rules and that these rules were 'legal'. This seems incompatible with his conception of a legal system since the secondary rule of recognition identifies which rules are to be regarded as legal. If primary rules are in fact legal rules then a system should be in place determining the legal validity of these rules. By expanding the concept of law-applying authority to whomever, as a matter of social practice, are identified and regarded as legal officials, it becomes possible to assess the existence of a rule of recognition

without focusing too much on international institutions. As I argued, there is every indication that an international rule of recognition exists within domestic legal practice.

How should we understand international law's authority? I argued that it is best understood as contingent on the relationship between international and national law. The emergence of courts and tribunals in specialized areas and the ever-growing implementation of international law in domestic legal systems through *direct effect* indicate that compulsory jurisdiction is increasing. However, to what extent international law has compulsory jurisdiction depends on how this relationship develops over time.

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