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RESEARCH ARTICLE

A new philosophy for international legal skepticism?

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Abstract

Ronald Dworkin maintains that a system of coercive government is a genuinely legal one if and only if it exhibits fidelity to a conception of the rule of law as valuable for the constitutive contribution it makes to the treatment of all its individual human subjects with equal concern and respect. This requires a particular type of institutional structure, namely one that satisfies the criteria that constitute government according to the rule of law, and a particular political culture or *ethos* on the part of both rulers and ruled that Dworkin labels law as integrity. The existing practice of global coercive government may well satisfy neither of these conditions. If so, then given Dworkin's account of law, international law is not really law. Importantly, this is a practical claim, not a descriptive/explanatory one. Specifically, it entails that international officials are sometimes morally permitted to tell noble lies regarding what the 'law' is, to refuse to pronounce on questions of 'law', and to refrain from applying and enforcing actors' 'legal' rights and duties.

Keywords: Dworkin; international law; interpretivism; legal skepticism; legitimacy; rule of law

Introduction

Is international law really law? As H.L.A. Hart notes in the introduction to *The Concept of Law*, the person who poses this question does not intend to deny the existence of the social practice commonly labelled 'international law'. Rather, she wants to know whether that practice possesses some property or properties that warrant the claim that it is law, presumably because she thinks that something of explanatory or normative significance turns on the answer. Following Hart, then, we should delay giving any answer to the question 'is international law really law?' until we have found out what it is that puzzles the person who poses it. 'What more do they want to know, and why do they want to know it?'[1]

[1]Hart 2012, 5.

In a posthumously published article Ronald Dworkin offers the following answer to Hart's question: whether international law is really law matters because it determines how we should interpret those international agreements, codes of conduct, etc., commonly referred to as international law.[2] This way of stating the significance of the answer to the skeptical challenge undersells it, however. For Dworkin, success in the process of constructive interpretation that yields a true proposition of law necessarily provides a moral justification for the political community's exercise of coercion to enforce a right or duty. Thus, the question of how we ought to (constructively) interpret international law is not a morally-neutral matter regarding the meaning of texts like the U.N. Charter but a morally loaded question posed from the standpoint of an international legal official regarding the justifiable use of coercion in international affairs.[3] Put another way, given Dworkin's understanding of law the question 'is international law really law?' conveys the worry that this system of government does not satisfy the conditions necessary and sufficient to morally justify the coercion it sanctions (and prohibits).[4]

As I read him, Dworkin maintains that a system of coercive government counts as a genuinely legal one if and only if it exhibits fidelity to a conception of the rule of law as valuable for the constitutive contribution it makes to the treatment of all its (individual human) subjects with equal concern and respect. This requires a particular type of institutional structure, namely one that satisfies the criteria that constitute government according to the rule of law, and a particular political culture or *ethos* on the part of both rulers and ruled that Dworkin labels law as integrity. In a political community that governs itself through law properly so-called, this *ethos* regulates the community's use of coercion to uphold its members' political rights

[2]Dworkin 2013, 3. For discussion of other concerns that might lie behind an expression of international legal skepticism, see Hart 2012, Chapter X; Lefkowitz 2020a; Pavel and Lefkowitz 2018; Hathaway and Shapiro 2011; Kleinfeld 2010, 2011.

[3]Throughout this essay I use the phrase 'international official' to refer to actors who occupy offices in the institutions that comprise the existing international state-centred system of coercive government; roughly, those who justify at least some of their official conduct by appeal to what is commonly labelled 'international law'. Examples include officeholders in international organizations such as the U.N. and the International Court of Justice, as well as domestic officials who conduct their state's foreign policy. Though technically advisory, international lawyers employed by ministries of foreign affairs, defence, etc., count as quasi-international legal officials in virtue of the key role they normally play in executive officials' identification of their international legal rights and duties.

[4]A focus on coercion may strike some readers as misguided insofar as international law places fairly strict limits on its use to induce compliance. Of course, a community's proscription on the coercive enforcement of certain legal obligations stands in just as much need of justification as does its sanctioning the coercive enforcement of other legal obligations. Moreover, international law does sanction the use of coercion to enforce compliance with the core norms of sovereignty, namely those that entitle states to govern particular territories and people. Arguably, these constitute the core of international law because they provide a necessary background for all of its other norms, including those that may not be enforced through the use of coercion. In this regard they are akin to those aspects of domestic criminal law that provide a necessary background for a municipal legal system's contract and property law. Finally, even if a focus on coercive enforcement treats as an essential feature of law what is only an essential feature of *law within a modern state*, we can restate Dworkin's characterization of true propositions of law so that it avoids this mistake. Success in the process of constructive interpretation that yields a true proposition of law necessarily provides a moral justification for the political community's enforcement of a right or duty. Enforcement may take the form of denying the benefits of cooperation to an actor who violates the law, rather than the use of force. See Hathaway and Shapiro 2011.

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and duties. It does so by informing members' attempts to identify terms for just interaction, i.e., attempts to specify those legal rights and duties members of the community should or already do enjoy, and to engage with one another on those terms. For example, judges identify those rights and duties enforceable upon demand without any further legislative action by constructively interpreting the political community's past practice of government according to the rule of law as an attempt to realize concretely a fundamental moral commitment to treating all of its members with equal concern and respect. Legal subjects instantiate such treatment by guiding their conduct according to findings of law simply because it is the law; that is, because they take the exercise of governmental power in accordance with law as integrity to be legitimate. In sum, for Dworkin legal reasoning has a specific form; the product of such reasoning, law properly so-called, necessarily provides a moral justification for the exercise of governmental power; and legitimate government simply is government according to the rule of law informed by a proper understanding of what makes the rule of law valuable.

In his last paper Dworkin responds to the international legal skeptic's challenge with cautious optimism. While it is 'very young', 'effectively reborn in 1945' with the signing and coming into force of the UN Charter, he maintains that the contemporary global system of coercive government does qualify as a genuine legal order.[5] It follows that in order to identify the rights and duties possessed by international legal subjects, international officials ought to constructively interpret the practice of international government (at least since 1945) as one that aims at the realization of a world in which all individuals are treated with equal concern and respect.[6] The identification of an international legal right or duty on the basis of such a constructive interpretation provides a moral justification for the exercise of coercion that conforms to its terms.

In what follows I defend a more pessimistic conclusion: given Dworkin's account of what makes a practice of coercive government a legal one, there may well be compelling reasons to endorse international legal skepticism. If that skepticism is borne out, then much of the exercise of coercive government authorized and carried out within the existing international 'legal' system cannot be morally justified in the specific way that law serves to justify coercive government. That is, the mere fact that international 'law' permits, requires, or forbids a particular type of conduct on the part of a particular international actor fails to provide even a *pro tanto* moral justification for the conduct in question. Moreover, if international law is not really law, then international officials need not, and indeed, cannot display the integrity incumbent upon those who govern in a genuine legal order. Rather than identifying international legal rights and duties on the basis of principled moral reasoning that is sensitive to both considerations of fit and justification, international officials ought to reason strategically with an eye towards mitigating the worst evils international 'law' enables, and fostering reforms that will lead to the realization of a

[5]See Dworkin 2013, 29. See Lefkowitz 2020a and 2022 for an explication of Dworkin's philosophy of international law.

[6]Since international law is presently 'nascent' and immature (a 'child'), it currently makes only a limited, though still important, contribution to that goal, namely by mitigating the worse 'dangers of the insulated sovereignty of the Westphalian system.' Dworkin 2013, 23.

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global community of principle, one governed in accordance with a proper understanding of the value of the international rule of law.

Scholarly engagement with Dworkin's philosophy of international law provides one reason to consider the position I elaborate in this essay. Neither those who criticize Dworkin nor those who defend him have recognized the centrality of the regulative ideal of the rule of law to his legal philosophy, and so none have considered the possibility that his philosophy of international law may fail on its own terms.[7] More importantly, though, Dworkin's consideration of international law's status as law merits our attention because he is one of the most profound contributors to a tradition of theorizing law as an inherently moral undertaking; what I elsewhere label law as a vocation.[8] Scholars in this tradition locate the essence of law not in particular kinds of rules, or institutions, or linguistic practices, but rather in a regulative ideal that distinguishes the legal form of social order from other ideal types of social order. To reiterate, for Dworkin that regulative ideal is government on the basis of fidelity to a conception of the rule of law as valuable for the constitutive contribution it makes to the treatment of all its (individual human) subjects with equal concern and respect. For Lon Fuller, another prominent contributor to this tradition of theorizing law, agents' commitments to reciprocal regard for one another as responsible and autonomous agents provides the regulative ideal that distinguishes law from other forms of social organization.[9] Among contemporary international lawyers the best-known member of this tradition is Martti Koskenniemi. This claim may strike some as surprising and obviously false; after all, Koskenniemi describes law as a grammar, a language for making and contesting claims, and usually eschews talk of the rule of law. Yet it is precisely because law as language places no constraints on actors that Koskenniemi argues for the cultivation of a culture of formalism: 'a culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it'.[10] As I argue elsewhere, Koskenniemi's description of a culture of formalism and its value is quite similar to Dworkin's (and Fuller's) account of a genuine legal order.[11]

The value of this essay, then, lies in its presentation of one attempt to articulate law, or a legal order, as a moral ideal, and a demonstration of how that ideal might be put to critical use; to wit, by a participant in the contemporary state-centred practice of international coercive government who is devoted to the ideal of the rule of law, but who begins to question (or is encouraged to question) whether

[7]An incomplete list of scholarly engagement with Dworkin's philosophy of international law includes Palombella 2014; Jovanović 2015; Christiano 2016; Chilton 2017; Bustamante 2017, 2023; Besson 2020; Lefkowitz 2020a, 2022; Tasioulas 2021; Vinx 2022. A vast literature engages with Dworkin's general philosophy of law, of course.

[8]See Lefkowitz, forthcoming.

[9]Fuller 1973. For accounts of international law that draw deeply on Fuller's philosophy of law, see Brunnée and Toope 2010; Fox-Decent and Criddle 2018.

[10]Koskenniemi 2001, 500. See also Koskenniemi 2007, 2010.

[11]See Lefkowitz, forthcoming. Other contemporary contributors to the tradition of theorizing law as an inherently moral undertaking who bring that framework to bear on (so-called) international law include Nardin 2008; Capps 2009; and Dyzenhaus 2022.

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that practice is a (highly) imperfect token of the law-type, or is instead a token of some other type of social order. Or alternatively, by a participant who judges the practice of international coercive government to be a token of the (rule of) law type, but who begins to question whether other participants in the practice share her understanding of what makes (the rule of) law valuable, with its implications for what counts as acting with fidelity to that ideal.[12]

In the interest of encouraging genuine consideration of what is a rather provocative claim, it may be worth noting that Dworkin denies that there is a single concept of law such that there can be only one answer to the question 'is international law really law?' Rather, concepts are embedded in particular discourses which can be distinguished on the basis of their aim or purpose. Thus, Dworkin distinguishes two related concepts of law that figure in practical or normative discourse from the (or a) concept of law that figures in descriptive/explanatory discourses.[13] The former are the doctrinal concept of law, which figures in discourses concerning the law of a particular political community, and the aspirational concept of law, which figures in discourses concerning the ideal of the rule of law. This essay explicates and illustrates the link between these two normative concepts of law; that is, how an agent's conception of the rule of law figures in her judgments of what the law is. In contrast, what Dworkin labels the sociological concept of law figures in social scientific accounts of law, such as those that aim to explain or predict the development (or not) of specific types of legal institutions in particular circumstances. Thus, there may well be a concept of law, or a discursive practice that involves characterizing social practices as legal or non-legal, in which international law counts as law. That is why we should follow Hart in responding to assertions of international legal skepticism by asking 'what more do they want to know, and why do they want to know it?'

The question remains why we should accept Dworkin's characterization of the concept of law as it figures in normative discourse; for example, in asserting or contesting rights or duties enforceable upon demand without any further legislative action. Why construe the law as a political community's working conception of what counts as living up to its fundamental commitment to interacting on the basis of a proper conception of the rule of law, rather than, say, as directives issued by lawmakers to legal subjects that purport to enhance their conformity to right reason?[14] This is a valid question but not one I can address here. However, many of those who reject Dworkin's characterization of the concept of law as it figures in normative discourse nevertheless maintain that law's legitimacy – its justifiable claim to authority over legal subjects to which correlates their duty to obey the law – depends on legal officials exhibiting fidelity to the ideal of the rule of law. Thus, those inclined to adopt a legal positivist characterization of law may

[12]Of course, one can defend an account of law as a moral ideal type without endorsing the international legal skepticism for which I argue in this essay. For instance, one might pursue a precarious balance between commitment and cynicism, while railing against the frequently successful attempts by a hegemonic power, or global capitalists, or populist political leaders to render international law nothing more than a tool of the powerful. See Koskenniemi 2017a, 2019.

[13]Dworkin 2006, 1–5.

[14]The latter is a slightly simplified version of Joseph Raz's account of the normative concept of law. See Raz 1979, 2006.

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still find the arguments that follow worthy of their attention, even if they think those arguments speak to international law's legitimacy, not its status as a genuine example of law.[15]

My argument begins in the next section with an outline of several reasons to suspect that the existing global system of coercive government does not adequately satisfy the conditions for the international rule of law. As I explain, this argument concerns the applicability of the *concept* of the rule of law to the contemporary global political order. As such, it does not depend on any particular *conception* of the rule of law, an account of what makes fidelity to the rule of law valuable, or as Dworkin sometimes writes, a political ideal. I then suggest that international law's 'constitutional defects' are likely both cause and effect of an international political order premised on states' pursuit of their national interests given their relative power; at best, an example of rule by law, not the rule of law. If so, then the current international practice of coercive government is an example of what Dworkin labels Legal Pragmatism, which he characterizes as 'a skeptical conception of law because it rejects genuine, non-strategic legal rights'.[16]

Even if the global system of coercive government adequately satisfies the conditions for the rule of law, I suggest that Dworkin's characterization of what makes the rule of law valuable may not be immanent in most international officials' exercise of the powers that attach to their offices. If so, then this system of government is not a legal one properly so-called, since findings of law that flow from international law as integrity will prove efficacious only if they happen to coincide with those that flow from whatever rival conception(s) of the rule of law as a political ideal most international officials implicitly embrace.[17] The practical implications of international legal skepticism are addressed in the final section. Building on brief pieces of counsel Dworkin offers to officials in what he labels wicked or evil legal systems, I argue that international officials are sometimes morally permitted or perhaps even required to tell noble lies regarding what the 'law' is, or to refuse to pronounce on questions of 'law', or to refrain from applying and enforcing what they identify as actors' 'legal' rights and duties.[18] For each of these strategies I offer recent examples from the international state-centred practice of coercive government that might be construed as evincing

[15]'Legal positivism' refers here to a philosophical account of the nature of law, not to the school of international legal theory that grounds both the existence and normativity of international law in state consent.

[16]Dworkin 1986, 160.

[17]Throughout this essay I speak of officials embracing, employing, accepting, and subscribing to law as integrity or some rival conception of the value(s) or purpose(s) that informs a particular (type of) practice of coercive government. Like Dworkin, in using such language I do not mean to imply that as a matter of course officials explicitly 'ask themselves basic questions of political philosophy about which rights are enforceable upon demand' (Dworkin 2013, 12). Rather, officials' 'training and experience supplemented, we might hope, by some academic curiosity, form their working and largely unexamined methods' for identifying the law (ibid, at 13). Immanent in those methods, however, will be some conception of the value(s) or purpose(s) served by the practice of coercive government in which they participate, and that conception will normally determine to a considerable extent (the content of) those rights and obligations they identify as enforceable upon demand.

[18]I concur with David Dyzenhaus's contention that the label 'wicked' or 'evil' legal system distracts from the core question, which is whether a practice of government exhibits at least adequate fidelity to (a proper conception of) the rule of law. See Dyzenhaus 2022, 23.

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their adoption. My aim here is simply illustrative, however; I aspire to clarify the practical significance of international legal skepticism, not to defend the claim that the conduct described in these cases is best understood as exemplifying international legal skepticism. The argument in this essay, if successful, provides the rationale for that further project.

An international rule of law?

The existing state-centred practice of global coercive government may fail to qualify as a genuinely legal order either because it does not adequately satisfy the conditions for the rule of law, or because while it does so, law as integrity informs few international legal officials' (implicit) understanding of the value of the international rule of law. I explore the first of these grounds for challenging the genuine legality of so-called international law in this section, and the second in the section that follows.

The concept of the rule of law

The argument that follows rests on Dworkin's characterization of the concept/conception distinction. In *Law's Empire*, he writes:

> the contrast between concept and conception is here a contrast between levels of abstraction at which the interpretation of the practice can be studied. At the first level [i.e. that of the concept] agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second [i.e. that of the conception] the controversy latent in this abstraction is identified and taken up.[19]

The concept of the rule of law, I maintain, is best understood in terms of government through law, supremacy of law, and formal equality before the law. This characterization of the rule of law is often described as a thin or formal view. Since Dworkin is commonly characterized as a proponent of a thick or substantive view of the rule of law, challenging his claim that international law is really law by raising doubts as to whether it satisfies the conditions for the thin view of the rule of law may seem an odd strategy. However, the thick/thin or formal/substantive comparisons apply at the level of *conceptions* of the rule of law, not the concept of the rule of law. In Dworkin's terms, these are labels for (families of) views regarding what makes the rule of law valuable, or what is the same, for a particular understanding of the rule of law as a political ideal.[20]

[19]Dworkin 1986, 71.

[20]When Dworkin first distinguishes between the 'rule-book' and the 'rights' conception of the rule of law, he characterizes this as a disagreement over how best to characterize the ideal of the rule of law, and he explicitly connects that disagreement to the question of how judges ought to identify the law (Dworkin 1985, 9–32). Such disagreement presupposes agreement on 'discrete ideas that are uncontroversially employed in all interpretations' of the practice. In the case of the rule of law, I maintain that government through law, supremacy of law, and formal equality before the law provide the required 'discrete ideas'.

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Government through law obtains when, or to the extent that, a political community exercises coercive power only in accordance with prospective, publicly promulgated, standards that are clear and do not demand the impossible. Law enjoys supremacy when, or to the extent that, it applies to the rulers as well as to the ruled. This means that specific exercises of political power must be authorized by law, and that government action cannot transgress any standing legal restriction. In practice, and perhaps also in principle, supremacy of law requires recourse to an independent agent charged with determining the legality of conduct undertaken by public or private actors.[21] Finally, supremacy of law exists only insofar as government officials, particularly those who execute the law, defer to the conclusions of those officials charged with identifying what the law is. Formal equality before the law requires that like cases be treated alike. As should be clear, the aim of guiding while also constraining the exercise of coercive government provides the unifying theme that animates the concept of the rule of law. The contrast frequently drawn between the rule of law and arbitrary rule reflects this understanding of rule according to law.[22]

The notions of government through law, supremacy of law, and formal equality before the law are implicit in what Dworkin characterizes as the most abstract account of legal philosophy's subject matter. Legality, he writes,

> insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified. The law of a community on this account is the scheme of rights and responsibilities that meet that complex standard… This characterization of the concept of law sets out, in suitably airy form, what is sometimes called the 'rule' of law.[23]

A key passage in his paper on international law also points to Dworkin's recognition that the identification of law properly so-called requires a constructive interpretation that invokes both the concept of the rule of law detailed above and a proper understanding of its value. There he writes that we justify claims regarding what the law is ' – if we can – through a political theory that combines an attractive conception of political legitimacy together with a convincing conception of the special political virtue of fairness, one that makes history, convention, and expectation particularly pertinent to the identification of rights that are enforceable on demand…'[24] For Dworkin, the attractive conception of political legitimacy, the

[21]Raz offers a practical argument for recourse to independent courts, namely that as an empirical matter a society will better realize government through law if it includes such an institutional arrangement than if it does not. Raz 1979, 216–18. Waldron offers a principled argument for recourse to independent courts: 'Courts, hearings, arguments – those aspects of law are not optional extras. To say that we should value aspects of governance that promote the clarity and determinacy of rules for the sake of individual freedom, but not the opportunities for argumentation that a free and self-possessed individual is likely to demand, is to slice in half, to truncate, what the Rule of Law rests upon: respect for the freedom and dignity of each person as an active intelligence.' Waldron 2008, 87.

[22]This characterization of the concept of the rule of law draws on Tamanaha 2012 and Chesterman 2008.

[23]Dworkin, 1986, 93. See also Dworkin 2006, 172.

[24]Dworkin 2013, 12. See also Dworkin 2011, 408–9.

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ends for which political power may be justly exercised, is grounded in the principle of equal concern and respect. A convincing conception of the special political virtue of fairness speaks to the means by which those ends must be pursued, namely through government in accordance with the rule of law.

Skeptical challenges to an international rule of law

Immediately following the above quotation Dworkin notes parenthetically that 'some purported legal systems cannot be justified in that way'.[25] Is the contemporary global system of coercive government one such system? Skepticism regarding the degree to which it satisfies the conditions for the rule of law provide one basis for suspecting that it is. Consider, first, government through law. Arguably the existing international political order satisfies the demand that coercive government be exercised only in accordance with prospective, publicly promulgated, standards fairly well, especially given the explosion of treaties following the end of the Cold War and the continuing (though perhaps also diminishing) efforts at codification undertaken by the International Law Commission. Still, there are some causes for concern. One is states' increasing tendency to rely on informal and non-binding mechanisms, rather than treaties, to structure their interactions with one another. As Shaffer and Sandholtz observe, 'the move away from multilateral treaties and from publicized written commitments monitored by third-party institutions reflects systemic changes that are worrisome… [since] these shifts towards informal mechanisms can reduce transparency and accountability and enhance the ability of powerful states to deploy coercive leverage to advance their interests'.[26] A second is the UN Security Council's targeted sanctions regimes.[27] Placement on the Al-Qaida Taliban sanctions regime was initially subject to no requirements of transparency or due process, and the creation of an Office of the Ombudsperson to address these shortcomings has done little to improve it. Indeed, in 2021 one holder of this office resigned from it, citing concerns about 'persistent obstacles to fairness in the process, including extensive reliance on confidential evidence of wrongdoing and a refusal to allow sanctioned petitioners to review the reasons they were placed on the U.N. sanctions list in the first place'.[28]

How well international law satisfies the requirement of clarity will likely be a bone of contention, particularly where the absence of an adjudicatory body that enjoys compulsory jurisdiction results in a paucity of case-law. The clarity of international law may also be threatened by its increasing fragmentation, the proliferation of multiple legal regimes and/or tribunals that claim jurisdiction over the

[25]Dworkin 2013, 12.

[26]Shaffer and Sandholtz 2023. Jochen von Bernstorff likewise observes a marked decline in 'binding rule-making' and multilateral treaties in favour of 'informal regimes and custom [that] in practice often favor strong actors who, in looser unions with self-chosen partners, secure and further expand their technological, economic, and scientific lead by creating new standards and re-interpreting existing ones.' See von Bernstorff 2019, 55.

[27]See, e.g., Chesterman, 2009, 70–3.

[28]See Lynch 2021, 'How a Dream Job Became a Bureaucratic Nightmare for a Top UN Lawyer,' *Foreign Policy* 27 July 2021, at https://foreignpolicy.com/2021/07/27/un-terrorism-lawyer-resigning-ombudsperson-bureaucracy/. Some permanent members of the UNSC have also opposed talk of extending the Ombudsperson's mandate to encompass other UN targeted sanctions regimes. See Biersteker et al., 2021.

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same actors and conduct but apply different bodies of law, with no hierarchical arrangement or conflict rules to settle disputes between them. This development increases the likelihood that actors will be subject to two (or more) contradictory legal rules or judgments, with the resolution of such conflicts dependent on political negotiation rather than legal reasoning.[29]

Formal equality before the law also seems problematic, with powerful states enjoying greater latitude in their international undertakings than do weaker states. In a speech on the international rule of law that she gave while serving as the President of the International Court of Justice, Rosalyn Higgins remarked that

> The realities of power, coupled with the promotion of their own interests and the protection of other favoured states, means that the decisions of the Security Council, while striving for a principled application based on Charter requirements, are subject to 'the achievement of the possible'. That in turn means that Security Council decision-making is not always regarded as 'applicable equally to all'. Arguments about consistency in the application of sanctions to different states said to be violating the Charter illustrate the point.[30]

The same is true for the ICC's activities to this point, which have focused almost exclusively on the conduct of officials in relatively weak states. As Gabriel Lentner documents, powerful members of the UNSC 'subject other, weaker, states to the jurisdiction of an international [criminal] tribunal but are not willing to subject themselves to such jurisdiction', or for that matter, to permit the Security Council to refer a case to the ICC where doing so threatens their national interests or those of their allies.[31]

From the standpoint of realizing the rule of law, the greatest defect in the existing global system surely concerns the supremacy of law, especially the dearth of independent tribunals recognized by all international 'legal' subjects as enjoying standing authority to determine for them what the law is.[32] As Arthur Watts writes, the International Court of Justice's

[29]See Lefkowitz 2020b. Matthias Kumm maintains that the dangers legal pluralism poses to government by law are attenuated by the fact that the participants in different legal regimes share a commitment to the rule of law. Yet he also maintains that the international order's 'compartmentalization' – its treatment of trade law, human rights law, environmental law, and so on as effectively self-contained and isolated legal regimes – is an example of 'legal hypocrisy', a failure to exhibit fidelity to the ideal of the rule of law. See Kumm 2017, 197. Similarly, Martti Koskenniemi maintains that agents committed to the rule of law can (and do) draw on a variety of tools to address fragmentation and legal pluralism, all in pursuit of a political community in which no actor is subject to arbitrary rule. Koskenniemi's concern with the recent fragmentation of international law owes instead to the underlying philosophical view he identifies as driving it, namely an instrumental, economic, or in Dworkin's terminology, legal pragmatist approach to global government. See Koskenniemi, 2017b, 401.

[30]Higgins 2007, 3–4.

[31]Lentner 2018, 5. See also Müller 2022.

[32]Higgins 2007, 11; Chesterman 2008; Crawford 2003, 11–12; Collins 2014, 87. Jack Goldsmith and Daryl Levinson argue that the absence of hierarchical or centralized institutions of legislation, adjudication, and enforcement are endemic to 'state law;' that is, legal regimes such as international and (domestic) constitutional law 'that both constitute and govern the behavior of states and state actors' (Goldsmith and Levinson 2009, 1795). This claim might look like the first premise of a *reductio ad absurdum* response

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> jurisdiction in all cases requires the consent of the States whose dispute is to go before the Court… A reluctant defendant State can, therefore, prevent a dispute being referred to the Court – or indeed to any other form of judicial or arbitral settlement, for example by an ad hoc tribunal, since any such reference is similarly subject to the defendant State's consent. Such a purely consensual basis for the judicial settlement of legal disputes cannot be satisfactory in terms of the rule of law.[33]

Consider, too, the late ICJ judge James Crawford's observation that 'it may be that decisions of the Security Council are subject to the authority of the Charter, but the fact is that there is no regular institutional means for bringing Charter constraints to bear on the Security Council'.[34] Admittedly, the decades following the end of the Cold War witnessed a significant increase in the judicialization of international law, especially (though not only) in the fields of international human rights law, international trade law, and international investment law.[35] Particularly for a court-centred theorist of law like Dworkin, these developments might be treated as evidence of the supremacy of law in some parts of the state-centred global practice of coercive government, even if the project of subjecting the entirety of that practice to the rule of law remains incomplete. Two considerations warrant caution in drawing this optimistic conclusion, however.

The first is that judicialization need not instantiate a commitment to the rule of law, insofar as tribunals, dispute resolution mechanisms, and so on may be designed not to constrain the exercise of political power but simply to make it more effective or efficient. This will be the case if, for example, the function of a

to the view that the paucity of international tribunals with compulsory jurisdiction and a reliance in most cases on self-help for enforcement prevents the realization of an international rule of law. For that view would seem to entail that constitutional law does not, and perhaps cannot, satisfy the requirements for the rule of law, and so on my reading of Dworkin, does not count as law properly so-called. This conclusion may not be absurd; after all, plenty of scholars hold that (much of) what goes under the heading of constitutional law is simply extra-legal politics. But there is no need for Dworkin to bite this bullet (if indeed it is one), or at least not on the basis of the Goldsmith and Levinson's argument. That is so for two reasons.

First, Goldsmith and Levinson repeatedly concede that judicial review of constitutional questions play a significant role in the U.S. legal-political order (ibid, 1812–15). While there may be greater uncertainty on constitutional questions than on questions of ordinary tort, contract, or property law, courts play a much more important and effective role in U.S. constitutional practice than they do in international legal practice (particularly if the EU is viewed as *sui generis*, neither a state nor an international organization). At a minimum, then, the case for holding that the international order fares quite poorly in realizing the supremacy of law is a much stronger one than the case for drawing the same conclusion vis-à-vis U.S. constitutional law. Second, Goldsmith and Levinson's argument rests on a Legal Positivist account of law, in which a lack of consensus on what the law is undermines its capacity to guide conduct. Yet Dworkin rejects this account of law in favour of a dynamic alternative that treats debate and disagreement as an essential feature of law, not a bug. Indeed, at times Goldsmith and Levinson's depiction of (alleged) defects in U.S. constitutional practice reads much like Dworkin's appeal to what he labels theoretical disagreement to critique Legal Positivism (ibid 1808–14; see Dworkin 1986, 4–11, 31–44). In short, much of the uncertainty they identify in U.S. constitutional practice poses a challenge to government in accordance with the rule of law only if we accept an account of law or its value that Dworkin argues against.

[33]Watts 1993, 15.

[34]Crawford 2003, 10. See also Whittle 2015, 675–77.

[35]See, e.g., Alter 2014.

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court-like body is simply to facilitate ongoing or renewed bargaining among actors, to contribute to the setting of the price for altering previously agreed terms of interaction rather than treating those terms as standing legal restrictions, or genuine obligations, that actors may not transgress.[36] The latter, recall, is a core element of the supremacy of law. To anticipate the discussion in the next sub-section, judicialization sometimes serves to advance rule by law rather than the rule of law.[37]

The recent widespread backlash against the liberal international order provides a second basis for a more pessimistic outlook regarding supremacy of law in the international order.[38] There are two components to this backlash. First, a number of states have adopted measures that shield them from the jurisdiction of international tribunals. These include formal withdrawals, of course, but also rulings by domestic constitutional courts that challenge international tribunals' jurisdiction, and non-cooperation in giving effect to the judgments they issue.[39] Another illustration of the backlash against international judicialization is the United States' decision to paralyze the World Trade Organization's Appellate Body by blocking the appointment of new members to take the place of those who have reached the end of their term (while also adopting policies and enacting legislation that almost certainly violates its commitments under the WTO agreement, something that is also true of China). Second, some states have sought to neuter international tribunals' ability to hold them to account by reinterpreting the rules those tribunals are charged with applying. In general, these reinterpretations grant states greater discretion, particularly in their domestic affairs.[40] It is likely no coincidence that they are pursued by actors who exhibit (and often explicitly profess) little

[36]See, e.g., Joost Pauwelyn's observation that 'what is actionable under the WTO is not so much the breach of obligations but the upsetting of the negotiated balance of benefits consisting of rights, obligations, and additional trade concessions,' and his urging that the practice be reformed so that WTO rules and Dispute Settlement Body decisions are 'respected as international obligations, not as some political promise that can be withdrawn or exchanged for another.' Pauwelyn 2000, 340–41.

[37]Someone might object that supremacy of law is satisfied so long as actors largely conform to the rules, a goal to which tribunals might plausibly contribute, even if those roles simply serve to make actors' pursuit of their interests more effective or efficient. That is, they may reject the distinction between rule by law and rule of law as specious. While I disagree, the point can be conceded *arguendo*, and the objection advanced in the main text reframed so that it targets *the value* of government in accordance with the rule of law. Recall that for Dworkin the status of a practice of government as law, and so the legitimacy of its attempt to uphold or enforce subjects rights and duties, depends on its officials exhibiting at least adequate fidelity to the ideal of the rule of law *and* their possessing (perhaps implicitly and somewhat inchoately) a proper understanding of what makes government in accordance with the rule of law valuable. Its value, Dworkin maintains, lies not in facilitating actors' pursuit of their perceived interests in light of their relevant power, but in constituting actors as juridical equals entitled to treatment with equal concern and respect. In the next section of this essay, I examine the possibility of drawing a skeptical conclusion regarding international law's status as law on the grounds that few international officials properly appreciate the value of government in accordance with the rule of law.

[38]Caron and Shirlow 2018; Danchin et al. 2020; Alter 2024.

[39]For examples, see Shaffer and Sandholtz 2023, 48–52.

[40]For example, Tom Ginsburg observes that the Shanghai Cooperation Organization, which includes China, Russia, and India, has 'introduced a subtle rhetorical shift in focusing on the 'rule of international law,' which reinforces sovereignty and consent, rather than the thicker concept of the international rule of law pushed by some democracies, [where] the latter phrase implies extending rule of law values – accountability, equality, and fairness – to the international level.' Ginsburg 2020, 248.

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commitment to the principle that the law applies to rulers as well as the ruled – that is, to the supremacy of law.[41]

In short, the international order suffers from significant deficiencies along all three dimensions of the rule of law: government through law, equality before the law, and supremacy of law. Moreover, as I will now explain, we must be careful not to move too quickly from the observation of certain features associated with the rule of law to the conclusion that a practice of holding accountable is premised on fidelity to that ideal, even if only weakly. Rather, we should first consider why the practice in question falls short in realizing the rule of law in the specific ways it does, but not in others. When we do so, we may find that the best explanation is that the practice is not an imperfect example of a rule of law order, but instead that it is an example of a different sort of social order, albeit one with features that overlap to some extent or in specific ways with a genuinely legal one.[42]

International legal pragmatism: a skeptical conception of international law

The absence of an international rule of law is neither synonymous with nor does it necessarily entail that international 'legal' rules and institutions make no contribution to the production of social order. To the contrary, both Institutionalists in the field of International Relations and Law and Economics scholars of international law maintain that the contemporary international 'legal' order is premised on and contributes to the possibility of mutually advantageous interaction among states given their perceived national interests and relative power.[43] Those interests consist largely of survival, security, and the enhancement of material well-being, with power exercised militarily, economically, and culturally. Unlike Political Realists, who deny international law any role in practical reasoning, Institutionalists maintain that international law often can, should, and does figure in international actors' deliberations. However, publicly promulgated, prospective, standards such as the texts of international agreements, as well as the constructive interpretation of those agreements to determine what the law is in a particular case, simply reflect legal officials' calculations of the scope of mutually advantageous interaction between the parties whose interaction the law governs. Where adherence to an international rule runs contrary to a state's national interest, given its relative power, that rule provides the state in question with no reason for action.[44] This state of affairs can be described in terms of a denial of legal validity or a denial of legal normativity, but in either case the underlying assumption is that international 'law' serves only to enhance instrumentally rational choice by utility maximizing actors (typically states). It is an example of rule by law, but not the rule of law.

[41]See Shaffer and Sandholtz 2023; Scheppele 2018, 545.

[42]For an illustration of this point, see Fuller's discussion of the partial overlap between the norms constitutive of the legal (i.e., rule of law) and managerial forms of social order. Fuller 1973, 207–17.

[43]See, e.g., Koremenos 2013; Trachtman 2008; Posner and Sykes 2013. The argument in this section succeeds even if a different 'interest-based' theory of international relations, such as one that appeals to the interests of political or economic elites rather than states, best describes the existing international order.

[44]Typically, this conclusion will reflect a complex judgment that includes tradeoffs between immediate and more distant costs and benefits across a broad range of issues on which states may coordinate or cooperate.

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Institutionalists can happily acknowledge that, as Dworkin puts it, history, convention, and expectation should figure in the identification of (the precise content of) international actor's 'legal' obligations. But that is only because of the contribution these considerations make to the probability of realizing various future outcomes. In contrast, where coercive government is exercised in accordance with the rule of law, procedural fairness – backward-looking considerations of fair notice or a fair distribution of authority – operates as an independent moral consideration that constrains the enforcement of rights and duties on demand.[45] Why it does so, i.e. why coercive government ought morally to be exercised only in accordance with the rule of law, depends on a particular account of the value of the rule of law. If that account is to justify more than mere rules of thumb, however, it will have to show government according to the rule of law to have more than just instrumental value.

On the Institutionalist account, international law is simply an example of the form of government Dworkin labels Legal Pragmatism, which he characterizes as 'a skeptical conception of law because it rejects genuine, nonstrategic legal rights'.[46] In contrast, where government is exercised in accordance with the rule of law, people 'have distinctly legal rights as trumps over what would otherwise be the best future properly understood'.[47] The fact that a particular exercise of governmental coercion in the case at hand would benefit either some private party or the public as a whole does not suffice to justify it. In contrast, for the Legal Pragmatist 'what we call legal rights are only the servants of the best future: they are instruments we construct for that purpose and have no independent force'.[48] In *Law's Empire* Dworkin rejects Legal Pragmatism as an accurate representation of legal practice in the U.S. and Great Britain. But the truth of that conclusion, if it is true, is perfectly compatible with Legal Pragmatism providing the most convincing description of other systems of coercive government, including the current global political order.

In his article on international law Dworkin maintains that because powerful nations engage in international law-talk it is important to offer a doctrinal theory of law on the basis of which we can (rightly) contest the conclusions those nations draw regarding their international legal rights and duties.[49] He specifically cites international legal claims made by officials in, or associated with, the George W. Bush administration as an example of the type of situation in which his legal philosophy has this value. But contrary to what Dworkin suggests, he and his putative opponents – scholars and sometime officials such as John Yoo, Jack Goldsmith, and Eric Posner – do not disagree over what the law is. Rather, in Dworkin's terms, their dispute concerns whether the global system of coercive government counts as a genuinely legal one at all. Put another way, and again using Dworkin's terminology, Dworkin mistakenly characterizes these particular opponents as Legal Conventionalists (Positivists) when they are actually Legal Pragmatists. To rebut

[45]Dworkin 2011, 408.
[46]Dworkin 1986, 160.
[47]Ibid.
[48]Ibid.
[49]Dworkin 2013, 14–15.

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their arguments, Dworkin needs to argue that the global political order satisfies the conditions for the rule of law. An argument for the superiority of one *conception* of the rule of law as a political ideal (International Law as Integrity) over another (Orthodox International Legal Positivism) is no response to those who maintain that the *concept* of the rule of law does not apply to the existing system of global coercive government.

In sum, on my reading of Dworkin a practice of coercive government does not qualify as a legal one if it fails to adequately satisfy the conditions for the rule of law. There are plausible reasons to suspect this is true of the existing global political order. To defend this claim, I first distinguished between the concept of the rule of law and different conceptions of it. I then characterized the concept of the rule of law in terms of government through law, supremacy of law, and formal equality before the law. After briefly describing various features of the current global political order that warrant some skepticism regarding the applicability of the concept of the rule of law to it, I suggested that Institutionalism may more accurately model (so-called) international law, including both the content of its norms and the type of reason for action they provide. If so, then the current global political order exemplifies what Dworkin labels Legal Pragmatism, a practice of government that he explicitly characterizes as non-legal.

Mistaken conceptions of the international rule of law?

Suppose we take a more optimistic view than we did in the previous section of the extent to which an international rule of law presently obtains. Nevertheless, if most international officials employ a mistaken conception of the international rule of law, then the existing global system of coercive government will not qualify as a genuine legal order.[50] That is because findings of law that flow from international law as integrity will only be efficacious as law when they happen to coincide with findings of law that flow from the other accounts of the value of the rule of law endorsed by most international officials.[51]

I begin my explication and defence of this basis for international legal skepticism by briefly sketching several conceptions of the value of the international rule of law that we might plausibly ascribe to actors who participate in the contemporary international state-centred system of coercive government. I then draw on these conceptions of the international rule of law as a political ideal to demonstrate that if findings of law that flow from international law as integrity are efficacious only where they also flow from other philosophies of 'law', then the contemporary practice of international government is not a genuine legal order. My suspicion is that few international officials (implicitly or explicitly) rely on international law as

[50]How can a society enjoy the rule of law but lack genuine law? We should not let the terminology distract us; again, 'rule of law' refers to the *concept*, while for Dworkin, (genuine) 'law' refers to conclusions regarding the morally correct exercise of political power that flow from a specific *conception* of the rule of law as a political ideal, namely law as integrity.

[51]A finding of international law, such as the assertion of a legal right, is efficacious as law if it causally contributes to the production of international social order by being taken as a normally conclusive reason for action in virtue of its status as law.

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integrity when they draw conclusions regarding what the law is. More likely, their conduct is informed by Orthodox International Legal Positivism or what I label International Law as Communal Integrity – apart, of course, from those who (implicitly) deny the existence of an international rule of law. A few passing remarks aside, I will not attempt to defend this claim here. However, international officials' whose experience lends credence to my suspicion will have good reason to conclude that international law is not really law.

Consider, first, international law as integrity. The purpose of the existing global system of coercive government, or at least certain core elements of it, is taken to be the fostering of 'an international order that protects political communities from external aggression, protects citizens of those communities from domestic barbarism, facilitates coordination when this is essential, and provides some measure of participation by people in their own governance across the world'.[52] These aims reflect the contribution that contemporary international law makes to legitimizing the exercise of coercive government, mainly by states, but also by International Organizations; i.e. to making it the case that those who govern treat each and every one of the individuals whose lives their rule impacts with equal concern and respect.[53] The rule of international law as integrity obtains when international officials and subjects take responsibility for their (very young) society's public commitment to the principle of equal concern and respect. The spread of such a political culture is the means by which the rule of international law as integrity contributes to the realization of a world in which all are treated, and treat others, justly – or, perhaps more accurately at this stage in human history, less unjustly than in the past.

What I will call international law as communal integrity differs in one crucial respect from international law as integrity: whereas the latter is committed to value-individualism, the former embraces value-collectivism. Value-individualism is 'the view that only the lives of individual human beings have ultimate value and collective entities derive their value solely from their contributions to the lives of individual human beings'.[54] Value-collectivism denies this claim. A consideration of the value of political autonomy illustrates the difference between the two. Value-individualists treat political autonomy as valuable if and only if it contributes to the advancement of individual autonomy and/or well-being, though they disagree as to what counts as respect and/or concern for individuals and how specific forms of political autonomy serve to advance it. Value-collectivists, in contrast, deny that the value of communal autonomy is entirely a matter of the contribution it makes to the flourishing of its individual members. Rather, the justification of certain communal rights appeals to what is good for the community (the nation, the tribe, etc.), not for its members.

International law as communal integrity may well provide the most compelling rationale for the Westphalian ideal of state sovereignty. Central to that ideal is a

[52]Dworkin 2013, 22. Again, this characterizes the purposes of a 'nascent' or 'young' international legal order, and those may change or expand as international law matures.

[53]Precisely what that requires depends on how officials impact different individuals when exercising political power.

[54]Wellman 2013, 5.

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conception of a just international political order in which all States enjoy capacious rights to territorial integrity and political independence. International law as communal integrity grounds a constructive interpretation of states' rights to territorial integrity and political independence that places far more restrictions on when, why, and how one State may interfere in the domestic affairs of another than is true of international law as integrity. In particular, international law as communal integrity's commitment to value-collectivism justifies restricting the commitment to equal respect to states (or possibly peoples, e.g. nations or tribes), regardless of whether they treat their subjects with equal concern and respect; that is, without regard for whether those states exhibit in their domestic affairs a commitment to respect for basic individual rights and some form of democratic representation or accountability.

A more common view, held by Dworkin among others, associates the Westphalian ideal of state sovereignty with Orthodox International Legal Positivism. As agents whose non-instrumental value grounds a right to political autonomy, states bear only those international legal obligations to which they voluntarily consent, either explicitly in the case of treaties or implicitly in the case of customary international law. In order to identify a state's legal rights and duties, therefore, officials must determine the content of the agreements it has entered. In short, international law is posited by states, and its content consists in a consensus or shared understanding among states regarding the rights and duties various international legal subjects possess. The international rule of law is realized to whatever extent the exercise of international coercion conforms to the terms to which states have freely submitted. Its value follows from the fact that only such a system of coercive government treats the political communities that states constitute or represent with the equal respect to which they have a fundamental moral right.

International Law as Integrity, International Law as Communal Integrity, and Orthodox International Legal Positivism provide competing conceptions of the value of the international rule of law. Each offers a distinct account of the ends served by the existing practice of global coercive government and the specific manner in which the ideal of the rule of law frames the pursuit of those ends. My goal here is not to adjudicate between them; instead, I propose to draw on the foregoing catalogue of conceptions of the international rule of law as a political ideal to illustrate and defend the claim with which I began this section. That claim, again, is that if findings of law that flow from international law as integrity are efficacious only because they are also supported by rival philosophies of law, then the contemporary practice of international government is not a genuine legal order.

Like Dworkin, I focus my discussion on the legality of unauthorized humanitarian intervention (UHI): armed intervention by one or more states in the territory of another state, undertaken without authorization by the U.N. Security Council, for the purpose of alleviating a grave human rights situation, paradigmatically that constituted by crimes against humanity. Dworkin suggests that international law as integrity might yield the conclusion that states enjoy a legal right to UHI if such a finding were to flow from a constructive interpretation of Article 2(4) of the United Nations Charter informed by 'the responsibility to protect people from the dangers of the insulated sovereignty of the Westphalian system', including

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the danger of 'internal terrorism'.[55] However, Dworkin also notes that international law as integrity might fail to yield such a finding of law, because it would facilitate aggressive wars carried out under cover of a legal right to UHI. Dworkin points to the U.S. led invasion of Iraq in 2003 as a reason to take that risk seriously.[56] Still, if the risk of causally contributing to an increase in aggressive war is quite small, and the potential benefit of reducing the incidence and magnitude of crimes against humanity significant, then international law as integrity may well already ground a legal right to UHI. In what follows I will assume that it does so.[57]

Suppose, however, that most international officials employ an Orthodox International Legal Positivist account of what makes law.[58] These officials might well judge UHI to be illegal on the grounds that the UN Charter categorically prohibits armed intervention in the absence of Security Council authorization, and the absence of any subsequent development of a norm of customary international law that modifies the duty states have to forbear from such conduct.[59] Alternatively, imagine that most international officials' judgments regarding what the law is are informed by a (perhaps implicit) commitment to International Law as Communal Integrity, with the community whose autonomy international law serves to advance taken to be the one constituted by the state. These officials, too, will likely conclude that states have a legal right against any interference in their domestic affairs because they think such a finding of law flows from what they take to be the correct conception of the international rule of law as a political ideal. In an international political order populated largely by officials of one or both of these two persuasions, no finding of a right to UHI on the basis of international law as integrity will prove efficacious even if, as I am assuming, such a right does flow from that conception of the value of the international rule of law. Though we are assuming that the global system of government satisfies to a sufficient degree the requirements for the rule of law, it lacks the distinctive culture or *ethos* necessary to make it a genuinely legal one, namely a fundamental commitment among most or all of its officials (and perhaps subjects as well) to identifying law on the basis of a principle of equal concern and respect for all human beings.[60]

[55]Dworkin 2013, 23.

[56]This is an odd piece of evidence to offer in support of the danger of abuse, since as Dworkin himself acknowledges the U.S. and the U.K. did not offer a humanitarian justification for the invasion of Iraq in advance of launching their war.

[57]The legal right may be more circumscribed than I suggest in the text, e.g., it may require that UHI be taken as a last resort.

[58]Again, none of the references in the text to officials embracing, employing, etc., a particular conception of the value of the rule of law when they identify the law are meant to imply that they always or even often do so self-consciously. A particular conception of the international rule of law as a political ideal may be so deeply integrated into a given international official's understanding of (this aspect of the social) world that normally it is simply obvious to her what the law is, or at least what sort of considerations are relevant to determining what the law is.

[59]I believe this is the position taken by most international legal officials and a fair number of international legal theorists.

[60]Note that the state of affairs described in the text differs from one in which most officials embrace international law as integrity but conclude, let us assume mistakenly, that a system of international government that categorically prohibits UHI better treats all of its (individual) subjects with equal concern and respect than does one that permits it.

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Of course, in some cases a finding of law that flows from International Law as Integrity will coincide with those that flow from rival philosophies of law to which most international officials subscribe. For example, international officials who embrace a Positivist account of legal validity may conclude that the overall reactions of states to UHI by Tanzania in Uganda, Vietnam in Cambodia, the ECOWAS states in Sierra Leone, and NATO states in Kosovo 'amount to recognition of the lawfulness of the practice [of UHI] under very limited circumstances', i.e. to the emergence of a rule of customary international law permitting such conduct.[61] Or perhaps those officials who subscribe to International Law as Communal Integrity think of peoples, not states, as the communities whose treatment with equal respect is constituted by international government in accordance with the rule of law. If so, then they might conclude that a constructive interpretation informed by this conception of the international rule of law as a political ideal yields the conclusion that states enjoy a legal right to UHI when the very existence of a people or its ability to engage in politics is at grave risk.[62] In these circumstances, even if few international officials adhere to International Law as Integrity, a declaration of UHI's legality by one who does will likely prove efficacious. It will not be a declaration of genuine law, however. To be a true proposition *of law* a declaration must characterize some aspect of a particular *type of political order*, namely one characterized by a practice of government according to law informed by the *ethos* or public culture Dworkin labels political integrity. The stipulation that the efficacy of finding UHI to be legal depends on the fact that the dictates of rival philosophies of law happen to overlap with those of international law as integrity implies that the system of international government under consideration here is not such a political order.

It may be tempting to respond to the argument for international legal skepticism developed in this section by rejecting the requirement that, in general, findings of law be efficacious. Why not employ International Law as Integrity to identify international rights and duties enforceable upon demand even if most other international officials and subjects will reject such claims because they do not flow from their own misguided conceptions of the international rule of law as a political ideal? The answer is that such declarations fail to 'guide us in continuing the practice of coercive government'.[63] Put another way, such findings do not causally contribute to the production of international social order by being taken as normally conclusive reasons for action in virtue of their status as law. They are not declarations of what the law or, more accurately, the 'law' is because they do not continue the existing international practice of coercive government. Instead, other participants reject or ignore these findings because they do not flow from the values or purposes that they (perhaps unconsciously) take to inform the practice. To reiterate the point made in the previous paragraph, before we can answer the question 'what exercise of coercive government does our practice sanction?' we must first answer

[61]Ratner 2015, 294.
[62]See, e.g., Walzer 2004.
[63]Dworkin 2006, 13.

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the question 'is this political order, or practice of coercive government, a legal one?'[64]

To help drive home this point it may be useful to reconsider Dworkin's example of writing a chain novel. Dworkin introduces it to illustrate the role that the criteria of fit and substance play in constructive interpretation, and so his focus is on how an individual ought to respond to the work of earlier authors if she wishes to do her best at extending the story. But as Gerald Postema points out,

> Each novelist must recognize that the success of her interpretation depends not only on the abstract merits of it as an account of work to that point, but also on the success of the chapter she writes on the basis of this interpretation. But the success of that chapter, and so the significance of her contribution to the novel as a whole, depends on whether the themes she develops in her chapter are taken up in appropriate ways by subsequent writers in the chain. A novelist in the chain cannot regard herself in abstraction from the collective project in order to construct her interpretation of the work without jeopardizing her contribution and the integrity of the work as a whole. She must construct an interpretation, cognizant of the interpretive activity of other contributors, both past and future.[65]

Suppose our chain novel is one to which the authors have the opportunity to contribute repeatedly over time. Possibly from the very start of their participation, but almost certainly over the course of their repeated attempts to contribute to the novel, the authors will develop a conception of the type of novel they are collectively writing. If, over time, a particular author finds that certain of her contributions are ignored or re-written, she may begin to question whether she and the other participants are actually writing the type of novel she thought they were writing. The best explanation for her co-authors ignoring characters or plot lines she tries to introduce is not that they disagree over what will make the novel the best example of the type she thought they were writing. Rather, the best explanation is that the other participants are writing a different sort of novel for which the characters and plot lines she introduces either are not a fit or, while not entirely out of place, clearly contribute less to making the novel the best example of the type it is than do the characters and plot lines introduced by other contributors. Of course,

[64]To be clear, the claim here is not that the answer to doctrinal questions is determined by a consensus among a community's officials, or its members more generally. I accept, *arguendo*, that identifying the law requires an exercise of constructive interpretation, rather than the identification of a social fact. Moreover, since it is the practice and not any description of it that determines what the law is, I agree with Dworkin that law as integrity could be the best interpretation of a particular practice of coercive government even if some of its officials reject that characterization of how they (and other officials) exercise political power. However, the argument in the text does not depend on how international officials characterize what they do. Rather, it holds that if the exercise of political power by most international officials reflects a (perhaps implicit) conception of the international rule of law other than international law as integrity, then that fact will manifest itself in a widespread refusal to treat as findings of law conclusions that flow from international law as integrity, unless the latter happen to coincide with findings of law that flow from whatever alternative conception of the international rule of law actually does inform the conduct of most international officials.

[65]Postema 1987, 311–12.

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some of her earlier contributions may have been 'taken up in appropriate ways by subsequent writers in the chain' because, as it happens, they were a good fit for the novel the group is actually writing. But if our author does not want the success of her contributions to depend on such chance alignments, then at least in the short-run she will need to revise her conception of the type of novel she and her co-authors are collectively writing.[66] The key point here is that to the extent her attempt to contribute to the collective writing of one kind of novel succeeds only where it fits with the collective writing of a different type of novel, our author does not write the type of novel she thinks she and her co-authors are writing. The same is true for the collective activity that constitutes the practice of international coercive government. The attempt to govern in accordance with International Law as Integrity will not succeed as such if most other participants in the practice (implicitly) subscribe to a different conception of the international rule of law.

For any interpretive practice, whether an individual begins to doubt that the point or purpose she attributes to the practice is the same one the other participants attribute to it typically depends on how the others respond to her contributions to the practice. Where an agent's assertions of law go unchallenged, even if that is only because they are the object of an overlapping consensus among officials (implicitly) committed to rival conceptions of the rule of law as a political ideal, she may have little reason to question whether the practice of coercive government in which she participates is a legal one. Her faith in that proposition may also survive a fair number of challenges to the assertions of law she advances, as she may attribute those challenges to other participants' mistaken understandings of what flows from a shared conception of the value of government in accordance with the rule of law. Yet each disagreement on a proposition of law can also serve as a seed from which doubts about the commitment of other participants in the practice to (what the agent takes to be) the correct conception of the rule of law as a political ideal can grow.[67] If these doubts grow strong enough, the agent will (or at least should) cease to identify the practice of coercive government in which she participates as a legal one. Consequently, she will reason differently about what to do than if she had not adopted this skeptical stance.[68]

The foregoing argument reflects Dworkin's contention that specific propositions of law are embedded in theories of political morality.[69] 'Each judge's interpretive

[66]In the longer run she may be able to convince her co-authors to write the sort of novel she thought they already were writing, and/or turnover among the participants writing the novel may produce that outcome.

[67]Which of these two explanations for conflicting assertions of law we should accept is itself an interpretive question. See Dworkin 2011, 161–2.

[68]The chain novel example discussed above may serve to reinforce the practical nature of Dworkinian legal skepticism. Suppose that one contributor, Amber, begins to suspect that the aim she attributes to their collective enterprise is not the one the other participants attribute to it. Whereas she had (perhaps implicitly) assumed that they were writing a romance novel, reflection on both the contributions of the other participants and their responses to her own contributions, some of which they have ignored or re-written, now leads her to believe that the purpose of the collective enterprise is to write a mystery. Her doubts about the point of the enterprise present her with a practical question: if they are not writing a romance novel, how should she contribute to the enterprise going forward? Should she contribute at all?

[69]Dworkin 2006, 50.

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theories are grounded in his own convictions about the 'point' – or justifying purpose or goal or principle – of legal practice as a whole'.[70] It follows, Dworkin maintains, that 'any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others'.[71] If: (1) legal arguments necessarily assume an abstract jurisprudential foundation, a specific conception of the point or value of government in accordance with the rule of law; and (2) if an agent's constructive interpretation of past and present political practice leads her to attribute to the political community a jurisprudential foundation other than the one she thinks justifies the coercive enforcement of rights; then she ought to conclude that the political community's practice of coercive of government is not a genuinely legal one.[72]

Though the skeptical possibility I argue for here follows from Dworkin's account of law, it is not one he recognizes. This is likely a consequence of his paying insufficient attention to the collective or social dimension of an interpretive practice such as law; that is, the fact that the success of an assertion such as 'X has a legal right to phi' in producing social order depends on its acceptance or uptake by other members of the political community. As T.R.S. Allan observes, 'Dworkin presents the tension between competing elements of interpretation as a feature of the lawyer's private deliberations; but such deliberations cannot normally diverge too far from those of other participants in a collective practice'.[73] Dworkin's focus on the lawyer's private deliberations leads him to consider only one type of internal (or practical) skepticism, namely the impossibility of fashioning a coherent interpretation of past political decisions.[74] Once we recognize the public dimension of law as an interpretive practice, we should also acknowledge the possibility of a second type of internal (or practical) skepticism. It occurs when the conduct of other participants in the practices so disrupts what Allan describes as the 'delicate balance between individual conscience and collective understanding' that an agent can no longer view the practice as even a highly imperfect attempt to govern in accordance with (what she takes to be) a proper understanding of the rule of law as a political ideal.[75]

[70]Dworkin 1986, 87.

[71]Ibid., 90.

[72]Dworkin states that if a 'conception of law offers to find in the general structure of a particular community's legal practice a political justification of coercion, then it should not be supportive, but in some way skeptical, about legal systems that lack features essential to that justification' (ibid., 103). He continues: 'we have no difficulty in understanding someone who does say that Nazi law was not really law… [because] he is not making that sort of pre-interpretive judgment [i.e., that descriptively it shares certain features with what we take to be a genuine legal order] but a skeptical interpretive judgment that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify coercion. His judgment is now a special kind of political [i.e., practical] judgment' (ibid., 104).

[73]Allan 2013, 127.

[74]Dworkin 1986, 266–75. Dworkin attributes this position to the critical legal studies movement and argues that they fail to make a compelling case for it. He also considers and rejects external skepticism, the possibility of adopting a standpoint outside a practice of reason-giving from which one can challenge the meaningfulness, truth, or reality of claims advanced within it.

[75]Allan 2009, 724. Two additional remarks on the idea of law as an overlapping consensus on propositions that flow from international law as integrity may be useful. First, Dworkin maintains that a consensus

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Law must exist somewhere between apology and utopia: legal rights and duties can be neither reduced to nor exist in complete isolation from what legal subjects actually do, since in either case law ceases to be a practice whereby actors hold themselves and one another accountable. A crucial question, therefore, is when does non-compliance with one or more finding(s) of international law that flow from international law as integrity warrant the conclusion that the existing global system of coercive government is not a legal one, but is instead some other type of political order? Two considerations make this a particularly difficult question to answer. First, there is substantial but far from total overlap in the content of the norms that flow from the conceptions of international political order surveyed here, i.e., International Law as Integrity, International Law as Communal Integrity, and Orthodox International Legal Positivism. As a result, it can be difficult to discern whether a given act is an example of non-compliance with a true proposition of law, i.e. a norm that is 'in force' in a genuinely law-governed international community, or whether that act is instead evidence that the proposition of law is not in force (or not true) because it does not flow from the normative logic of the non-legal political order that actually structures relations among international actors.[76]

on some propositions of law – paradigms of the day, as he calls them – is a necessary condition for the interpretive activity that constitutes the identification of existing legal rights, duties, powers, and immunities. However, this point about the preconditions for an interpretive practice does not address the skeptical challenge raised in the text, which concerns the constructive interpretation of what are pre-interpretively and provisionally identified as law. Second, as a matter of legislative and judicial politics, Dworkin acknowledges that the pursuit of an overlapping consensus may sometimes be desirable. 'We should be willing to work with those who favor the policies or decisions we do even when our grounds are different from theirs' (Dworkin 2006, 67). Indeed, he maintains that 'it might well sometimes be better, for a variety of reasons, for the majority [on a multi-member court] to settle on a single, more superficial, opinion that each can join' than for each to provide a separate but concurring opinion' (ibid). Yet Dworkin explicitly distinguishes these points about the 'practical politics of adjudication' from the question of what the law is. As he puts it, 'I am concerned with the issue of law, not with the reasons judges may have for tempering their statement of what it is' (Dworkin 1986, 12). Regardless of whether the agent concludes that the practice of government in which she participates is, or is not, a legal one, she will almost surely need to engage in the practical politics of adjudication. If she judges the practice to be a non-legal one, her reasons for doing so will be purely strategic, as I explain in the next section of this paper. If she judges the practice to be a legal one, she may also have principled reasons to seek incompletely theorized agreements (in judicial decisions, or legislation), such as the value of preserving opportunities for further debate within the political community on the content of specific political rights and responsibilities.

[76]Though their concern is with a particular putative international legal norm rather than the practice as a whole, Jutta Brunnée and Stephen Toope's discussion of the prohibition on torture nicely illustrates the difficulty of discerning whether a given pattern of conduct is best construed as widespread violations of a legal norm that is in force or rather as evidence that a putative norm is not in force; that is, that participants in the practice do not actually use it to hold themselves and one another accountable. Brunnée and Toope offer evidence 'that the anti-torture rule is broken on a daily basis around the world' and conclude that 'it is the concrete practice of torture that calls into question the reality of the prohibition' (Brunnée and Toope 2010, 259–60). Jeffrey Dunoff observes that because Brunnée and Toope hold that 'practice that diverges from a formal rule can be understood less as a case of non-compliance than as evidence that the purported rule is not supported by a community of practice and should not properly be considered law,' they 'may provide alleged lawbreakers with a powerful argument that the norm being violated is not law at all,' and so 'undermine the normative power of a claim of illegality' (Dunoff 2011, 334). To the contrary, insisting that the law prohibits X in the face of widespread conduct to the contrary may lead to the dismissal of international lawyers as 'naïve idealists,' or worse yet, to the dismissal of international law as hypocrisy.

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Second, the object of investigation, namely the practice of international government, is a moving target. It continually evolves as actors who embrace each of the conceptions of the purpose or value of global coercive government listed above exercise power (or authority) within it. These two factors combine to create a substantial risk of seeing in the international political order what we want to see even when it is not really there.

Practical implications of international legal skepticism

The arguments sketched in the preceding sections surely require further elaboration and defence.[77] I leave that task for another day, however, and instead consider what follows morally if one or another of these challenges to the genuine legality of so-called international law succeeds. I do so in order to demonstrate why international actors and those who would advise them should take seriously the question 'is international law really law?' Absent such a demonstration many might reasonably dismiss international legal skepticism as of interest only to a small coterie of legal philosophers who often appear to be concerned with classification for its own sake. Yet if officials in a non-legal system of government are sometimes morally permitted or even required to act in a manner that would be impermissible were they participants in a genuine legal order, as I will argue they are, then we ought to recognize that behind international legal skepticism lies a core question of political philosophy, namely 'what justifies the (or this) exercise of coercive government?'

Assume, *arguendo*, that the international political order either fails to adequately satisfy the conditions for the rule of law, or that while it does so, most international officials operate with a mistaken understanding of what makes the international rule of law valuable. Any finding of law that flows from international law as integrity will be ineffective unless it happens to coincide with one that flows from whatever model of political order the global system of coercive government actually exemplifies. Thus, an international official who aims to govern morally will need to reason strategically, rather than in the principled manner appropriate to an official in a genuine legal system. His or her goal will be twofold: first, to mitigate the worst evils perpetrated by the system of coercive government in which he or she participates, i.e. evils committed by officials in that system acting in accordance with its normative logic, and second, to foster reforms to that system and to the community it governs that lead over time to it becoming a community of principle, one governed in accordance with a proper understanding of the value of the rule of international law.

Oftentimes any course of action other than identifying and enforcing what are widely but mistakenly perceived to be genuinely legal rights and duties will prove ineffective at advancing these goals. Yet Dworkin identifies two strategies that may occasionally enable officials in 'legal' systems to do so.[78] First, officials can

[77]For example, might certain regimes within the global practice of coercive government, such as the European Union, qualify as genuinely legal, even if others do not? Perhaps, though the European Union's status as *sui generis* may owe in part or whole to its instantiating the rule of law beyond the state, thereby providing the exception to the international legal skeptic's rule.

[78]Dworkin 1977, 326–7; Dworkin 2011, 410.

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tell a noble lie, identifying as 'law' an exercise of coercive government that serves the end of mitigation or reform, or both, but that is not justifiable by appeal to the normative logic of the system of government in which they participate. Second, officials can refuse to govern, either by not pronouncing on a question of 'law' or by choosing not to apply or enforce what they find the 'law' to be. In what follows, I describe examples of international conduct, or in one case commentary on international conduct, that illustrate these two strategies. I am not concerned with whether the agents I describe understood their actions in the terms I will use to characterize them; at least some likely did not. Rather, I maintain only that if international law as integrity offers the correct account of legitimate rule, and if on that account the existing global system of coercive government is not a genuine legal order, then the conduct I describe may well be morally justifiable as an example of a noble lie or a refusal to govern.

Dworkin identifies the strategy of refusing to pronounce on a question of law with resignation from office and holds that such a plan of action 'will ordinarily be of little help' since 'it would only mean that other officials would enforce that injustice'.[79] There are other possibilities, however, which may avoid this defect. Consider, for instance, the time-honoured tradition of characterizing legal disputes in terms that enable law-identifying officials to largely avoid engaging with the substantive question of political morality of concern to the parties to a dispute, and perhaps all members of the political community. Arguably the ICJ's construal of the issue before it in the Kosovo case as a matter of the legality of unilaterally issuing a declaration of independence evinces its adoption of this strategy.[80] The settlement of that question, the court held, did not require it to address the content of the international law governing recognition and self-determination; i.e. 'whether or not Kosovo has achieved statehood' or 'whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence'.[81] A refusal to resolve the questions of secession and statehood raised in the Kosovo case undertaken under cover of a refusal to take them up might well do more to mitigate the injustice of the existing international political order than would any settlement of those questions the ICJ might have issued. The kind of ambiguity that would be an affront to justice in a genuine legal order may be the morally best path forward outside that context.

International officials might also decline to engage with a particular legal question, and so refuse to govern, by issuing a declaration of *non liquet*; that is, by refusing to issue a finding of 'law'. For example, in its advisory opinion on the legality of the threat or use of nuclear weapons, the ICJ refused to 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake'.[82] Were the international political order a genuine legal system it would not be permissible for the ICJ to refuse to issue a finding of law, since

[79]Dworkin 2011, 410.

[80]*Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010.

[81]Ibid.

[82]*Legality of the use or threat of nuclear weapons*, ICJ Advisory Opinion of 8 July 1996.

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this would declare certain interactions among members of the international community to lie outside the law. The same conclusion does not follow in the case of a non-legal political order, however; instead, a declaration of *non liquet* is permissible and perhaps obligatory if it will best serve to advance the goal of mitigating the injustices the international political order facilitates, and/or the goal of realizing a genuinely legal international order. This might be true in the Nuclear Weapons case if any finding of 'law' regarding the use of nuclear weapons in a supreme emergency would have reduced the ICJ's future ability to advance one or both of these two goals more than a finding of *non-liquet* did.

As an example of finding law but refusing on moral grounds to enforce it, consider the Independent International Commission on Kosovo's description of NATO's 1999 air-campaign against Serbian forces as 'illegal but legitimate'. Though NATO lacked UN Security Council authorization to intervene in Kosovo, the IIC held that its conduct was legitimate because 'all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule'.[83] Strictly speaking this commission was not a part of the global system of coercive government, and so those who served on it were not international officials. Nevertheless, the commission clearly aimed to influence the conduct of international officials; indeed, it may be that the commission was speaking for international officials who could not publicly take such a stand without compromising (the illusion of?) the international rule of law. A strategy of finding law but refusing on (unspoken) moral grounds to enforce it might justify the decision by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia not to open an investigation into NATO's air campaign. The same conclusion might apply as well to the international community's response to Tanzania's armed intervention in Uganda.

International officials' refusal to enforce what they acknowledge to be law because they judge conduct contrary to it to be morally justifiable conflicts with fidelity to the international rule of law. This implication comes out clearly in Thomas Franck's comparison of NATO's intervention to the famous case of Dudley v. Stephens, where an English court found two shipwrecked sailors who killed and ate a third guilty of murder, but also appealed to the executive to grant them clemency.[84] Yet as Justice Foster pointed out in response to Justice Truepenny's adoption of the same strategy in Lon Fuller's *Case of the Speluncean Explorers*, the need to resort to 'a dispensation resting within the personal whim of the executive', i.e. to arbitrary rule, undermines the distinctive legitimacy that legality bestows upon the exercise of coercive government.[85] Recognition of this fact may explain why some, including Franck at times, attempt to characterize 'illegal but legitimate' in terms consistent with the rule of law, namely as a gesture in the direction of a criminal defence of justification or excuse, or as an example of civil disobedience. If these attempts run aground, as I suspect they do, then that is because the international political order currently lacks the institutional and

[83]Independent International Commission on Kosovo 2000, 4.
[84]Franck 2002, 180.
[85]Fuller 1949, 620.

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cultural background necessary for these practices to be part of the larger normative system that governs interactions among international actors. This claim may be implicit in Dworkin's criticism of Franck for arguing 'that a sense of moral duty can justify violations of international law', and is advanced explicitly by Mary Ellen O'Connell, who argues that Franck's focus on mitigating the penalty for 'illegal but legitimate' has no practical application in the existing international order.[86] Whereas both Dworkin and O'Connell worry that talk of illegal but legitimate conduct will weaken a genuinely legal international order, I contend that adopting such a strategy (though perhaps not talking about it too much) may be morally justifiable if the contemporary global system of coercive government is not a legal one properly so-called.

On occasion, international officials may also advance the cause of justice by telling noble lies; that is, by identifying as 'legal' an exercise of coercive government that does not flow from the normative logic of the system of government in which they participate, but that does serve to mitigate the injustices that system facilitates, and/or contributes to its transformation into a genuine legal order. Consider, for example, the ICTY's judgment in the *Tadic* case that international criminal law applied to actors engaged in non-international armed conflicts.[87] As Robert Cryer and Albert Nell note,

> quite a lot of *Tadic's* majority opinion, although largely clothed in positivist garb, reads with more than a hint of the law of nature [or better, natural law]. Although the majority in *Tadic* was careful to attempt to bolster their case with references to relevant (and, at times, less relevant) state practice, [then President of the Tribunal Antonio] Cassesse has all but admitted this was cover for 'humanizing' the law applicable to non-international armed conflicts.[88]

The fact that Cassesse (and perhaps other members of the majority) felt the need to clothe their argument in Positivist garb suggests that they feared their identification of the law would not stand unless it were perceived to flow from such an understanding of what makes law. Of course, one might argue that even within a genuine legal order sustaining faith in the ideal of the rule of law requires that judges present their conclusions in the cases before them as if they were the product of formal reasoning even if they are sometimes (or perhaps necessarily) the product of substantive or purposive reasoning.[89] Dworkin demurs. The rule of law does not depend on the lie (noble or otherwise) that adjudication is not or should not be political, in the sense that it does not or should not involve recourse to normative principles implicit in the practice as well as past attempts to specify their content (e.g., in legislation or a treaty). However, judges' substantive reasoning will count as interpretation, rather than legislation, only if it appeals to principles that are actually

[86]Dworkin 2013, 23; O'Connell 2004, 269–70.

[87]*Prosecutor v. Tadić 1995*, IT-94-1, United Nations International Criminal Tribunal for the former Yugoslavia.

[88]Cryer, 2011, 214–15.

[89]Fish 1994.

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implicit in the practice; that is, principles that flow from the regulative ideal that serves to orient it. The significance of a surfeit of relevant positive law in the *Tadic* opinion is evidence of a lack of what Dworkin calls fit between the opinion and the practice it purports to characterize. Insofar as the majority's finding of law in the *Tadic* case was not warranted by the practice, they created a new norm under the guise of making explicit a norm already implicit in the practice.[90] This may be all to the good, particularly in light of the subsequent embrace of the majority's argument in the Rome Statute creating a permanent International Criminal Court. That is, the majority's noble lie may have served both to mitigate the injustices facilitated by the present international political order and contributed to the development of both the institutional framework and political *ethos* necessary for the existence of genuine international law. Yet in substituting their judgment of what the 'law' ought to be for what the 'law' is, the actions of the majority in the *Tadic* case also appear to conflict with government according to the rule of law.

The possibility that international officials may be morally permitted or even required to adopt the noble lie strategy may assuage the concern that the embrace of international law as integrity by international courts and organizations will render international law a less effective means for advancing justice. Suppose, for example, that International Human Rights Law has its greatest impact when domestic actors deploy it as part of a political campaign to reform one or another element of government at the state or sub-state level.[91] If so, Adam Chilton argues, then insofar as we are concerned with states violating the rights of their citizens, we should not encourage the ICJ and other international institutions to start reading human rights treaties more broadly [i.e. employing international law as integrity to constructively interpret them]. Instead, we should find ways to make sure that the international community does not take steps to discourage states from signing onto strongly worded agreements, so that those agreements can later help in domestic political struggles to improve human rights chances.[92]

Yet if the current system of coercive government is not a genuine legal order, then even international officials who endorse Dworkin's legal philosophy should not employ international law as integrity to discharge their duties; instead, they should engage in precisely the kind of strategic moral reasoning Chilton advocates.

Needless to say, no judge or legal advisor who lies about what the law is, or who refuses to uphold what he declares to be law, or who refuses to settle a legal dispute, displays Dworkinian integrity in the performance of his official duties. But those who occupy offices in a non-legal system of coercive government are under no moral obligation to do so; indeed, as the argument in the previous section demonstrates, they cannot do so. Rather, these agents must be prepared to reason strategically in the ways I describe in this section, and perhaps others as well, in order to mitigate the injustices facilitated by the current global political order, and perhaps in the long run, to affect its replacement by a legitimate one.

[90]Indeed, Judge Li took this position in his dissenting opinion, writing that 'the decision on this question is in fact an unwarranted assumption of legislative power which has never been given to this Tribunal by any authority.' *Tadic*, Dissenting Opinion of Judge Li.

[91]See, e.g., Simmons 2009.

[92]Chilton 2017, 114–15.

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Conclusion

Though he described it as fragile, nascent, and in critical condition, Dworkin saw in the founding of the United Nations, the gradual emergence of international human rights law, and the development of pure international criminal law, including a permanent international criminal court, the shoots of a genuinely legal international order. I have argued that we have weighty reasons to conclude that his assessment was overly optimistic. For Dworkin, a practice of coercive government qualifies as a legal one if and only if a critical mass of those who participate in it do so in a manner that exhibits fidelity to a proper understanding of the rule of law as a political ideal. Yet it seems plausible to conclude that a fair number of international officials either have no commitment to the rule of law, or that if they do, that they do not (implicitly) understand the value of that ideal, and so what fidelity to it requires, in the terms that Dworkin maintains justify the exercise of coercive government. Crucially, for Dworkin the question of whether international law is really law is a normative one, one posed in the first instance from the standpoint of a participant in the practice of international state-centred coercive government who wonders what sort of practical stance she should take vis-à-vis the norms that constitute the practice. Given his aim of offering practical guidance to such an actor, Dworkin should not have drawn on his account of how actors in a genuine legal order ought to discharge their duties, but instead built on his brief reflections on the morally proper conduct of officials in systems of coercive government that lack a commitment to the rule of law.

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