

Ancilla Iuris

Systems Theory and the
International Rule of Law

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Abstract

Systems theorists have been criticized for failing to provide an adequate account of the features of the international legal system. This criticism of systems theory parallels a similar critique of international law advanced by positivists working in the Anglo-Saxon legal tradition. Systems theory's critics have attempted to use Hart's argument against international as an argument against systems theoretic account of international law.

The factors which influenced Hart's critique of international law are well-known: it is open-textured, structurally decentralized, and lacks a single clear rule of recognition. In this paper, I attempt to answer some of these criticisms. I argue that the positivist critique of systems theory mischaracterizes the nature and structure of international law. To make this argument I first develop a broadly Luhmannian account of international law and the international rule of law and argue for an autopoietic account of international law-making. Second, I suggest that systems theory does a better job of answering positivist criticisms of international law than similar versions. I conclude by arguing that systems theory does a better job of identifying and explaining the unique features of international law and the international the rule of law.

I.

WHAT SYSTEMS THEORISTS MEAN WHEN THEY TALK ABOUT INTERNATIONAL LAW AND THE INTERNATIONAL RULE OF LAW¹

To the innocent eye, the formal structure of international law lacking a legislature courts with compulsory jurisdiction and officially organized sanctions, appears very different from that of municipal law. It resembles ... in form though not at all in content, a simple regime of primary or customary law. Yet some theorists, in their anxiety to defend against the sceptic the title of international law to be called 'law', have succumbed to the temptation to minimize these formal differences, and to exaggerate the analogies which can be found in international law to legislation or other desirable formal features of municipal law (HLA Hart).²

In his comments on systems theoretic accounts of international law, Paulus criticizes systems theorists – notably Teubner and Fischer-Lescano – for failing to provide an adequate account of how legal systems emerge in the international arena and of the international rule of law generally.³ I aim to fill this gap in this paper. I provide an outline of a theoretical account of a international law, show how such a theory would answer common positivist and monist objections to international legal pluralism, and how such a theory would conceive of the existence of international law and the international rule of law.

Claims for the existence of an international legal system, including stronger claims for the existence of an international rule of law, are often met with the long-standing scepticism that has surrounded claims for the existence of international law *qua* law.⁴ The problems from the Anglo-Saxon perspective with providing a clear definition of international law are well-known. International law is generally open-textured and structurally decentralized.⁵ It lacks a clear rule of recognition. Multiple courts exist with different jurisdictions which apply different bodies of law.

Since international law lacks the formal features of municipal legal systems, positivists have been quick to accuse those who believe that international law is still law in the relevant way of downplaying the importance of formal features to make international law 'law'. Others have gone further still, rejecting the premise entirely that international law is properly law, have described it as an agonistic terrain of struggle where political disputes can be put into a common vocabulary. Even more radical theorists, such as Koskeniemi, have argued, echoing the work of other critical legal theorists, that international law is not so much a legal system governed by the rule of law as a method of bringing diverse political disputes under the rubric of the same system:

In the absence of agreement over, or knowledge of, the 'true' objectives of political community – that is to say, in an agnostic world – the pure form of international law provides the shared surface – the *only* such surface – on which political adversaries recognize each other as such and pursue their adversity in terms of something shared, instead of seeking to attain full exclusion – 'outlawry' – of the other. In this sense, international law's value and its misery lie in its being

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1 I wish to thank Hengameh Saberi for her helpful comments on an earlier draft of this paper, as well as the very helpful suggestions for improvement by a blind reviewer. I benefited greatly from discussions with Richard Collins as I was writing this paper.

2 *H.L.A. Hart. The Concept of Law*, 3rd edition (Oxford 2012), 232.

3 Andreas L. Paulus, "Commentary to Andreas Fischer-Lescano & Gunther Teubner. The Legitimacy of International Law and the Role of the State," *Michigan Journal of International Law* 25(4) 1047-1058, P. 1052

4 *Richard Collins, The Institutional Problem in Modern International Law* (London 2016), 2.

5 *Ibid.*, 7; *H. L.A. Hart. The Concept of Law*, 3rd edition (Oxford 2012) 124-28.

the fragile surface of political community among social agents – States, other communities, individuals – who disagree about their preferences but do so within a structure that invites them to argue in terms of an assumed universality.⁶

As in many areas of philosophy, part of the debate turns on the framing of the question and how we understand the existence of plural legal systems. The question if international law is law only matters if, for law to be a legal system, it must be formally identical to the domestic law. Somek, for instance, has argued, that the question if international law is constitutionally deficient only matters if all legal systems require a constitution to be law in the relevant sense.⁷ If the analogy to municipal law were correct, then international law would require, as Crawford has suggested, both democratization and a constitution with greater respect for human rights.⁸

The problem is magnified when we ask not only if law, but also the rule of law, exists in the international arena. Those who prefer a narrow definition of the rule of law suggest that it can be said to exist where some basic set of procedural conditions are met, by, e.g., Fuller's desiderata for a functioning legal system.⁹ Against those who prefer a narrow view, others, like the former Secretary General of the United Nations, have suggested that the rule of law is:

a principle of governance in which all persons, institutions, and entities public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms, and standards. It requires, as well, measures to ensure adherence to the principles of fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁰

In this paper, I will argue that while those theorists who would define international law narrowly are correct to avoid the pitfalls of an excessively robust account of international law, their account is nonetheless incomplete.

This is for several reasons. First, they assume that all legal systems must have the same rule of recognition. For this reason, they have no way of accounting for the pluralism of international law. One of the strengths of autopoietic systems theory is that it can account for the rule of law in systems where there are no supreme legal norms, or where the supremacy of legal norms is challenged.¹¹ It does so by recognizing, in the words of Palombella, the autonomy of non-monist legal orders.¹² Second, they often err (particularly if they are inspired by CLS) by reducing all law to politics or by assuming all legal systems must follow-up the same basic rules. This is because, in searching for a narrow account of law, they fail to conceive of the particular way in which law, unlike politics, reproduces itself, and what distinguishes law from politics.

Thus, instead of focusing on Hartian approaches to the definition of law (and whether or not such approaches require substantive norms to provide a working account of international law and the international rule of law), I will use a broadly Luhmannian theory to develop an account of international law and the international rule of law. I will proceed by first developing an account of the rule of law which builds on the work of Luhmann and Teubner, and argue in favour of an autopoietic account of law-making.¹³ I will suggest that this is a more promising avenue for identifying the unique features of international law and what makes international law both international and operating according to the principles of the rule of law.

II. OUTLINES OF AUTOPOIETIC SYSTEM THEORY

I develop the theory of autopoietic systems in this section before turning to applications of the theory in the rest of the paper. Readers well-versed in the theory need not focus heavily on this section.

6 *Martti Koskenniemi*, What Is International Law For? in Michael Evens, *International Law*, 4th edition (Oxford, Oxford University Press, 2014) 29, at 47-49.

7 *Alexander Somek*, From the Rule of Law to the Constitutionalist Make-over: Changing European Conceptions of Public International Law, *Constellations* 18 (2011) 576-588, 576.

8 *James Crawford*, The Changing Constitution of the United Nations, in Hazel Fox (ed.), *The Changing Constitution of the United Nations* (London 1997), 15-16.

9 *Stéphane Beaulac*, The Rule of Law in International Law Today, in Gianluigi Palombella & Neil Walker (eds.), *Relocating the Rule of Law* (Oxford 2009), 197; *Simon Chesterman*, An International Rule of Law? *American Journal of Comparative Law* 56, no. 2 (2008) 331-361; see also *Richard Collins*, *The Institutional Problem in Modern International Law* (London 2016), specifically chapters seven and eight.

10 *Kofi Annan*, What is the Rule of Law? (New York 2008), available at: <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>, last access April 5, 2018.

11 As has been the case in the jurisprudence of the European Court of Justice. See, representatively, ECJ, Joined Cases C-402/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council & Commission*, 2005 E.C.R. II-3649, Judgment of 3 September 2008, paras 316-7.

12 *Gianluigi Palombella*, The rule of law beyond the state: Failures, promises, and theory, *International Journal of Constitutional Law*, 7, 3 (2009), 442-467.

13 *Gunther Teubner and Andreas Fischer-Lescano*, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, *Michigan Journal of International Law*, 25, 4 (2004), 999-1046.

Following early sociologists like Weber and Durkheim, Luhmann conceives of the development of modern society in terms of the emergence of structurally differentiated spheres of activity. Systems theory eschews functional accounts of social systems, providing instead a formalist account of social organizations that defines systems in terms of their attributes. Luhmannian systems theory starts from an account of the relationship between system and environment, focusing on the questions of boundary maintenance and of differentiation.¹⁴ Unlike open systems theory, as championed by Parsons, which relies on a teleological interpretation of social systems in order to differentiate systems from their environment,¹⁵ Luhmannian systems theory argues that social systems constitute their own boundaries through the actions of the system itself.

Such autopoietic systems do not have constant, invariant boundaries. Rather, through the process of autopoietic self-selection, systems create their own boundaries. A system is autopoietic when it fixes its own boundaries by processing communications received by the system and applying its own internal code to those communicative irritants received from the environment. Autopoiesis is then the production of meaning and boundary, by stipulating what is and what is not part of the system, *via* communicative processes.¹⁶ A system continues to exist for as long as autopoiesis continues to maintain the system's boundaries.¹⁷

1. Codes and Programs in Autopoietic Systems

Autopoiesis requires that each system adopts a code which it uses to classify communications. The code takes the form of a binary method of classification.¹⁸ At each moment, the system assigns a code to all information the system receives (e.g. in the legal system as legal or illegal), allowing the system to reduce internal complexity through a process of classification of the communicative elements which make up the system.¹⁹ The process of decision-making is constrained in so far as each system adopts a code which allows the system to classify actions in the environment and to respond to the effects of the environment on the system.

Through self-constitution *via* autopoiesis, systems produce a record of their decisions. Systems theory calls this record a program. Simply put, programs are a record of repeated temporal applications of the system's code.²⁰ These programs form a basis upon which the system can process new communications, and aid it in assigning codes to new communications (in law, which I discuss in greater detail below, such a program would be the legal system's jurisprudence).²¹ The development of programs allows systems to build up internal complexity by adopting internal structures to sort through the increase in communication which results from the evolution of systems.²²

By adopting programs, autopoietic systems become historical systems.²³ The temporality of the decisions of autopoietic systems allows for their stability *and* adaptation over time through the use of communication with carries with it a record of what has happened at every moment.²⁴ Communication reaches back into the past to previous decisions as the system processes utterance in the present.²⁵ The system defines itself through its past decisions.²⁶ The system makes choices based upon its past selections, and its current situation. In so doing, it builds up a store of past selections that serve to stabilize expectations and influence future selections. It uses this store of meanings as values that inform future choices.

As systems develop programs and thus a temporal record of their activities, they become capable of second-order observation. They adopt methods of dealing with the complexity of their environments, which can involve separating out autopoietic communications central to the system from those which are not. Systems use the ability of self-examination to create different mechanisms to relate to their environment. "They simplify their experienced complexity by devising internal mechanisms that specialize in handling their various aspects. In this way, they make those aspects available for deeper consideration. They also develop interactions between themselves and their subsystems. Eventually, they come to observe all those interactions."²⁷ Second-order observation becomes, for complex systems, a way of coordinating actions and ensuring internal consistency.

14 Hugh Baxter, Niklas Luhmann's Theory of Autopoietic Legal Systems, *Annual Review of Law and Social Science* 9 (2013) 167-184; Kevin W. Gray, *The Autopoietic Turn in Habermas' Legal Philosophy*, *Ancilla Iuris* (2014), 41-57.

15 Niklas Luhmann, *Social Systems* (Stanford 1995), 176 *et passim*; also, Niklas Luhmann, *Operational Closure and Structural Coupling*, *Cardozo Law Review* 13 (2012) 1419-1441.

16 Niklas Luhmann, *Social Systems* (Stanford 1995) 35.

17 Niklas Luhmann, *A Sociological Theory of Law* (London 2012), 81.

18 Niklas Luhmann, *Social Systems* (Stanford 1995), 217-218.

19 *Ibid.*, 162.

20 Niklas Luhmann, *Law as a Social System* (Oxford 2004), 118.

21 Niklas Luhmann, *Social Systems* (Stanford 1995), 444. Niklas Luhmann, *Theory of Society*, vol. 1 (Stanford) 217-218.

22 Niklas Luhmann, *A Sociological Theory of Law* 2nd edition (London 2012), 80.

23 *Ibid.*, 85.

24 Niklas Luhmann, *Social Systems* (Stanford 1995), 162.

25 *Ibid.*, 167.

26 Loet Leydesdorff, *Luhmann, Habermas and the Theory of Communication*, *Systems Research and Behavioral Science* 17, 3 (2000), 273.

27 Kenneth C. Bausch, *The Habermas/Luhmann Debate and Subsequent Habermasian Perspectives on Systems Theory*, *The Journal of Systems Research and Behavioral Science* 14 (1997), 316.

2. Centre-Periphery and Structural Coupling

At this point, two changes to Luhmann's theory adopted at the end of his career become central to understanding how complicated, functionally differentiated system function. First, Luhmann argues that internally complex systems are separated into centre and periphery. The centre of the system comprises those actors or communications central to the continued function of the system, while the periphery includes those actors or communications which play a role in the function of the system but lack a central adjudicative or coding role in the continuing function of the system.²⁸

Second, Luhmann introduces the idea of structural coupling. Systems remain stable by observing their past communicative actions. These observations, either of self or of the environment, are actions of the system. This holds equally true for observations of previous decisions by the system which serve to condition the program of the system,²⁹ and for acts of external reference which involve incorporating the external acts into the system through its own decision.³⁰

While operative closure remains the basis of autopoiesis (and solves the problem of maintaining system identity), such closure is only normative and not cognitive.³¹ Systems remain capable of causal interaction with their environments.³² Communications in the system's environment are made intelligible to the system by the system's use of its internal coding. These irritations to the system form the basis under which the system can respond to the environment.

The key element stabilizing the relationship between systems (and thus, system and environment) is the structural coupling of systems. Structural couplings between systems emerge as part of the widespread differentiation of society into different systems which are forced to interact as each form's the other's environment.³³ In some cases, systems which are in constant contact (in systems-theoretic terms, are simultaneously observing and observed) go beyond mutual irritation and develop permanent lines of cognitive influence (what Luhmann terms relationships of structural coupling).³⁴ In such situations, systems come to anticipate the actions of other systems and develop programs for

dealing with them (an example would be the fact that legal obligations are structurally coupled to contractual obligations in the economic system, or that legal obligations are created by acts of the political system).³⁵ The act of mutual interpretation of communicative utterances – always on the terms of the system itself however – creates the potential for intersystemic communicative flows, while allowing the system to preserve its boundary maintenance through autopoiesis.³⁶

III.

LAW AS AUTOPOIETIC SYSTEM

Unlike positivist legal theories, which attempt to define what structures (rules, norms, texts) can be classified as law by focusing on the commands each directs to its addressees (as primary rules), and how addressees determine the nature of law (such as in the dominant Hartian account of secondary norms), systems theory begins instead with a description of the operations which define the system.³⁷ Although law does serve the two principal functions in modern society outlined by Hart (by proving commands addressed at individuals discernible as law), that is only secondary to its description in systems theoretic terms. Systems theory conceive of systems in terms of generalized norms of behaviour. First, by specifying generalized norms of behaviour, law provides a gamut of choice for the individual and stabilizes expectations related to human action (rending such expectations impersonal and generally applicable).³⁸ The universalizability of the legal form leads to a differentiation of cognitive and normative expectations and allows law to become independent of environmental effects (e.g. the effects of traditional forms of life) on the legal system.³⁹ Second, at least in part, law defines the boundaries and selection types of other social systems,⁴⁰ by labelling as legal/illegal possible decisions taken by other social systems.

Instead of a functional account of social systems, at the centre of the autopoietic account of the legal system is the role played by autopoiesis in the production of internal communications, which sets the expectations of all participants and stabilizes

28 *Niklas Luhmann*, *Theory of Society*, vol. 2. (Stanford 2012), 164.

29 *Niklas Luhmann*, *A Sociological Theory of Law*, 2nd edition (London 2012), 86.

30 *Ibid.*, 87.

31 *Ibid.*, 52.

32 *Hugh Baxter*, *Niklas Luhmann's Theory of Autopoietic Legal Systems*, *Annual Review of Law and Social Science* 9 (2013) 167-184, 169.

33 *Niklas Luhmann*, *A Sociological Theory of Law* 2nd edition (London 2012), 385.

34 *Ibid.*, 28; *Niklas Luhmann*, *Operational Closure and Structural Coupling*, *Cardozo Law Review* 13 (1992) 1419-1441, 1423.

35 *Niklas Luhmann*, *A Sociological Theory of Law* 2nd edition (London 2012), 381-2.

36 *Niklas Luhmann*, *Operational Closure and Structural Coupling*, *Cardozo Law Review* 13 (1992) 1419-1441, 1424-5

37 In this respect, Luhmann's theory here parallels Hart's account of the role of secondary rules in determining what constitutes law and what does not (even if Luhmann often overstates the difference between the two theories). *Niklas Luhmann*, *A Sociological Theory of Law* 2nd edition (London 2012), 78.

38 *Ibid.*, 25-28; see also *Franz Becker and Niklas Luhmann*, *Verwaltungsfehler und Vertrauensschutz: Möglichkeiten gesetzlicher Regelung der Rücknehmbarkeit von Verwaltungsakten* (Berlin 1963), 9.

39 *Niklas Luhmann*, *A Sociological Theory of Law*, 2nd edition (London 2012), 109.

40 *Ibid.*, 105.

norms of behaviour. Like all autopoietic systems, law sets its own boundaries, allowing those aspects of the environment to influence law only when law itself decides to allow them to construct such an influence.⁴¹ Drawing on the general theory of coding he developed with regard to social systems generally, Luhmann argues that law simplifies the external environment by assigning to communications its own coding, which for the legal system is the distinction between what is legal/illegal.

1. The Development of the Legal Program

Over time, the repeated application of law's code produces the legal system's program, which includes the body of decisions which creates the jurisprudential basis of the legal system.⁴² Initially, modern society presents a great deal of variability to the legal system's environment. It is impossible to determine in advance exactly what decisions the system will arrive at in response to irritations from its environment. "Law's conditional programs (existing law) are produced by itself through self-observation in its previous coding. And there is no hierarchy. Structures do not pre-exist and determine what can be a legal communication, but are stabilizing elements that are formed by, and can be changed by, what is coded legal/illegal."⁴³

Overtime, the legal system both develops and evolves by the repeated action of law's coding. The legal system, through the creation of specific episodes and of goals, produces temporal differentiation in its program which integrates the results of these procedures or negotiations into the conditional matrix for its further operations.⁴⁴ In this respect, programs in legal systems are always conditional programs, waiting to be transformed to the future.⁴⁵ Systems may evolve either because new subsystems emerge within the system or because the system is forced to react, as part of the mechanism of dynamic stabilization, to changes in the environment and to evolve in a different way.⁴⁶

2. Structural Coupling and Constitutionalization of Law

One obvious mode of interaction is the interaction which occurs between the legal system and the political system. Unlike the case of juridification, which occurs when one the legal system colonizes another system (reducing its possibility for autopoiesis), the autonomy of autopoietic systems guarantees that systems can make their own decisions with respect to how to respond to their environment.⁴⁷ The legal system is therefore able to causally influence other systems only by acting as an environment irritant to those system or in the case of repeated irritation through structural coupling.

Structural coupling as we have seen, is strictly cognitive and not normative. Political norms may enter the legal system, but only as facts in the environment (and not norms) of which the legal system can take cognizance.⁴⁸ The legal system codes political acts as legal or illegal as part of its observations of the political system (for instance, courts alone apply the coding of legal or illegal to acts of violence, irrespective of how participants in the political system view such acts).⁴⁹

Consider the case of legislation promulgated by the political system. While it is the case that legislation belongs to both the political and legal systems, the meaning of each communication is determined internally by each system. Law will recognize a statute and conceptualize its meaning by applying its own interpretative practices (e.g. by making reference to what it calls 'the intention of parliament'). However, "[t]hese interpretative practices (attributing a holistic meaning to a text and locating that text alongside other legal texts) are not political communications."⁵⁰ By contrast, the political system understands statutes, and the meaning of communications, not in terms of legal/illegal, but in terms of its own communications (e.g. the political motivations for passing a particular piece of legislation or the anticipated consequences of an act of parliament).

In its simplest terms, legislative acts irritate the legal system, forcing it to respond. New norms develop from legislation which creates new competences. New statutes create new conflicts where none existed before. Such political acts have to be integrated into the legal system, even if the act of integration creates temporal inconsistency by introducing new norms which conflict with previous aspects of the legal system's program.

41 *Richard Nobles and David Schiff*, Introduction, in Niklas Luhmann, *Law as a Social System* (Oxford 2004), 1-51, 4.

42 *Ibid.*, 11.

43 *Ibid.*, 11.

44 *Niklas Luhmann*, *Law as a Social System* (Oxford 2004), 184. See also *Gunther Teubner*, *Episodenverknupeung*. in Baecker, Dirk, Jürgen Markowitz, Rudolf Stichweh, Hartmann Tyrell and Helmut Wilke eds, *Theorie als Passion: Niklas Luhmann zum 60. Geburtstag* (Frankfurt 1987), 423-46.

45 *Niklas Luhmann*, *Law as a Social System* (Oxford 2004), 196; citing *Torstein Eckhoff & Knut Dahl Jacobsen*, *Rationality and responsibility in administrative and judicial decision-making* (Copenhagen 1960); *Niklas Luhmann*, *Rechtssystem und Rechtsdogmatik* (Stuttgart 1974).

46 *Richard Nobles and David Schiff*, Introduction, in Niklas Luhmann, *Law as a Social System* (Oxford 2004), 1-51, 25.

47 *Ibid.*, 8.

48 *Ibid.*, 10.

49 *Niklas Luhmann*, *Law as a Social System* (Oxford 2004), 101.

50 *Richard Nobles and David Schiff*, Introduction, in Niklas Luhmann, *Law as a Social System* (Oxford 2004), 1-51, 8-9.

Ad hoc methods of interaction are ultimately too unreliable for modern society. As the political system develops, structural pressures require a means for the political and economic system to become structurally coupled, which is accomplished through the constitutionalization of society.⁵¹ By delimiting the specific roles and competences to be played by each system, constitutions both restrict the influence of law and politics on each other (e.g. by reducing certain types of corruption) and by delimiting powers and rights.⁵² Constitutions became understood as positive statutes of law which provide conflict rules for disputes within the legal system.⁵³

3. Centre-Periphery of the Legal System

As the legal system evolves, it also differentiates internally, developing what Luhmann called a centre and a periphery.⁵⁴ As part of internal differentiation, we see the emergence of courts, separated from administrative legal tribunals, and the development of professional organizations (including the bar).⁵⁵

Much like in Anglo-American philosophy of law, courts play a central role in Luhmann's theory. Luhmann models the legal system as composed of an adjudicative centre (composed of courts and the equivalent in the municipal system).⁵⁶ Conversely, structures such as parliament, and participants such as lawyers, and clients, and elements of the legal program not part of jurisprudence (such as soft law) form the periphery.

Inside the centre of the legal system, a recursive procedure is at work. Processes of meaning generation become formal legal procedures; the reliance on procedure in turn grants stability to the system. For example, in positive law, the relevant procedure is arrived at through administrative decisions that stabilize rule-application. The subsystem of court procedures is supposed to suspend social power dynamics, and to isolate law from its surrounding environment. These procedures legitimate decisions while also contribute to a store (i.e. a program) of decisions that will legitimate future decisions.

51 *Niklas Luhmann, Law as a Social System* (Oxford 2004), 404. *Hugh Baxter, Niklas Luhmann's Theory of Autopoietic Legal Systems*, *Annual Review of Law and Social Science* 9 (2013) 167-181. *Niklas Luhmann, Verfassung als evolutionäre Errungenschaft*, *Rechtshistorische Journal* 9 (1996), 176-220. See also, *Chris Thornhill, Niklas Luhmann and the sociology of the constitution*, *Journal of Classical Sociology* 10, 4 (2010), 315-337.

52 *Niklas Luhmann, Law as a Social System* (Oxford 2004), 404.

53 *Ibid.*, 406.

54 *Ibid.*, 274.

55 *Ibid.*, 274 *et passim*.

56 *Richard Nobles and David Schiff, Introduction*, in *Niklas Luhmann, Law as a Social System* (Oxford 2004), 1-51, 31.

IV. INTERNATIONAL LAW AND SYSTEMS THEORY

In the previous sections, I developed an account an autopoietic account of law inspired by a sociological account of the differentiation of modern society. In this section, I will show how such a theory can provide an account of the nature of international law. I will use this theory to clarify problems in the nature of international law in the subsequent section, before discussing the rule of law in the concluding section.

Systems theory requires an account of pluralism and territorial space to provide an adequate account of international law. Only in his later writing does Luhmann address the problem of globalization, arguing that the facts of functional differentiation mean, in effect, that the entire world can be described as a social system (the world system), differentiated into multiple subsystems, which "operate independently of spatial boundaries."⁵⁷ He rejects one view of globalization: that world society can be described as a theory of nation-states.⁵⁸ A world system cannot be composed of territorially bounded states, he argues, as such states "are simply not social systems in his sense of the term," and do not enjoy operational closure.⁵⁹

Nevertheless, such differentiation does not occur uniformly. In spite of such differentiation, political systems still retain a degree of territorial organization.⁶⁰ Conversely, he argues that "we can ... speak largely of a global legal system, albeit one largely without centralized legislation or decision-making capacity."⁶¹

While there is a great deal to recommend in this approach, the dominance of different international decision-making authorities, none of which are directly subordinated to the other, casts doubt on Luhmann's claim that the same coding is being used in the same way by these various competing legal decision-making authorities. A more likely view, championed initially by Teubner, is that the modern world is composed of separate, parallel autopoietic legal regimes.

Quoting Ehrlich, writing on informal legal systems a century earlier, Teubner argues that "the centre of gravity of legal development ... from time immemorial has not lain in the activity of the state, but in

57 *Niklas Luhmann, Theory of Society*, volume 1 (Stanford 2012), 96.

58 *Ibid.*, 10.

59 *Ibid.*, 96.

60 *Ibid.*, 10.

61 *Hugh Baxter, Niklas Luhmann's Theory of Autopoietic Legal Systems*, *Annual Review of Law and Social Science* 9 (2013) 167-184, 169.

society itself, and must be sought there at the present time.”⁶² Teubner repurposes Ehrlich’s work to argue that much law-making exists beyond the nation-state as pockets of law making beyond or parallel to national borders and largely insulated from the state.⁶³ Instead of focusing on modern nation states, Teubner argues, we must focus instead on particular legal communications (and understand how the communication is constitutive of individual legal systems). Emerging global law is a set of legal orders in its own right, which “grow mainly from the social peripheries, not from the political centres of national states and international institutions.”⁶⁴ What defines legal pluralism broadly is the existence of legal regimes which have successfully turned from the law of local societies to the laws of diverse functional systems and of different ethnic, cultural, and religious communities.⁶⁵ The most prominent example of extra-territorial legal systems, with its own coding, adjudication and programming, can be found in the *lex mercatoria*.⁶⁶ (Naturally, there are many other examples of international legal systems independent of states: the legal regimes of multinational enterprises, human rights regimes and courts,⁶⁷ and *lex sportiva*.)⁶⁸

Formally, systems of law beyond the state have no core territory, but instead are formed of “invisible colleges, markets, networks, etc.”⁶⁹ As systems become decoupled from national political systems, legislative bodies become less important.⁷⁰ While academics have long debated whether or not such

legal systems actually are law,⁷¹ *lex mercatoria* has a long history of application, even if it lacks the enforceability of state law coupled to the political system (e.g. is backed by sanction).⁷²

How a legal system ultimately functions, as one amongst many pluralist systems, remains an empirical question. However, the fact that its borders are not fixed across time is no bar to its existence.⁷³ What matters from the perspective of autopoiesis is that it uses its own coding to separate it from the national legal system and other legal systems,⁷⁴ and that it carries with it procedures rendering legal questions decidable.⁷⁵ *Lex mercatoria*, particularly where it provides for closed circuit arbitration, or arbitration through the ICC in Paris, the IMC in Antwerp, or the ILA, provides a means for the system to resolve questions of legality.⁷⁶

With respect to how structural coupling between pluralist orders emerges, *lex mercatoria* provides a useful example. *Lex mercatoria* has developed its own relationships to other legal systems and has developed its own program. For instance, ICSID rules require enforcement at the level of the state, requiring that states interpret and assign their own coding to international arbitral awards. In a pluralist legal order, different legal systems take a different view of which legal systems to recognize and which to not. *Lex mercatoria* or the law of international arbitration is recognized as a legal system in France but not in the UK.⁷⁷ This in turn will affect how awards are enforced by the relevant domestic legal orders to which they relate.

With respect to programs, as Cremades has argued, the constant interchange of norms between arbitral awards has contributed to the development of a new legal order where “[t]rade usages and customs as well as professional regulations will attain the status of law as they become embodied in arbitral decision making.”⁷⁸ We have begun to see precedent-

62 Gunther Teubner, Global Bukowina: Legal Pluralism in the Modern World, in Gunther Teubner (ed.), *Global Law without a state*, (Aldershot 1997), 3-28, 3; citing Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge 1936), 390.

63 Anthony Giddens, *The Consequences of Modernity* (Stanford 1990), 70.

64 Gunther Teubner, Global Bukowina: Legal Pluralism in the Modern World, in Gunther Teubner (ed.), *Global Law without a state*, (Aldershot 1997) 3-28, 7.

65 It has been suggested that Teubner has moved away from ethnological accounts of legal pluralism in his recent writings. Be that as it may, much of the literature does draw on that work (including Teubner in his early work).

66 Hans-Joachim Mertens, *Lex Mercatoria: A Self-Applying System Beyond National Law?* in Gunther Teubner (ed.), *Global Law without a State* (Aldershot 1997) 31-43.

67 Especially in the case of human rights, it would be “unbearable if the law were left to the arbitrariness of regional politics” (Niklas Luhmann, *Recht der Gesellschaft* (Frankfurt 1993), 574 *et passim*).

68 Gunther Teubner, Global Bukowina: Legal Pluralism in the Modern World, in Gunther Teubner (ed.), *Global Law without a state*, (Aldershot 1997), 3-28, 5, citing Gérard Simon, *Puissance sportive et ordre juridique étatique* (Paris 1990); James R. Nafziger, *International sports law as a process for resolving disputes*, *International and comparative law quarterly* 45 (1996), 130-49.

69 Gunther Teubner, *Law as an Autopoietic System* (London 1995), chapter 5.

70 Gunther Teubner, *Autopoiesis and Steering: How Politics Profits from the Normative Surplus of Capital*, in Roeland Veld, Linze Schapp, Catrien Termeer and Mark van Twist (eds.) *Autopoiesis and Configuration Theory: New Approach to Societal Steering* (Dordrecht 1991) 127-41; Anne Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, *Government and Opposition*, 39, 2(2004): 159-190.

71 Ursula Stein, *Lex mercatoria: Realität und Theorie* (Frankfurt 1995).

72 Gunther Teubner, Global Bukowina: Legal Pluralism in the Modern World, in Gunther Teubner (ed.), *Global Law without a state*, (Aldershot 1997), 3-28, 13.

73 Eugen Langen, *Transnational Commercial Law* (Leiden 1973); Harold J. Berman, *The Law of International Commercial transactions (lex mercatoria)* in W.S. Surrey and D. Wallace Jr (ed.), *Lawyers Guide to International Business Transactions: The Law of International Commercial Transactions (Lex Mercatoria)* (Philadelphia 1983), 51.

74 Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, *Cardozo Law Review* 13 (1992): 1443-62.

75 Gunther Teubner, Global Bukowina: Legal Pluralism in the Modern World, in Gunther Teubner (ed.), *Global Law without a state*, (Aldershot 1997), 3-28, 14.

76 *Ibid.*, 16; citing Clive M. Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 9th edition (London 1990).

77 Thomas Schultz, *Transnational legality: Stateless Law and International Arbitration* (Oxford 2014), 12; citing, for the French case, Emmanuel Gaillard, *Legal Theory of International Arbitration* (Leiden 2010) 188 *et passim*.

78 Gunther Teubner, Global Bukowina: Legal Pluralism in the Modern World, in Gunther Teubner (ed.), *Global Law without a state*, (Aldershot 1997), 3-28, 15; citing Bernardo M. Cremades, *The impact of international arbitration on the development of business law*, *American Journal of Comparative Law* 31 (1983), 526-534, 533.

based reasoning in arbitral panels.⁷⁹ At the same time, *lex mercatoria* has evolved to provide procedures that look like substantial rules of legal procedure common to all legal systems. Procedural norms are embedded in the major arbitral legal systems, such as the rules of UNCITRAL, UNIDROIT, ECE, ESCAP, the ILA, ICC, IMIC, which provide for a right for both parties to be heard.⁸⁰ Teubner views this, following the rhetoric of fragmentation, as the “almost explosive expansion of independent and globally active, yet sectorally limited, courts, quasi-courts and other forms of conflict-resolving bodies,” which included, as of 2004, 125 international institutions.⁸¹

Accepting the argument that multiple international functionally differentiated legal systems have emerged with their own dispute resolution bodies attached to them, Teubner and Fischer-Lescano argue that this entails three conclusions about the international order:

1. The fragmentation of global law is more radical than any single reductionist perspective—legal, political, economic or cultural—can comprehend. Legal fragmentation is merely an ephemeral reflection of a more fundamental, multidimensional fragmentation of global society itself.

2. Any aspirations to a normative unity of global law are thus doomed from the outset. A meta-level at which conflicts might be solved is wholly elusive both in global law and in global society. Instead, we might expect intensified legal fragmentation.

3. Legal fragmentation cannot itself be combated. At the best, a weak normative compatibility of the fragments might be achieved. However, this is dependent upon the ability of conflicts

law to establish a specific network logic, which can effect a loose coupling of colliding units.⁸²

It is worthwhile dwelling for a moment on how Teubner and Fischer-Lescano have repurposed Luhmann’s systems theoretic account of international law. They argue that the pluralist international legal arena is composed of multiple different legal systems, each of which applies its own (but not identical) coding to its decisions, developing programs applicable only to the adjudicative bodies of each tribunal. Communication between legal regimes operates using Luhmann’s model of system-environment, relying, as the case may be, on irritation between legal systems or structural coupling between legal regimes.⁸³

1. A More Precise Model of Global Legal Orders

To model the relationship of legal systems in a more precise manner, Teubner and Fischer-Lescano draw on the centre-periphery model developed by Luhmann in his later work, arguing that courts and other adjudicative bodies occupy the centre of these functionally differentiated plural legal systems, with peripheral regions “populated by political, economic, religious etc. organizational or spontaneous, collective or individual subjects of law, which, at the very borders of law, establish themselves in close contact with autonomous social sectors.”⁸⁴ The fragmentation of global society, creates:

[Z]ones of contact between the legal periphery and autonomous social sectors, an arena for a plurality of law-making mechanisms is established: standardized contracts, agreements of professional associations, routines of formal organizations, technical and scientific standardization, normalizations of behaviour, and informal consensus between NGOs, the media and social public spheres.⁸⁵

On this model then, we see legal systems with adjudicative bodies surrounded by other legal organizations and norms, and civil society. “Following the collapse of legal hierarchies, the only realistic option is to develop heterarchical forms of law that limit themselves to creating loose relationships between the fragments of law.”⁸⁶ The most we can hope for is that law may act as a “gentle civilizer of

79 Gunther Teubner, *Global Bukowina: Legal Pluralism in the Modern World*, in Gunther Teubner (ed.), *Global Law without a state*. (Aldershot 1997), 3-28, 15; See also, *Thomas Carbonneau*, *Rendering arbitral awards with reasons: the elaboration of a common law of international transactions*, *Columbia Journal of Transnational Law* 23 (1985) 579-614; *Klaus-Peter Berger*, *The international arbitrator’s applications of precedents*, *Journal of International Arbitration* 9 4-22;

For an example of such use of precedent: “The Tribunal considers that it is not bound by previous decisions. At the same time, it believes it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law” (*Saipem v Bangladesh; Decision on Jurisdiction of March 21, 2007*, para. 90).

80 *Ursula Stein*, *Lex mercatoria: Realität und Theorie* (Frankfurt 1995), 240 *et passim* & 107 *et passim*.

81 *Gunther Teubner and Andreas Fischer-Lescano*, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, *Michigan Journal of International Law*, 25, 4 (2004), 999-1046, 1000-1001; citing *Georges Abi-Saab*, *Fragmentation or Unification: Some Concluding Remarks*, *NYU Journal of International Law and Politics* 31 (1999) 919-933, 923.

82 *Ibid.*, 1004.

83 *Ibid.*, 1018; citing *Marc Amstutz*, *Zwischenwelten: Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht*, in Gunther Teubner & Christian Joerges, ed, *Rechtsverfassungsrecht: Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie* (Berlin 2003), 216; *Christian Joerges*, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective*, *Eur. L.J.* 3 (1997) 378-406.

84 *Gunther Teubner and Andreas Fischer-Lescano*, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, *Michigan Journal of International Law*, 25, 4 (2004), 999-1046, 1012.

85 *Ibid.*, 1012-1013.

86 *Ibid.*, 1017.

social systems.”⁸⁷ Contradictions, they argue, citing Ladeur, “cannot be avoided, rather a new form of self-observation and self-description within the legal system must, in fact, take on the task of maintaining compatibility and lines of communication between differing legal arenas.”⁸⁸

In subsequent sections, I will apply the systems theoretic account of legal pluralism and international law to the debates over the existence of international law and the rule of law in the international legal arena. I will argue that it provides an account of law which answers the objections of Hartian-inspired legal theorists.

V.

DISORGANIZED LAW: WHAT COUNTS AS INTERNATIONAL LAW?

Both theorists and practitioners are often quick to conclude that many, if not all, elements of international law are not law.⁸⁹ Looking for the equivalent form and function of a domestic rule of recognition, and rejecting Palombella’s caution, they quickly dismiss large swathes of international law.

Describing the view of critics, Schultz writes: “[w]hat is meant here is that legality is not a scalar property, but an on/off property: something is law or it is not law; it is not more or less law, a little bit law or very much law, law to 20, 50, or 70 percent.”⁹⁰ This is Hart’s view, who denied that something could qualify as law where there was no a clear rule of recognition or of adjudication.⁹¹ Such scholars hold that impression that “international legal scholarship has become a cluster of different scholarly communities, each using their different criteria for the ascertainment of international legal rules.”⁹²

For these theorists (who I will term, following Pauwelyn, bright-line theorists),⁹³ just as not all norms which effect human behaviour are necessarily law, not all international norms are necessarily international law. While law can impose norms, so too can “religions, morality, or parents as well as your local street gang or sports club.”⁹⁴ In the domestic arena, domestic public law “is increasingly supplemented by informal, non-legislative rules, policy statements, or administrative guidelines that, much like in international law, are often referred to as ‘soft law’.”⁹⁵ The universe of norms is larger than the universe of law.

1. The Bright-Line School

The bright-line school, classically represent by Hart, and recently taken up by Reisman and others, argues for the binary nature of law.⁹⁶ Something is either law or non-law, and there is a bright-line between the two. As Klabbers writes, “within the binary mode, law can be more or less specific, more or less exact, more or less determinate, more or less wide in scope, more or less pressing, more or less serious, more or less far-reaching; the only thing it cannot be is more or less binding.”⁹⁷ Similarly, Weil argues “the threshold [between law and non-law] does exist: on one side of the line, there is born a legal obligation that can be relied on before a court or arbitrator, the flouting of which constitutes an internationally wrongful act giving rise to international responsibility; on the other side, there is nothing of the kind.”⁹⁸

In the context of soft law, Reisman argues that those who work in international law are too quick to count some forms of quasi-legal discourse as law.⁹⁹ He does concede that “soft law is a useful tool for some international law jobs but not for others.”¹⁰⁰ It alerts the reader, who is trying to understand the complex way in which international law is formulated, to “the possibility of different levels of law.”¹⁰¹ Soft law is useful for constructing non-binding arrangements between parties (often designed for action coordination). For civil society members, “whose law job is to design and promote

87 Ibid., 1045; making a play on the words of *Martti Koskenniemi*, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Oxford 2002).

88 *Gunther Teubner and Andreas Fischer-Lescano*, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, *Michigan Journal of International Law*, 25, 4 (2004), 999–1046, 1045; citing *Karl-Heinz Ladeur*, *Postmoderne Rechtstheorie: Selbstreferenz—Selbstorganisation—Prozeduralisierung* (Berlin 1992), 159–60.

89 See note 2, *supra*.

90 *Thomas Schultz*, *Transnational legality: Stateless Law and International Arbitration* (Oxford 2014), 18; quoting *Ronald Dworkin*, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller’s Novel Claim*, *University of Pennsylvania Law Review* 113 (1965) 668–690, 677–8; *Lon L Fuller*, *The Morality of Law*, rev edition (New Haven 1969), 122–3; *Joseph Raz*, *Practical Reason and Norms* (Oxford 1999), 150; *Matthew H Kramer*, *Objectivity and the Rule of Law* (Cambridge 2007), 105–9.

91 *H.L.A. Hart*, *The Concept of Law*, 3rd edition (Oxford 2012), 232 et passim. More recently, it is also the view of Posner and Goldsmith, in their *The Limits of International Law*, albeit in slightly more sophisticated form. *Richard Posner and Jack Goldsmith*, *The Limits of International Law* (Oxford 2007).

92 *Jean d’Aspremont*, *Formalism and the Sources of International Law* (Oxford 2011), 3.

93 *Joost Pauwelyn*, *Is It International Law or Not, and Does It Even Matter?* in *Joost Pauwelyn, Ramses Wessel, and Jan Wouters*, *Informal International Lawmaking* (Oxford 2012), 125.

94 Ibid., 125.

95 *Alexandre Fluckiger*, *Régulation, dérégulation, autorégulation: l’émergence des actes étatiques non obligatoires*, *Revue de droit suisse* 123 (2004), 159–303; *Jacob Gersen and Eric Posner*, *Soft Law: Lessons from Congressional Practice*, *Stanford Law Review* 61 (2008) 573–628.

96 Reisman has sometimes appeared not to favour the bright-line school, but in his recent writings he has moved away from the New Haven School’s process-based approach (see n 97, *infra*).

97 *Jan Klabbers*, *The Redundancy of Soft Law*, *Nordic Journal of International Law* 65 (1996) 167, 181.

98 *Prosper Weil*, *Towards Relative Normativity in International Law*, *American Journal of International Law* 77 (1983) 413–442.

99 *W. Michael Reisman*, *Soft Law and Law Jobs*, *Journal of International Dispute Settlement* 2, 1 (2011), 25–30.

100 Ibid., 25.

101 Ibid., 25.

new legal arrangements, the term soft law offers a way to advance their programmes by attaching the word 'law' to what are only their legislative proposals, albeit qualified by the word 'soft'.¹⁰² Government officials use the phrase soft law to prepare "internal constituencies, both governmental and non-governmental, for eventual adoption of the same instruments as law."¹⁰³

However, Reisman argues, those who work as judges or arbitrators (as he himself does), should avoid the temptation of soft-law he suggests: "[t]he trader, the investor, the executive signing off on her company's balance sheet and the soldier on the battlefield, must all be able to incorporate into their respective decision-making what the law prohibits and permits, lest they suffer penalties or jail."¹⁰⁴ For these jobs, it is not helpful to know that there is soft law out there. Moreover, besides not providing guidance to people who must be able to determine what the law actually is, soft law has potential deleterious effects: uncertainty over the law produces disincentives for investing. It chills human rights by allowing latitude for authoritarian governments and undermines the rule of law. It is inappropriate for commercial arbitration where parties need to know what the law is in a certain jurisdiction. What forms part of the international legal system matters, because one of law's most important values is the promotion of legal certainty.¹⁰⁵

Reisman argues that the rejection of the binary model of law undermines the international rule of law. In the context of arbitration, Reisman argues that part of every arbitration agreement is the principle that "those who are designated to resolve their disputes will not evade that mandate by deciding ex aequo et bono, lege mercatoria, by 'international public policy', ordre public international or by any other impressive-sounding but inherently vague principle."¹⁰⁶ Reisman gives the example of the use of equitable principles by the ICJ in *Libya v Tunisia*, where the parties specified that equitable principle could be applied in Article 1 of the agreement submitting the dispute to the ICJ as well as relevant rules form the Third Conference on the Law of the Sea.¹⁰⁷ He contrasts this with the tribunal in the OSPAR case, where Ireland asked the court to apply evolving international law and practice in international environmental law. The tribunal declined in that case, writing:

When the Parties have so empowered an international arbitral tribunal, it may apply norms that are not *lex lata*, if, in the tribunal's judgment, the norms have been accepted and are soon likely to become part of the international *corpus juris*. But the arbitral tribunal then applies them because of the Parties' instructions, not because they are 'almost' law.¹⁰⁸

This view is to be preferred, he suggests, to the view of the ICJ in the *Case Concerning the Gabčíkovo-Nagymaros Project*, where the court said that new norms and standards in international law, which have been forth in a great number of instruments during the last two decades, form part of international law. "Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."¹⁰⁹

2. Grey Zone Theorists

The problem with the bright-line theorists' perspective is that it assumes that legal norms are law in all contexts, or law in none. This view is simply not compatible with legal pluralism (the view I defended above). While that may not be a knock-down argument against the bright-line view, it is, moreover, incompatible with the practice of international courts and tribunals. To take but one example, in 1996, the Dispute Panel of the WTO found that the precautionary principle did not form part of international investment law, even if it was already part of the corpus of international environmental law.¹¹⁰

Schultz phrased the concern this way:

A first intuitive, and very understandable, reaction to the question whether it matters that anything is law would be to argue that it determines what is justiciable. Surely if something is law, so the thinking goes, it means we can invoke it in court and have it enforced by legal institutions. But that argument, even though it seems sensible, is not accurate and calls for a first basic distinction in thinking about legality.¹¹¹

102 Ibid., 25-26.

103 Ibid., 26.

104 Ibid., 26.

105 Neil McCormick, *Rhetoric and the Rule of Law* (Oxford University Press 2005) 16.

106 W. Michael Reisman, *Soft Law and Law Jobs*, *Journal of International Dispute Settlement* 2, 1 (2011) 25-30, 26.

107 *Continental Shelf (Tunisia v Libya)* 1982 ICJ Rep 18 at 23.

108 *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention*, Ireland versus United Kingdom of Great Britain and Northern Ireland, Final Award, 2 July 2003, Permanent Court of Arbitration, para 99.

109 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v Slovakia) 1997 ICJ Rep at 7, para 140. Reisman understates how often informal agreements are treated as law. The ICJ has also recognized them in the Pulp Mills dispute (*Case Concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay) 2010 ICJ Rep (April 10), paras 132-50, and, *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v Bahrain) 1994 ICJ Rep (July 1), para 123).

110 *Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998), 2.

111 Thomas Schultz, *Transnational legality: Stateless Law and International Arbitration* (Oxford 2014), 9-10.

The problem is that this argument is circular. Norms are part of international law if they can be invoked before and applied by courts and tribunals. But it is the courts themselves which make the determination what is law and thus what is justiciable. “Disquieting as the circularity may seem, the argument is jurisprudentially correct, and very simply so: the officials of the legal system decide what they recognize as law, thereby exerting the powers bestowed upon them by the system’s secondary rules of recognition.”¹¹² Since courts determine what is law and what is not, there is no a priori reason to believe that every court (and hence every legal system) will come to the conclusion that the same sets of norms are law.

The second problem is that not all norms are imperative. Some provide guidance and a means of coordination only in specific contexts. Thus, against the view of the bright-line theorists, the so-called grey line school argues that, within the realm of law, not all law imposes or proscribes specific behaviour or legally binding rights and obligations.¹¹³ Legal normativity, they argue, is not always equivalent to legal imperativity.¹¹⁴ On that view, while law is, by definition, “legally binding it does not always amount to an obligation or imperativity. An instrument can be legally binding (law) but only hortatory.”¹¹⁵

These theorists argue that legal normativity is a matter of degree, with “varying scales of normativity and a large grey zone between what is law and what is not law.” They hold this view for various doctrinal reasons. Baxter, for instance, has argued that the difference between binding and non-binding norms is “not qualitative but quantitative—that different norms carry a variety of differing impacts and legal effects.”¹¹⁶ General Assembly Resolutions are sometimes given legal weight or found to possess “nascent legal force” or to be “quasi-legal rules.”¹¹⁷ Legal process theorists – including members of the New Haven School of International Law – take a similar view of interna-

tional legal normativity.¹¹⁸ They view law as emerging not only between state, but in ongoing interactions between parties, such as between bureaucrats and institutional actors.¹¹⁹

Theorists such as Kingsbury, working within the Global Administrative Law tradition, attempt to hold onto the Hartian idea of a rule of recognition, arguing that since a “rule of recognition for a legal system that is not simply the inter-state system has not been formulated,” theorists should engage in “a weighing exercise to gauge normativity whereby ‘compliance with publicness considerations [e.g. legality, rationality, and proportionality] becomes more and more important in determining weight (perhaps even rising to be requirements of validity) the less the established sources criteria are met’.”¹²⁰

Grey zone theorists hold several theoretical commitments. While they often subscribe to some rule of recognition, grey zone theorists maintain, against Hart, that what matters in any particular context is the selection criteria chosen by actors immersed in the practice, irrespective of whether or not other actors in other legal systems would recognize those selection criteria themselves. “This implies accepting that the actual center of gravity of complex legal systems is not in its apex, that is, just in its table of constitutional values, but in a special practice of recognition, which makes sense of these values and offers, through time and circumstances, some coordinates of importance, meaning, and effectiveness through their implementation.”¹²¹ What looks like the constitutionalization of international law is, in this perspective, the emergence of realm-specific rules of recognition.

Second, unlike positivists, they do not view law as emerging only in the interaction between states, but also through the multidirectional interaction of local, national and international actors. In so far as

112 *Thomas Schultz*, *Transnational legality: Stateless Law and International Arbitration* (Oxford 2014), 10.

113 *Jean-Paul Jacque*, *Éléments pour une théorie de l’acte juridique en droit international public* (Paris 1972) 227; *Richard Reeve Baxter*, *International Law in “Her Infinite Variety,”* *International and Comparative Law Quarterly* 29 (1980), 549

114 *Joost Pauwelyn*, *Is It International Law or Not, and Does It Even Matter?* in *Joost Pauwelyn, Ramses A. Wessel, Jan Wouters, Informal international lawmaking* (Oxford 2012), 125-26.

115 *Ibid.*, 125-26, citing *Jean-Paul Jacque*, *Éléments pour une théorie de l’acte juridique en droit international public* (Paris 1972) 231.

116 *Ibid.*, 128; citing *Richard Reeve Baxter*, *International Law in “Her Infinite Variety,”* *International and Comparative Law Quarterly* 29 (1980), 549-66.

117 *Ibid.*, 127-128.

118 *W. Michael Reisman*, *A Hard Look at Soft Law*, *American Society of International Law Proceedings* 82 (1988) 373-377.

119 *Paul Schiff Berman*, *A Pluralist Approach to International Law*, *Yale Journal of International Law* 32, 2 (2007), 301-330, 302.

120 *Joost Pauwelyn*, *Is It International Law or Not, and Does It Even Matter?* in *Joost Pauwelyn, Ramses A. Wessel, Jan Wouters, Informal international lawmaking* (Oxford 2012), 129; Thomas Frank has stressed the objective criterion of legitimacy, as measured by determinacy, symbolic validation, coherence, and adherence). *Thomas Franck*, *The Power of Legitimacy Among Nations* (Oxford University Press, Oxford 1990) and *Thomas Frank*, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, *American Journal of International Law* 100 (2006) 88-106. Kingsbury argues that global administrative law is law where it meets the requirements of “publicness” in law,” and “adherence to legality, rationality, proportionality, rule of law, and some human rights,” *Benedict Kingsbury*, *The Concept of “Law” in Global Administrative Law*, *European Journal of International Law* 20 (2009) 23-57, 30.

Klabbers depends on objective criteria of consent (rather than subjective ones) to determine whether or not something counts as law. *Jan Klabbers*, *Reflections on Soft International Law in a Privatized World*, *Finnish Yearbook of International Law* 16 (2005) 313-28, 322.

121 *Gianluigi Palombella*, *The rule of law beyond the state: Failures, promises, and theory*, *International Journal of Constitutional Law*, 7, 3 (2009), 442-467, 466.

the local is concerned, legal pluralists believe that an increasingly disaggregated state means that norm generation can occur both below and above the state. Third, these norms can be created by non-state actors (including international organizations, corporations, etc.). Fourth, they believe that as legal orders develop, they require rules to coordinate activities between them. These can be explained as I will argue below, in terms of structural coupling between legal orders, and the development of procedural mechanisms to solve conflicts.¹²²

However, before I address that argument, I will first address how systems theorists can respond to the positivist attack on the existence of international law. I will argue that systems theory avoids several of the well-known problems associated with different doctrinal approaches to the identification of international law.

3. How Can We Tell What (If Anything) Is Law?

Within the debate, four means for identifying international law have been proposed.¹²³ These methods are loosely: 1) form – that some particular formal act systems theoretic makes law ‘law’ (e.g. passage by parliament or some other body, or inclusion in a treaty to make international law.), 2) intent – what the parties wanted determines whether or not something is law, 3) effect – whether or not something is treated as law makes it hard, 4) substance (recognized manifestations of consent and compliance).

There are particular problems which on the view of both legal pluralism and systems theory are irresolvable with each one of these approaches. First, the form-based approach assumes a one-size-fits all approach to law. The problem is that no particular set of formal requirements will capture all international law, as I have argued above. International law is not just made by passage in parliament or incorporation into treaties. Sometimes, informal statements and agreements are law and will be enforced by courts. Agreements between bureaucrats, such as the Basel Committee, will create law in some contexts. International courts and tribunals apply “norms with a benign neglect of the type of instruments in which the norm was laid down.”¹²⁴

With respect to the question of intent, not only is it particularly hard to determine what the parties intended (even assuming they intended the same thing), as parties themselves are often not clear on what they intended, or, in some cases, intent is not enough (for instance, certain types of agreements may be unconstitutional under domestic legal systems and not, therefore, international law in the relevant sense).¹²⁵ Moreover, this approach would reduce international law to politics, taking away the interpretive role of the courts.

Under the effects model, Alvarez has argued that everything is law which provokes normative effects.¹²⁶ This view is compatible with the legal pluralism I discussed above.¹²⁷ International law is law if it changes the behaviour of states. On this view then, virtually anything is law. But here again, the problem of the distinction between law and politics emerges. Just as not everything is law in the domestic realm if it provokes a change in behaviour (after all, the highwayman does not make law with his gun), international law “cannot be defined on the basis of actual behaviour alone,”¹²⁸ without falling into the confusion of law and politics in Critical Legal Studies.

Finally, the substance approach suggests that if law meets certain criteria (Franck’s determinacy, symbolic validation, coherence and adherence; Kingsbury’s requirements of publicity, and the entity’s adherence to legality, rationality, proportionality, rule of law, and human rights; Klabbbers’ objective standards for legal validity independent of the intent of the parties), then it is law. Klabbbers suggests consent can be seen as a substantive criterion for identifying law (which creates a rebuttable assumption that something is law).¹²⁹ Similarly, Van Hoof suggests that a substantive approach could adopt the objective standard of “recognized manifestations of consent.”¹³⁰ However, this view, while interesting, departs radically from the traditional view that international law is based on consent and voluntariness, and not on objective criteria (its closest parallel would be the rules of *jus cogens*, which are thought to exist outside of state consent). This view would effectively subordinate international law to natural law accounts of legal normativity.

122 Paul Schiff Berman, A Pluralist Approach to International Law, Yale Journal of International Law 32, 2 (2007), 301-330; Gunther Teubner and Andreas Fischer-Lescano, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, Michigan Journal of International Law, 25, 4 (2004), 999-1046, 1000.

123 Joost Pauwelyn, Is It International Law or Not, and Does It Even Matter? in Joost Pauwelyn, Ramses A. Wessel, Jan Wouters, Informal international lawmaking (Oxford 2012), 131 *et passim*.

124 Jan Klabbbers, The Undesirability of Soft Law, Nordic Journal of International Law 67 (1998) 381, 388-9.

125 Joost Pauwelyn, Is It International Law or Not, and Does It Even Matter? in Joost Pauwelyn, Ramses A. Wessel, Jan Wouters, Informal international lawmaking (Oxford 2012), 135.

126 *Ibid.*, 137; citing José Alvarez, International Organizations as Law-Makers (Oxford University Press, Oxford 2005).

127 See, e.g., Brian Tamanaha, A General Jurisprudence of Law and Society (Oxford 2001) 167.

128 Jan Klabbbers, Reflections on Soft International Law in a Privatized World, Finnish Yearbook of International Law 16 (2005) 313-28, 322.

129 Jan Klabbbers, Informal agreements in international law: towards a theoretical framework, Finnish Yearbook of International Law 5 (1994) 267-387.

130 Godefridus van Hoof, Rethinking the Sources of International Law (Deventer 1983).

The version of systems theory I develop here advances two particular arguments which make it superior, on my view, to other accounts. First, it holds “that the nature of the current changes in the international world evades subjection to any of the various possible metarules or interpretive and ‘ordering’ paradigms” beyond the sociology of law.¹³¹ Second, it takes the view that more complicated attempts to define law are incompatible with the sociology of law and the empirically observed diversity of legal systems. It adopts the deceptively simple view that anything which is assigned a coding of legal/illegal is putatively law. It simplifies the questions – what is international law generally and what counts as international law – to the more manageable question, does this particular legal system recognize a particular norm as part of its legal program (following Palombella’s proposed reclassification of rules of recognition)?¹³² While Hart thought international law lacked a rule of recognition and therefore was at best an emergent legal system, systems theorists argue that international law is a pluralist legal system with each system (or subsystem) possessing its own rule of recognition, manifest in the process of coding and the development of a program.

With respect to the four methods of classification proposed by criteria (form, intent, effect and substance) proposed by Klabbers, a well-developed systems theoretic account of international law accounts for each of them within the broader autopoietic framework, without prioritizing any of the criteria. Rather than falling into the CLS trap, autopoietic legal systems recognise political formalities as environmental irritations, but maintain that such irritations lack normative content. Instead, the system is cognitively open to them, assigning them particular meanings in the program of each legal system (as the domestic legal system does to legislative enactments). Intent, similarly, is treated as a factor a system may or may not take account of, but because here again it lacks normative content, it can be assigned a different weight by the legal system or by different subsystems under conditions of legal pluralism. Substance, on the other hand, is a formal property of autopoietic systems. A system which adopts a particular code and applies it in a repeated manner meets the substantive requirements under systems theory.

VI. ROOM FOR NORMATIVITY? THE VIRTUES OF SIMPLICITY FOR A THEORY OF THE RULE OF LAW

It is often argued that systems theory is too simple to account for legal normativity and the role of law as paramount social system in modern society.¹³³ It particular, it is often objected that a systems theoretic account of law cannot account for the paramount value of legal certainty,¹³⁴ that such a theory of law leaves no room for notions of justice, and that it cannot provide a satisfactory account of the rule of law. I will deal with each one of these objections in turn.

With respect to the question of certainty and predictability, autopoietic system theory argues that in every legal system there will be a centre with a clear legal program providing the requisite certainty for communication to continue and to stabilize the system against environmental disturbances resulting from pressures in the system’s environment. Stability, on this view, is a necessary value of the system to guarantee continued autopoiesis in the face of environmental pressures likely to result from inconsistent application of the code. In this respect, stability is the result of second order observation of its internal communication carried out by all well-developed systems.

The centre-periphery model is central to every systems theoretic account of law’s normativity. Systems theory argues that some norms will be central to the legal system while other will remain at the system’s periphery. Against the bright-line theorists’ attack on legal pluralism and soft law, autopoietic systems theory argues that legal systems guarantee stability by granting the same weight to legal norms central to the system’s program, irrespective of what weight those norms are granted by other systems. Soft law, conversely, is treated as a peripheral norm in (most) legal systems. It is granted legal force in some situations and not others, in response to pressures from the environment. Systems theory rejects the belief that soft law is either always law or not, while showing how confining it to the systems periphery preserves the stability of the legal system, without undermining the constancy of legal outcomes and hence a system’s stability.

131 Gianluigi Palombella, *The rule of law beyond the state: Failures, promises, and theory*, *International Journal of Constitutional Law*, 7, 3 (2009), 442–467, 461; See also, Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, *International Journal of Constitutional Law*, 6, 3–4 (July 2008), 373–396.

132 See *supra* n. 12.

133 As Raz puts it, “[t]here can be human societies which are not governed by law at all. But if a society is subject to a legal system then that system is the most important institutionalized system to which it is subjected,” *Joseph Raz*, *The Authority of Law* 2nd edition (Oxford 2009), 120.

134 Neil McCormick, *Rhetoric and the Rule of Law* (Oxford 2005), 16,

With respect to the question of justice, the Luhmannian account conceives of justice and rule of law as the properties of a well-functioning legal system, rather than as features to be imposed from the outside. The normative ideals of justice and equality belong to the legal system, but only as defined by the system itself. Thus, just as acts of legislatures become incorporated into law by the law's own application of its code, moral imperatives become incorporated into law as part of the general absorption of environmental norms into the law through a process of juridification. In this respect, moral imperatives are no different from other environmental irritants which effect systems.

In developing this account of justice, Luhmann relies not on the wholesale incorporation of external norms into the legal system, but on the legal system's own self-observation. Justice is merely the self-description of the legal system and a process of second order observation undertaken by the system of itself, to ensure that the system is applying the legal/illegal in similar ways. In this regard, it is an observation designed to contain conflicting norms by observing how the system reacts to events in the environment over time.¹³⁵ In the first instance, justice is more or less equivalent to equality of results and is reducible to procedural justice.¹³⁶ Through repeated applications of the code, law creates conditional programs which allows like cases to be decided in a like manner.¹³⁷

It might be objected that this is not justice in the true sense of the word, in so far as it provides no necessary coherence between justice in the moral sense and its role in the legal system. However, this flexibility is system theory's strength in a pluralized world. Justice in international law is the repeated response of the various subsystems to environmental irritations, allowing each to construct a program in response to environmental irritation. Each subsystem in a globally pluralist system will respond to different environmental irritations, constructing different programmatic conceptions of justice. Investment tribunals will develop a legal program with specific reference to economic rights. Human rights legal systems will develop a legal program that will develop specific human rights conceptions of justice. While structural couplings between legal systems will emerge, the precise meaning of legal norms will vary between systems as each system provides its own interpretation of the cognitive irritants from outside the system. As has occurred in different contexts, each legal system will give each legal communication its own precise meaning.¹³⁸

¹³⁵ Niklas Luhmann, *Law as a Social System* (Oxford 2004) 175.

¹³⁶ Niklas Luhmann, *Legitimation durch Verfahren* 2nd edition (Frankfurt 1983).

¹³⁷ Richard Nobles and David Schiff, Introduction, in Niklas Luhmann, *Law as a Social System* (Oxford 2004), 1-51, 22-23.

VII. LEGAL PLURALISM AND THE RULE OF LAW

The final question is whether systems theory can provide an account of the rule of law under conditions of legal pluralism. It has been contended that it is too procedural and formalistic to provide such an account.

In sociological terms, rule of law is the elevation of one particular form of legal organization to the center of state (as in the *Rechtsstaat*).¹³⁹ In the narrowest sense, the rule of law requires the state to recognize individuals as holders of rights, and that law recognizes restraints on government by requiring compliance with the law and imposing limits on law-making power.¹⁴⁰ As the *Rechtsstaat* develops, law becomes superior to parliament and external to and independent of state action.¹⁴¹

In one of the first considerations of the topic, Dicey described the rule of law as necessarily, intertwined with a history of institutions, conventions, custom and social practices. He conceived of the rule of law as (1) "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power," (2) "equality before the law, or the equal subjection of all classes to the ordinary law of the law administered by the ordinary law courts," and (3) that the constitution is "not the source but the consequence[...] of the rights of individuals, as defined and enforced by the courts."¹⁴² Hayek argued that, for the rule of law to exist, "the law must be general, equal and certain."¹⁴³ Fuller argued that to qualify as a legal system, and hence for the rule of law to obtain, a legal system must meet eight criteria: (1) it must be a system of rules, (2) with promulgation and publication of those rules, (3) which are clear and intelligible, (4) with avoidance of retroactive application, and, (5) avoidance of contradictory rules. The rules must be (6)

¹³⁸ In addition to the principle of precaution (discussed above), an obvious example would be the dispute between the ICTY and the ICJ over the meaning of effective control. See, comparatively, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v USA), ICJ, Judgment of 27 June 1986, at paras. 105 – 115 versus *Tadić*, Appeals Chamber, ICTY, 15 July 1999 (Case no. IT-94-1-A).

¹³⁹ It is manifestly not universal. See, eg, Gianluigi Palombella, *The Rule of Law and its Core, Relocating the Rule of Law*, edited by Gianluigi Palombella and Neil Walker (Oxford 2009), 18; Georg Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd edition (Tübingen 1919).

¹⁴⁰ Brian Z. Tamanaha, *A Concise Guide to the Rule of Law, Relocating the Rule of Law*, edited by Gianluigi Palombella and Neil Walker (Oxford 2009), 4.

¹⁴¹ Gianluigi Palombella, *The Rule of Law and its Core, Relocating the Rule of Law*, edited by Gianluigi Palombella and Neil Walker (Oxford 2009), 22; Carré de Malberg, *Contribution à la théorie générale de l'Etat* (Paris 1920), vol 1, 140 ff; Giovanni Sartori, *Nota sul rapporto tra Stato di diritto e Stato di giustizia*, *Rivista internazionale di filosofia del diritto* I-II (1964) 310-316.

¹⁴² Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edition (London 1961), 202-3.

¹⁴³ Friedrich August Hayek, *The Political Idea of the Rule of Law* (Cairo 1955), 34.

practicable, (7) consistent over time, and (8) congruence must obtain between official actions and declared rules.¹⁴⁴ Raz similarly has argued, in a similar vein, that (1) all law should be prospective, open and clear, (2) law should be relatively stable, (3) the making of particular laws should be guided by open, stable, clear and general principles, (4) the independence of the judiciary should be guaranteed, (5) the principles of natural justice must be observed, (6) the courts should have review powers over the implementation of other principles, (7) the law should be easily accessible, and (8) the discretion of crime-preventing agencies should not be allowed to pervert the law.¹⁴⁵

Tamanaha proposed classifying accounts of the rule of law along a spectrum. Proceeding from thin to thick accounts of the rule of law, Tamanaha suggests that the thinnest accounts from those which are thin to those which are thick. Proceeding from thin to thick, Tamanaha classifies theories of the rule of law as those which stress: (1) rule-by law, (2) formal legality, (3) democracy, (4) individual rights, (5) rights of dignity /and or justice, and finally (6) laws providing for the welfare state.¹⁴⁶

Cumulatively, Beaulac has endorsed the view that to show the existence of the rule of law, we need to show the existence of a legal system that possesses (1) principled normal rules, (2) adequately created and equally applicable to all legal subjects, (3) enforced by accessible courts of general jurisdiction.¹⁴⁷ It is his account I will draw on here to show that autopoietic systems theory can provide the outlines of a theory of rule of law at the international level.

First, autopoietic systems theory shows how inside each legal system there is the consistent application of a systems internal binary coding through the reception and application of communication. Second, it shows how, unlike the work of Reisman and others, each legal system constitutes its own legal subjects (i.e. rights holders) through the development of a legal program which grants rights to participants in the legal system. However, rather than conceiving of rights in the Diceyan framework as preconstitutional, systems theory conceives of rights as a framework created to stabilize the system and the normative demands of individual participating in it.¹⁴⁸ Against the Diceyan view which

remains confined to the theory of citizens as rights holders within a national constitutional framework, the version of systems theory I have advocated for in this paper claims that which individuals count as rights holders (e.g. natural persons versus legal persons) will depend on the relevant legal system in a pluralist international arena.

Third, with respect to the putatively difficult prong of the test for the international rule of law,¹⁴⁹ the systems theoretic model avoids many of the pitfalls of other accounts of the rule of law in the international arena. By stressing the interdependence of legal subsystems in a pluralized world, it argues that the test for adjudication will be found inside each pluralist subsystem and not across the global legal system as a whole. Rejecting therefore accounts that there is no international rule of law because there is no international court with general and compulsory jurisdiction,¹⁵⁰ it stresses that the rule of law generally obtains by virtue of multiple legal subsystems exercising jurisdiction in the transnational legal arena.

VIII. CONCLUDING REMARKS

In this paper, I have argued that a systems theoretic account of legal pluralism, emerging from the deceptively simple rules of autopoiesis and system coding, can answer the objections of those theorists who argue that international law is not law, by showing how autopoiesis aids in the development of a consistent body of jurisprudence and contributes to an empirically defensible account of international law and the international rule of law. My account is deflationist, in that it maintains that justice and the rule of law are not external attributes to be ascribed or not to a legal system, but part of every advanced legal system under the conditions of structural differentiation.

Ultimately, the compatibility of systems theory with actually observed international law and legal practice is an empirical question. However, I have outlined in this paper where I believe international jurisprudence provides evidence for these claims. Nevertheless, such a systems theoretic account would require further investigation to demonstrate that these claims can be broadened to cover international law generally.

144 *Lon Fuller*, *The Morality of Law*, 2nd edition (New Haven 1969). Fuller's theory has been applied to international law. See, e.g., *Jutta Brunnée and Stephen J. Toope*, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge 2010).

145 *Joseph Raz*, *The Authority of Law*, 2nd edition (Oxford 2009), 214-218.

146 *Brian Z. Tamanaha*, *On the Rule of Law: History, Politics, Theory* (Cambridge, 2004), 91; *Brian Z. Tamanaha*, *A Concise Guide to the Rule of Law*, *Relocating the Rule of Law*, edited by Gianluigi Palombella and Neil Walker (Oxford 2009), 4-13.

147 *Stéphane Beaulac*, *An Inquiry into the International Rule of Law*, *European University Institute Working Papers*, MWP 2007/14 (2007) 1-29, 8.

148 *Chris Thornhill*, *A Sociology of Transnational Constitutions* (Cambridge 2016).

149 *Stéphane Beaulac*, *An Inquiry into the International Rule of Law*, *European University Institute Working Papers*, MWP 2007/14 (2007) 1-29, 17.

150 As Watts has argued: "a purely consensual basis for the judicial settlement of legal disputes cannot be satisfactory in terms of the rule of law," *Arthur Watts*, *The International Rule of Law*, *German Yearbook of International Law* (1993) 16-47, 37.