

Constitutionalism and the making of international law

Fuller's procedural natural law*

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While constitutions typically address issues of law-making, international law lacks such constitutional guidance when it comes to questions concerning the sources of the law. The United Nations Charter, considered by some as the functional equivalent of a constitution for the world community (Fassbender 1998), is fairly silent on law-making. On a generous interpretation, it can be read as supporting the idea that law (proper law, that is) may be made by the Security Council, and that somehow the General Assembly too has a role to play in the making of international law. On a more narrow reading, however, law-making is seen to be absent: the General Assembly has been given recommendatory powers, nothing more, and the powers of the Security Council are administrative rather than legislative.¹ In other words: the Council may have some leeway in applying existing law, but no competence to make law itself.

Most textbooks on international law typically treat article 38 of the Statute of the ICJ as an authoritative enumeration of the sources of international law. While this is perfectly acceptable for everyday purposes, it is nonetheless useful to point out that article 38 lacks constitutional ambitions and is fairly unspecific at any rate. It contains a list of the sort of instruments the ICJ can apply, but does not specify how these instruments (treaties and customary law, above all) are supposed to come into being. Moreover, there would seem to be a general consensus that the list is no more than a useful starting point: many would deny, for instance, that it qualifies as an exhaustive list.

As a result, public international law has always been in dire need of a sources theory, which is reflected in sources doctrine being one the prime areas of international legal scholarship. Much attention has been paid, over the years, to questions such as where does international law come from and how is it made. By

* This paper forms part of a common project by Anne Peters, Geir Ulfstein and myself to come to terms with the constitutionalization of international law.

¹ Although the Council nowadays comes close, on occasion, to making law. See, e.g., Alvarez 2005, 184–198.

contrast, domestic constitutional scholarship tends to be far less obsessed with sources doctrine, and even in European Community law, which can be seen as an offspring of international law, sources doctrine does not play a prominent role amongst academics.²

The aim of this paper is to discuss the current state of the art of sources doctrine in international law, and to investigate what a constitutional sources scheme could look like. In doing so, I invoke the help of Lon Fuller, whose eight *desiderata* comprising the inner morality of law may not add up to a full-fledged sources doctrine (this will be further discussed later in this paper), but do carry important lessons for those who make international law. Fuller has long been overshadowed by his countrymen Ronald Dworkin (in jurisprudence) and John Rawls (in political philosophy), but seems to have been re-discovered in recent years.³ The implications of his thoughts for international law have, however, remained hitherto unexplored, perhaps partly because Fuller himself wrote next to nothing about international law, unlike, for example, his counterpart Hart.⁴ This paper then is a first attempt to apply Fullerian insights to the making of international law. I will start by sketching the deficiencies of current sources doctrine, after which Fuller's work will be explored. It is important to note, though, that this is merely a launching pad for further discussion: it is not, and cannot be, the final analysis of Fuller and international law.

² There are few monographs devoted to the sources of EC law. Perhaps the most obvious two are Prechal 1995 and Tridimas 1999, although the latter is perhaps an attempt to identify principles rather than an attempt to explain their role and origin. Interestingly, both have been published in a second edition. In addition, there is the classic study by Richard Lauwaars (1973), which however focuses more on validity.

³ The journal *Law and Philosophy* devoted a special issue to Fuller in 1994, and a very useful conference volume was published five years later. See Witteveen & van der Burg 1999. Some fairly recent works in jurisprudence, addressing the Rule of Law, owe much to Fuller, paying homage to one of the first to actually think through what this could entail. See, e.g., Barnett 1998 and Allan 2003.

⁴ Hart 1961, Chapter 10 contains – and this is rare among legal theorists, with the exception of Hans Kelsen – an in-depth discussion of international law. What probably helped matters was that Hart's father in law was John Fischer Williams, himself a renowned international lawyer. See Lacey 2004.

1.

Sources doctrine has been and continues to be a regular staple of international legal scholarship. Grotius already devoted considerable attention to law-making, to treaties and custom, as did Vattel. Around the turn of the 19th and 20th centuries the Hegelian current influenced Jellinek in positing his theory of *Selbstbindung*. The Cold War informed the theories of McDougal, Lasswell and others at the New Haven school as well of those of Tunkin and other Soviet scholars and representatives. And the debate continues until the present day, as witnessed for instance by Alvarez's monumental work on law-making by international organizations.

Still, for all this continuity, it would seem fair to state that sources scholarship tends to come in waves. Going back almost a century in time, an important first wave occurred during the 1920s and 1930s, the formative years of international law as we have come to know them (Spiermann 2005), when the Permanent Court of International Justice first thought of ways to explain the binding nature of treaties⁵ and, a few years later, expanded on the nature of the international legal order, holding that obligations can only come into being based on the consent of states.⁶ In scholarship, much sources doctrine played out between the two poles of positivism and naturalism, with positivists typically stressing that international law is, and ought to be, based on the firm consent of states, and naturalists suggesting that instead, much international law is, or ought to be, based on what is necessary rather than what can be agreed on, and that universal or quasi-universal values surely inform, and ought to inform, international law-making.

This became even more visible during the second wave of international sources debate, which took place roughly between the mid-1960s and the early 1980s. Inspired by decolonization and the emergence (or recognition) of new, global problems, theorists observed a move towards a law of co-operation (see especially Friedmann 1964). New actors, such as companies, international institutions, and individuals, had risen to prominence and international law had started to infiltrate hitherto unexplored issue areas (the environment, in particular). Many regulatory issues demanded new ways of thinking about the sorts of instruments most suitable for arranging regulatory cooperation or, alternatively, issues such as trade came increasingly to be regarded as issues of regulatory cooperation rather than as issues

⁵ See the Case of the *SS Wimbledon*, [1923] Publ. PCIJ Series A, no. 1. For an analysis, see Klabbers 1998.

⁶ See the Case of the *SS Lotus*, [1927] Publ. PCIJ, Series A, no. 10.

which could be dealt with on the basis of treaties between states thereby committing themselves to limit the scope of their activities (see generally Howse 2002). And at the same time, delayed slightly by the outbreak of the cold war, a serious discussion arose about whether there would be an international *ordre public* which ought to be protected from incursions by states acting individually or together. Were there, as Verdross already asked in 1937, ‘forbidden treaties’ in international law (see Verdross 1937)? More or less simultaneously, discussions took place on *jus cogens*,⁷ on *erga omnes* obligations,⁸ on international crimes of states,⁹ and on the uses and ontology of soft law and informal agreements (Dupuy 1977), leading some to suggest a need to rethink the sources of international law (van Hoof 1983), and others to query the wisdom of incorporating relative normativity – the idea that law can come in varying gradations of ‘bindingness’ – in a legal order that was still, predominantly, horizontal in organization (Weil 1983).

At the beginning of the 21st century, specific sources doctrine seems to be going through one of its quiet stages, at least on the surface (Klabbers 2005b). Instead of being specifically the subject of international legal scholarship, sources doctrine today presents itself in at least three different guises. First of all, many international lawyers are occupied (pre-occupied might be the more appropriate term) with rules of interpretation. There is, for example, a serious debate going on within the WTO as to how WTO-law ought to be most properly interpreted,¹⁰ with the various dispute settlement organs (panels and the appellate body) constantly invoking the rules of treaty interpretation as laid down in the Vienna Convention on the Law of Treaties, and with WTO’s policy-making organs happily creating new, and somewhat different rules of interpretation.¹¹

This is not an isolated phenomenon, peculiar to the WTO alone, and its logic is obvious: whoever controls the way a treaty is interpreted also controls the contents of its provisions (Klabbers 2006c). On a somewhat different scale, similar discussions take place elsewhere about the proper interpretation of human rights instruments, world order treaties generally, or the constituent instruments of

⁷ See article 53 of the 1969 Vienna Convention on the Law of Treaties.

⁸ See *Barcelona Traction, Light and Power Company, Ltd. (Belgium v Spain)*, [1970] ICJ Reports 3.

⁹ Launched by the International Law Commission in 1976. For a useful overview, see Jorgensen 2000.

¹⁰ A useful overview is Lennard 2002.

¹¹ For a critique, see Klabbers 2005a.

international organizations. Even the European Court of Justice, not generally known for its welcoming embrace of international law, has seen fit to devote attention to the rules of interpretation as laid down in the 1969 Vienna Convention. Indeed, recently the first arguments have been made about the proper interpretation of other international legal instruments, in particular Security Council resolutions (see Papastavridis 2007).

The second way in which sources debate is being displaced takes the form of a debate on the conflict of norms, a debate that, while not exactly new,¹² has been raging for a decade or so, and even, in the form of a more comprehensive discussion on the fragmentation of international law, has attracted the attention of the International Law Commission (see Koskenniemi 2007). Here, the import of the debate is to figure out whether some rules prevail over others, or leave other rules unapplied, or even abrogate them. And in the absence of a clear hierarchy in international law, which would uphold the simple position that some rules are simply of higher status than others, much of this debate too focuses on substance (see generally Klabbers 2008b).

But perhaps most significant is the way sources doctrine connects to constitutionalism: much of the debate on constitutionalism in international law can be seen as a debate on sources in disguise. Much of the debate is about how international law does, or should, reflect certain values presumed to be held in common by humanity at large.¹³ International law is thus, with greater or smaller degrees of explicitness, thought to rest upon common values and, as a result, also thought to stem from these values. Indeed, on this view, taken to the extreme, international law is but the legal expression of common values, and those values, in turn, are such that no derogation is permitted: it is this that warrants the qualification of those norms as constitutional. Philosophically, all this is not unproblematic: it would be difficult to find a leading contemporary philosopher willing to argue that humanity holds certain values in common, and that for this reason it is safe to assume the existence of norms of a constitutional character which would be binding on the international community as a whole (be it states, or also other actors). Even leading liberal thinkers such as Isaiah Berlin have consistently rejected this possibility,¹⁴ and the very emergence and popularity of other dominant

¹² Important early contributions include Rousseau 1932, Aufrecht 1951–52, and Jenks 1953.

¹³ On the somewhat thoughtless use of the concept of value, see Klabbers 2008a.

¹⁴ See e.g. Lilla, Dworkin & Silvers 2001.

streams in ethics owes a lot precisely to the universality problem: the traditions of communitarianism, republicanism and virtue ethics deny that universal values can exist altogether in a meaningful way.¹⁵

This may be too strongly put. There is some evidence to suggest that human beings universally share certain notions of what is abhorrent and what is not, what is scandalous and what is not. Thus, it has become possible, perhaps plausible to argue, that events such as the Rwanda genocide or, earlier, South Africa's apartheid system, receive universal condemnation precisely because they conflict with shared values.¹⁶ But that still leaves the problem that condemnation after the fact presupposes a different sense of agreement than does legislation beforehand: the problem for sources doctrine is, however, not so much to find things to condemn ex post facto, but rather to formulate rules in advance whose transgression will be deemed intolerable, and to do so with a considerable dose of precision.

2.

Sources doctrine, in the different guises presented above, predominantly looks at substance these days. Formalism has lost much of the attraction it may have held to earlier writers, and arguments about validity have disappeared. Still, more recognizable work in source doctrine continues to appear, although this too does not focus on formal or formalist considerations. A prominent example is the work of Jose Alvarez, aiming to provide an explanation for the normative role played by international organizations (see Alvarez 2005). A second example, presented not as a work on sources but as something else (what exactly is unclear) is the publication by Jack Goldsmith and Eric Posner under the title *The Limits of International Law*. Both works have in common that they seek to explain the emergence of international law with the help of insights from the neighbouring discipline of international relations; they also have in common that they fail to convince.

Since the sources catalogue of article 38 ICJ Statute is unable to do justice to the role international organizations play in the making of international law, Alvarez posits a different theory: to him, everything is law that proves to have 'normative

¹⁵ The seminal work is MacIntyre 1985.

¹⁶ Hints to this effect are contained in Linklater 1998 and in some of the works of Zygmunt Bauman, e.g. 1997. A formulation closer to international law is Fischer-Lescano 2003.

ripples'. Should states behave in accordance with a General Assembly resolution, then such a resolution may well be regarded as having legal effect, as being a source of international law. By contrast, if the resolution is by and large ignored, if it turns out to lack normative ripples, then it cannot be regarded as a source of international law.

That is, at first sight, an attractive theory: it does not seem overbearing in that it does not rest on common values, and it seems to be able to reconcile the twin demands of state sovereignty and effective operation. Alvarez finds some inspiration for it in international relations scholarship: after all, the insistence of normative ripples means that what ultimately matters is the behaviour of states, and who would be better placed to study and make sensible remarks about state behaviour than international relations scholars?

Still, the adoption of an external perspective, informed by international relations theory, forces Alvarez to suggest that law is what states actually do; by insisting on the primacy of state behaviour he loses the possibility to claim that what states end up doing might actually be illegal. He ignores, in a word, the normative aspect that comes inextricably with law, and substitutes the external perspective of the international relations scholar for the internal perspectives of the subjects of the law, for whom what matters is rather whether they consider themselves bound. Surely, if there is one insight from Hart's *The Concept of Law* that has been generally accepted, this is it: law, being a social construct, owes much to whether it is somehow accepted or recognized, yet recognition can never be identified on the basis of behaviour alone.¹⁷ One needs to somehow ascertain the internal perspective of the law's subjects, and while this is methodologically fraught with problems, it cannot simply be ignored or replaced by external observation.

That point emerges even more forcefully from Goldsmith and Posner's *The Limits of International Law*. In this far from monumental work,¹⁸ they aspire to understand the making of international law with the help of rational choice theory. Recasting the world as being composed of states (only states, and only two of them, really), and presuming those states to be unitary, homogenous actors driven by a maximization of self-interest, they reach the not all that surprising conclusion that international law emerges from the self-interest of states, and has no constraining force as soon as the law departs from those interests or, as the case may be, the

¹⁷ For a more expansive discussion, see Klabbers 2006b.

¹⁸ Elsewhere I set out what's wrong with it in greater detail: see Klabbers 2006. An excellent, slightly more sympathetic, discussion is van Aaken 2006.

interests change so as to depart from the law. This would cry out, obviously, for a theory on how state interests change, but none is forthcoming. It also blatantly ignores the constructivist insight that law need not only constrain, but is of supreme relevance in shaping discussions, paradigms, and social institutions, and therewith guides behaviour.

The main problem for present purposes, however, is that like Alvarez, Goldsmith and Posner too work on the basis of the idea that the force of law can be observed from the outside alone, simply by looking at the behaviour of states. Thus, again, just like Alvarez, they end up ignoring Hart's crucial insight about the internal perspective: they are unable to formulate a rule of recognition or suchlike, and it never even occurs to them that the internal perspective might be of relevance.

But of course it is relevant, whichever way one looks at it: the existence of a legal rule cannot be ascertained merely on the basis of state behaviour alone, for doing so would make it impossible to tell legal from illegal behaviour. Many people cheat on their taxes, yet few would insist that therefore tax evasion must be legally justified. Many states commit torture, but few would insist that therefore committing torture is legally justified. Yet this is precisely where both Alvarez, and Goldsmith and Posner, though starting from different premises and working in different traditions and with different agendas, end up.

3.

It seems inevitable that a constitutionalist theory of sources needs to take Hart's internal perspective into account, but there is more to it than just that. Classic sources doctrine works on the basis that the only law that could possibly emerge among states was law that emanated from the free consent of the states. Hence, the doctrine rests on two relevant givens: the only law-makers are states, and the decisive factor is the presence of the consent to be bound on the part of the states. This can be expressed by signature or ratification of treaties, whereas with custom it could, albeit somewhat awkwardly, be theorized as the absence of objections or protests against a rule during the process of its crystallization. The persistent objector doctrine, regardless of the intensity with which it was invoked, bears testimony to this consent-based theory of custom. And within this framework, it is hardly a coincidence that international tribunals do not rely on general principles of law or, where they do, reconstruct them as based on consent in some way or another, and that judicial decisions and academic writing are clearly thought of as

subsidiary. Consent is what matters, and only the consent of states counts, not consent by other entities. It is indeed telling that acceptance by international organizations has no bearing on the entry into force of the 1986 Vienna Convention on the Law of Treaties with or between International Organizations; or that national liberation movements cannot become parties to the 1977 additional protocols to the Geneva Conventions. (See more generally Klabbers 2003.)

Yet, it is no longer plausible to think only in terms of states as law-makers, and only of consent as the basis of obligation. As Alvarez notes, there is clearly a wider spectrum of law-making activities, both formally and somewhat less formally below the radar, and a convincing sources doctrine should somehow come to terms with all these normatively relevant activities. Thus, there is little doubt that states and other entities conclude all sorts of informal agreements (some speak of memoranda of understanding) which, so the dominant approach holds, are devoid of legal effects but not devoid of normative value (see especially Aust 2000). While this dominant interpretation is open to criticism (see Klabbers 1996), the observation that many such agreements are concluded is not. Likewise, much normatively relevant activity takes place in networks of civil servants, hopping from capital to capital and sending e-mails and faxes by the dozens in order to establish transboundary regulation, without involving the formalities of signature and ratification typically associated with proper treaties. Judges, law-makers and others involved in policy-making or execution engage in transnational dialogues, take cues from each other, and, in short, influence future behaviour in ways that seem legally relevant but that are not, and possibly cannot be, captured by traditional sources doctrine (see in particular Slaughter 2004).

Likewise, as Alvarez suggests, the work of international organizations cannot always plausibly be captured by traditional sources doctrine. Resolutions adopted by the General Assembly, or by other large plenary bodies such as the WTO's Ministerial Conference, are typically intended to have some normative effect and may well generate, as Alvarez has it, normative ripples. Yet, to regard them as either treaties or custom seems implausible, as are earlier attempts to regard them as examples of 'instant custom'.

In addition to public international organizations, some standard-setting also takes place in the private or quasi-public sector. Environmental standards owe much, these days, to the work of the International Organization for Standardization (ISO), itself a body comprised of public and private standardization institutions. Some rules on proper behaviour in sporting events may emerge from the World Anti-Doping Agency, exercising public or semi-public powers but itself difficult to

categorize. Equally difficult to capture are the standards on food safety developed by Codex Alimentarius, a joint venture of two international organizations (WHO and FAO) whose products are in principle regarded as non-binding, but which do generate normative force and may be thought of as binding by means of a *renvoi* in a binding document.¹⁹

The legal theorist Neil Walker has drawn attention to the output of regimes such as those established by the Good Friday Agreement concerning Northern Ireland (see Walker 2000). The agreement itself is, of course, a treaty, and fits nicely into traditional sources doctrine, but the measures adopted under the treaty are more difficult to classify. It is no coincidence that Walker feels the need to launch the concept of meta-constitutionalism to come to terms with such arrangements. Much the same can, arguably, be said about the output of the Conferences of the Parties (COPs) or Meetings of the Parties (MOPs) established under many international environmental agreements. These MOPs or COPs are perhaps best to be compared to regular international organizations, but that says little about the legal status of the resolutions they adopt.

And then there is the possibility of law arising more or less spontaneously without quite amounting to traditional customary law as conceptualized between states. A leading example may be *lex mercatoria*, a body of rules arising out of, and governing, the practices of businesses and traders. These may, but need not, turn into formal law, but it is clear that their informal status notwithstanding, they do exercise normative guidance.

All this – and the enumeration is not even meant to be exhaustive – underlines the need for a new sources doctrine. In particular, if there is any substance to the claim that international law is in a process of constitutionalization, then there would seem to be a clear need for a sources doctrine to accompany this process and to help delimit law from non-law, not only by observing whether or not normative utterances exercise normative ripples, but also beforehand, in order to help guide the actors involved. Surely, if one of the functions of law is to provide people and other actors with some form of guidance as to what they can do tomorrow and next year, then this applies *a fortiori* to a legal order that thinks of itself as constitutional.

Yet, classic sources doctrine does not help much, seeing how limited it is by still referring to states as the single relevant law-makers (and even the activities of international organizations are often conceptualized as those of states in the

¹⁹ The WTO's Agreement on Sanitary and Phytosanitary Measures contains a reference to the Codex, accepting its standards as binding upon the WTO's membership.

aggregate, rather than as having independent value) (see Klabbers 2005d). As a result, it is perhaps not surprising that many international lawyers have turned to international relations scholarship for inspiration and guidance, but much of this scholarship contends itself by looking at the behaviour of states (or, sometimes, other actors). At its best, international relations scholarship can explain why states cooperate, but it cannot explain why states choose certain modalities of cooperation over others, or why certain modalities of cooperation are preferred over others. Much less can international relations scholarship explain why some instruments are considered as law, while others are not; why some are deemed to give rise to legally binding rights or obligations, whereas others are not. The recent wave of studies in ‘treaty design’ stays rather too close to international relations scholarship to be of much help. Legal niceties are all but ignored, and all too often the discussion takes place in a sort of vacuum where states are the only actors and are thought to operate rationally on the basis of some undefined national interest.

4.

The surprising thing is that throughout recent history, international lawyers have hardly looked at jurisprudence for guidance on sources. International lawyers tend to address jurisprudence only in passing, or in a way which suggests that it came to them as an afterthought, rather than something central to their studies. Or if they pay attention to jurisprudence, they do so only perfunctorily: there may be the compulsory reference to Hart or Kelsen (see for example Danilenko 1994), or to vague notions of natural law, typically dictated by what the author deems necessary for the survival of mankind (see for example Charney 1993 and Tomuschat 1999), but no in-depth engagement.²⁰

Moreover, to the limited extent that authors known for their work in jurisprudence or even political theory have taken on international law, the results have not always been very encouraging. Austin’s early positivism forced him to hold that international law, not springing from a single sovereign source, could not properly be considered law to begin with; at best, it was to be regarded as ‘positive morality’ (see Austin 1995). Kelsen’s pure theory led him to conceptualize the

²⁰ A partial exception is van Hoof 1983, who does take Hart seriously but ultimately presents a theory considering as law things that have manifestly been consented to in one way or another which takes Hart’s internal perspective insufficiently into account.

international legal order as a single legal order whose organs would be states. Thus, on this notion, a state engaging in self-defense would do so exercising a power delegated by the international legal order. Whatever the attractions of this view (and there might be more than is often realized), it is not easy to reconcile with the starting point of state sovereignty. Hart, by contrast, famously devoted an entire chapter of his *The Concept of Law* to international law, but in doing so may not have convinced traditional international lawyers that international law lacked a rule of recognition.

There are, admittedly, some initially appealing reasons for not looking too closely at jurisprudence. Much jurisprudence works on the assumption that law exists in a vacuum, the vacuum of a single and highly developed legal order – typically that of a western developed state. Much analytical jurisprudence, moreover, is concerned with the properties of rules, devoting quite a bit of energy to figuring out what a rule is, and how a rule works. This seems, at first sight, to have fairly little relevance for the rough-and-tumble world of international law. Likewise, much US-based jurisprudence is concerned with the role of courts and judges,²¹ and while this body of work could yield useful insights on topics such as judicial review²² in international law (where it is sadly often ignored as well), it has little to say about sources.

The remainder of this paper will be devoted to exploring the work of the Harvard legal theorist Lon Fuller and its possible relevance for a constitutionalist sources doctrine. Fuller is possibly best known for two reasons: his pioneering work in bringing law and economics together, and his classic debate with H.L.A. Hart on the role of morality in law. In a nutshell, whereas Hart was willing to recognize that morality has a role in law, he would not insist in law being morally commendable: a morally repugnant law could still be considered law. Fuller, on the other hand, argued that a morally repugnant law should not be considered law. What makes Fuller's work so interesting is that he did not come at this via the classic natural law route: his is not an argument that insists that law, however made, will have to conform to basic moral precepts in order to deserve to be called law, and therewith

²¹ This applies obviously to much of the work of Ronald Dworkin, best known perhaps for his creation of a Herculean judge able to find the right answer to all legal questions. See Dworkin 1977, and Dworkin 1986. It also applies to much other work. Burton 1992 stands as a fairly typical example. For a memorable critique, see Hart 1983a.

²² Important contributions would include Ely 1980 and Kennedy 1997.

deserve to be followed. Instead, Fuller approached things not in terms of the substance of the law, but, precisely, in terms of how the law would come about.²³

5.

In what is most likely his most famous work, *The Morality of Law*, published first in 1964, Fuller posited the tantalizing proposition that law is unlikely, indeed highly unlikely, to be morally repugnant if the law-making process adheres to a number of basic procedural propositions. Somewhat tongue in cheek perhaps, he referred to this as ‘procedural natural law’. The intriguing aspect then is that he need not insist on importing moral standards into substantive law, a feat that is difficult to achieve in any less than fully homogenous society, and may be next to impossible on a global scale. Instead, he insisted that if a number of more or less procedural or formal requirements were to be respected by the law-makers, there would be a great chance that the resulting law, while maybe not to everyone’s liking, would at least be morally acceptable.

Like so many other works in jurisprudence, *The Morality of Law* too assumes a kind of legal vacuum: it is set in a single society, governed by a benign dictator playfully referred to as Rex. As a result, it is not immediately possible to simply transpose Fuller’s procedural natural law requirements to the international level, but it may just be possible to pick up a few useful suggestions.

One of the things that makes Fuller so interesting, and potentially rewarding for the international lawyer, is that even though he wrote mostly about a generalized domestic legal system, he was keenly aware of the relevance of law not solely being made by authorities, but between the subjects of the law. He referred to this as implicit law, which is most easily recognizable to us in the form of customary law, but would also encompass spontaneous law: phenomena such as *lex*

²³ Note, though, that Fuller’s work is not about participation, deliberative democracy, or Habermasian discourses. For him, procedure referred more to the technical side of things, and he would possibly allow for benign dictatorship, precisely in order to escape any need to focus on substance. What mattered to Fuller was that the way in which law would be made would exclude nastiness, but it might be possible to reconcile his canons with law-making by a single legislator; indeed, his own example involved a single legislator. Perhaps (this is speculation) the example of Nazi Germany from which he drew so much inspiration had diminished his faith in democracy at least to the extent that he could not regard it as a solid defense against impervious law: democracies too can create nasty law if they neglect the law’s inner morality.

mercatoria. It is even plausible that he went so far as to suggest that law could only be called law if it would remain in congruence with its social substratum (but without lapsing into descriptive sociology).²⁴

While his ‘canons’²⁵ are presented as relating foremost to legislation, there seems to be no particular reason to limit them as applicable to legislation only – and indeed doing so would make them less useful for international law. If it sounds, at first blush, counterintuitive in a domestic setting to apply Fuller’s requirements to contracts, it is because contracts rarely demand the impossible, pose contradictory requirements, or are retrospective. Clearly, though, in international law such phenomena are normal and to be expected, as the very popularity of discussions on fragmentation and treaty conflict suggests. Moreover, the multilateral law-making process is not so far removed from domestic law-making as to make a Fullerian analysis a futile exercise already at the outset (at least colloquially multilateral law-making is often enough referred to as legislation), and the recent activities of the Security Council may suggest that legislation and international law are no longer complete strangers either.²⁶

In addition, it is worth noting that Fuller himself did not see a fundamental distinction between legislation on the one hand, and other law-making devices (custom and contract, especially) on the other hand, given for instance his repeated insistence that legislation involved some form of reciprocity between law-maker and subject. He seemed to decline the view of legislation as predominantly an exercise of authority; instead, it represented merely a further point on the continuum of law as a social ordering process.²⁷

Fuller identified eight general procedural requirements which, to his mind, law ought to meet if it were properly to be called law. These can sound trivial in a domestic setting, but might be less trivial in international affairs. For instance, law must be publicized: if law remains secret, then one cannot expect the subjects of the

²⁴ Useful on this point is Postema 1994.

²⁵ The term is used by Kenneth Winston in his introduction to Fuller’s posthumously published papers. See Fuller 1981a.

²⁶ It is no coincidence that a recent study of Security Council sanctions aims to apply a rule of law framework to them. See Farrall 2007.

²⁷ It is no accident that he discusses the notion of reciprocity at length in the opening chapter of *The Morality of Law*. See Fuller 1969, 19–27. Without focusing on this precise point, Schauer too notes that there appears to be a certain unity about Fuller’s work: in other words, his work on legislation cannot be seen in isolation from his other work. See Schauer 1999.

law to behave in accordance with it other than by sheer coincidence. By the same token, law ought to be, as a general rule, prospective rather than retrospective: people cannot be expected to behave today in accordance with norms that will only enter into force in the future. While on limited occasions justice could be served by allowing for law's retroactive effect, the general admonition is clear: law shall not be retrospective. In addition to these, he formulated six more general requirements: law needs rules (it cannot function on a case-by-case basis²⁸); the rules should be reasonably clear; the rules should not contradict each other unduly; they should not ask for the impossible (surely, one should not be fined for being unable to levitate above the sidewalk); they should remain fairly constant over time (change is fine, but not from day to day since law must assist people in long-term planning of their affairs); and there should be some congruence between declared rules and official action.

Surely it was no coincidence that at some point Fuller referred to these requirements as 'procedural natural justice': his main ambition seems to have been twofold. First, to bridge the gap, often thought unbridgeable, between the considerations of natural law and positive law: never shall the two meet, perhaps, except through a procedural approach.²⁹ Second, to connect law and morality, not, as so often, by insisting on the moral contents of the law in a direct manner, but rather by claiming that taking these eight requirements into account would render arbitrariness well-nigh impossible. If the hallmark of despotism and repugnant law is precisely arbitrariness, it would seem to follow that Fuller's internal morality of the law puts a stop to immoral law. Or rather, the chances of anything grossly immoral yet scoring well on Fuller's requirements would be low: it is almost unthinkable to have Rex, Fuller's ubiquitous king, govern despotically if he has to make sure that his decrees do not contradict each other, do not ask the impossible, are not retrospective, are publicized, are not too contradictory, are reasonably clear, remain fairly constant over time, and meet with general official implementation.

Fuller's views on the inner morality of the law have received plenty of criticism, much of it to the effect that what Fuller prescribes is said to have little to do with justice but rather more with efficiency. From the point of view of the legislator, so the critique goes, Fuller's list is merely for guaranteeing law's effectiveness. Adherence to the eight requirements will ensure that law can be

²⁸ The common law is no exception of course: the difference being that its rules are created by the courts, setting binding precedents.

²⁹ A similar thought underlies Ely 1980. For a vigorous critique, see Tribe 1980.

effective, that it can reach the outcomes the legislator had in mind, but it says little about morality or justice. Just like a carpenter can use his skills to make torture racks or hospital beds (this is Hart's simile, see Hart 1983b), or as a sharp knife may be used for murder as well as life-saving surgery,³⁰ so too Fuller's inner morality is, as it were, morally neutral: it can also give rise to bad law. There is nothing preventing an ill-intentioned legislator from taking Fuller's requirements and putting them in the service of evil.

To this critique, there are two replies. The first is that generally speaking, it is highly unlikely that the list will be used for evil purposes, precisely because it is meant to stamp out arbitrariness. The legislator who is forced to publish his laws, make them prospective, et cetera, cannot just do as he pleases. It is surely no accident that Fuller titled his *desiderata* 'Eight Ways to Fail to Make Law':³¹ Transgressing the *desiderata* would simply not result in anything recognizable as law. While theoretically the critics have a point, in practice, so the counter-argument would go, their point is about as strong as a snowball in hell: it is unlikely to appear.

Yet, because this is of course impossible to prove or disprove in any meaningful way, Fuller's own response is both more principled and more complicated. Making a distinction between managerial direction and law properly speaking, Fuller suggests that

the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing. (Fuller 1969, 209–210.)

Elucidating a point made by Hart, he ends up concluding in a lengthy footnote that the 'crucial point' in distinguishing law and managerial direction 'lies in a commitment by the legal authority to abide by its own announced rules in judging the actions of the legal subject' (see Fuller 1969, 215–216, note 29). Here then, almost unnoticeably, the emphasis shifts from the list of the eight requirements to the final requirement: the congruence between what the law says and what officials

³⁰ The sharp knife analogy is based on Raz 1979b. Incidentally, Raz basically agrees with Fuller, except on the point of conflict within legal systems. Raz's own list of requirements relating to the Rule of Law is not dissimilar to Fuller's, although Raz pays more attention to institutional back-up by emphasizing the role of courts.

³¹ Fuller 1969, 33. A few pages later he specified that failure to live up to his list would amount to 'eight distinct routes to disaster' (*ibid.*, 39).

do. Therewith, Fuller's requirements transform from an instrumental set of guidelines at the service of the legislator to something more akin to the rule of law: those officials will have to be able to provide justifications for acting contrary to what the law provides (see also Allan 2003).

This raises the obvious question as to the continued relevance of the remaining seven requirements. There is an understandable temptation to discard these: they can be seen to have become irrelevant. Still, this would be too hasty a conclusion, for without them, arbitrariness might return.³² As Fuller explains, the eight requirements are interdependent in that law by definition ought to be general: mere congruence alone would become difficult to defend if, say, a legislator could enact a law stating that tomorrow Mr Jones will be imprisoned for something he did five years ago while it was legal to do so, and then have the officials faithfully give effect to such a law (see Fuller 1969, 209–210).

6.

At this point, it becomes relevant to see what Fuller could possibly mean with respect to international law, in particular regarding sources doctrine. The main lesson, to my mind, is this: Fuller's inner morality suggests that it may be possible to have morally responsible and responsive law without having to rely on values. Fuller does not provide us with a full-fledged sources doctrine; he is too unconcerned with questions of legal validity to be of much use here. As Joseph Raz has remarked, Fuller seems to treat most rules as being similar in their effects, refusing to make sharp distinctions between law, morality, and other possible normative orders.³³ He eventually makes a distinction between law and managerial direction, but this distinction, as discussed above, is functional rather than principled: it owes nothing to the source of the command, but instead is related to the command's generality.

³² This reading is confirmed by MacCormick, pointing out that 'laws exhibiting the other seven characteristics would necessarily limit the scope for official arbitrariness.' See MacCormick 1999, 45.

³³ See Raz 1994, 196–197, footnote 4, stating that Fuller 'is totally uninterested in the special features of legal systems. His theory is best seen as an inquiry into some putative features of practical laws generally, whether legal or not.' Hart made much the same observation in his review of *The Morality of Law*. See Hart 1983b, esp. 343–344. Fuller would defend his broad conception in Fuller 1981a.

What Fuller does suggest though, is that it might be possible to think of general law, universally shared and morally acceptable, without having to base this directly on values or a similar conception. If the problem with substantive values is typically that they are rarely shared universally (not so much because cultures differ,³⁴ but rather because people are bound to have different opinions), then an appeal to such substantive values does not and cannot provide a solid basis for founding general international law.

To get to this point, however, two steps must be taken. First, much of what Fuller says depends on his conception of what law is – if one does not share his conception of law, then arguably it will also become difficult to share his further thoughts. Second, there is the matter of Fuller’s particular perspective, which is very much a perspective internal to the legal profession.

Fuller’s conception of law comes very close to Oakeshott’s ideas about the modern state. For Oakeshott (writing after Fuller and, it seems, not familiar with Fuller’s work), the modern state relieves the tension between two forms of political association: purposive and non-purposive.³⁵ In the purposive form (*universitas*, in Oakeshott’s terminology), associations are thought to strive towards a higher goal: for a football club, it may be winning the league; for a company, it may be maximizing profit. By contrast, non-purposive associations (what Oakeshott referred to as *societas*) are far less ambitious, merely content with living together and being held together, typically, by a set of rules on how the various members should interact, but nothing more demanding than that. Fuller’s conception of law comes close to Oakeshott’s idea of *societas*: ‘law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as guardian of the integrity of this system’ (Fuller 1969, 210). Indeed, Oakeshott proposed a fairly similar, almost value-neutral, conception of the rule of law in his classic essay on the topic: ‘[...] the only “justice” the rule of law can accommodate is faithfulness to the formal principles inherent in the character of *lex*: non-

³⁴ The homogeneity of cultures tends to be exaggerated. On this, see Rosen 2006.

³⁵ See Oakeshott 1975. Fuller himself made a remarkably similar distinction between two principles of association: the principle of shared commitment, and ‘the legal principle’. See Fuller 1981b, 67–85. I have explored Oakeshott’s distinction with respect to international organizations in Klabbers 2005c.

instrumentality, indifference to persons and interests, the exclusion of *prive-lege* (sic) and outlawry, and so on' (see Oakeshott 1999, 173).

This presupposes, quite obviously, that the citizenry is capable of acting independently and freely, and therewith puts a premium on such things as liberty and independence.³⁶ Yet, it does so without turning these into absolutes: while Fuller's conception is not completely value-neutral, to him substantive values represent a negative set of parameters, so to speak: as long as law avoids certain pitfalls, everything goes. And law will avoid these pitfalls as long as the eight procedural, non-objectionable requirements are followed. This is rather different from the typical resort to values in today's international legal discussion, which tends to posit positive parameters. Law is thought to contain certain absolute prohibitions as well as (increasingly, so it seems) certain fairly absolute commands: install human rights (civil and political rights, at any rate), install democracy, install a market economy. Fuller's, by contrast, is negative, seeing the law more as boundaries within which citizens can freely operate and do as they see fit.³⁷

While an obvious point of critique with respect to western societies is that typically, they have moved beyond *societas* and also comprise some conception of the common good (be it the welfare state, the liberal market-oriented economy or even the rights republic),³⁸ the same critique does not immediately apply to international society, such as it is. Attempts to posit a conception of the common good for international society tend to be wishful and straining a bit, no matter how intelligently done. Such attempts have a hard time coming to terms with the political division of the world, with its approximately 200 independent and sovereign entities.³⁹ At the very least then, Fuller's conception of law as facilitative rather than anything else, as allowing 'self-directed action',⁴⁰ would seem recognizable to today's international lawyer.

³⁶ For that reason, Fuller is often treated in the same breath as someone like Hayek: see, e.g., Allan 2003 and Raz 1979b. See above all also Hayek 2001. Witteveen robustly claims that Fuller's 'clearly is a liberal political theory'. See Witteveen 1999, 323.

³⁷ He did, to be sure, reach 'the somewhat startling conclusion that it is only under capitalism that the notion of the moral and legal duty can reach its full development.' See Fuller 1969, 24.

³⁸ See on this point Barber 1988, 169.

³⁹ Recent attempts include Kuper 2004, Caney 2005, and Dryzek 2006.

⁴⁰ The term is Fuller's. See Fuller 1969, 210.

The second relevant point resides in Fuller's perspective, which is very much that of a lawyer. The critique of instrumentalism, allowing an evil legislator to come up with efficient laws by following the eight requirements, is plausible when read from outside the legal profession: for the non-lawyer this may seem as yet another ploy to smoothen governance, regardless of its contents. Yet, it has been argued with great force that Fuller, when writing, most assuredly had the legal profession in mind: he was not interested in telling people how great law was to begin with, but rather in telling lawyers (including students, obviously) how to achieve decent law (see in particular Schauer 1994). The difference is substantial, as it implies that the choice of how to use law has already been made. To refer back to the earlier simile proposed by Hart (according to which the carpenter can use his skills to make torture racks as well as hospital beds), Fuller's work implies that the carpenter had already chosen to make hospital beds; the next step would be how to make a great hospital bed. In other words: Fuller's system stands or falls by accepting that the substance of law needs to be somehow decent, and his requirements are a method of getting there.⁴¹

Again, then, Fuller is not entirely value neutral, but it is important to realize that his resort to values is minimal, it is thin rather than thick. He does not propose to carve regular elections in stone, or outlaw torture, or install a market economy, although he would probably, as a citizen, endorse all three. What he does propose is that law-making should take place following certain minimum baselines, as doing so would at the very least render the chances of law's substance being odious fairly negligible.

7.

What lessons can we draw then from this overview of Fuller? Arguably, as already noted, it does not amount to a full-fledged sources theory. It pays no attention to the formal validity of law (and his requirements are not presented as validity conditions, to be sure), yet it is precisely such a concern with formal validity that is

⁴¹ Arguably, indeed, this is the only way in which Fuller makes sense; mere instrumentalism on his part would not befit his intentions (we may presume), and possibly even make things worse. As Tamanaha points out, to give the label 'law' to pernicious rules might make the system more evil than it would be without the label. Tamanaha, incidentally, treats Fuller as a purely formal legalist, and dismisses him without paying attention to Fuller's perspective. See Tamanaha 2004, 94–95.

necessary to separate law from other normative commands, be it Hart's gunman, be it morality or religion, be it managerial direction. By the same token, Fuller has fairly little to say about things such as who should participate in law-making, or whether or not laws should be democratically made.

What Fuller does teach us, though, is still quite relevant. For one thing, treaty-makers and other legislators or would-be legislators (the Security Council comes to mind) would be well-advised to publicize their results. This is hardly a novel insight of course (it formed already a part of Woodrow Wilson's plea for open covenants, openly arrived at, and found recognition in both the League Covenant and the UN Charter), but well worth repeating in the age of shady 'diplomatic assurances', agreements emerging from amorphous networks of civil servants without public or parliamentary control, or guidelines for blacklisting individuals in the form of so-called non-papers.

By the same token, the lack of publicity surrounding many deals made out of the public view may well lead to conflicting norms, telling people to do both A and non-A simultaneously. Hence, there might be merit in not doing things quickly and in secret; while secrecy and swiftness may appear effective, they are also likely to result in conflicting norms, given that the various branches of bureaucracies are unaware of what their colleagues are doing.

Quickly shifting political perceptions may lead to quickly changing ideas as to what the law ought to be or even – as in cases of torture, treatment of prisoners, or the right to self-defense – as to what the law is. Today's end is often seen to justify today's means, and if there is a different end tomorrow, then different means will be employed, i.e. the content of today's rules will be said to have changed. The task of the lawyer, so Fuller suggests, is not to take this lying down, let alone to justify rapid change. While change as such is fine (and inevitable at any rate), change at a rapid pace can only lead to arbitrariness. The responsible treaty-maker, or law-maker in general, will resist the urge to live solely from day to day and to be inspired solely by the needs (and the madness) of the day.

So too should treaty-makers and quasi-legislators withstand the urge to make retrospective law. While typically this is one point where international law scores reasonably well, there is always the temptation to jeopardize the *nullum crimen* idea in order to address evil. Perhaps Michael Akehurst best captured the general spirit

when proclaiming that those who thought there would be something wrong with Nuremberg's retroactivity had a rather peculiar sense of morality.⁴²

Another lesson to be learned from Fuller is that it might be useful to have fairly clear rules. While complete clarity is an illusion (the nature of language is such that there will always be communicative distortions), surely the idea, popular among international lawyers, of hiding disagreement behind 'constructive ambiguity' is fairly pointless, and in the end only allows the powerful to run away with the vague terms and dictate their contents. Likewise, rules demanding the impossible may well be counterproductive. While direct equivalents are difficult to find in international law, many states adhere to international environmental treaties without having the technical ability to comply, which then in turn leads to various compliance issues. Again, one may wonder what is the point of this kind of commitment, other than an expression of aspiration.

8.

Sources doctrine seems to be a never-ending discussion, and for a good reason. The litigant who can point to a provision in a valid treaty has a powerful legal argument at her disposal; the state that can claim a generally accepted rule of custom in support of its actions has, likewise, a strong legal argument to continue doing what it does. It is no coincidence that activist groups do their utmost to present their *desiderata* as being supported by binding legal rules, and that much political debate is, eventually, about the law – either about what it says, or about what it should say. Sources doctrine, in other words, is the point where law and politics meet, and as a result, Sir Robert Jennings' classic question, 'What is international law and how do we tell it when we see it?' loses nothing of its urgency (see Jennings 1981).

Precisely because there is so much at stake, international law is in dire need of a decent sources theory. Theories about interpretation or treaty conflict may offer stop-gap solutions for a while, but cannot completely do the trick precisely because they presuppose the existence of generally accepted sources, as does much of the constitutionalism debate. Nor is it a coincidence that all three, in their own ways, resort to substance. Typically, the interpretation debate is about whether some sets of rules warrant different interpretation than others because of their substance. The

⁴² '[...] anyone who thinks that justice demanded the acquittal of the men convicted at Nuremberg has a very peculiar idea of justice.' See Akehurst 1986, 280.

treaty conflict debate is about whether some sets of rules are hierarchically superior because of their substance, and the constitutionalism debate taps directly into substance by suggesting that law and values are really the same thing.

What is lacking, however, is the formal element, and recent attempts to reinvigorate sources theory (Alvarez' normative ripples, the rational choice approach of Goldsmith and Posner) do nothing to fill that gap. The present paper looks towards the work of Lon Fuller, in particular his 'procedural natural justice', in the hope that this would be of some help. After all, Fuller's requirements are all more or less of a procedural nature, which helps raise the expectation that they might be of use in coming to terms with formal validity.

In a sense then, the outcome is disappointing. Fuller's *desiderata* would seem to be of little help when it comes to the formal validity of international law. Indeed, his requirements presuppose formal validity; what they test is, yet again, substantive validity, in that laws that do not meet his requirements do not deserve to be called 'law'.

Still, Fuller's list is useful, largely for two reasons. First, the list makes it possible to address substantive validity without invoking universal values. Precisely by concentrating on formal characteristics, he manages deftly to circumvent the need for universal moral agreement underlying legal rules. In a pluralist world, where people are bound to disagree and political cleavages can run deep, this is very useful in its own right. Second, his requirements offer a standard against which some of today's law-making can be tested, and found wanting. Whether it be standard-setting in informal networks of governors or law-making by the Security Council, Fuller provides a vocabulary to help reflect on these matters, and suggests that much of it is difficult to reconcile with even a minimalist version of the rule of law.⁴³ In this sense, Fuller is surely of some help in the constitutionalization of international law.

9.

Throughout this paper, I have assumed that law needs to meet with some formal criterion of validity in order to be accepted as law. This was the reason to discard the theories of both Alvarez and Goldsmith and Posner as flawed, and this has also

⁴³ Essentially the same point is made (without relying too much on Fuller) by Farrall 2007.

been the main reason for discarding Fuller's contribution. Whatever its merits, it cannot qualify as a full-fledged theory of sources precisely because it lacks a *Grundnorm*, a rule of recognition, or some similar criterion for establishing law's formal validity, and therewith distinguishing it from other, non-legal, systems of norms. As Raz explains, the importance of a formal criterion resides in the circumstance that 'it alone can guarantee that the content of law can be determined in an objective and value-neutral way' (see Raz 1979a, 152).

Fuller, as noted, did not care much about formal validity or, more accurately, did not care much for distinctions between law and other systems of norms. He was happy to define law broadly so as to encompass also the internal rules of universities (and there are a lot of internal rules in universities these days), sports clubs, churches and professional associations. And indeed, to a large extent, insistence on a formal criterion of validity is largely a positivist invention. It is no coincidence that notions such as the *Grundnorm* or the rule of recognition are immediately identified with the two leading twentieth century positivists: Hans Kelsen and H.L.A. Hart, respectively. While it may then be reasonably fair to criticize those working by and large in a positivist tradition (such as Alvarez, or Goldsmith and Posner) for ignoring formal validity, the question arises whether it is also reasonable to chide Fuller as well, although emphatically not following in positivist footsteps, for ignoring formal validity.

Frederick Schauer suggests, in a quite brilliant essay (see Schauer 1999), that Fuller's ontological commitment to natural law may have been fairly thin. Fuller saw law more as a mechanism for social ordering than as a lofty, high-minded phenomenon in its own right. In other words, while he may have preferred law to live up to naturalist standards, he by and large accepted the view of law as a social construction, made to serve certain purposes other than, or in addition to, the service of high moral ends. As a result, it becomes plausible to regard Fuller's eight requirements as not only laying down a substantive set of criteria for the validity of law, but simultaneously embodying also a formal criterion: law that did not meet the eight requirements, at least to some extent, would simply not be law. Admittedly, Fuller's requirements are not highly selective as a formal matter and do little to help distinguish between purely moral and purely legal injunctions (if these exist in pure forms to begin with), but this is only consistent with his broad conception of law. As Schauer puts it, involving yet another analogy, Fuller could still, with his canons, insist that a soft rubber screwdriver is not really a screwdriver, as it would be incapable of doing its job of driving screws, regardless of its designation and exterior appearance (Schauer 1999, 140).

If this view is correct, then it might be possible, after all, to regard Fuller's work as something approaching a full-fledged sources theory, combining formal and substantive criteria for the identification of legal rules. The price to pay (if there is one), is that Fuller's requirements are compatible with a wide range of sources, and may ultimately see law and morality collapse into each other. But that, in turn, may be precisely what international law is in need of, judging by the clever justifications of torture, refusal of *habeas corpus*, renditions, and the like in today's international law.⁴⁴ Perhaps in a world where many would agree that law is made through unaccountable networks of civil servants; by private agencies; through spontaneous formation and fomenting; by semi-public bodies; or through self-regulating companies, Fuller's work would carry unexpected normative force. It may be the case that, with respect to domestic societies, Fuller has been, as the quip goes, deservedly forgotten (although this would probably be too hasty a judgment, as T.R.S. Allan has suggested, see Allan 2003), but he does offer some food for thought for the international lawyer.

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⁴⁴ While sometimes bordering on the sanctimonious, the most lucid discussions I am aware of are contained in Sands 2005.

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