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CHAPTER 8

THE SOURCES OF INTERNATIONAL LAW: SOME PHILOSOPHICAL REFLECTIONS

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I. INTRODUCTION

It seems only natural to begin the study of international law with a description of its sources. After all, whether as practitioner or scholar a person cannot begin to ask or answer questions about international law until he or she has some sense of what the law is. This requires in turn a basic grasp of the processes whereby international legal norms and regimes come to exist. Thus students of international law must engage immediately with some of the most basic questions in the philosophy of law: what is law, and what is a legal order or system.[1]

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[1] Perhaps the second most common approach to the study of international law begins with the concept of obligation; see e.g. Bederman, D. J., *The Spirit of International Law* (Athens, Ga.: University of Georgia Press, 2002). However, this approach also leads quickly to the question 'what is law?' since a primary reason for adopting it is to address immediately scepticism regarding international law's status as genuine law, which frequently has its roots in a (perhaps implicitly held) command theory of law.

These questions frame much of Professor Besson's excellent discussion of the sources of international law.[2] In this essay I seek to build upon a number of Besson's arguments regarding the nature of law and legal order, and her use of those arguments to describe and evaluate both existing and possible though currently non-existent sources of international law. Occasionally I argue at length in support of a particular conclusion, but more often I aim simply to indicate avenues for future research and debate. As will become clear, many theoretical questions regarding the sources of international law remain in need of further exploration.

II. The Nature of Law and the Sources of International Law

1. Conditions for International Legal Validity: Social Facts and Morality

Most contemporary philosophers of law agree that the normativity characteristic of law and legal order is that of practical authority: law necessarily claims a right to rule its subjects, to which correlates a duty on their part to obey the law. They disagree, however, about the implications this analysis of law's normativity has for the sources of law, and in particular, whether it entails that correctness as a moral principle, or at least consistency with certain moral principles, can or must serve as a condition for legal validity.

Joseph Raz argues that law can function as a practical authority only if those it addresses are able to identify the existence and content of legal norms solely by appeal to social facts, such as the signature and ratification of a treaty. This is so, Raz maintains, because law's claim to legitimate authority rests on its ability to mediate between its subjects and the reasons that apply to them. Law enjoys legitimacy only when it serves those it addresses by improving their conformity to right reason. Yet law cannot possibly serve this function if in order to determine its existence and content, law's subjects must first exercise the very moral judgment for which legitimate law is meant to substitute. Thus Raz concludes that it follows from the very nature of law that morality cannot serve as a condition for legal validity.[3]

Similarly, Scott Shapiro argues that rules, including legal rules, can make a practical difference to an agent's deliberation only if his conduct might diverge from that required by the rule in counterfactual circumstances in which the agent does

[2] Besson, S., 'Theorizing the Sources of International Law', Chapter 7 in this volume.

[3] See Raz, J., *The Morality of Freedom* (Oxford: Clarendon Press, 1986) and Raz, J., 'The Problem of Authority: Revisiting the Service Conception', *Minnesota Law Review*, 90 (2006), 1003.

not seek to guide his conduct by following it.[4] Assume for the sake of argument that all agents have a moral obligation to take no more than their fair share of the oceans' fish. With respect to an agent's deliberation, the addition of a legal obligation to do so adds nothing to the existing moral obligation. Obedience to this law will not make an agent any more likely to act as he has most reason to act, namely by taking no more than his fair share of the oceans' fish. Nor is there any situation in which the agent's attempt to act on his own judgment rather than the law's will lead him to act differently than if he sought to obey the law.

Contemporary legal philosophers refer to the view that the existence and content of law must be identifiable without recourse to moral argumentation as Exclusive Legal Positivism. If true, it implies that where international law references morality (as, at least apparently, do many of the norms that constitute International Human Rights and International Humanitarian Law), and where there are few or no social facts that stipulate how those moral norms are to be understood in the law (such as verdicts in previous cases or widely endorsed memoranda of understanding), legal officials will frequently create law when they act on these norms. For example, given the paucity of social facts pertaining to the content of human rights norms, at least at the international level, courts and tribunals called upon to decide cases under such norms are almost certainly engaged in an activity that is far more legislative than it is adjudicative. Thus Exclusive Legal Positivism provides a theoretical argument, grounded in an analysis of the very nature of law, for the conclusion that international courts and tribunals are a source of international law.

The claim that morality can provide neither a necessary nor a sufficient condition for legal validity has not gone unchallenged even among legal positivists. Inclusive Legal Positivists argue that consistency with, or correctness as, a moral principle is a possible but not a necessary condition for legal validity.[5] Whether it actually plays this role in a given legal order depends on the specifics of the rule of recognition to which officials of that order adhere.[6] Elsewhere I suggest that a case for the legal validity of (certain) human rights norms can be made by reconceiving in Inclusive Legal Positivist terms Simma and Alston's well-known attempt to ground the legality of such norms in general principles of law.[7] Arguably, the claim that correctness as a moral principle currently provides a sufficient condition for the legal validity of certain human rights norms better accounts for claims made in a number of opinions issued by the ICJ—such as its appeal to elementary considerations of

[4] Shapiro, S. J., 'On Hart's Way Out', *Legal Theory*, 4/4 (1998), 469–507.

[5] Waluchow, W. J., *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994); Coleman, J., *The Practice of Principle* (Oxford: Clarendon Press, 2001). H. L. A. Hart also endorsed Inclusive Legal Positivism; see the postscript to Hart, H. L. A., *The Concept of Law* (2nd edn., Oxford: Clarendon Press, 1994).

[6] See section III below for a detailed discussion of the idea of a rule of recognition.

[7] Lefkowitz, D., and Kassner, J., 'Inclusive Legal Positivism, International Law, and Human Rights', manuscript on file with authors; Simma, B. and Alston, P., 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', *Australian Year Book of International Law*, 12 (1992), 82.

humanity in *Corfu Channel* and to the principles and rules concerning the basic rights of the human person in *Barcelona Traction*—than do alternative explanations drawing on custom or general principles of law. Yet such an approach remains committed to the view (emphasized by Simma and Alston) that international legal validity rests ultimately on a consensus regarding what counts as a source of law, and so what counts as law. Moreover, because it maintains that morality is a possible but not a necessary condition for legality, this approach is consistent with the fact that international legal officials have treated correctness as a moral principle as a sufficient condition for legality during certain historical periods but not others.

Of course, there is a long tradition in both legal philosophy and practice of arguing that agreement with (certain) dictates of morality necessarily provides a condition for the validity of any legal norm, including international ones. For example, Mortimer Sellers, a leading proponent of Republican Legal Theory, argues that 'moral justification is an inescapable element of legal validity in any conscientious, justified, or legitimate system of law', and that international lawyers 'seeking objective standards [for what the law is] must look first to popular sovereignty [i.e. democratically enacted law] . . . [and second] to fundamental principles: does the law serve justice, the common welfare, and basic human rights?'[8] Similarly, John Tasioulas employs a Dworkinian interpretive approach, with its roots in the Common Law tradition, to defend an account of customary international law according to which the best interpretation of state practice and *opinio juris* is partly a matter of which interpretation has the 'greatest ethical appeal . . . determined by reference to the ethical values it [international law] is intended to secure . . . [which] include peaceful co-existence, human rights, [and] environmental values, among others'.[9] In contrast to Exclusive Legal Positivism (and possibly, though not necessarily, Inclusive Legal Positivism), these approaches to adjudication imply that when judges or arbitrators rely upon moral arguments to reach their decisions they do not create new law, but merely apply or interpret legal norms that are valid (partly) in virtue of their agreement with true moral principles. The Common Law tradition also provides the background against which David Dyzenhaus critically evaluates the sources of international law, as he appeals to that tradition's substantive (i.e. morally laden) conception of the rule of law to challenge the legal validity of certain putative exercises of international legal authority by the UN Security Council (as well as the positivist account of the nature of law according to which the products of such acts are legally valid, though perhaps illegitimate).[10]

[8] Sellers, M. N. S., *Republican Legal Theory* (New York: Palgrave-Macmillan, 2003), 135; Sellers, M. N. S., *Republican Principles in International Law* (New York: Palgrave-Mcmillan, 2006), 25.

[9] Tasioulas, J., 'Customary International Law and the Quest for Global Justice', in Perreau-Saussine, A. and Murphy, J. B. (eds.), *The Nature of Customary Law* (Cambridge: Cambridge University Press, 2007), 307.

[10] Dyzenhaus, D., 'The Rule of (Administrative) Law in International Law', *Law and Contemporary Problems*, 68 (2005), 129–30.

Interestingly, the conceptions of law that during the past several decades have figured most prominently in (Anglo-American) analytical legal philosophers' debates over the nature of law have barely made an appearance (at least explicitly) in discussions regarding the nature and sources of international law. As the foregoing discussion illustrates, however, that is beginning to change, and it is likely that Exclusive Legal Positivism, Dworkinian Interpretivism, and the rest will soon join other modern theories of the nature and sources of international law, such as Feminist Jurisprudence and Critical Legal Studies, alongside the more traditional Hobbesian, Groatian, and Kantian accounts.

2. Legitimacy and the Sources of International Law

a. The Instrumental Justification for International Law's Legitimacy

Though the law necessarily claims authority over its subjects, it may not always enjoy it. Rather, law succeeds in providing its subjects with authoritative reasons for action only when its claim to authority is morally justifiable, or legitimate. Thus an analysis of law's legitimacy requires an account of the conditions under which some or all of those the law addresses have a duty to obey it, as well as an explanation of why it is they have such a duty when those conditions obtain.

Raz argues that the law's claim to practical authority over its subjects is justified if and only if the following two conditions are met. First, they are more likely to act on the balance of undefeated reasons that apply to them if they intend to obey the law than by pursuing any other strategy, such as attempting to determine for themselves what they have most reason to do, or obeying a different putative authority. Second, the domain of conduct the authority addresses is not one where it is more important that agents act on their own judgment than that they act as they have most reason to act.[11] Raz's justification for obedience to law is instrumental; under the conditions it describes law serves as a means to the end of rational action. The service conception of practical authority, as Raz calls it, provides an account of the rationality of obedience to law; however, it entails a *moral* duty to obey the law in those cases where the reasons an agent will do better at acting on by obeying the law are moral ones. In these cases, the 'ought' in the claim 'she ought to obey the law' is a moral one because the underlying reasons are moral.

From the standpoint of demonstrating the legitimacy of at least some existing international legal norms, several features of Raz's instrumental justification for law's claim to authority make it especially attractive.[12] First, it does not require

[11] Raz, J., *The Morality of Freedom* (above, n. 3); Raz, J., 'Problem of Authority' (above, n. 3).

[12] Note that while its attractiveness from this standpoint may make a small contribution to its persuasiveness, the core argument for the service conception of practical authority rests on its place in the broader theory of reasons, value, and autonomy that Raz defends.

that those the law addresses consent to its authority. Thus it explains why an international actor (henceforth, IA) may have a duty to obey certain international legal norms even if they predate the IA's existence, or even if the IA's agreement to be bound by those norms did not meet the conditions for genuine consent. Second, the service conception of law's authority does not require that the procedure whereby international law is created be fair and/or impartial. It is at least possible that an unfair procedure—for example, one in which a few powerful IAs do most of the work crafting new laws, while weaker IAs are left to take it or leave it—results in legal norms that meet Raz's conditions for legitimacy. In practice, the development of new international legal norms is often unfair in just this way, even though in principle all states, at least, are sovereign equals.[13] Third, the normal justification thesis allows for the partial or piecemeal legitimacy of international law. Whether obedience to law makes it more likely that an agent will act as right reason dictates likely varies from case to case, both with respect to the agent and to the type of conduct at issue. Given the degree to which military, political, and economic power have shaped the development and content of international law, many people will likely welcome the possibility of defending something less than a general and universal duty to obey international law.

All three of the aforementioned implications for the legitimacy of international law have important consequences for an analysis of the sources of international law. If genuine consent or procedural fairness were a necessary condition for international law's legitimacy, then the current practices of international law creation would almost surely need to undergo significant modification in order to give rise to legitimate law—and there is little reason to think that the necessary changes would occur any time soon. Of course, Besson may be right to suggest that international law will enjoy its greatest claim to legitimacy (sufficient, perhaps, to generate a general duty to obey the law) if it is created democratically. Indeed, there may even be a moral duty to create democratic processes charged with creating, modifying, and annulling international law, and in some cases that duty may defeat a duty of obedience to law. Nevertheless, in so far as the current sources of international law do not qualify as democratic, those concerned to defend the legitimacy of at least some of its current norms may welcome the fact that Raz's instrumental justification enables them to do so.

b. Consent as a Basis for International Law's Legitimacy

Raz's scepticism with respect to the role consent plays in justifying law's claim to authority goes deeper than the above remarks suggest, as he maintains that neither instrumental nor non-instrumental justifications for treating putative acts

[13] See Kingsbury, B., 'The International Legal Order', in Cane, P. and Tushnet, M. (eds.), *Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003), 293.

of consent as genuinely normative (i.e. ones that genuinely alter an agent's normative situation) suffice to justify a moral duty to obey the law.[14] It may be possible to challenge this conclusion, however, if it can be shown that at least some (actual or possible) states have a right to self-determination, in light of which they can come to be morally bound by certain international legal norms only if they consent to them.[15] For example, if it is more important that such a state choose which economic policies to adopt than that it choose the best ones (however exactly that is understood), then it follows that those laws that pertain to international trade will morally bind this state only if it consents to be bound by them. Obviously these claims stand in need of a careful defence. However, I shall assume their truth here in order to engage with a different (and more frequently made) objection to grounding international law's legitimacy in state consent, namely that consent can give rise to genuine moral obligations only if it is free and informed, and that most acts of putative consent to be bound by international legal norms fail to meet at least one, if not both, of these conditions.[16] This is true, yet those who criticize consent on this basis may draw an overly broad conclusion, and be too quick to dismiss the importance of consent for legitimate international law.

It is at least possible and, I suggest, maybe even likely that certain states' agreement to be bound by particular treaties were made voluntarily; that is, in the absence of duress and with an adequate understanding of the legal obligations they were thereby acquiring. If they meet the two additional requirements described below, then these states do have a consent-based obligation to uphold the legal obligations created by these treaties, and this is so even if some of the other signatories to the same treaties did not accede to them voluntarily. It may be that those states that are able to genuinely consent to be bound by a particular body of international law do so only because they believe that the other signatories (and perhaps non-signatories as well) will abide by the terms of the treaty. Yet the necessary assurance may have its origins in the very same fact that renders those other states' consent merely putative (i.e. not genuinely obligating), namely the economic and military power of the genuinely consenting states and their willingness to use it to enforce the terms of the treaty against the merely putatively consenting states.

Moreover, some international legal norms may serve interests that are believed to be common to all those international actors subject to them, and to do so in a manner that is universally viewed as acceptable even among IAs with different understandings of what would be ideal. If such laws exist, then consent to be bound by them is morally binding. This is so, I suggest, even if unbeknownst to them

[14] Raz, J., *The Morality of Freedom* (above, n. 3), 80–94; Raz, J., 'Problem of Authority' (above, n. 3), 1037–41.

[15] Or, perhaps, if they willingly and knowingly accept the benefits provided them by others' obedience to the legal norms in question. See Lefkowitz, D., 'The Principle of Fairness and States' Duty to Obey International Law', under review.

[16] See e.g. Allen Buchanan, Chapter 3 in this volume.

the less powerful states would have been coerced into complying with these laws if they had not already endorsed them. Genuine consent—for international actors as for all other agents—does not require that agents could have voluntarily done otherwise. Rather, it requires only that the reasons that explain (i.e. motivate) an agent's consent not include fear of morally unjustifiable coercion by another agent, or non-culpable ignorance or mistaken belief.

If they are to create moral obligations, then in addition to being free and informed putative acts of consent must not conflict with certain other moral duties. For example, given a duty not to facilitate murder, a voluntary agreement to lend a criminal assassin the use of your gun is void *ab initio*, and so creates no duty to lend the gun or to compensate the assassin for failing to do so. In so far as certain international legal norms necessarily require immoral conduct, even free and informed consent to obey them will not make those laws legitimate. For example, suppose that by barring states from enacting trade regulations aimed at ensuring the morally proper treatment of non-human animals and the natural environment, the World Trade Organization (WTO) necessarily renders its signatories complicit in immoral conduct.[17] It follows that even a state's free and informed consent to abide by the rules incumbent upon members of the WTO will not give rise to a moral duty to obey those rules.

Finally, consent generates a moral duty to obey the law only for those officials and citizens of states with a legitimate claim to domestic authority. Officials of illegitimate states lack the standing to morally bind members of the political community they rule or, in many cases, the moral power to give effect to the international legal obligations they acquire (e.g. by enacting domestic laws or administrative rules that their subjects have a moral duty to obey).

Recognition that consent can—and perhaps in a limited number of cases, does—justify international law's claim to legitimate authority has important implications for the sources of international law. For example, a focus on the conditions in which consent actually generates an obligation can lead to changes in the processes whereby international legal norms are created, modified, or annulled that aim specifically at clarifying when an IA has genuinely consented to be subject to (some part of) international law, and increasing opportunities for them to do so. This may add further impetus to the project of codifying customary international law, as it can contribute to states' knowledge of those norms (especially their content) and present opportunities for states to freely agree to be bound by them.[18]

[17] For an argument that, in practice, this is what the WTO does, see Singer, P., *One World* (2nd edn., New Haven: Yale University Press, 2004), 51–70.

[18] To clarify, states and other IAs can be legally bound by customary international law without consenting to it, and perhaps even despite their explicit objection to being bound by certain customary legal norms. In both cases, the states in question have a *legal* obligation to act as the law demands, but they do not have a *moral* duty to fulfil their legal obligation based in consent.

3. Legality and the Sources of International Law

Just as legal philosophers disagree over whether the legal validity of a norm is necessarily conditional upon its moral correctness, or at least its consistency with certain moral principles, so too they disagree over the relationship between morality and legality, or the rule of law. On the formal conception of legality, which will be the focus of my remarks here, the rule of law amounts to the rule of rules; that is, formal legality sets out those conditions that must be met (to some degree) for a rule-guided social order to exist.[19] Law's essential function (or at least one of its primary functions) is to guide its subjects' conduct. Whether, or how well, law does this depends on its subjects' ability to identify what the law requires of them, which means that the law must be publicly promulgated and prospective, clearly formulated and without contradiction or demands for the impossible, applied to particular cases in a manner consistent with a reasonable understanding of its demands, and so on. To these properties of formal legality many also add certain institutional mechanisms that seem practically necessary for their realization, such as an independent judiciary and procedural fairness in the administration of the law. The virtue of the rule of law (understood formally) lies in the contribution it makes to agents' ability to plan their lives, and to follow through on those plans. It does so by reducing uncertainty about what they should do, not only by clarifying what sorts of conduct they may engage in without risking sanctions from those who rule (through law), but also by solving coordination problems, providing the assurance necessary to overcome prisoner's dilemmas, and in other ways as well. Whether it is a morally good thing that a given society realizes formal legality largely depends on the ends and the means to them that society's law permits, requires, or forbids officials and other members to pursue.

Clearly formal legality can be realized to varying degrees, both with respect to individual legal norms and entire legal orders, and this has important implications for law's legitimacy. There can be no duty to obey secret laws or laws that demand the impossible (including, but not limited to, laws that apply retroactively). But do agents have a duty to obey laws that are less than perfectly clear yet also far from opaque? What about laws that are occasionally applied unequally (i.e. where all are not equal before the law), particularly where the law's subjects can predict with a fair degree of accuracy when this will occur? What are agents with a duty to obey the law to do when confronted with conflicting legal obligations, particularly in the absence of well-functioning institutional mechanisms for resolving such conflicts?

[19] The formal understanding of the rule of law includes no moral constraints on law; rather, all of the constraints follow purely from what is necessary for the existence of a rule-guided social order. For substantive conceptions of legality, in contrast, those properties constitutive of the rule of law follow from a moral ideal, such as reciprocity between ruler and ruled.

As Brian Tamanaha points out, all of these questions arise for subjects of international law. For example, inequalities of power, together with features of the current international legal order such as the absence in most cases of a legal duty to submit to adjudication by a court or tribunal, significantly weaken the equal application of the law.[20] Also, 'the proliferation of uncoordinated tribunals and the disaggregation of international law along subject-specific lines . . . generate problems with consistency and coherence . . . [particularly] in overlapping areas between separate treaty regimes, as when environmental issues have implications for trade'.[21] The different approaches among municipal legal systems to the interpretation and incorporation of international law only add to these problems of consistency and clarity. Besson rightly emphasizes the need to craft institutions for the creation, modification, and annulment of international legal norms, as well their application to particular cases, that more fully realize formal legality. Nevertheless, given international law's sometimes tenuous hold over the conduct of actors influenced as well by considerations of political, economic, and military power, occasional deviation from the demands of formal legality may be a positive feature of the current international legal order.

III. The Nature of a Legal Order and the Sources of International Law

Having identified some of the implications that certain analyses of the nature of law, legitimacy, and legality have for the sources of international law, I concentrate in the remainder of this paper on the nature of a legal order or system, again with an eye on the consequences for a proper understanding of international law's sources.

1. Is International Law Primitive?

Among the most influential of H. L. A. Hart's insights is his analysis of a legal system as a union of primary and secondary rules.[22] Primary rules govern actions by spelling out particular obligations (or their absence); secondary rules, in contrast, are rules that govern primary rules. Hart argues for this analysis of a legal system by considering three shortcomings or defects endemic to what he labels a primitive legal

[20] Tamanaha, B., *On Rule of Law* (New York: Cambridge University Press, 2004), 132.

[21] Ibid. See also Boyle, A. and Chinkin, C., *The Making of International Law* (Oxford: Oxford University Press, 2007); Kingsbury, B., 'International Legal Order' (above, n. 13), 280–1. But see Donald Regan, Chapter 10 in this volume.

[22] Hart, H. L. A., *The Concept of Law* (Oxford: Clarendon Press, 1961).

order. First, participants in such an order labour under a great deal of uncertainty because they lack an authoritative practice for settling disagreements over what the law is, including whether a given rule is law, what the content of that law is, and how to resolve conflicts between different laws. Second, a primitive legal order has a static character, since it lacks any authoritative procedures for changing primary rules and the obligations they create. Third, it suffers from inefficiency (and likely ineffectiveness as well) since all members of the community share equally in the authority to determine when violations of the law have occurred and how to respond to them, and bear equally the duty to exercise this authority.

Different types of secondary rules address each of these three shortcomings. The solution to the last of them lies in the development of rules of adjudication, which authorize and obligate only certain actors to apply and enforce the law. Rules of change address the second of the aforementioned defects, as they specify the means by which agents may change general rules as well as particular obligations. As for the uncertainty common to practically any primitive legal order, Hart contends that it is overcome through legal officials' adherence to a rule of recognition: a rule 'by reference to which the validity of the other rules of the system is assessed, and in virtue of which the rules constitute a single system'.[23]

Legal orders can suffer to varying degrees from the shortcomings of uncertainty, inefficiency, and a static character. Therefore, rather than asking whether international law is primitive, as if that is an all-or-nothing feature of legal orders, we should instead examine in what respect and to what degree it manifests those qualities that when fully realized characterize a primitive legal order. For example, with respect to its adjudicatory practices, the current international legal order occupies an intermediate place between a primitive and an advanced legal order, since in some cases the authority to apply and enforce certain laws lies only with designated officials, while in others the law may or must be applied and enforced by any and all members of the international community.

Adopting this nuanced approach helps clarify Hart's own remarks on the primitiveness of international law. Though he briefly criticizes several arguments intended to demonstrate that international law contains rules of adjudication, his case for the international legal order's primitiveness rests primarily on the argument that 'that there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules'.[24] In other words, Hart maintains that international law lacks a foundational rule of recognition. A legal order rests on such a rule, Hart claims, only when there are criteria for settling what the law is other than the current beliefs of those subject to it. In so far as the existence and scope of international legal norms is simply and entirely a matter of consensus amongst IAs, as positivists in the international law sense maintain, it follows that the international

[23] Ibid. 228. [24] Ibid. 231.

legal order lacks a rule of recognition at its base, and so does not constitute a legal system.[25]

No international legal scholar will dispute the claim that international law currently lacks a single basic rule that serves both of the functions that Hart assigns to a rule of recognition: validating norms as law and systematizing them, in particular by establishing relations of superiority and subordination between laws of various types. The defect of uncertainty, recall, attends not only the absence of an authoritative process for identifying norms as legally valid, but also the absence of such a process for establishing the precise scope of particular legal norms. Unlike a domestic legal order that treats common law as subordinate to statutes, for example, international law currently lacks a hierarchy of sources of international law. Besson suggests that 'there is nothing about the existence of a rule of recognition . . . that requires a hierarchy among the sources recognized by the rule of recognition'.[26] Hart's view of the matter is somewhat ambiguous; on the one hand, he suggests that merely being validated by a single rule of recognition provides a kind of minimal unity to a set of rules, while on the other he emphasizes in several places the importance of the rule of recognition's systematizing function.[27] Regardless, the absence of any hierarchy of sources clearly entails that members of the international political community will experience greater uncertainty with respect to their legal obligations, and so in that sense be subject to a legal order that is more primitive, than is true for officials and subjects of a domestic legal system like the one mentioned above. Moreover, the uncertainty caused by the absence of a ranking of international legal norms in virtue of their source may be further exacerbated by the lack of any systematic ordering of different international legal regimes.

Despite the resulting uncertainty, however, the primitiveness of the international legal order can be viewed in a positive light. For example, as was previously suggested in the discussion of the rule of international law, it may be that the existing international legal order can better accommodate the realities of power in current international relations than would a less primitive legal order. In particular, the larger space left by a primitive legal order for politics and power may make it more conducive to the achievement of peace than would be the case were international law to strive to place greater limits on these modes of interaction—limits that might encourage some states to ignore the demands of international law, or worse yet, to challenge the international legal order's legitimacy. Conversely, however, international law's current primitiveness may make it a less effective vehicle for the achievement of justice than it would be were it less primitive in various respects; for instance, were the ICJ to enjoy compulsory jurisdiction.

[25] Positivism (in the international law sense) was the most influential paradigm of international legal relations during the time Hart was writing *The Concept of Law*, so it would have been natural for him to conceive of international law in positivist (or consensualist) terms, and given such a conception, to conclude that international law lacks a basic rule of recognition.

[26] Besson, S., this volume, 181. [27] Hart, H. L. A., *The Concept of Law* (above, n. 22), 92–3; 97–8.

2. Does Customary International Law Rest on a Rule of Recognition?

Suppose international law were to rest on a rule of recognition with something like the following content:[28] X is a legally valid norm if and only if it originates in a treaty or customary practice.[29] Each of the disjuncts can serve as a criterion for legal validity only if it makes a norm's status as law turn on some feature of the world other than the belief by those subject to it that it counts as law. This condition appears to be met for treaty law, which is clearly akin to the 'authoritative list or text of the rules' that Hart offers as an illustration of a relatively simple rule of recognition.[30] But what about customary international law (henceforth CIL)? Hart rejects as both normatively and epistemically redundant the rule that states should behave as they customarily behave.[31] As he puts it, such a rule 'is an empty repetition of the mere fact that the society concerned (whether of individuals or states) observes certain standards of conduct as obligatory rules', which is just to say that the (positive) obligations, and the primary rules that create them, exist only because those subject to these rules believe themselves to be bound by them.[32] Moreover, it is at least arguable that no authoritative procedure exists for settling disputes over the existence, content, and scope of customary international legal norms. When called upon to apply CIL to particular cases, the International Court of Justice and other tribunals claim that their decisions rest on judgments regarding the existence of a consensus among states (i.e. practice plus *opinio juris*). It seems that just as 'in the simpler [i.e. primitive] form of society we must wait and see whether a rule gets accepted or not', so too disputes over customary international legal norms end only once states reach a consensus.[33] Is Hart right, then, to conclude (contra Besson) that there is no rule of recognition for CIL?[34]

Ideally, a rule of recognition serves two functions. The first, ontological, function makes possible the kind of justification and criticism constitutive of a rule-governed practice for identifying norms as legally valid. The second, authoritative resolution, function makes possible the settling of disputes over the content and scope of

[28] The following discussion draws partly on Lefkowitz, D., '(Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach', *Canadian Journal of Law and Jurisprudence*, 21/1 (2008), which also contains a more detailed discussion of Hart's analysis of international law and responses to it by a number of prominent international legal theorists.

[29] Until recently, such a rule (perhaps also including general principles of law) was likely the least controversial candidate for a basic international rule of recognition. It is probably more accurate today to include the ICJ and certain other international tribunals, as well as global governance institutions such as the WTO, among the sources of international law.

[30] Hart, H. L. A., *The Concept of Law* (above, n. 22), 92.

[31] The rule cited in the text is the one Kelsen proposes as the *Grundnorm* for international law. I consider it here only as a rule of recognition, and only for customary international law.

[32] Hart, H. L. A., *The Concept of Law* (above, n. 22), 230. [33] Ibid. 229.

[34] Besson, S., this volume, 180–1.

particular legal norms. I maintain that CIL rests on a rule of recognition that performs only the first of these two functions, one with the following content: N is a customary legal norm if most states regard it as a customary legal norm from what Hart calls the internal point of view, and what makes it a customary legal norm is that most states regard it as such. Agents adopt the internal point of view with regard to some rule when they believe that they (and the others the rule addresses) ought to conform to it, such that an appeal to the rule provides a sufficient justification for behavior that conforms to it, as well as for criticism of behaviour that deviates from it.[35]

The second phrase in the proposed rule of recognition for CIL plays a crucial role because it distinguishes a legal order in which there is a mere convergence of beliefs that N is a legally valid norm from one in which belief in the legal validity of N is rule-guided. In a legal order of the first type, the relevant agents might have different reasons for accepting norms N1, N2, etc. as legally valid; one might do so because he thinks those norms substantively just, another because a third agent has pronounced them legal, and so on. Regardless of their reasons for believing that N is a legal norm, however, these actors will agree that an agent that violates it acts illegally. In a legal order of the second type, agreement that acts contrary to N count as illegal follows from a shared understanding of what makes a customary norm legally valid, one they manifest in practice through adherence to the aforementioned rule. The existence of such a rule warrants a kind of normative claim unavailable to participants in the first type of legal order, namely the justification of a judgment regarding the legality of a particular act in terms of fidelity to the rule or criticism of such a judgment as a deviation from it. I contend that customary international law, as it currently exists, is an example of this second type of legal order; that is, it rests on a rule of recognition, albeit one that serves only the ontological function.

The above characterization of the rule of recognition for CIL may seem to conflict with the traditional and still widely shared view that CIL rests on *usus*, or practice, as well as *opinio juris*, but this is not so. The existence in society S of a customary rule C governing acts of type T depends on a shared belief in such a rule among (most) members of S. Shared beliefs differ from those that are merely had in common in that they involve a mutual awareness among those that share the belief. The proper characterization of that mutual awareness is a matter of some debate: individualists describe it in terms of members of S knowing that other members of S believe that customary rule C governs acts of type T, and that other members of S know that (most) other members of S know this, while collectivists characterize it holistically as either a plural intention, a group belief, or a joint commitment to accept as a

[35] Hart, H. L. A., *The Concept of Law* (above, n. 22), 56–7, 101–3. See also Coleman, J., *The Practice of Principle* (above, n. 5); Shapiro, S. J., 'What is the Internal Point of View?', *Fordham Law Review*, 75/3 (2006), 1157–70.

body that members of S should perform acts of type T (or should perform acts of type T only under certain specific conditions, or should not perform acts of type T, etc.).[36] Regardless, achieving the necessary mutual awareness requires that members of S communicate with one another (though the content of the beliefs they must communicate varies depending on the proper analysis of a shared belief). This communication can take the form (at least in part) of the commission of acts of type T, but it need not do so; there is no conceptual barrier to the successful development of a new rule of CIL solely through so-called verbal acts, such as statements in international organizations, policy or white papers, and instructions to armed forces, even if this is highly unlikely to occur in practice. The crucial point is that on the proposed account the necessity of practice for the creation of a new customary norm, and so a new norm of CIL, follows from the very nature of customary rules as shared beliefs.

Of course, state practice (and, perhaps, the practice of other types of IAs) frequently contributes to the development of new norms of CIL in ways other than the one just mentioned. For example, state practice often provides the raw material of 'facts on the ground' that over time both shape and become the subject of rule-guided behaviour. Additionally, state practice can provide evidence of the existence and content of a customary norm, not only in cases of conformity to it but also where the rule is honoured in the breach; that is, where states make significant efforts to cover up or deny violations of the rule. This epistemic role provides adjudicative bodies such as the ICJ with a good reason to emphasize state practice in reaching their decisions.[37] Nevertheless, the epistemic value of state practice for the process of customary law formation (as opposed to the identification of existing norms of CIL) follows from the contribution it makes to the communication necessary to create a shared belief that acts of type T are subject to customary norm C, and that norm C counts as law.

3. (Dis)solving the Chronological Paradox in Customary International Law Formation

The foregoing defence of a rule of recognition for customary international law plays a crucial role in resolving an alleged paradox in the formation of new rules of CIL,

[36] Hart was most likely an individualist; the three collectivist accounts gestured at in the text are those of Michael Bratman, Raimo Tuomela, and Margaret Gilbert respectively.

[37] International Law Association, London Conference, *Final Report of the Committee on Formation of Customary (General) International Law* (2000), <http://www.ila-hq.org/en/committees/index.cfm/cid/30>, 40; The report notes that with some exceptions, 'if there is a good deal of State practice, the need (if such there be) also to demonstrate the presence of the subjective element is likely to be dispensed with' The fact that the ICJ does not always require parties to *demonstrate* the existence of a belief that conduct of a certain sort is subject to CIL does not entail that such norms can *exist* in the absence of that belief, a point the Court emphasizes in its own repeated insistence that CIL rests on both *usus* and *opinio juris*.

namely that their creation requires that states act from the belief that the law already requires the conduct specified in the rule. This so-called chronological paradox rests on two confusions, the first regarding the process whereby a customary rule comes to exist, and the second regarding the process whereby that customary rule becomes law.

Briefly, a customary rule exists amongst a group of actors if and only if most of them, most of the time, believe that such a rule exists and applies to them, where that belief manifests itself in both the actors' conduct and their justification and/or criticism of their own and others' conduct.[38] Such a state of affairs may arise in myriad ways.[39] For instance, at some initial point in time a few members of the group may believe falsely in the existence of a certain customary rule, but if they persist in this belief enough other members of the group may come to share it so that at some later point in time the customary norm truly does exist and apply to members of this group.[40] Alternatively, a few members of the group may believe that all should be bound by some rule, and that the best way to bring about a state of affairs in which they are is to act *as if* the rule already exists and applies to members of the group.[41] Or perhaps the rule is imminent in the practices of members of the group, and all come to believe in its existence at the same time. The crucial point these examples illustrate is that the evolution of a new customary rule does not require that agents believe truly that they are subject to the rule prior to their actually being bound by it.

As adherence to the rule exempting diplomatic vehicles from minor parking prohibitions illustrates, the belief by most states that they are subject to a customary rule does not suffice to make that rule legally valid. Rather, it must also be the case that officials of the international legal order adhere to a rule of recognition that directs them to treat customary rules in that domain of conduct as legally valid—that is, as a source of law. Distinguishing (at least conceptually) between the processes of custom formation and the legal validation of customary norms dissolves the chronological paradox: the rule-guided judgment regarding the legal validity of a customary norm is conceptually distinct from the process whereby

[38] In other words, a customary rule governs the conduct of members of a particular group when they adopt the internal point of view with respect to that rule. As the rule of recognition for CIL described previously illustrates, a rule of recognition is nothing more than the customary rule to which officials adhere when determining the legal validity of various norms, and in some cases, their systematic relation to one another.

[39] Many scholars err (or so I contend) when they identify as a necessary condition for the creation of a new customary norm what is only one possible means by which such a norm may come to exist.

[40] Geny, F., *Méthode d'interpretation et sources en droit privé positif* (2nd edn., Paris: F. Pichon et Durand-Auzias, 1919), 367–71.

[41] Kontou, N., *The Termination and Revision of Treaties in the Light of New Customary International Law* (New York: Oxford University Press, 1994). This procedure for the creation of new customary international law fits the image of claim and response some international lawyers use to describe certain examples of customary law creation, such as the so-called Truman Proclamation. See Walden, R. M., 'Customary International Law: A Jurisprudential Analysis', *Israel Law Review*, 13 (1978), 97.

that customary norm comes to exist.[42] The failure to distinguish between these conceptually distinct aspects of CIL formation may be a consequence in part of the fact that states have historically comprised both the actors whose conduct and beliefs give rise to the existence of a customary rule, and the vast majority of the officials in the international legal system whose adherence to the rule of recognition leads them to deem some of those rules legally valid.

Given the rapidity with which international law has recently been evolving, and the exponential growth in its reach and sophistication, philosophers of law have good reason to pay greater attention to it than many currently do. This is so not only for the contributions that legal philosophers can make to a proper understanding and evaluation of international law, but also because reflection on it may lead to refinements or even wholesale modifications to our understanding of the nature of law and a legal order.

[42] The point may be made more vivid by considering that as a conceptual matter, the agents whose beliefs in the existence of a customary rule are necessary for the existence of that rule need not overlap at all with the agents whose beliefs in the existence of a rule of recognition that treats custom as a source of law are necessary for the legal validity of that customary rule.