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# (Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach

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## **(Dis)solving the Chronological Paradox in Customary International Law: A Hartian**

### **Approach**

As traditionally conceived, the creation of customary international law gives rise to the following chronological paradox. In order to create a new rule of customary international law, states must act from the belief that the law already requires the conduct specified in the rule.<sup>1</sup> Yet until they have successfully created the new rule of customary law, the conduct in question is not legally required. Thus the development of a new rule of customary international law appears to be impossible.

Francois Geny suggests one way to avoid the chronological paradox, namely that states *falsely* believe that the law already requires the conduct specified by the nascent rule.<sup>2</sup> In section I, I consider Geny's solution to the chronological paradox, and a recent criticism of it by Michael Byers.<sup>3</sup> I contend that Byers's criticism rests on misunderstandings regarding both the nature of a legal system and the nature of customary law formation, and so fails as a response to Geny. Yet Geny, too, fails to grasp correctly the nature of customary law formation, and so he offers as a *necessary* condition for the creation of a new customary rule what is only one *possible* means by which such a rule may come to exist. Moreover, like all those who assert the existence of the chronological paradox, Geny conflates the process of customary rule formation with the process by which such rules become legally valid.

In section II, I argue that the creation of a new rule of customary international law requires a two-step process; first, the development of a new customary rule, and second, the incorporation of that rule into international law. The chronological paradox results from the conflation of these two steps. Once we draw the appropriate conceptual

distinction, the chronological paradox dissolves. Confusion over this distinction arises, I conclude, because in the international legal system, the same agents whose beliefs give rise to the new customary rule are the legal officials whose adherence to the rule of recognition leads them to deem that new rule legally valid.

The proposed solution to the chronological paradox employs H.L.A. Hart's analysis of the concepts of law and a legal system, and in particular, the idea of a rule of recognition. Yet Hart denied the existence of an international rule of recognition. Hart's argument for this conclusion, and so his belief that in certain respects international law remains a primitive legal order, are set out in section III. I also consider there the attempts by Anthony D'Amato, Thomas Franck, and G.J.H. van Hoof to refute Hart's doubts concerning international law, and argue that none succeed. In fact, none of these theorists appear to grasp the primary reason behind Hart's skepticism with respect to the existence of an international rule of recognition.

In section IV, I offer a novel argument for the existence of a rule of recognition at the base of customary international law. This argument turns on a distinction between the ontological and authoritative resolution functions of a rule of recognition, a distinction Hart elides. If successful, the view described in this section demonstrates that customary international law does rest on a rule of recognition, albeit one that does not serve the authoritative resolution function, and so the proposed solution to the chronological paradox rests on a secure foundation.

## I

The chronological paradox arises only if states must truly believe the law already requires the conduct specified in some rule in order for that rule to become part of international

law.<sup>4</sup> One obvious way to defuse the paradox, then, is to argue that in order to create a new rule of customary international law, states must *falsely* believe that the conduct specified in the nascent customary rule is already legally required. This solution, proposed by Francois Geny, keeps to the letter of the *opinio juris sive necessitates* requirement, as traditionally conceived, since those states contributing to the creation of a new customary rule believe that their conduct is already legally required. At the same time, it avoids the chronological paradox by acknowledging that during the period of creation, this belief on the part of states will be false. Thus the creation of a new customary legal rule does not in fact require the impossibility that the rule in question already be part of existing customary international law.

Michael Byers finds Geny's proposed solution to the chronological paradox unsatisfactory, 'because it is inconceivable that an entire legal process – and since the customary process provides the basis for the law of treaties, an entire legal system – could be based on a persistent misconception.'<sup>5</sup> Byers's criticism rests, however, on two misunderstandings. First, he fails to distinguish carefully between two types of conventional rules that partly constitute the international legal system: (1) the conventional rule of recognition employed by officials to determine whether particular norms are legally valid (i.e. norms of the international legal system), and (2) primary rules of customary international law.<sup>6</sup> Second, Byers errs in asserting that Geny's proposal entails a *persistent* misconception on the part of states that they are bound by a rule of customary law (or the rule of recognition). This claim evidences a lack of understanding with respect to the nature of conventional rules. I develop each of these points in turn.

Following Hart, I suggest we understand a legal system to consist in the union of primary and secondary rules, where primary rules address the behavior of subjects in the legal system (e.g. what they ought to do), while secondary rules address the behavior of officials in that legal system (e.g. instructing officials as to what counts as a rule of the legal system).<sup>7</sup> Byers suggests that the entire international legal system rests on the ‘customary process,’ with the implication that the *opinio juris* requirement applies even to the most basic rule of the international legal system – the rule in virtue of which all other rules count as legal, or what Hart calls the rule of recognition. But even if *opinio juris* is a necessary condition for the creation of primary rules of customary international law, it cannot be a condition for the creation or existence of the conventional rule of recognition employed by officials in the international legal system. This is so because in order for a given norm to qualify as a norm of the international legal system it must be validated by the rule of recognition. The rule of recognition cannot validate itself, however, and so there can be no legal obligation to adhere to the rule of recognition. The rule of recognition is not itself law, but rather a conventional rule that makes law possible.<sup>8</sup> In subscribing to the rule of recognition that is the basis of the international legal system, then, officials cannot correctly believe this rule to be law; such a belief is conceptually incoherent. Thus even if correct, Geny’s solution to the chronological paradox would not entail that the entire international legal system had its basis in a ‘persistent misconception’ on the part of legal officials.

Of course, it may be that neither international law as a whole, nor customary international law, constitutes a legal *system*; one united by a rule of recognition. Rather, it may be comprised only of a *set* of legal norms; this is Hart’s view, as will become

clear later in this paper. Even if this is the case, however, Byers still misspeaks when he states that on Geny's view, the creation of a new rule of customary international law would require a *persistent* misconception on the part of states, namely the false belief that the rule they wish to create already exists as a legal rule. For if at some point a sufficient number of states come to hold a belief in the existence of some customary rule C, then in virtue of their doing so that belief will be true. This follows from the nature of customary (or social) rules; such rules exist 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 conduct of the actors and their justification and/or criticism of their own and others' conduct. So, if at time t1 only states A and B believe that there exists a social rule R in society S, according to which A and B have an obligation to  $\phi$ , while all the other members of S do not believe in the existence of R, then A and B believe falsely. However, if at some later time t2, C, D, E, etc. also come to believe in the existence of R, so that all or almost all members of S believe in R, then A and B will no longer err when they believe that they have an obligation to  $\phi$  in virtue of R.<sup>9</sup>

Crucially, A and B having a false belief that R applies to members of S can be part of the mechanism whereby a sufficient number of members of S come to believe in R so that it really does apply to members of S. There is nothing conceptually problematic, then, in basing the *creation* of customary rules on actors falsely believing that such rules already exist. It is true that the *existence* of customary rules cannot be based on a false belief – that is, on a persistent misconception – but contrary to Byers's claim, Geny's solution to the chronological paradox does not entail such a conclusion.

Nevertheless, we ought to reject Geny's solution for two reasons. First, he treats as a necessary condition for the creation of a new customary rule what is only a sufficient condition, in certain circumstances, for the creation of such a rule. While the having of (initially) false beliefs in the existence of some customary rule R may be one way to bring about a state of affairs in which a sufficient number of members of some society S believe in the existence of R (and act accordingly) so that R is a customary rule in S, it is not the only way to bring about this state of affairs. We can imagine a case in which R has been imminent in the practices of members of S, and all (or at least most) of its members come to believe in the existence of R at the same time. While the rule is only imminent, no member of S believes in its existence, and since all members of S come to believe in it at the same time, none of them ever believes falsely in R's existence. Alternatively, at t1 A and B may believe that R ought to be a rule for members of S, and believe that the best way to bring such a rule into existence is to act *as if* R already exists and applies to members of S.<sup>10</sup> Their appeals to R to justify their own behavior, and to criticize others, may lead to the widespread adoption of R by other members of S, so that A and B no longer need believe that they ought to act *as if* R exists, but instead act on the now true belief that R really does exist. As set out, this scenario does not require that A and B ever hold a false belief regarding the existence of R, and yet it seems quite plausible to think that a new customary rule could come to exist as the result of such a process.

The second reason to reject Geny's solution to the chronological paradox is that he fails to distinguish the process whereby a customary rule comes to exist, and the process whereby that rule comes to be law. As I demonstrate in the next section, once we

draw this distinction we can dissolve the chronological paradox, rather than attempt, as Geny does, to tweak the traditional understanding of the requirements for the creation of a new rule of customary international law.

## II

Most international legal theorists subscribe to the view that the creation of a new rule of customary international law requires both state practice and *opinio juris sive necessitates*; the belief that the law requires the practice in question. Byers writes that ‘it is clear that something in addition to State practice should be necessary for customary international law, for it is essential that one be able to distinguish between legally binding rules and patterns of behavior which are not legally required.’<sup>11</sup> This remark illustrates exactly the confusion upon which the chronological paradox rests. For it conflates two separate conceptual distinctions that must be drawn: the first is that between rule-guided behavior and non-rule-guided behavior, while the second is between legal and non-legal rules. While both distinctions turn on the beliefs had by certain agents, the beliefs in question differ, and at least as a conceptual matter, the agents who must hold the beliefs can also diverge.

Customary international law consists in customary rules. The first conceptual question we must address, then, is what distinguishes convergent behavior that results from adherence to a rule from convergent behavior that results from habit, or an overlap of interests. Once again, Hart provides the answer: the convergent behavior of various agents reflects the existence of a social rule when most of those agents take an internal point of view with respect to that behavior.<sup>12</sup> Agents adopt such a point of view when they believe that they ought to conform their behavior to a certain standard, such that



behavior that deviates from the standard warrants criticism, and appeal to the standard provides a sufficient justification for behavior that conforms to it. These normative elements are absent in cases where convergent behavior results from habit, or an overlap of interests. So for example, regular riders on a bus may sit in the same seats out of habit. Should one of them choose to sit in a different seat, however, she will not necessarily be criticizable for doing so. Likewise, the interests of different homeowners in diverse types of flowers that happen to complement one another may result in a beautiful neighborhood. But if one homeowner elects to plant non-complementary flowers, she will not be criticizable for doing so, or at least not on the grounds that she has deviated from a rule governing the planting of flowers in this neighborhood.<sup>13</sup> In contrast, a person who refuses to return to the dugout after the umpire has called a third strike on her is liable to criticism, and crucially that criticism involves her failure to adhere to the conventional rules of baseball.

Agents' adoption of the internal point of view enables us to distinguish rule-guided behavior from convergent behavior that merely reflects habit or overlapping interests. Yet the existence of a customary (or social) rule is only a necessary, not sufficient, condition for the creation of a new rule of customary international law. For even if there exist customary rules that govern a particular domain of state conduct, it does not follow necessarily that the customary rules in question are legal ones. For instance, ceremonial salutes at sea and the practice of exempting diplomatic vehicles from parking prohibitions are both governed by non-legal customary rules.<sup>14</sup> Rather, what makes customary rules international law is adherence by officials in the

international legal system to a rule of recognition that takes custom to be a source of valid law (at least with respect to certain domains of conduct).<sup>15</sup>

The rule of recognition directs officials in a legal system to declare certain norms legally valid, and so ones that ought to be adhered to by subjects of the legal system, and applied by officials to settle disputes. Like customary rules concerned with agents' conduct, the rule of recognition is a social rule. It exists and has the content it does only as long as officials in the legal system adopt the internal point of view with respect to it; that is, only as long as legal officials appeal to the rule to justify their conduct (qua officials), and as a basis for criticizing legal officials who deviate from it (in their capacity as legal officials). Thus a second necessary condition for the creation of a new rule of customary international law is that the rule of recognition followed by officials in the international legal system treat customary rules (at least in some domains of conduct) as legally valid. Together, a customary rule and this rule of recognition are jointly sufficient for the existence of a rule of customary international law.

With a clearer conceptual understanding of the process whereby a new rule of customary international law comes to exist, we can now dissolve the chronological paradox. 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. We can imagine, for example, a society whose legal officials live in isolation from their subjects, but subscribe to a rule of recognition that directs them to validate the society's customary rules as law. These officials have no part in the creation of the customary rule; indeed,

qua customary rule, they may not be subject to it at all. But it is only in virtue of these officials' adherence to the rule of recognition specified above that the customary rule becomes law. Likewise, while the remaining members of this society play a necessary role in the creation of the rule, they are powerless to make that rule legally valid. Since they are not legal officials, even their belief that the rule is law does not suffice to make it so.<sup>16</sup> As this imagined scenario illustrates, the creation of a new rule of customary law (international or domestic) does not require any agent to believe that her conduct is already legally required.<sup>17</sup> Nor does the chronological paradox reappear at the level of customary rule formation, since as I argued in the previous section, the development of a new customary rule does not require that those whose beliefs are instrumental in such a process already believe that their conduct is required by a rule.

Why, then, have so many international legal theorists thought that the creation of new norms of customary international law suffers from the chronological paradox? A likely answer is that they have been misled by the fact that, in the international legal system, states comprise both the primary actors whose conduct and beliefs give rise to the existence of a any 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 that rule legally valid.<sup>18</sup> It is easy to conflate the two distinct conceptual claims:

- (1) the development of a new customary rule requires that states (in their capacity as members of the society of states) believe in the existence of such a rule
- and
- (2) in order for a customary rule to be law, states (in their capacity as officials of the international legal system) must believe that it is law

into the single claim

- (3) the development of a new customary rule of international law requires that states believe the rule to already be law.

This claim, of course, entails the chronological paradox. While the dual roles played by states in the international legal system may be the cause of the mistaken belief in this paradox, it is important to note that the problem is a conceptual one. As I have demonstrated here, once we draw the appropriate conceptual distinctions, the chronological paradox will trouble us no more.

### III

The solution to the chronological paradox presented in the previous section rests on Hart's analysis of the nature of law and a legal system, and in particular on the idea of a rule of recognition. Yet when he turns in the final chapter of *The Concept of Law* to a discussion of international law, Hart denies the existence of an international rule of recognition. Furthermore, he rejects the necessity of a rule of recognition for the existence of a genuine legal order, and so the need for an international rule of recognition if international law is to count as genuine law. Therefore, a successful defense of my proposed solution to the chronological paradox requires at a minimum the refutation of the first of these two claims. Completion of this task will at least show the applicability of my solution to the existing international legal order, even if not to all possible legal orders (encompassing customary norms). After defending the existence of a rule of recognition for contemporary customary international law, I conclude with a few remarks regarding Hart's contention that a customary legal order can exist in the absence of a rule of recognition.

After a brief summary of Hart's discussion of international law, focusing in particular on those remarks that pertain to the existence of an international rule of recognition, I examine in the remainder of this section attempts by several international legal scholars to rebut Hart's claim that no such rule exists. These writers – Anthony D'Amato, Thomas Franck, and G.J.H. van Hoof – largely fail to grasp the primary reason behind Hart's skepticism. Indeed, some of these authors evidence a deep misunderstanding of Hart's entire project, and in particular, the limited function of a rule of recognition. In the following section, I offer a novel defense of a rule of recognition for customary international law premised on a distinction between the ontological function and the authoritative resolution function of such a rule, a distinction elided by Hart's talk of a rule of recognition serving to identify what the law is.

Hart frames his discussion of an international rule of recognition as a response to Kelsen.<sup>19</sup> Specifically, Hart rejects Kelsen's insistence that any legal order, and in particular the international legal order, must have a *Grundnorm*, a rule that (1) functions to validate all other rules as rules of the legal order in question, (2) unifies these rules in a single system, and (3) makes possible the existence of obligation creating rules. With regard to the last of these functions alleged to show the necessity of a *Grundnorm*, Hart argues that the existence of obligation creating rules amongst a group of actors requires only that those actors adopt the internal point of view with respect to certain standards of conduct, a state of affairs that can obtain in the absence of any 'basic norm.' He also argues that it is quite possible for a legal order to consist of a mere *set* of rules, without there being any secondary rule of recognition that unites them into a *system* of rules. This claim entails the falsity of the second reason Kelsen gives for the necessity of a

*Grundnorm* as a condition for the existence of a legal order. Finally, Hart argues that as a conceptual matter the existence of a rule in a given society (or social order) does not depend on its validation by a *Grundnorm* or rule of recognition. Rather, its acceptance by members of that society suffices for the existence of the rule in question. In short, neither the existence of a rule nor the capacity of that rule to impose obligations on those subject to it requires the existence of a *Grundnorm*, nor does the existence of a legal order require the systematicity a *Grundnorm* provides. Thus Hart concludes that no conceptual, or a priori, argument supports Kelsen's assertion that the international legal order must rest on some *Grundnorm*. And since the rule of recognition, as Hart describes it, serves the first two of the three functions Kelsen attributes to the *Grundnorm*, it follows that the existence of a rule of recognition is not a necessary condition for the existence of a legal order. Therefore, it is possible that the current international legal order, or at least customary international law, does not rest on a rule of recognition. If this is in fact the case, then the view advocated earlier does not provide a solution to the chronological paradox for these legal orders.<sup>20</sup>

Even if Hart correctly argues that the existence of the international legal order does not require a *Grundnorm* or rule of recognition, it does not follow that there is no such norm or rule. Hart recognizes this, and therefore he does not limit himself to criticizing Kelsen's assumption that an international *Grundnorm* must exist. Instead, he goes on to attack Kelsen's claim to have identified the norm in question, namely that 'states should behave as they customarily behave.' Such a rule, Hart contends, is redundant. A rule that says 'you have an obligation to follow the rule that says you have an obligation to do X' adds nothing to the simpler rule that says 'you have an obligation

to do X'. Such a rule is normatively redundant, as it amounts to the assertion that an agent has an obligation to do what he has an obligation to do. Such a rule is also epistemically redundant; as Hart 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.'<sup>21</sup> It seems that the only reason to accept such a *Grundnorm* would be if some basic norm were necessary for the existence of a legal order. Insofar as Hart successfully demonstrates that the existence of an international legal order does not depend on an international *Grundnorm* there is not even this reason to accept Kelsen's proposed rule. The same conclusion follows if we understand Kelsen's proposed rule as a Hartian rule of recognition, rather than as *Grundnorm*.

Having undermined both Kelsen's theory of international law and his proposed *Grundnorm* for the international legal order, Hart brings his discussion of international law to a close with the claim that though 'different interpretations of the phenomena to be observed are of course possible... it is submitted that there is no basic rule providing general criteria of validity for the rules of international law.'<sup>22</sup> Though Hart endorses Bentham's assessment that international law is sufficiently analogous in content to municipal law to warrant being labeled law, in its form or structure international law remains a primitive social order.

Hart's conclusion has not discouraged a number of international legal theorists from attempting to use his concepts of law and a legal system to analyze international law. However, while each has engaged to some degree with Hart's denial of an international rule of recognition, and his description of international law as in certain respects a primitive social order, none appear to have fully grasped Hart's reasons for

drawing this conclusion. A brief review of the responses to Hart's discussion of international law offered by Anthony D'Amato, Thomas Franck, and G.J.H. van Hoof, provides some evidence to support this claim.

D'Amato was among the first international legal theorists to consider the implications of Hart's analysis of law for the international legal order, and to criticize Hart's remarks on international law.<sup>23</sup> He rightly objects to Hart's assertion that an international rule of recognition would exist were it to come to pass that non-party states to multi-lateral treaties were generally viewed as being bound by those treaties: 'Assigning international legislative consequence to multilateral conventions may be a step in the direction of simplicity, but surely cannot be held to be the revolution which transforms primitive international law into a complex system of modern law.'<sup>24</sup> But many of D'Amato's other criticisms miss the mark. For instance, he accuses Hart of relying on legal concepts to explain why it is that people obey the law. But Hart's account of how social norms create obligations (as social facts), involving the adoption of an internal point of view with respect to certain standards of conduct, does not rely on any specifically legal concepts. Indeed, D'Amato appears to imply that Hart's theory of legal obligation suffers from the chronological paradox; that even the coming into existence of a rule of recognition requires that the relevant agents conduct themselves in certain ways with the belief that their conduct is already legally required.<sup>25</sup> D'Amato suggests that international law demonstrates the falsity of such a conclusion, but as should be clear from the discussion earlier in the process whereby conventional norms come to exist, Hart is not committed to it anyway.



Nor does D'Amato grant sufficient recognition to Hart's separation of the analytical question regarding what the law is, and the role a rule of recognition plays in addressing that question, and normative questions such as 'what ought the law to be?' and 'is there a moral obligation to obey the law?' For example, D'Amato claims that Hart's analysis of a rule of recognition cannot cope with the possibility that those who exercise the authority conferred by the rule will abuse it.<sup>26</sup> This is only a problem, however, if it is assumed that a legal obligation to  $\phi$  entails a moral obligation to  $\phi$ . Hart explicitly denies the necessity of such an implication. Even if those empowered to create law by the rule of recognition in a given legal system choose to create morally problematic laws, such "abuse" need not result in immoral consequences, particularly amongst a population well-schooled in Hart's legal theory.<sup>27</sup> Moreover, the kind of abuse D'Amato has in mind – a legislator changing or manipulating the rule of recognition at whim – are extremely unlikely, if not impossible, in a legal system with any significant number of legal officials. In such a legal system, the rule of recognition will depend on a consensus amongst most legal officials, and so no single legislator (or judge, etc.) will be capable of changing the rule herself.<sup>28</sup>

Perhaps most surprisingly, D'Amato chooses not to contest at all Hart's claim that international law contains no rule of recognition. Rather, D'Amato appears to adopt a different method for challenging Hart's analysis of international law. He begins by granting Hart's claim, and remarking that its acceptance 'may suggest that international law is basically incomplete and thus deserving of less respect on the part of states than ordinary municipal law.'<sup>29</sup> To head off such worries, D'Amato then attempts to demonstrate that Hart's concept of a rule of recognition is conceptually and morally

problematic. If successful, his criticisms might be taken to imply that the international legal order's lack of a rule of recognition should not be viewed as a strike against it. Unfortunately for D'Amato, the aforementioned rebuttals to his criticisms undermine this strategy for refuting Hart's skepticism.<sup>30</sup>

In *The Power of Legitimacy Among Nations*, Thomas Franck also attempts to rebut Hart's claim that international law does not rest on a rule of recognition.<sup>31</sup> Yet Franck not only fails to identify Hart's primary reason for reaching the skeptical conclusion that he does, he also misinterprets the role Hart assigns a rule of recognition in his theory of law and of a legal system. Specifically, Franck erroneously claims that the rule of recognition plays a crucial role in generating law's normativity.<sup>32</sup> Whatever the merits of Franck's account of international law's normativity, his discussion leaves Hart's skepticism unaddressed, as the following remarks illustrate.

Franck reads Hart as claiming that the validation of primary rules of obligation by a rule of recognition adds to their legitimacy, by which he means their 'pull to compliance.' For example, Franck writes that

primary rules, if they lack adherence to a system of validating secondary rules... may well exert a pull toward compliance, but a weaker one than is evinced by primary rules of obligation that are reinforced by a hierarchy of secondary rules which define the rule-system's 'right process.' Another way to say this is that a rule is more likely to obligate if it is made within the framework of an organized normative hierarchy...<sup>33</sup>

Franck's reference to legitimacy and obligation are somewhat ambiguous here (and throughout his book); it is often unclear whether he intends to assert a descriptive thesis –

under such and such conditions, actors are more likely to be motivated to comply with legal norms – or a normative thesis –under such and such conditions, states have a reason, and perhaps even that special kind of reason known as a moral obligation, to comply with legal norms. Hart offers a descriptive thesis of obligations as social facts; a given norm imposes obligations when the relevant actors adopt the internal point of view toward it, that is, when they appeal to the norm as a sufficient justification for conduct that conforms to the norm, and for criticizing those whose conduct deviates from the norm. But as was just noted, Hart is quite clear that it does not follow from the (social) fact that an agent has a legal obligation to comply with a given norm that she has a *moral obligation*, or indeed any reason at all, to comply with that norm. But even if these ambiguities regarding the concepts of obligation and legitimacy are left aside, nowhere does Hart make the claim that agents are more likely to adopt the internal point of view with respect to a social norm (such as a law) if that norm is endorsed by a rule of recognition. In fact, the one rule in a legal system to which actors (or at least officials) must adopt the internal point of view is the one that cannot be given a greater ‘pull to compliance’ through validation by a rule of recognition, namely the rule of recognition itself.

Consider another of Franck’s attempts to characterize Hart’s theory of law, and the role a rule of recognition plays in it.

In his [Hart’s] view, a simple rule (“cross on the green, stop on the red”) may arise as a discrete obligation entered into consensually by an otherwise unassociated group of actors: for example, random pedestrians and motorists. But that obligation’s compliance pull would be enhanced if

the traffic rule has been made by a city council organized in accordance with a state constitution which, itself, is a valid exercise of powers allocated to the state by the national constitution. Primary obligations such as those imposed by the traffic rule may come into operation as mere reciprocal arrangements, lacking adherence to a system of secondary rules about how rules are to be made, interpreted, and applied. Such *ad hoc* rules are not necessarily incapable of obligating parties which have agreed to abide by them. But rules which adhere to a hierarchy of secondary rules are of a higher order of obligation because they can exert a pull toward compliance even on parties which have not specifically agreed to comply. The basis of an obligation created by a primary rule which is reinforced by a rule hierarchy is not specific consent but *status*.<sup>34</sup>

This paragraph contains the same problems as those identified previously: ambiguity with respect to the concept of obligation, and the attribution to secondary rules, including the rule of recognition, of a normativity generating power that Hart does not assign them. But it evidences an additional misunderstanding of Hart's view as well.

Franck places great weight here (and elsewhere) on the distinction between specific consent or agreement on the one hand, and status as a member of the community on the other, as a basis for being bound by law. Apparently he believes that a rule of recognition is both necessary and sufficient for the latter being a possible source of obligation. Hart would deny this, however. Conceptually, nothing prevents an agent from becoming bound by a primary norm even if she has not specifically consented to it, and this is so even if no rule exists in the community for identifying what the law is, and

for systematizing it – that is, even in the absence of a rule of recognition as Hart conceives of it. Primary rules (and even some secondary rules, such as rudimentary norms of contract) exist and apply to all members of a community as long as most of its members believe they do. It is consensus, not consent, that provides the basis for social norms; that is why new entrants to the community (agents born into it, or newly created states) are automatically bound by these norms, regardless of whether they agree to be. Of course, the consensus amongst a given group of agents may be that certain norms are binding only on those who specifically consent to them; but whether this is so, and for what norms, is a contingent matter that will likely vary from community to community.

Nor is a rule of recognition, as Hart understands it, necessary to define membership in the community. Membership does depend on a consensus within a group regarding who counts as a member; but such a consensus can exist even in the absence of any mechanism for authoritatively resolving who is, and who is not, a member of the community. Of course, except in the conditions that Hart describes as necessary for the survival of a primitive social order (e.g. ties of kinship and a stable environment), uncertainty is likely to arise regarding the exact criteria for membership, which may well lead in turn to disruptions of social order. A rule of recognition will help to address this defect, but it is not necessary for the existence of any community at all, even a community of groups or collective agents.<sup>35</sup>

It is important to note the exact nature of the criticisms leveled here against Franck. Primarily, I aim to demonstrate that Franck misunderstands the task Hart assigns a rule of recognition in his theory of law and of a legal system, and therefore Franck's remarks do not constitute a rebuttal of Hart's skepticism with respect to the existence of

an international rule of recognition. Whether states are bound by (some) international legal norms because of their membership in the international (legal) community, or because they have specifically agreed to be bound by these norms, makes no difference to Hart's claim that there exists no criterion for identifying what the law is except the beliefs of states. It is uncertainty over what the law is, and not the descriptive or normative basis of legal obligation, that Hart contends a rule of recognition addresses. Even if Franck makes an important contribution to the latter issue, his discussion leaves Hart's skepticism regarding an international rule of recognition intact.

To my knowledge, G.J.H. van Hoof displays the most sophisticated grasp of Hart's theory by an international legal scholar.<sup>36</sup> Van Hoof clearly understands Hart's analysis of a legal system as a union of primary and secondary rules, the function that Hart believes the rule of recognition plays in a legal system, and what distinguishes Hart's theory of law from natural law and both Austin's and Kelsen's brands of positivism. But like D'Amato and Franck, van Hoof does not clearly perceive the primary reason behind Hart's assertion that the international legal order does not rest on a rule of recognition.

Consider van Hoof's critique of Hart. First, he asserts that 'no grounds [for denying the existence of a rule of recognition] are adduced and Hart's view in this respect cannot really be called a conclusion; it is rather a presumption.'<sup>37</sup> Second, van Hoof chastises Hart for failing to conduct an empirical search for an international rule of recognition, as he appears to believe that Hart has done in the case of municipal legal systems (specifically, the English and U.S. legal systems).<sup>38</sup> Third, Hart is accused of making contradictory claims regarding international law. On the one hand, he describes

the international legal order as 'simple' and 'primitive,' while on the other hand he acknowledges that international law is in many ways more like a municipal legal system than a 'small community closely knit by ties of kinship, common sentiment, and belief, placed in a stable environment.'<sup>39</sup> Fourth, van Hoof claims that when he turns to international law, Hart's approach becomes more restrictive; in particular, Hart 'implies that a rule of recognition requires the existence of a legislature.'<sup>40</sup>

What truth, if any, is there to these criticisms? With regard to van Hoof's third objection, the answer is none. He identifies as a 'remarkable contradiction' Hart's claim that 'in form, international law resembles such a [primitive] regime of primary rules, even though the content of its often elaborate rules are very unlike those of a primitive society, and many of its concepts, methods, and techniques are the same as those of modern municipal law.'<sup>41</sup> Yet this statement is not a contradiction; it merely asserts that despite certain similarities of function and content, there is a formal or structural difference between municipal legal orders and the international one, namely that in the former legal validity is bestowed by conformity to a rule of recognition, while this is not so in the latter case. International law resembles (but is not equivalent to) a primitive social order in that it suffers the same problems of uncertainty with respect to identifying norms and their scope that plagues such an order. In sum, careful attention to exactly what feature of the international legal order Hart is describing as resembling a primitive social order or a municipal legal system reveals that his claims produce no contradiction.

Van Hoof's first two criticisms overlap somewhat, insofar as he appears to believe that Hart ought to have provided empirical grounds to support his statement if he wished to advance it as a conclusion. In one respect, van Hoof is correct; since a rule of

recognition is a social fact, the non-existence of such a rule can only be demonstrated by an exhaustive empirical study. Yet Hart is clearly aware of this, as he writes that ‘once we emancipate ourselves from the [i.e. Kelsen’s] assumption that international law *must* contain a basic rule, the question to be faced is one of fact. What is the actual character of the rules as they function in the relations between states?’<sup>42</sup> Why, then, does Hart not engage in an exhaustive empirical search of the type he and van Hoof appear to agree is necessary? The likely reason is that though Hart couches his discussion in general terms, his primary (and perhaps even sole) focus is Kelsen’s theory of international law.<sup>43</sup> Hart may well have been more concerned with differentiating his theory of law from Kelsen’s – that is, with a theoretical debate – than with the particular question of international law. Given that aim, establishing the possibility of a legal order without a *Grundnorm* or rule of recognition was a far more important task than establishing whether there was (or is) an international rule of recognition.

But even if this *explains* why Hart does not make any effort to examine the practices constitutive of international law for signs of a rule of recognition, it does not *justify* his bald assertion that ‘there is no basic rule providing general criteria of validity for the rules of international law, and... the rules which are in fact operative constitute not a system but a set of rules...’<sup>44</sup> Yet Hart’s claim is not mere assertion, as van Hoof would have it. For though Hart does not take on the extremely difficult task of proving a negative – in this case, the non-existence of an international rule of recognition – he does provide a crucial reason for thinking that no search will turn up such a rule. According to Hart, a legal order rests on a rule of recognition only when there are criteria for settling what the law is other than the current beliefs of those subject to the laws. Insofar as the



existence and scope of international legal norms is simply and entirely a matter of consensus amongst states, as international legal positivists assert, it appears to follow that the international legal order does not rest on a rule of recognition. Van Hoof may be right, then, to describe Hart's claim as a presumption, rather than a conclusion. Nevertheless, it appears to be a presumption that international legal theorists, or at least those persuaded of the truth of Hart's legal positivism, have good reason to take seriously.

To reiterate, Hart's assertion that there is no international rule of recognition rests on a conceptual point regarding the necessary conditions for the existence of such a rule, together with a widely (though not unanimously) accepted view of international law. Among the passages providing textual support for this claim is Hart's remark that, were it generally recognized that certain treaties bind even those states not party to them, such treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules. A basic rule of recognition could then be formulated which would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states.<sup>45</sup>

Van Hoof interprets this statement as implying that a rule of recognition exists only insofar as a legislature does, a far more restrictive understanding than Hart employs when he first introduces the concept of a rule of recognition.<sup>46</sup> Hart's remark does not have the implication van Hoof believes it does, however. Rather, it depicts one *possible*, but not *necessary*, change to the international legal order that would suffice for the existence of an international rule of recognition.<sup>47</sup> Seen in the context of other remarks Hart makes in

his rebuttal of Kelsen's theory of international law, what Hart's statement does imply is that a legal order has no rule of recognition if the legal validity of a norm is solely a matter of its acceptance as law by most of those subject to it. The significance of states being legally bound by treaties to which they are not parties lies in the possibility of a norm being legally valid even if it is not thought to be so by those subject to it, just as in a municipal legal system the legal validity of a norm does not depend on the belief of most, or even all, of the persons subject to it.

Like D'Amato and Franck, van Hoof fails to provide a convincing rebuttal to Hart's claim that the international legal order lacks a rule of recognition. Equally important is that all three miss the primary source of Hart's skepticism, namely that a rule of recognition exists only where there is an authoritative procedure in place for settling disputes over what the law is (including the exact scope of specific legal norms). In the next section, I argue that serving this function is not essential for the existence of a rule of recognition, and contend that existing international law, and more specifically, customary international law, can and does have a rule of recognition at its base.

#### IV

Though Hart focuses specifically on Kelsen's theory of international law, his argument can be stated in more general terms. First, a rule of recognition is not necessary for the existence of a (customary) legal order. It is enough that most or all of the relevant actors (e.g. the members of the society in question) accept norms N1, N2, etc., as legal norms. Note that it makes no difference if the relevant actors have different reasons for accepting N1, N2, etc., as legal norms; for instance, if one actor thinks these norms are legal because they are substantively just, while another actor thinks they are legal because

some third actor has pronounced them legal, and so on. Regardless of the different reasons these actors have for believing that N is a legal norm, all will agree that when someone violates the norm, that agent acts illegally. The fact that in the (most) primitive legal order agents can have different reasons for believing that N1, N2, etc. are legal norms is a crucial point to which I return below.

Second, a rule of recognition serves both an identification function and a unifying (and perhaps more importantly, a systematizing) function in those legal orders that have such a rule. A rule that serves these functions ameliorates one of the basic defects of a primitive legal system, namely uncertainty with respect to what the law is (addressed by the identification function) or with respect to the scope of particular legal norms (addressed by the systematizing function). It does so by providing a procedure for the authoritative resolution of debates over these questions. According to Hart, then, a legal order contains a rule of recognition only when officials of that order adhere to a rule that serves these functions; that is, playing these roles is essential to the existence of a rule of recognition. Insofar as no authoritative procedure exists for resolving disputes over what counts as a valid norm of customary international law, or over the scope of particular customary legal norms, it follows that customary international law lacks a rule of recognition. It is in this technical sense a primitive legal order. For just as ‘in the simpler form of society we must wait and see whether a rule gets accepted as a rule or not,’ disputes over customary international legal norms end only once states reach a consensus.<sup>48</sup>

I suggest that in his discussion of a rule of recognition’s identification function, Hart elides an important distinction between what I will label the ontological function

and the authoritative resolution function of such a rule. The former makes possible the kind of justification and criticism constitutive of a rule-governed practice for identifying norms as legally valid. The latter makes possible the settling of disputes over what the law is, as well as over the scope of particular legal norms. I contend that it suffices for the existence of a rule of recognition that it serves the ontological function; serving the authoritative resolution function is not essential for the existence of such a rule. Existing customary international law rests on a rule with just these features; that is, one that serves the ontological, but not the authoritative resolution, function. That rule is ‘X is a customary legal norm if most states believe it is a customary legal norm, and what makes it a customary legal norm is that most states believe it is a customary legal norm.’ The second-phrase here is crucial because it distinguishes a mere convergence of beliefs that N is a legally valid norm, as in the hypothetical social order described in the first paragraph of this section, from one in which belief in the legal validity of N is rule-guided. The following example both serves to illustrate this point and to make the case that the proposed rule of recognition really does form the basis for contemporary customary international law.

Imagine a scenario in which a state serving on the United Nations Security Council – say the United Kingdom – decides to vote against a proposal to condemn as illegal state A’s intervention in state B (where neither A nor B is the United Kingdom). Suppose that the United Kingdom offers as a justification for its vote its belief that state A has not acted illegally because its conduct conforms to a norm that is legal because it is just. That is, the U.K. justifies its vote by appeal to the belief that the substantive justice of the norm suffices for that norm’s legal validity. Surely much of the criticism directed

at the U.K. would involve substantive arguments concerning the justice of this particular intervention, the effects that a rule legalizing interventions of this type would have on international peace and stability, and so on. I suggest, however, that the U.K. would also be criticized for deviating from the existing shared normative practice governing the legal validation of norms, namely the recognition of norms as legally valid by most states. In other words, the U.K. would be criticized for deviating from the international rule of recognition (at least as concerns customary international law, and perhaps also treaty law), and those who made the criticism would take the fact of deviation from this rule to be a sufficient reason for criticizing the U.K.; that is, a reason to criticize the U.K. independent of any substantive concerns regarding justice or international peace and stability.

Of course it is possible to criticize those who object to the U.K.'s deviation; that is, to argue that the U.K. (and other states) ought not to adhere to the rule of recognition that forms the basis of customary international law because adherence to a different rule of recognition would lead to more substantively just outcomes. But the *existence* of a rule of recognition does not turn on whether such a rule, and the legal order to which it gives rise, produces peace or justice (though some degree of stability is probably necessary). Thus it is one thing to criticize those who object to the U.K.'s deviation by arguing that morally the U.K., in its role as an official of the international legal order, ought not to adhere to the existing rule of recognition.<sup>49</sup> That criticism is distinct, however, from (the possibility of) the kind of criticism that follows from the existence of a rule of recognition; namely criticism for deviation from the rule. Note that no such

criticism can be made in a legal order where the common belief in the legal validity of certain norms results only from a fortunate overlap of beliefs.

In sum, I claim that we can infer from actual and likely counter-factual state conduct that customary international law rests on a rule of recognition that states the existence conditions for customary international legal norms. States rely on this rule in distinguishing mere customary international norms (or usage) from norms of customary international law (or custom); that N is a norm of customary international law is not merely a matter of common belief, but adherence to a shared normative standard for legal validity. True, this rule does not contribute to the amelioration of the problem Hart focused on in his discussion of the rule of recognition; there is no less uncertainty in customary international law than there would be in the absence of the proposed rule. In that respect, customary international law remains primitive and its rule of recognition defective, and so the argument here does not constitute a direct rebuttal of Hart's skepticism regarding an international rule of recognition. But serving the authoritative resolution function is not essential to the existence of a rule of recognition, and it is only the existence of such a rule for contemporary customary international law that my proposed solution to the chronological paradox requires.

While the foregoing argument demonstrates that existing customary international law rests on a rule of recognition, it may not suffice to prove that customary law (international or otherwise) can exist *only* in the presence of a rule of recognition. Whether it is thought to entail this stronger conclusion will depend in part on one's assessment of the primitive social order described earlier, in which there is an overlap of beliefs regarding the legality of certain norms, though these beliefs have different bases.

If such a legal order counts as customary, then a rule of recognition, even one that serves only the ontological function, is not necessary for the existence of a customary legal order. If, on the other hand, the reader's intuition is that this order is not a customary legal order (perhaps because it does not rest on any shared convention regarding legal validity), then this may lend some support for the strong claim that a *conceptually necessary condition* for the creation of a new rule of customary international law is that officials in the international legal system adhere to a rule of recognition that treats customary rules (at least in some domain D) as legally valid.<sup>50</sup>

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<sup>1</sup> See, for example, the International Court of Justice's opinion in the *North Sea Continental Shelf Cases*; Restatement (Third) of the Foreign Relations Law of the U.S. (St. Paul, MN: American Law Institute Publishers, 1987): §102; H.W.A. Thirlway, *International Customary Law and Codification* (Leiden: A. W. Sijthoff, 1972) at 47.

<sup>2</sup> Francois Geny, *Methodes d'interpretation et sources en droit prive positif*, 2<sup>nd</sup> Edition (Paris: F. Pichon et Durand-Auzias, 1919) at 367-71. See also Peter Benson 'Francois Geny's Doctrine of Customary Law' 20 *Canadian Yearbook of International Law* 267 (1982).

<sup>3</sup> Michael Byers, *Custom, Power and the Power of Rules* (New York: Cambridge University Press, 1999) at 130-3.

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<sup>4</sup> Throughout this paper I follow the common practice in discussions of international law of describing states as agents; for instance, I speak of states' having beliefs and acting as legal officials in the international legal order. But as Antonio Cassese points out, "although the protagonists of international life are States as legal entities or corporate structures, of course they can only operate through individuals, who do not act on their own account but as State officials, as the tools of the structures to which they belong" (Antonio Cassese, *International Law, 2<sup>nd</sup> Edition* (New York: Oxford University Press, 2005) at 4). On the justifiability of attributing not only acts but also mental states to states, see Lefkowitz 'The Principle of Fairness and States' Duty to Obey International Law" (cite).

<sup>5</sup> Byers, *supra* note 3, at 131.

<sup>6</sup> By 'conventional rule' (or 'social rule') I mean a rule that exists as a matter of convention. This use of the term 'convention' should be distinguished from a common understanding of that term in international law as synonymous with 'treaty'.

<sup>7</sup> H. L. A. Hart, *The Concept of Law* (New York: Oxford University Press, 1961). Hart's discussion of this distinction is somewhat problematic. For one attempt to clarify it, see Neil MacCormick, *H.L.A. Hart* (Stanford, CA: Stanford University Press, 1981) at 103-6.

<sup>8</sup> See Hart, *supra* note 7 at 104-5, 108.

<sup>9</sup> I assume that A, B, C, D, E, etc. all believe themselves to be members of the same group; that is, each believes she is a member in the group, and believes that the others are members of the group.

<sup>10</sup> Nancy Kontou defends this view in *The Termination and Revision of Treaties in the Light of New Customary International Law* (New York: Oxford University Press, 1994).



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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 Raphael M. Walden “Customary International Law: A Jurisprudential Analysis” (1978) 13 *Israel Law Review* 97.

<sup>11</sup> See Byers, *supra* note 3 at 130.

<sup>12</sup> See Hart, *supra* note 7 at 56-7, 101-3. For discussion, see MacCormick *supra* note 7; Jules Coleman, *The Practice of Principle* (New York: Oxford University Press, 2001).

<sup>13</sup> One can easily imagine the other bus riders, or neighbors, complaining that the deviator has done something she ought not to do. But we must be careful to distinguish between (a) the clothing of individual preferences in moral language, which likely underlies the claim of a bus rider who complains of being displaced from “my seat”; (b) non-rule based moral reasons, such as those grounded in the principle of fair-play, which might provide a basis for criticizing the neighbor who refuses to plant flowers; and (c) criticism of an agent by appeal to a social rule, one that exists (and so provides a reason) if and only if most members of a group adopt the internal point of view with respect to the conduct at issue.

<sup>14</sup> Ian Brownlie, *Principles of Public International Law, 5<sup>th</sup> Edition* (New York: Clarendon Press, 1998) at 5. Brownlie writes that the term ‘usage’ in international law refers to non-legal customary (or social) rules, such as those mentioned in the text, while the term ‘custom’ serves as a term of art that refers only to social rules that impose legal obligations.

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<sup>15</sup> The reader might reasonably wonder how there come to be specifically legal officials in the first place. After all, the existence of such officials are presupposed in the account set out in the text of how a customary rule becomes legally valid, and the concept of an office seems best understood in terms of various normative rules, which at least initially might well be customary rules. Thus the initial creation of a legal office, and so of a legal official, would seem to require the temporally prior existence of some customary legal rules, and so the chronological paradox arises once again. I set this question aside here in order to focus on the question of how new customary norms of international law come to be part of an already existing international legal order (that includes, among other things, international legal officials). For one response to the question regarding the origins of legal officials (on a Hartian legal positivist account of law and a legal system), see Coleman, *supra* note 12 at 100-1.

<sup>16</sup> Note the difference between this belief and the belief by ordinary members of this society that since their legal officials adhere to the aforementioned rule of recognition, and the customary rule exists, that rule is law. This belief, while true, does not make the rule in question legally valid.

<sup>17</sup> Since the rule of recognition directs officials to pronounce customary rules as legally valid, there can be no new rule of customary law until a customary rule already exists. Given such a rule of recognition, it will often be true that once such a rule exists, it exists as a legally valid rule. That is, it exists as law prior to its application by legal officials to settle a dispute. But again, the beliefs of those subject to the rule (*qua* subjects) as to the legal status of the rule have no bearing on what that status actually is.

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<sup>18</sup> Judges sitting on the International Court of Justice (and the International Criminal Court) may be actual analogues to the legal officials described in the earlier hypothetical example; that is, agents whose beliefs are relevant to what counts as law, but not to the formation of customary rules that are eligible for incorporation into law. Article 38(1) of the Statute of the International Court of Justice is usually described as denying judicial decisions the status of a source of law, but what matters is the actual practice of officials in the international legal order, and here the issue may not be so clear.

<sup>19</sup> See Hart, *supra* note 7 at 226-31.

<sup>20</sup> Hart aims his critique against the existence of a rule of recognition for the international legal order as a whole, and not simply customary international law. But it seems quite possible for a legal order to contain various rules of recognition for sub-classes of legal rules in that order without their also being a single (even very complex) rule of recognition at the base of the legal order as a whole. Such a legal order would give rise to less uncertainty than a primitive legal order, insofar as some disputes could be settled by an authoritative process, even if it also produced more uncertainty than would a legal order with a single, all-encompassing, rule of recognition. The international legal order may constitute just such a legal system. Thus Hart correctly endorses the rejection of *pacta sunt servanda* as the all-encompassing rule of recognition for the international legal order, yet as Franck (and others) correctly observe, this conventional rule does serve as a rule of recognition for one part of international law, namely treaty law (Ibid at 228; Thomas Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) at 187). *Pacta sunt servanda* is clearly akin to a rule directing actors to “an authoritative list or text of the rules,” which Hart offers as an illustration of a relatively

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simple rule of recognition (See Hart, *supra* note 7 at 92). Even if no authoritative procedure exists in the international legal order for adjudicating conflicts between obligations imposed by different treaties, or between treaty obligations and customary international law obligations, points on which I take no position, this entails only that the international legal order contains less systematicity than do many domestic (or municipal) legal orders. It does not follow that the international legal order contains no rules of recognition. Note, too, that the argument of this paper depends only on the existence of a rule of recognition for customary international law, and not a single all-encompassing rule of recognition at the base of the entire international legal order.

<sup>21</sup> See Hart, *supra* note 7 at 230.

<sup>22</sup> *Ibid* at 231.

<sup>23</sup> Anthony A. D'Amato 'The Neo-Positivist Concept of International Law', 59 *AJIL* 321-4 (1965).

<sup>24</sup> *Ibid* at 323-4; see Hart, *supra* note 7 at 231, and discussion of Hart's remark below.

<sup>25</sup> *Ibid* at 323.

<sup>26</sup> *Ibid* at 322-3.

<sup>27</sup> I place the term 'abuse' in scare quotes to indicate that the concern lies not with the failure to adhere to the standards for creating legal rules, but rather with the purposes for which officials use their powers to do so.

<sup>28</sup> D'Amato also reads Hart's denial of a necessary connection between law and morality as implying that international law cannot incorporate moral principles, a conclusion he finds problematic in the case of international humanitarian law. As Hart later made clear in his postscript to the second edition of *Concept of Law* (which, it should be

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acknowledged, was published several decades after D'Amato's article), he thinks it is *possible*, but not *necessary*, for a legal system to treat morality as a source of law. See Hart, *The Concept of Law*, 2<sup>nd</sup> Edition (New York: Oxford University Press, 1994). Thus Hart's theory of law does not commit him to excluding as sources of international law the moral principles constitutive of *jus ad bellum* and *jus in bello*. Whether they are in fact sources of international law depends on the rule of recognition to which officials in the international legal system adhere, or so I argue elsewhere. See 'Inclusive Legal Positivism, International Law, and Human Rights,' draft on file with author.

<sup>29</sup> D'Amato, *supra* note 23 at 322. No such implication follows from Hart's theory, and D'Amato's cautious word-choice may indicate an awareness of this.

<sup>30</sup> Interestingly, D'Amato adopts Hart's analysis of law and a legal system in his book *The Concept of Custom* (Ithaca, NY: Cornell University Press, 1971). However, while he refers to secondary rules a number of times, D'Amato does not use the term 'rule of recognition,' and cites several times to the article discussed in the text.

<sup>31</sup> See Franck, *supra* note 20 at 183-194.

<sup>32</sup> In doing so, he transforms Hart's rule of recognition into something akin to Kelsen's *Grundnorm*. Yet as was indicated above, Hart attributes law's normativity (as a descriptive matter) to the adoption of the internal point of view with respect to (particular) legal norms, rather than to the existence of a basic norm of the legal system. In fairness to Franck, though, it should be noted that on a number of occasions in the chapter on international law, Hart speaks as if the concepts of a *Grundnorm* and a rule of recognition are equivalent.

<sup>33</sup> *Ibid* at 184.

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<sup>34</sup> Ibid at 187.

<sup>35</sup> Compare to Franck's remark that the international community is defined by an ultimate rule of recognition that specifies the sources of members' obligations. Ibid at 190.

<sup>36</sup> G.J.H. van Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer, 1983) at 44-56.

<sup>37</sup> Ibid at 53; see also Walden, *supra* note 10 at 90.

<sup>38</sup> Van Hoof's complaint is somewhat odd, since Hart conducts no search for the rule of recognition in either the English or American legal systems, but rather offers possibly oversimplified candidates for such rules which at least initially appear to fill the functions that Hart's theory of a legal system requires a rule of recognition to fill.

<sup>39</sup> See Hart, *supra* note 7 at 89-90.

<sup>40</sup> See van Hoof, *supra* note 36 at 55.

<sup>41</sup> Ibid at 54. The quote from Hart is in Hart, *supra* note 7 at 222.

<sup>42</sup> See Hart, *supra* note 7 at 230.

<sup>43</sup> Indeed, John Tasioulas has suggested to me that Hart may have written the chapter on international law only because Austin and Kelsen discussed it.

<sup>44</sup> Ibid at 231.

<sup>45</sup> Ibid at 231.

<sup>46</sup> D'Amato gives the same interpretation of Hart's remark in *The Concept of Custom*; see D'Amato, *supra* note 29 at 28-9.

<sup>47</sup> Though as was noted earlier, D'Amato correctly points out that this change would not necessarily entail an all-encompassing rule of recognition; that is, one that validated and systematized all international legal norms.

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<sup>48</sup> See Hart, *supra* note 7 at 229.

<sup>49</sup> The parallel here would be to argue that an official of a domestic legal system ought not to adhere to a rule of recognition that directs him to treat legislative enactments as legally valid if the laws enacted are unjust – e.g. enslave a portion of the population

<sup>50</sup> Besides those mentioned in this paper, other discussants of the chronological paradox include Hans Kelsen, *Principles of International Law, 2<sup>nd</sup> Edition* (New York: Holt, Rinehart and Winston, 1966); John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980); and John Tasioulas ‘Customary International Law and the Quest for Global Justice,’ in *The Nature of Customary Law: Philosophical, Historical and Legal Perspectives*, A. Perreau-Saussine and J.B. Murphy (eds) (New York: Cambridge University Press, 2007) at 307-35. Unfortunately, considerations of space preclude engagement with their views here.