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# What Makes a Social Order Primitive? In Defense of Hart's Take On International Law<sup>‡\*</sup>

David Lefkowitz, University of Richmond

H.L.A. Hart's discussion of international law in Chapter X of *The Concept of Law* has earned him few friends. In one respect this is surprising; after all, Hart devotes a considerable portion of the chapter to rebutting his fellow Legal Positivist John Austin's claim that international law is not law properly so-called, but (only) positive morality. Why, then, do so many remain unhappy with Hart's treatment of international law? In a word, because he characterizes it as primitive. More precisely, Hart maintains that international law resembles the simple legal order that regulates a primitive society, one that "we are accustomed to contrast with a developed legal system," and especially, in *The Concept of Law*, with the municipal legal system of a well-functioning state.<sup>1</sup> For some, the mere use of the word 'primitive' to describe international law casts a good deal of suspicion not only on

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\* I wish to thank Nicole Roughan for inviting me to present an earlier version of this paper at the National University of Singapore Law School, and for her comments on it, as well as those offered by David Frydrych, Mark McBride, Terry Nardin, James Penner, Patrick Taylor Smith, and a referee for this journal. Any remaining errors are my own. Portions of this paper were completed while I served as an Isaac Manasseh Meyer Visiting Research Fellow at the National University of Singapore, and as the Class of 1958 Rorer Ethical Leadership Visiting Fellow at the United States Naval Academy's Stockdale Center for Ethical Leadership. The views expressed herein are strictly my own.

<sup>1</sup> H.L.A. HART, *THE CONCEPT OF LAW*, 3<sup>RD</sup> EDITION (2012), at 214.

Hart's discussion of it but also on his entire analysis of law.<sup>2</sup> For others, the problem lies with the fact that this very analysis provides no warrant for the conclusion that international law is akin to a primitive social order; that is, for Hart's assertion "that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules."<sup>3</sup> Hart's arguments in Chapter X, writes Jeremy Waldron, "become careless and their application thoughtless in regard to law in this area," and the result is an embarrassingly inadequate account of the nature and status of international law.<sup>4</sup>

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<sup>2</sup> See, e.g., Ian Brownlie, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS* (1998), at 3-6; Jason A. Beckett, *The Hartian Tradition in International Law*, 1 *THE JOURNAL JURISPRUDENCE* 51-83 (2008) at 56; Patrick Capps, *International Legal Positivism and Modern Natural Law*, in *INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD* (J. Kammerhofer and J. D'Aspremont eds., 2014) at 215; and Anthony A. D'Amato, *The Neo-Positivist Concept of International Law*, 59 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 321-324 (1965) at 322-23, though D'Amato later adopted facets of Hart's analysis of law. Socio-legal jurists sometimes respond this way as well; see, e.g., Roger Cotterrell, *What is Transnational Law?* 37 *LAW AND SOCIAL INQUIRY* 500-524 (2012) at 507; and Brian Tamanaha, *What is Law?* WASHINGTON UNIVERSITY IN ST LOUIS LEGAL STUDIES RESEARCH PAPER No. 15-01-01(2015), accessed from SSRN on June 6, 2016, at 54.

<sup>3</sup> Hart, *supra* note 1, at 214.

<sup>4</sup> Jeremy Waldron, *International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?* In *READING HLA HART'S THE CONCEPT OF LAW* (L. Duarte d'Alemlida, J. Edwards, and A. Dolcetti eds., 2013) at 213 and 211. See also Waldron's description of Hart's reflections on international law as

Mehrdad Payandeh also claims to identify multiple shortcomings in Hart's application of his own ideas to international law, and suggests that his "insistence that international law does not constitute a legal system seems almost as problematic as Austin's insistence that international law is not law at all."<sup>5</sup> Even Jean D'Aspremont, who draws a great deal from Hart's analysis of law in developing his own formalist theory of international law's sources, describes Hart's discussion in chapter X as a "disappointing and unconvincing portrayal of international law as a very primitive set of rules."<sup>6</sup> At best, then, Hart's allegedly careless ruminations on international law constitute a missed opportunity to improve the quality of his own jurisprudential theorizing, as well as that of his students and readers. At worst, despite his intentions Hart bears some blame for the persistence of skepticism vis-à-vis international law's genuine status as law, and the relatively small number of analytical legal theorists engaged with this "issue of the hour."<sup>7</sup>

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"unhelpful," "careless," and "indifferent" in Jeremy Waldron, *Hart and the Principles of Legality*, in THE LEGACY OF H.L.A. HART (M.H. Kramer et al. eds., 2008) at 68-9.

<sup>5</sup> Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 967, at 978 (2011).

<sup>6</sup> JEAN D'ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* (2011), at 56. For another example of an international legal theorist who put Hart's analysis of law to work despite expressing deep dissatisfaction with Hart's discussion of international law, see G.J.H. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* (1983).

<sup>7</sup> Waldron, *supra* note 4, at 69.

In this essay I argue that antipathy to Hart's treatment of international law rests on two misunderstandings. The first concerns the nature of the distinction, or rather *distinctions*, that Hart draws between a primitive and an advanced society. Not only in Chapter X but throughout *The Concept of Law* Hart fails to clearly and consistently separate two bases for differentiating a simple or primitive social order from a complex or advanced one. One is the absence or presence of secondary rules *tout court*. The other is the absence or presence of a division of labor in identifying, altering, applying and enforcing the general social rules that govern and partly constitute a given society. This specialization in the performance of governance tasks is realized in the practice of a specific class of secondary rules, namely those that create or constitute legislative, judicial, and executive offices and institutions.<sup>8</sup> Waldron, Payandeh and others assume that Hart has the first of the two aforementioned distinctions in mind when he characterizes international law as primitive, and critique it on that basis. I contend, however, that when Hart describes international law as akin to a simple social order he employs the second basis for distinguishing a primitive from an advanced society. Read in this light,

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<sup>8</sup> My use of the phrase 'governance tasks' is inspired by Lewis A. Kornhauser, *Governance Structures, Legal Systems, and The Concept of Law*, 79 CHICAGO-KENT LAW REVIEW 355. Like Kornhauser, my reading of *The Concept of Law* pushes it in a social scientific direction, albeit without reducing the study of the question "what is law?" to a mere description of common features characteristic of putative legal orders that Hart seems to have thought exhaustively characterized the sociology of law.

many of Hart's claims in chapter X were compelling when he wrote *The Concept of Law*, and to a not insignificant degree remain so today.<sup>9</sup>

The second confusion that afflicts critics of Hart's remarks on international law follows from a failure to distinguish carefully between two different functions that reference to the rule of recognition serves in Hart's analysis of law. One is epistemic; the (or a) rule of recognition is a norm that actors can use to identify the law of a particular society. The other is ontological; here 'rule of recognition' refers not to a norm but to the practice of holding accountable that makes it the case that rules R1, R2, etc., are rules of a particular society. Whereas Hart's critics rely on the epistemic role played by a rule of recognition, and so reject his claims that international law lacks a rule of recognition and is not a legal system, I argue instead that these claims should be interpreted ontologically. A legal system in the sense that concerns Hart in chapter X requires a hierarchy of agents, a feature international law largely does without. That is why he maintains we can form no ontological "rule" of recognition for international law, or at least not an informative "rule," since there is nothing much to say about what makes L1, L2, etc.,

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<sup>9</sup> Few believe that either the idea of social rules or of specialization in the performance of governance tasks, or their combination, suffice to distinguish law from other kinds of social orders. One or two passing remarks aside, I leave the question of what does so aside in this paper and use the terms 'law' and (social) 'rule' interchangeably.

international law other than that states use them to hold themselves and each other accountable.<sup>10</sup>

In the next section I offer a careful reading of passages from chapters V and VI in *The Concept of Law* that support the following two conclusions. First, the absence of a division of labor in the performance of governance tasks – i.e. identifying, altering, applying, and enforcing law – is equally, if not more, central to Hart’s understanding of what makes a society primitive than is the absence of any secondary rules at all. Second, and relatedly, it is primarily in terms of the presence of such a division of labor and the implications it has for the ontology of law that Hart understands the idea of a legal system, and the ideas of a rule of recognition and legal validity that accompany it. These conclusions provide the basis for the interpretation of Hart’s remarks on international law that I offer in section II, one I explicate by way of contrasting it with Waldron’s and Payandeh’s mistaken reading of chapter X. In the third and final section I offer rebuttals to several other criticisms of Hart premised on a misunderstanding of his characterization of

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<sup>10</sup> No doubt many international lawyers will immediately object and point to international courts, dispute resolution panels, semi-autonomous administrative rule making bodies created by treaties, etc. There is some truth in these observations, though as Hart emphasized in chapter X, we should be careful not to exaggerate it. In any case, conceding the development that international law has undergone since Hart wrote *The Concept of Law* does not undermine the superiority of the interpretation of his argument I offer to that offered by his critics. Nor, more importantly, does it detract from the theoretical and moral advantages we stand to gain if we take Hart’s remarks on international law to heart.

international law. Furthermore, I suggest some of the ways in which embracing that characterization might enhance both our theoretical understanding of how international law contributes to the production of social order as well as the quality of our reflection on international law as a means for advancing or realizing justice.

## I

From the very outset Hart fails to clearly and consistently distinguish between the absence of secondary rules and the absence of specialization in the performance of governance tasks as a basis for characterizing a social order as primitive. He begins his exposition of the idea of a primitive society with the following claim:

It is, of course, possible to imagine a society without a legislature, courts, or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we characterized rules of obligation.<sup>11</sup>

Here Hart does not maintain that primitive communities are ones characterized only by the existence of duty-conferring rules. Rather, he claims only that in such a society social rules exist and contribute to the production of social order in virtue of the group members *in general* taking the internal point of view to those rules; that

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<sup>11</sup> Hart, *supra* note 1, at 91.



is, their “use [of] the rules as standards for the appraisal of their own and others’ behavior.”<sup>12</sup> In order to avoid certain confusions he fears will follow from labeling as ‘customary’ a social order that lacks any specialization in the performance of governance tasks, Hart proposes in the next sentence to refer “to such a social structure as one of primary rules of obligation.”<sup>13</sup> Alas, in doing so he appears to shift from distinguishing between a primitive and an advanced society on the basis of the absence or presence of specialization in governance, or what I will call the specialization distinction, to distinguishing between the two types of societies on the basis of the absence or presence of secondary rules *tout court*, or what I will call the functional distinction.<sup>14</sup>

The ensuing discussion of the defects of uncertainty, rigidity, and inefficiency that characterize a primitive society, and the contribution that rules of recognition,

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<sup>12</sup> *Id.*, at 98.

<sup>13</sup> *Id.*, at 91.

<sup>14</sup> Hart then immediately lays the ground for further possible confusion by briefly noting the content of the rules that must regulate even a primitive society, such as “some form [of] restrictions on the free use of violence, theft, and deception” (*Id.*, at 91). Given this characterization of a primitive community, a society will qualify as advanced if the content of its norms regulate and make possible many forms of conduct beyond those that make up what Hart later refers to as the minimum content of natural law. One perhaps too charitable interpretation of Hart’s repeated insistence in Chapter X that municipal and international law are characterized by many analogies of content would be to read him as insisting that in this vitally important respect international law resembles more closely an advanced legal system like that of a well-functioning modern state than it does the social order of a primitive society.

change, and adjudication make to ameliorating these defects, further muddies the fact that there are two ways to distinguish primitive from advanced societies at issue. The functional distinction figures most clearly in Hart's description of a primitive society suffering from the rigid or static character of its rules. "There will be no means, in such a [primitive] society, of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones: for again, the possibility of doing this presupposes the existence of rules of a different type from the primary rules of obligation by which alone the society lives."<sup>15</sup> The implication seems clear: if a society possesses rules of change then it is not a primitive society, a point Hart's critics press against him when they point to the existence of such rules in international law as a reason to reject his description of it as primitive. Read in context, however, even this passage offers some reason to think that Hart had both the functional and the specialization distinction in mind. He continues:

In an extreme case the rules may be static in a more drastic sense.

This, though never perhaps fully realized in any actual community, is worth considering because the remedy for it is something very characteristic of law. In this extreme case, not only would there be no way of deliberately changing the general rules, but the obligations

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<sup>15</sup> *Id.*, at 92-3.

which arise under the rules in particular cases could not be varied or modified by the deliberate choice of any individual.”<sup>16</sup>

The acknowledgment that this extreme case has likely never been realized in any actual community, together with Hart’s earlier reference to studies of actual primitive communities, suggest a recognition that communities without specialization in modifying the law, i.e. a legislature or courts, nevertheless can and do possess rules of change; e.g. rules that empower members “to release those bound from performance or to transfer to others the benefits which would accrue from performance.”<sup>17</sup> The contrast Hart draws between “changing the general rules” and changing “the obligations which arise under the rules in particular cases” also implies that the absence of a legislature or courts marks one way to distinguish a primitive society from an advanced one, with the absence of any rules of change at all providing a separate way of drawing such a distinction. Granted, in one sense the creation of a legislative body need not involve marking out a special set of agents who make or modify the rules; the legislators may consist of all a community’s members. Nevertheless, it introduces such specialization “in embryonic form” by introducing the categories of official and subject that Hart maintains are absent from a primitive community. Moreover, the deliberate change of general rules that constitutes legislation differs from the process of customary rule change in two related respects. First, the actors whose practice of holding accountable produces a

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<sup>16</sup> *Id.*, at 93.

<sup>17</sup> *Id.*, at 93.

change to a society's customary norm do not understand their actions as the deliberate creation of a new norm, but rather as making explicit a normative standard to which the community is (or has already become) committed. Second, the customary rule-making process is successful only when the new rule is generally practiced within the community, whereas the legislative law-making process makes possible successful rule change in advance of members of the society in question using the rules to hold one another accountable.<sup>18</sup> I return to all of these points below.

Hart's discussion of inefficiency focuses entirely on the shortcomings endemic to any society that does not employ a division of labor in carrying out the tasks of adjudication and enforcement. With respect to adjudication, Hart writes: "disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is *no agency* specially empowered to ascertain finally and authoritatively, the fact of violations."<sup>19</sup> As for enforcement, Hart describes as a weakness of a "simple form of life" the fact that "punishments for violations of the rules, and other forms of social pressure involving physical effort or the use of force, are not *administered by a*

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<sup>18</sup> See Gerald Postema, *Custom, Normative Practice, and the Law*, 62 *Duke Law Journal* 707-738 (2012); David Lefkowitz, *Sources in Legal Positivist Theories: Law as Necessarily Posited and the Challenge of Customary Law Formation*, in *THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW* (Jean D'Aspremont and Samantha Besson eds., 2017) 323-341.

<sup>19</sup> Hart, *supra* note 1, at 93, italics added.

*special agency* but are left to the individuals affected or the the group at large.”<sup>20</sup>

These defects in the capacity of rules to contribute to the production of social order can be mitigated by the adoption of rules that create specialized offices (e.g. judges) who enjoy sole authority to ascertain whether a violation of the rules has occurred, and “the exclusive power to direct the application of penalties by other officials.”<sup>21</sup> While Hart focuses on the characterization of these rules as secondary rules, the above description of the defects they address and the kind of solutions to them Hart identifies clearly implies that in these passages he conceives of specialization in the tasks of adjudication and enforcement as the property that distinguishes an advanced society from a simple or primitive one.

Hart’s discussion of the role(s) played by the rule of recognition is perhaps the most vexing feature of *The Concept of Law*. Nevertheless, a compelling case can be made that the specialization distinction, far more than the functional distinction, informs Hart’s claim that “possession” of a rule of recognition distinguishes a primitive from an advanced society. Hart identifies as the first defect of a primitive social order the fact that when “doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative.”<sup>22</sup> Reference to the existence of an official obviously implies a division of labor between rulers and ruled. But so too does reference to an

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<sup>20</sup> *Id.*, italics added.

<sup>21</sup> *Id.*, at 98.

<sup>22</sup> *Id.*, at 92.

authoritative text, since such a text must have an author, someone or some group whose judgment regarding the rules and their scope is taken as authoritative by other members of the community. Hart says as much when he writes that the crucial first step from the pre-legal to the legal – or perhaps he ought to have said, from a primitive rule-guided social order to an advanced one – is not “the mere reduction to writing of hitherto unwritten rules” but “the acknowledgement of reference to the writing or inscription as *authoritative*, i.e. as the *proper* way of disposing of doubts as to the existence of the rule.”<sup>23</sup> Why a *first* but, by implication, not a final step from pre-legal to legal? What does Hart mean when he describes even the simplest rule of recognition, such as reference to a list or text viewed as authoritative, as providing “in *embryonic form* the idea of a legal system?”<sup>24</sup> Why is it that: “in the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have *the germ* of the idea of legal validity?”<sup>25</sup> The answer to these questions, I submit, is that we have introduced the possibility not only of specialization in the identification of law, but a division of labor in the task of sustaining the rules that constitute it. That task is performed by the practice of holding accountable that Hart characterizes in terms of adopting the internal point of view to the social rules that regulate the affairs of members of a given society. It is the presence of this division of labor, at least to

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<sup>23</sup> *Id.*, at 95

<sup>24</sup> *Id.*, italics added.

<sup>25</sup> *Id.*, italics added.

some significant degree, that makes a society advanced in the sense that concerns Hart, and so its absence that makes a society primitive.

The foregoing discussion reveals an ambiguity in Hart's discussion of the idea of a "legal system." In some passages Hart contrasts a legal system with a mere set of laws or primary rules of obligation. The former differs from the latter in virtue of its including a rule of recognition that addresses doubts over the scope of various rules by arranging them in an order of superiority; for example, on the basis of their source.<sup>26</sup> In this case the (or a) rule of recognition refers to a genuine rule, one that actors can use to guide their conduct. Specifically, the rule presents itself as, and may well be, epistemically authoritative, a description of the practice of holding accountable that constitutes the normative social order in question that both members and non-members can use to describe and predict the conduct of practitioners.<sup>27</sup> Even a society that lacks any specialization in the performance of

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<sup>26</sup> *Id.*

<sup>27</sup> The rule can be deployed by participants in the practice to criticize others or to defend themselves against others' criticisms. Properly understood, however, such arguments can only insist that the other has failed to accurately comprehend some element of the practice. This is so because it is the actual practice of holding accountable, not any description of it, that makes it the case that agents enjoy particular rights, duties, powers, and immunities, the scope of which are more or (sometimes a lot) less determinate. See Postema, *supra* note 18, at 728; Lefkowitz, *supra* note 18, at 333-4.

Of course, insofar as those whose practice of holding accountable constitutes the existence of a specific rule-guided social order use (purportedly) authoritative epistemic rules of recognition to understand the practice in which they engage, such rules can influence the form the practice takes. Written texts in particular, such as a constitutional document or hornbooks used in legal education,

governance tasks can have a rule (or more than one rule) of recognition that serves this aim; e.g. one that depicts norms restricting violence against people as having action-guiding priority over norms that restrict violence against property.

Other passages in which Hart invokes the concept of a legal system, however, are better read as claims regarding the absence or presence of a division of labor in the task of sustaining the law by adopting the internal point of view to the rules that constitute it. Hart employs the phrase “rule of recognition” in these passages as well, but the phrase is a misnomer in that what Hart refers to is not a norm that officials use to determine what to do or to believe but to the social fact constituted by officials’ practice of holding themselves and one another accountable. Talk of a rule of recognition here is ontological, a description of *what makes it the case* that rules R1, R2, Rn are rules of the society in question. Put another way, it is an account of the truth conditions for candidate rules of recognition that play an epistemic role, i.e. statements that purport to provide actors with authoritative descriptions of officials’ practice of holding themselves and one another accountable.<sup>28</sup>

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can channel and in that way constrain a practice’s development. But this is fully consistent with the claim that it is the practice of holding accountable itself that makes it the case that the rules that regulate a given society are what they are.

<sup>28</sup> In many societies, the practice of holding accountable that constitutes the existence of law encompasses subjects or citizens as well as officials, but as Hart points out, that is not strictly necessary for the existence of a legal system; i.e. for the actual social world to approximate the one that participants in the practice aim to create through their practice of holding accountable.



When Hart describes as necessary and sufficient for the existence of a legal system in a given society general obedience to the law on the part of private citizens, i.e. subjects, and its officials' "effective acceptance" of common rules for identifying, changing, and adjudicating the law, he offers a response to the ontological question "what makes law?"<sup>29</sup> But why think satisfaction of both conditions is necessary, and not merely sufficient, for the existence of law, or more accurately, of a legal system? The answer is that only when both conditions are satisfied (to some considerable degree) will a society have achieved a division of labor *in sustaining the practice of holding accountable that constitutes law* that marks the transition from a primitive to an advanced social order. As Hart writes:

The assertion that a legal system exists is therefore a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour. [This]... is merely the reflection of the composite character of a legal system as compared with a simpler decentralized pre-legal form of social structure which consists only of primary rules. In the simpler structure, since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules. But where there is a union of primary and secondary rules, which is, as we have

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<sup>29</sup> Hart, *supra* note 1, at 116.

argued, the most fruitful way of regarding a legal system, the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone. In an extreme case the internal point of view with its characteristic normative use of legal language ("This is a valid rule") might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity.<sup>30</sup>

If we ignore the unfortunate phrase "which consists only of primary rules," there can be no doubt that, for Hart, one critical, indeed "most fruitful," way to distinguish an advanced legal system from a simple legal order is on the basis of specialization in the performance of governance tasks.<sup>31</sup>

In sum, when Hart invokes the concept of a rule of recognition that serves the epistemic function of identifying a society's rules and their scope, reference to a 'legal system' refers to a hierarchy of rules. In contrast, when Hart invokes the concept of a rule of recognition as part of his ontological account of what makes law, reference to a 'legal system' refers to a hierarchy of actors, of officials and subjects, or rulers and ruled.

## II

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<sup>30</sup> *Id.*, 117.

<sup>31</sup> Or perhaps it is only the modifier "of obligation" that Hart so often attaches to "primary rules" that we should abandon, in which case the primary/secondary distinction becomes synonymous with the absence or presence of a division of labor in governance.

With a clearer understanding of the two (or perhaps three) ways Hart distinguishes between a primitive and an advanced social order, as well as the two different roles reference to a rule of recognition plays in Hart's analysis of law, we can now explicate and assess Hart's characterization of international law in chapter X. An explanation of how and why criticisms of that characterization fail to hit their mark provides an especially perspicuous method for carrying out this task.

Waldron develops his objections to Hart's views on international law by evaluating "Hart's claim that the international legal order is a primitive legal system, consisting of *nothing but primary rules*."<sup>32</sup> He begins by pointing out that international law includes secondary rules of adjudication, such as those set out in the statute creating the International Court of Justice (ICJ), as well as secondary rules of change, such as those constitutive of the treaty-making process. Clearly Hart was aware of these features of international law; indeed, he explicitly refers to both of them in Ch. X. Therefore, Waldron attempts to extract what he takes to be Hart's reasons for nevertheless describing international law as a relatively simple social order. In the case of the ICJ, Waldron maintains it is the lack of compulsory jurisdiction, while in the case of treaty making it is the fact that the resulting rules

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<sup>32</sup> Waldron, *supra* note 4, at 216. Payandeh, *supra* note 5, adopts a similar strategy, though he sometimes runs together claims regarding the development of secondary rules for addressing uncertainty, rigidity, and inefficiency with the development of specialization in the performance of governance tasks. See also Capps, *supra* note 2, at 213; LIAM MURPHY, WHAT MAKES LAW (2014), at 147-50.

do not apply to non-parties.<sup>33</sup> Though Waldron concedes that the absence of compulsory jurisdiction marks a significant disanalogy between a municipal legal system and international law, he points out that this does not warrant the inference that international law contains no rules of adjudication.<sup>34</sup> As for the fact that treaties do not apply to non-parties, Waldron writes: “it is not clear why the point about ‘binding states that are not parties’ should be jurisprudentially so important,” and in particular, why Hart should apparently treat it as a necessary condition for the existence of rules of change.<sup>35</sup>

Waldron follows Payandeh in attributing Hart’s “poor reasoning” to an unwarranted assumption that the functions secondary rules perform, namely mitigating uncertainty, rigidity, and inefficiency, require the existence of the specific institutions found in a municipal legal system, such as that of a legislature or courts with wide-ranging compulsory jurisdiction.<sup>36</sup>

If the main distinction between the social rules of a primitive society and a more sophisticated legal system lies in the ability of the latter to address the problems of uncertainty, of the static character of the social rules, and of the inefficiency of the system in enforcing the rules, then there is no compelling reason why an international legal order needs to resemble the domestic legal order in *form* – the lack of

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<sup>33</sup> Waldron, *supra* note 4, at 215 and 217.

<sup>34</sup> *Id.*, at 215-16.

<sup>35</sup> *Id.*, at 217.

<sup>36</sup> *Id.*, at 214-15.

which is the main reason for Hart to qualify international law not as a system but only as a set of rules. ...[I]t is more convincing to ask whether the international order comprises structures which effectively fulfill legislative, judicative, and executive *functions* which overcome the defects of a primitive social system. If it fulfills this requirement there are no grounds to deny international law the status of a legal system.<sup>37</sup>

The problem with both Waldron and Payandeh's critiques is that "the main distinction" Hart draws between a primitive and an advanced society, or at least the one he employs when he describes international law as akin to a simple social order, is not the functional one Waldron and Payandeh assume. Rather, it is the absence or presence, respectively, of a division of labor in the carrying out of those tasks in virtue of which a legal system can rightly be said to exist.

Why accept this claim? Start with the fact that Hart tells us so in the introductory section of chapter X, where he writes: "it is indeed arguable, as we shall show, that international law not only lacks *the* secondary rules of change and adjudication *which provide for legislature and courts...*"<sup>38</sup> The claim here concerns the absence of specific kinds of secondary rules, not the absence of secondary rules *tout court*. Recall as well that when Hart first introduces the idea of a simple society that lacks rules of change he distinguishes between the absence of even an

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<sup>37</sup> Payandeh, *supra* note 5, at 981. In what respect is such an analysis "more convincing?" I address this question, and rebut Payandeh's assertion, in the following section.

<sup>38</sup> Hart, *supra* note 1, at 214, italics added.

embryonic form of legislation, i.e. rules constitutive of a process that makes possible deliberate change to general rules and that introduce the germ of the idea of a distinction between ruler and ruled, and rules that make possible changes to “obligations which arise under the rules in particular cases.”<sup>39</sup> The secondary rules that constitute treaty-making are examples of this second type of rules of change; they alter obligations that obtain under the general rules of international law only for the particular states that sign (and, if necessary, ratify) them.<sup>40</sup> As Hart notes in the final paragraph of Chapter X, were international law to evolve so that multi-lateral treaties were generally recognized as binding states that were not parties to them, then the norms that comprise international law would include secondary rules that provide for legislation, i.e. the ability to make deliberate changes to general rules in advance of any actor using them to hold himself or others accountable. It would also include the distinct categories of rulers (or officials) and ruled (or subjects), and so constitute a vertical organization that contrasts with the common description of international society as a horizontal order. Thus we have an

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<sup>39</sup> *Id.*, at 92-3.

<sup>40</sup> Waldron is right, then, to observe the parallel between actors entering into contracts within a municipal legal order and states entering into treaties within the international one, and to note that the intelligibility of both types of conduct requires postulating rules of change (Waldron, *supra* note 4, at 217). But he errs in concluding that this observation undermines Hart’s characterization of international law as primitive because Hart’s claim rests not on the absence of any secondary rules at all but on the absence of a division of labor in the making of rules that apply generally to members of society, i.e. independent of each (particular) member willingly submitting to those rules.

answer to Waldron's question quoted above regarding the jurisprudential significance of 'binding states that are not parties' to a treaty; such a practice is sufficient for the existence of a division of labor in making changes to the general rules that regulate members of international society, and it is the development of specialization in this and other governance tasks that transforms a given society from primitive to advanced.

Consider, now, Hart's remarks on international adjudication and enforcement.<sup>41</sup> He concedes that with respect to each of these components of governance there is some analogy between municipal and international law. In the case of enforcement international law includes "secondary rules specifying or at least limiting the penalties for violation," which might make some contribution to reducing "the smouldering vendettas which may result from self-help."<sup>42</sup> But to the extent these vendettas occur primarily because of the "absence of an official monopoly on sanctions," with an emphasis on both monopoly and official(s), the fact that international law relies almost exclusively on self-help does indeed make it

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<sup>41</sup> These appear primarily in the last section of Ch. X, where once again Hart indicates that his concern is with the existence of specialization in the performance of governance tasks, albeit in terms that invoke the now familiar conflation of the functional and specialization grounds for distinguishing primitive from advanced societies. The first two sentences of this section read as follows: "To the innocent eye, the formal structure of international law, lacking a legislature, courts with compulsory jurisdiction and officially organized sanctions, appears very different from that of municipal law. It resembles, as we have said, in form though not at all in content, a simple regime of primary or customary law" (Hart, *supra* note 1, at 232).

<sup>42</sup> *Id.*, at 97 and 93.

quite like a simple social order.<sup>43</sup> Payandeh's observation that at present all states enjoy a right to enforce a limited number of international legal norms poses little challenge to this conclusion, both empirically and in terms of its fit with Hart's description of a primitive society as one in which enforcement is "left to the individuals affected *or to the group at large*."<sup>44</sup> Hart does briefly argue earlier in chapter X that reliance on self-help to enforce the law may pose less of a threat to the existence of a stable social order in the international context than it does in the domestic one.<sup>45</sup> But he also points out that the same facts that explain why there is less need for an advanced legal system to produce a stable social order explain why it is less likely that such a system will develop in the international context, i.e. why some and perhaps even many international actors will not judge it to be in their interest all things considered. Note that this is an empirical claim, and conditional on certain facts that may turn out to be contingent. It is consistent, for example, with the possibility that economic or environmental changes may lead states to

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<sup>43</sup> *Id.*, at 93. Hart and Kelsen agree on this point, with the latter stating that in the international legal order "the technique of self-help, characteristic of primitive law, prevails." See Hans Kelsen, *PURE THEORY OF LAW* (1967) at 323.

<sup>44</sup> *Id.*, at 93, italics added. Payandeh, *supra* note 5, at 988.

<sup>45</sup> Hart, *supra* note 1, at 218-20.



engage in greater transfers of jurisdiction to international organizations (and the officials that populate them) than was true when Hart wrote *The Concept of Law*.<sup>46</sup>

With respect to adjudication, international law clearly differs somewhat from a primitive society in that it contains secondary rules “empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.”<sup>47</sup> Recall, however, that the defect that Hart believes courts and other adjudicatory bodies serve to mitigate is the fact that “disputes as to whether an admitted rule has or has not been violated will... continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation.”<sup>48</sup> Insofar as courts without compulsory jurisdiction lack this authority except in cases where parties to a dispute voluntarily place themselves under it, Hart likely concluded that their existence marks only a small advance in international law’s contribution to the production of social order. He may have been mistaken on this score; arguably, a number of ICJ decisions have made significant contributions to how states understand their legal obligations, rights, etc., and in so doing shaped their conduct in ways that would not have occurred in the absence of a World Court. Moreover, the proliferation within international law over the past few decades of adjudicatory

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<sup>46</sup> For an excellent contemporary exposition of this approach to analyzing international law and how it contributes to the production of social order, one at which Hart only gestured, see JOEL TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008).

<sup>47</sup> Hart, *supra* note 2, at 96.

<sup>48</sup> *Id.*, at 93.

bodies with compulsory jurisdiction, not to mention increasing engagement with international law by domestic courts, is surely the area of governance in which international law has moved furthest away from a simple social order (or, if you prefer, closest to an advanced one).<sup>49</sup> Nevertheless, if Hart's interest in the development of a division of labor in governance was motivated by the belief that it makes law a more effective tool for social control, then it was not implausible for him to conclude that a society that possesses only a court without compulsory jurisdiction was in this respect more like a social order that lacked any division of labor in adjudication than one equipped with compulsory courts of wide-ranging jurisdiction.

It is worth emphasizing here a point that both Hart and his critics make, though they then often ignore it: the property of being a primitive or advanced society is scalar, not bimodal.<sup>50</sup> While Hart does sometimes group primitive and international law together in a way that suggests they are equivalent, at other times he offers a more nuanced characterization of international law. For example, in the introduction to Ch. X he writes: "...the absence of an international legislature, courts

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<sup>49</sup> See Payandeh, *supra* note 5, at 985-6. See also Terry Nardin, *LAW, MORALITY, AND THE RELATIONS OF STATES* (1983), at 156-66.

<sup>50</sup> See, e.g., Waldron who shifts over the course of his discussion from describing Hart's view of international law as characterizing "international law as, in many respects, *more like* a system of 'primitive' law than like a municipal legal system" (Waldron, *supra* note 4, at 209, italics added) to describing Hart as "claim[ing] that the international order *is* a primitive legal system" (*Id.*, at 216, italics added).

with compulsory jurisdiction, and centrally organized sanctions... means that the rules for states *resemble* that simple form of social structure... which when we find it among societies of individuals, we are accustomed to contrast with a developed legal system.”<sup>51</sup> The argument in the proceeding paragraph takes this talk of resemblance seriously, not least because it directs our attention away from the metaphysical-conceptual parlor game of determining, for its own sake, what is law, and towards the “more fruitful” and empirically informed study of how rules and institutions function to produce social order.

Hart takes up the question of whether international law contains a rule of recognition as a response to Kelsen’s *a priori* assertion that it must. I discuss some of the details of that argument below. Here I consider the position Hart stakes out at its conclusion, namely 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, among which are the rules providing for the binding force of treaties.”<sup>52</sup> In the previous section I distinguished two functions that reference to a rule of recognition plays in Hart’s analysis of law or a legal system. The first is an epistemic function: a rule of recognition provides (or purports to provide) an epistemically authoritative description of what counts as law in a given legal order, i.e. an account of the sources of law in that society, possibly including a description of which laws take priority over others in the event

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<sup>51</sup> Hart, *supra* note 1, at 214, italics added.

<sup>52</sup> *Id.*, at 236.

of (apparent) conflict between them.<sup>53</sup> Understood in these terms, the claim that international law possesses no rule of recognition is false, as both Payandeh and Waldron point out. For example, both note that Article 38(1) of the ICJ Statute and the Vienna Convention on the Law of Treaties provide authoritative means for identifying international law.<sup>54</sup> As for systematizing international legal norms in the sense of identifying rules that regulate conflicts between them (or, perhaps better, specify their scope so that they do not conflict), Payandeh identifies the existence of a number of international rules that serve this function (albeit not on the basis of a law's source).<sup>55</sup> Furthermore, both Payandeh and Waldron take Hart to task for making it a condition for international law to qualify as a legal system that it manifest a level of systematicity in this respect that does not obtain in many municipal legal orders, especially in the case of constitutional law.<sup>56</sup> While all of

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<sup>53</sup> The rule is an *epistemic* authority, recall, because it is the actual practice of holding accountable, not a description of that practice, that determines what the law of a given community is.

<sup>54</sup> Waldron, *supra* note 4, at 219; Payandeh, *supra* note 5, at 989-90.

<sup>55</sup> Payandeh, *supra* note 5, at 992.

<sup>56</sup> Payandeh, *supra* note 5, at 991; Waldron, *supra* note 4, at 220-21. Payandeh, *Id.*, at 985-6, in particular makes much of the fact that the constitutional law of a domestic state is characterized by a degree of uncertainty similar to that present in the case of international law, and that at least in some such states, there exists no specialized body charged with adjudicating such disputes. Had Hart only acknowledged that fact, Payandeh maintains, he would not have offered as "antagonistic" a divide between international and municipal law as is suggested by the description of the former as primitive and the latter as advanced. The argument fails to persuade, however, because in a well-functioning municipal legal order constitutional disputes typically leave much existing law settled.

these claims are correct, they fail to address Hart's assertion that international law lacks a rule of recognition and that therefore it does not count as a legal system. That is because in making this claim Hart invokes the ontological, not the epistemic, function that reference to the rule of recognition plays in his analysis of law.<sup>57</sup>

Recall that in Ch. VI Hart maintains that a legal system exists when citizens or subjects generally obey the law while officials use it as a critical common standard of behavior. This "composite character" is what distinguishes a legal system from "a simpler decentralized pre-legal form of social structure."<sup>58</sup> A legal system, then, is a social order characterized by a significant division of labor in sustaining the practice of holding accountable that constitutes a given society's law. Put another way, what

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Whatever uncertainty and inefficiency attaches to those disputes has far less impact on municipal law's ability to contribute to the production of social order than is true in the case of international law, where a far wider range of norms are subject to these defects. (Note: this claim concerns law's contribution to producing social order, not the degree to which a stable social order obtains). If we keep in mind that the simplicity or complexity of a legal system is a matter of degree, and recall that Hart was well aware of the fact that municipal legal systems sometimes suffer from constitutional crises that inhibit their value as a means for social control (Hart, *supra* note 1, at 122-3), then the comparison between municipal constitutional law and international law does little to weaken Hart's case for characterizing the latter as akin to a primitive social order

<sup>57</sup> Other theorists who criticize Hart's assertion that international law lacks a rule of recognition because they mistakenly believe that what Hart has in mind when he makes this claim is an epistemically authoritative rule for identifying international law include von Hoof, *supra* note 6, at 55-6; Capps, *supra* note 2, at 214; and Benedict Kingsbury, *The Concept of Law in Global Administrative Law*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 23 (2009), at 28.

<sup>58</sup> Hart, *supra* note 1, at 117.

makes law (i.e. accounts for its existence) in a society that possesses a legal system is the practice of secondary rules of change, adjudication, and enforcement by one set of actors (officials) who rule over another set of actors (citizens).<sup>59</sup> Given this characterization of what it is for a society to possess a legal system, Hart's assertion that the rules that comprise international law constitute not a system but only a set seems quite plausible. Indeed, neither Waldron nor Payandeh deny it, nor do most international legal theorists *except those who mistakenly think international law's status as law depends on its possessing such a division of labor*. Of course, it is precisely this mistake that Hart aims to rebut in the final section of Ch. X.<sup>60</sup> Thus Payandeh errs when he claims that "Hart offers no compelling reason why a legal system would have to closely resemble the archetype of the municipal legal order of a modern constitutional state."<sup>61</sup> To count as a legal system in the sense that concerns Hart here just is to possess the division of labor in governance (e.g. a

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<sup>59</sup> Particular individuals may be members of both sets, of course, or there may be no overlap of membership at all between the two. A complete overlap of membership marks the limiting case I characterized in the previous section as the germ of a legal system.

<sup>60</sup> No less an authority on the history of international law than Martti Koskenniemi testifies to the mistaken acceptance of this assumption, describing international lawyers "past strategy to defend international law by a domestic analogy: the assumption that treaties were a kind of legislation, peaceful settlements of disputes a type of adjudication, and war and counter-measures a primitive form of enforcement." See M. Koskenniemi and P. Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553 (2002), at 558.

<sup>61</sup> Payandeh, *supra* note 5, at 981.

legislature, courts, etc.) realized in modern states and social orders that resemble them in this respect (e.g. the Roman Empire, or the Catholic Church).<sup>62</sup>

Hart not only denies international law the status of a legal system, he also asserts that it lacks a rule of recognition. Even if we restrict our interest to the ontological question of what accounts for the existence of law, this claim appears false. For we can formulate the following “rule” of recognition for a primitive society, a description of the conditions under which rules regulate (some of) the conduct of its members: rule R1, R2, etc. are rules of primitive society P if and only if its members “use the rules as standards for the appraisal of their own and others’ behaviour.”<sup>63</sup> But in fact Hart does not deny that we can formulate such a rule, only the utility of doing so. Speaking of the “strange basic norm which has been suggested for international law: ‘States should behave as they have customarily behaved,’” Hart writes: “we may be persuaded to treat as a basic rule, something which 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>64</sup> In contrast, where a society is characterized by a division of labor in the performance of governance tasks, the formulation of a “rule” of recognition shines

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<sup>62</sup> The legal theorist who comes closest to accurately describing Hart’s position as set out in the text is Alexander Somek, who suggests that the point would be better stated in terms of international law’s constitutional deficiency. See Alexander Somek, *Kelsen Lives*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 409-451 (2007), at 433.

<sup>63</sup> Hart, *supra* note 1, at 98.

<sup>64</sup> *Id.*, at 236.

new light on how law contributes to the production of social order by calling our attention to the fact that it is the conduct of officials, actors occupying offices constituted by rules that empower them to make, apply, and enforce the law, that accounts for law's existence. Likewise, in a primitive society the claim 'This is a valid law' amounts to nothing more than the empty claim 'this is a law of our society because it is a law of our society (i.e. because we treat it as such),' whereas once a division of labor in governance occurs the claim 'This is a valid law' can be theoretically informative; e.g. 'This is a valid law because it was enacted by the Queen in Parliament.' Thus with some minor rephrasing we can better convey the idea Hart meant to express in the passage quoted above: there is no *theoretically useful* basic rule in the international legal order of the sort that could provide *informative* general criteria of validity. This reflects the fact that there is relatively little division of labor in the performance of the governance tasks that constitute international law. It is, in this respect, not a legal system, and therefore bears a closer resemblance to a simple or primitive social order than to an advanced social order like the one realized in a well-functioning modern state.<sup>65</sup>

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<sup>65</sup> On this point, see also Richard Collins, THE INSTITUTIONAL PROBLEM IN MODERN INTERNATIONAL LAW (2016), at 83. As Hart notes, however, a legal system that exists in virtue of secondary rules that create the office of judge and the institution of a court "is necessarily also committed to a rule of recognition of an elementary and imperfect sort" (*Id.*, at 97). One might point to the recent growth of adjudicatory panels and semi-autonomous administrative rule-making bodies in various domains of international law to make the case that it is now possible to formulate a theoretically useful ontological "rule" of recognition for international law. Doing so will require



The foregoing interpretation of Hart's claim that international law lacks a rule of recognition and does not constitute a legal system casts an illuminating light on some of the remarks he makes in the course of his criticism of Kelsen.

Admittedly this interpretation requires a departure from the text, and in particular, a focus on agents rather than rules. Nevertheless, I suggest that the arguments presented thus far in this paper warrant such a departure. To begin, rather than assume that Hart understands 'rule of recognition' and 'validity' epistemically, and so conclude that he is talking past Kelsen, we should instead take Hart to be engaging directly with Kelsen by making an ontological claim regarding the existence conditions for norms.<sup>66</sup> Contra Kelsen, Hart asserts that the existence of international legal norms or rules does not require a *Grundnorm*.

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responding to skepticism regarding the genuine autonomy enjoyed by these administrative rule-making bodies, and rebutting the claim that the decisions of adjudicatory panels are merely epistemically authoritative claims regarding states' practice of holding accountable, but not themselves part of that practice (i.e. part of what makes international law what it is). Whether one treats the European Union and the European Court of Human Rights as components of international law will likely also have a significant impact on the position one takes.

<sup>66</sup> Waldron's suggestion that Hart's remarks in these paragraphs reflect a confusion on his part rests on the assumption that the rule of recognition plays a different (i.e. epistemic) role in Hart's analysis of law than the *Grundnorm* plays in Kelsen's analysis of law (Waldron, *supra* note 4, at 221). See also Murphy, *supra* note 32, at 147. My reading of Hart's argument suggests otherwise, with Hart countering Kelsen's transcendental account of law's normativity by pointing to (though not developing in this passage) a naturalistic account of normativity originating in the human practice of holding accountable. For a sketch of such an approach, see David Lefkowitz, *Giving Up On Moral*

...[I]t is surely conceivable (and perhaps has often been the case) that a society may live by rules imposing obligations on its members as 'binding'... [I]f rules are in fact accepted as standards of conduct, and supported with appropriate forms of social pressure distinctive of obligatory rules, nothing more is required to show that they are binding rules.<sup>67</sup>

It is true, Hart concedes, that in this

simpler case we cannot ask: 'From what ultimate provision of the system do the separate rules derive their validity or 'binding force'?' For there is no such provision and need be none. It is, therefore, a mistake to suppose that a basic rule of recognition is a generally necessary condition of the existence of rules of obligation or 'binding' rules. In the simpler form of society we must wait and see whether a rule gets accepted as a rule or not; in a system with a basic rule of recognition we can say before a rule is actually made, that it *will* be valid *if* it conforms to the requirements of the rule of recognition.<sup>68</sup>

Take this last sentence first. I suggest that it should be read as follows: in a legal system, i.e. a social order characterized by specialization in the performance of governance tasks, observers and participants can state correctly that R1 is a rule of

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*Truth Shall Set You Free: Walzer on Relativism, Criticism, and Toleration*, 274 REVUE

INTERNATIONALE DE PHILOSOPHIE (2015).

<sup>67</sup> Hart, *supra* note 1, at 234.

<sup>68</sup> *Id.*, at 235.

that society in advance of any actor using it to hold himself or another accountable. We can make this claim because there exists, and we can point to, a practice of legislation (including, in some cases, by courts) in virtue of which it is possible to make deliberate changes to the society's general rules. This is not possible in a simpler society, one that relies solely on a customary process of rule-formation, in which successful rule change occurs only once most members of the society in question use, or acknowledge the propriety of others using, R1 to hold themselves and others accountable.<sup>69</sup> Of course, we can formulate a rule that tells us how to *identify* new customary rules in advance of their being practiced; for example, we ought to believe in the existence of a customary norm C if (a) actors generally conduct themselves in ways that comport with it (or try to hide the fact when they do not), and (b) we have reason to believe they do so out of a sense of obligation, or because they believe C is a norm that applies to them.<sup>70</sup> However, Hart's claim here is ontological, not epistemic, or so I contend. Turning now to the other sentences in the above quotation, the existence of a rule-governed social order does not require a hierarchy of agents because the practice of holding accountable that constitutes such an order can be (and often has been) dispersed among all the members of the society in question. It is a mistake, therefore, to assume that we can, let alone must, formulate a *theoretically useful* "rule" of recognition, one that provides us with an

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<sup>69</sup> See Postema, *supra* note 18; Lefkowitz, *supra* note 18.

<sup>70</sup> Indeed, we can develop very sophisticated epistemic rules of this sort; see, e.g., the International Law Commission's Draft Reports on the identification of customary international law, available at [http://legal.un.org/ilc/guide/1\\_13.shtml](http://legal.un.org/ilc/guide/1_13.shtml).

*informative* description of *what makes it the case* that R1, R2, etc., are valid or 'binding' rules for every rule-guided social order. Rather, such a "rule" "is not a necessity, but a luxury, found in advanced social systems;" that is, in social systems characterized by a division of labor in the performance of governance tasks.

Liam Murphy speaks for many when he writes: "perhaps the main reason these last pages of *The Concept of Law* are confusing is that there is a disconnect between Hart's theoretical focus on the rule of recognition and what appears to be his main substantive complaint – that international law, lacking a legislature and (as he appears to have believed) rules of change generally, is a static legal order."<sup>71</sup> My goal in this section has been to demonstrate that this disconnect owes to Hart's presentation of his ideas, but not to those ideas themselves.

### III

The defense of Hart's take on international law presented above has two important implications. First, in setting the record straight with respect to what Hart meant when he characterized international law as akin to a primitive society, it provides a basis for correcting certain other erroneous attacks on Hart and his analysis of law. One might hope (against hope?) that this contributes at least in some small degree to legal theorists' collective effort to improve our theoretical understanding of law, as well as our moral engagement with it. Second, and relatedly, Hart's discussion of international law highlights an important dimension of law's ability to contribute to the production of social order. In doing so, it adds

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<sup>71</sup> Murphy, *supra* note 32, at 151-2.

further impetus to an already flourishing interdisciplinary investigation of international law's effectiveness. But perhaps more importantly, an appreciation of Hart's depiction of international law, properly understood, may encourage those legal and political theorists who argue for international legal action or reform to be more attentive to the differences between the international legal order and the legal system of a moderately well-functioning state.

Waldron considers ever so briefly the possibility that Hart means exactly what he says when he states that international law resembles a primitive social order in virtue of its lacking "secondary rules of change and adjudication which provide for legislature and courts."<sup>72</sup> His quick dismissal of it on the grounds of triviality is doubly mistaken, however.<sup>73</sup> First, it is no small matter to concede that international law is largely devoid of specialization in the performance of governance tasks given that one of Hart's goals in Ch. X is to rebut those who argue or assume that the presence of such specialization is at least a necessary condition for classifying international law with municipal law as law properly so-called.

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<sup>72</sup> Hart, *supra* note 1, at 214.

<sup>73</sup> Waldron, *supra* note 4, at 214. Arguably, the conclusions of a theory of society *should* strike members of the type of society of which it is a theory as trivial. For if they do not recognize (some aspect of) themselves and their way of life in the theory, even if in a less flattering light than they might have expected, then that is a good reason to conclude the theory is mistaken.

Payandeh, too, momentarily takes Hart at his word before rejecting his claim on the basis of the mistaken understanding of what Hart means when he describes international law as primitive described in the previous section. See Payandeh, *supra* note 5, at 994.

Second, if a central aim of *The Concept of Law* is to provide an account of how law contributes to the production of social order, then it seems quite plausible to hypothesize that any particular legal order's ability to perform that task will depend to a significant degree on the extent of specialization in the conduct of governance tasks that characterizes it. Perhaps that observation is so obvious as to be trivial? The many calls for international action and reform to the international legal order that display a failure to take seriously or even recognize the limits of international law's ability to shape the social world suggest otherwise. Moreover, Hart's observation that municipal law includes power-conferring rules is similarly trivial in that it does not expose us to a phenomenon with which we are unfamiliar but only calls our attention to a fact that we have momentarily lost sight of under the influence of bad legal theory. The bad legal theory that Hart criticizes in his discussion of international law, the conceptual claim regarding law that threatens to inhibit productive theoretical inquiry and sound moral deliberation, is the position that only if it possesses those features characteristic of an advanced municipal legal system, such as a legislature and compulsory courts, can international law provide a degree of social control. That he made such an argument renders somewhat ironic the fact that Hart is so often tarred and feathered for the alleged crime of drawing unwarranted conclusions regarding law *tout court* on the basis of reflection on municipal law alone.

Hart is also innocent of two further charges Waldron levels against him. The first, suggested by the title of the paper in which Waldron criticizes Hart's take on international law, is that the latter believed international law to be "a relatively

small and unimportant part of jurisprudence.” Waldron plays fast and loose with the text of *The Concept of Law* here. What Hart actually says is that: “only a relatively small and unimportant part of the most famous and controversial theories of law are concerned with the propriety of using the expressions ‘primitive law’ or ‘international law’ to describe the cases to which they are conventionally applied.”<sup>74</sup> Read in context, Hart clearly intends to dismiss as unimportant the question of whether rival theories of law sanction *talk* of international law as law, for as he repeats several times in *The Concept of Law*, Hart is not concerned with definitions. More importantly, Hart’s discussion of international law makes a vital contribution to the jurisprudential task he undertakes in *The Concept of Law*, namely making some headway in explaining how law contributes to the production of social order. Specifically, in Chapter X Hart offers arguments intended to reinforce three conclusions he has defended earlier in the book. First, the command theory’s depiction of law distorts our understanding of it, and so ought to be rejected.<sup>75</sup> Second, law differs in important ways from morality, and so we ought to carefully distinguish between the question “what is law?” and any number of moral questions we might ask about it. While the answers to some of those questions might reveal certain necessary connections between law and morality, this is not the case with respect to the very existence of law.<sup>76</sup> Third and finally, a division of labor in making, applying, enforcing, and identifying law, and so in sustaining the existence

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<sup>74</sup> Hart, *supra* note 1, at 4.

<sup>75</sup> *Id.*, at 216-26.

<sup>76</sup> *Id.*, at 227-32.

of a given legal order, likely enhances law's ability to contribute to the production of social order, but it is not a necessary condition for the existence of a law-governed social order.<sup>77</sup> No doubt it would have been nice had Hart told us more, say about exactly how differences in the type of agents and circumstances subject to regulation by social norms affect the content of the rules and the kind of institutions that regulate (and partly constitute) particular societies. But insofar as Hart wrote *The Concept of Law* as an introduction to legal philosophy, carried out largely with the intention of clearing away mistaken legal theories that he thought impeded either theoretical inquiry or moral deliberation, he can hardly be faulted for his failure to do so.

The second baseless criticism Waldron levels against Hart is that the latter's discussion of international law is a cause of the fact that contemporary legal philosophers have contributed little to the debate over the nature and importance of international law sparked by actions undertaken by various officials in the George W. Bush administration, as well as academic works such as Goldsmith and Posner's *Limits of International Law*.<sup>78</sup> Even if we accept *arguendo* that philosophers failed to engage with this debate-cum-political campaign, it is hard to see why we should attribute that fact to Hart's take on international law. After all, to the extent Goldsmith, Posner, Yoo and others understand (international) law along the lines of the command theory, Hart explicitly addresses and criticizes their position. And to

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<sup>77</sup> *Id.*, at 232-37.

<sup>78</sup> Waldron, *supra* note 4, at 210-11; Waldron, *supra* note 4, at 68-9. JACK L. GOLDSMITH AND ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006).



the extent that these theorists challenge not international law's status as genuine law but the conditions under which it actually provides those it addresses with reasons to comply with it, Hart does not much engage with that question.<sup>79</sup> Hart's decision not to take up in any detail in *The Concept of Law* the topics of political obligation and law's legitimate authority has not impeded contemporary legal and political philosophers' engagement with them. Nor is it clear that reflection on international law's *de jure* legitimacy has or will generate new accounts of what makes law legitimate.<sup>80</sup>

Brian Tamanaha has seized on Waldron's critique of Hart's depiction of international law to reiterate two long-standing objections to Hart's analysis of law advanced by socio-legal jurists.<sup>81</sup> The first is Hart's characterization in Chapter VI of a simple (i.e. primitive) social order as a "pre-legal" form of social

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<sup>79</sup> One might follow Thomas Franck and read portions of *The Concept of Law*, including Hart's discussion of the rule of recognition, as concerned with law's legitimacy. See Thomas M. Franck, *Legitimacy in the International System*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 705 (1988), at 751-58. Though misguided in certain respects, this reading can be made to stand up to some extent as long as our concern is with *de facto* legitimacy. Yet though they sometimes claim to be engaged only in the kind of social scientific analysis in which this sense of legitimacy has its place, few doubt that Goldsmith, Posner, and Yoo actually advance a normative argument, a claim regarding when actors, or at least the United States, ought to treat international legal obligations as providing it with a reason for action.

<sup>80</sup> See David Lefkowitz, *The Legitimacy of International Law*, in GLOBAL POLITICAL THEORY TODAY (David Held and Pietro Maffettone eds., 2016), 98-116.

<sup>81</sup> Tamanaha, *supra* note 2, at 54. See also Payandeh, *supra* note 5, at 993.

structure. By implication, and ignoring any talk of resemblance as opposed to identity, socio-legal jurists have concluded that Hart must also characterize international law as pre-legal. The second and related objection is that in developing his analysis of the concept of law Hart accords an unwarranted priority to the municipal law of a well-functioning modern state, or worse yet restricts the concept of law to such a legal system, a conclusion suggested by the fact that as a matter of consistency Hart must depict international law as a “pre-legal” social order.<sup>82</sup> As should now be clear, the first of these two objections is misguided, and to the extent the second objection rests on the first, it too should be rejected. Properly understood, Hart’s characterization in Ch. VI of a simple social order as “pre-legal” means only that such a society lacks a division of labor in the performance of governance tasks, while his argument in the last section of chapter X aims to establish the propriety of categorizing international law as law properly so-called despite its being “pre-legal” in this sense.<sup>83</sup> Given his poor choice of words

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<sup>82</sup> Cotterell, *supra* note 2, at 507, writes: “Hart is explicit: the introduction of secondary rules marks the transition from a *pre-legal* to a legal regime. A regime of social rules *needs this union* if it is to be clearly recognizable as law. Although Von Daniels thinks that international law (which, in Hart’s view, is basically just a set of primary rules) is law for Hart, in fact Hart carefully avoids any such claim and treats ordinary usage of the term “international law” as based only on an “analogy” with law understood in the conceptually adequate sense.” [citations removed from quote.]

<sup>83</sup> Contra Cotterell, then, von Daniels is right to describe Hart as holding that “a simple regime of primary law can be identified as a legal one.” See DETLEF VON DANIELS, *THE CONCEPT OF LAW FROM A TRANSNATIONAL PERSPECTIVE* (2010), at 143.

Hart undoubtedly bears considerable responsibility for these mistaken objections. Nevertheless, they ought to be discarded in light of the argument presented here.

What about Payandeh's assertion, noted in the previous section, that for purposes of assessing the (relative) simplicity or complexity of the international legal order it is "more convincing" to focus on how it functions to address challenges of uncertainty, rigidity, and inefficiency than to ask "whether international law encompasses legislative, judicative, and executive structures comparable to the municipal system in *form*."<sup>84</sup> Unfortunately, Payandeh never explicitly states the standard by which we can judge the depiction of international law as primitive to be more or less convincing. However, his exploration of the rules and mechanisms international law contains for addressing uncertainty, rigidity, and inefficiency suggests that it is shedding light on international law's ability to contribute to the production of social order that provides the standard Payandeh implicitly invokes. If so, then Payandeh's description of these rules and mechanisms largely supports Hart's characterization of international law as akin to a primitive social order, once that claim is properly understood. This is so because Payandeh documents the relative paucity of specialization in the performance of governance tasks that comprise international law, and points to various important respects in which this distinguishes the effects international law can have on social order from those produced by the municipal law of a well-functioning state.<sup>85</sup> It is rather ironic, then,

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<sup>84</sup> Payandeh, *supra* note 5, at 981.

<sup>85</sup> See, e.g., *Id.* at 994.

that Payandeh repeatedly chastises Hart for implying that international law is inferior to municipal law when *the only* respect in which Hart asserts this is the case is precisely the one Payandeh also identifies.

Payandeh worries that Hart's characterization of international law as "a less developed and thereby inferior set of social rules" contributes, or at least could contribute, to a diminution of its legitimacy.<sup>86</sup> For example, it might "lead political decision-makers – even if only subconsciously – to be more inclined to disregard the rules of international law when non-compliance is in their interest," while domestic judges may ask "why should inferior international law trump conflicting norms of domestic law?"<sup>87</sup> Yet here again Hart is international law's friend, not foe. The importance of a particular system of social rules lies not just in how well it serves to produce social order but also in the matters it regulates. No necessary inference is warranted, therefore, from the relative paucity of specialization and hierarchical structure that characterizes international law to any conclusion regarding the role it ought to play in agents' deliberations. This is the vitally important point with which Hart concludes his discussion of international law in chapter X. Having argued that with respect to its "formal structure" international law is indeed inferior to municipal law, Hart points out that with respect to its *content* "no other social rules are so close to municipal law as those of international law."<sup>88</sup> Like Bentham, Hart

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<sup>86</sup> *Id.*, at 978.

<sup>87</sup> *Id.*

<sup>88</sup> Hart, *supra* note 1, at 237.

concludes that this fact warrants the treatment of both as examples of law properly so-called.<sup>89</sup>

By his own account Hart sought in chapter X of *The Concept of Law* to defend only the modest claim that classifying international law with municipal law as law properly so-called was unlikely to “obstruct any practical or theoretical aim.”<sup>90</sup> I suggest a bolder claim is warranted: foregrounding the resemblance international law bears to a simple social order provides both theoretical and practical/moral benefits. The former consists in an improved understanding of how international law produces social order, including the limits of its ability to do so. The sustained cross-disciplinary engagement over the past few decades between international relations scholars and international legal theorists on the question of international law’s effectiveness illustrates this point, as both rationalism and constructivism have been put to good use to illustrate some of the myriad ways in which international law regulates (or fails to regulate) the conduct of members of a largely

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<sup>89</sup> Suppose, as some maintain, that Hart thought that non-contingently serving to advance the minimum content of natural law is a necessary condition for a set or system of rules to count as law. If so, then one might read into Hart’s talk of international law having a content closer to that of municipal law than any other social rules his implicit recognition of the fact that just as a well-functioning municipal legal order serves to restrain violence, theft, and fraud between individuals, so too a well-functioning international legal order serves to restrain the use of violence, theft, and fraud between states (though not between states and colonies).

<sup>90</sup> *Id.*, at 214.

horizontal social order.<sup>91</sup> Though there is a place even in this explanatory endeavor for the deployment of conceptual apparatus and skills in which philosophers enjoy a comparative advantage, they are likely to play a more prominent role when the conversation shifts from a concern with explanation and prediction to a concern with justification. For philosophers, then, the biggest payoff from an engagement with Hart's reflections on international law may be the reminder from "one of their own" that law's utility as a tool for realizing some desired state affairs varies quite considerably depending on whether it is the law of a well-functioning state or international law. Two important points follow. First, when they turn to questions of implementation, theorists of global justice should look to a broad range of institutional mechanisms to advance the goals or standards they defend, and recognize that law, international or domestic, may sometimes provide a very weak tool for affecting the change they desire. Second, attempts to deploy international legal norms for argumentative purposes, as well as calls for reform of international law, ought to rest on a proper understanding of how it contributes to the production of social order, namely one that takes as its starting point the absence (by and large) of a legislature, compulsory courts, and centralized enforcement. Arguably, this is so not only practically-speaking but also morally as well.<sup>92</sup>

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<sup>91</sup> See, e.g., JEFFREY L. DUNOFF & MARK A. POLLACK, *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART*, (2013).

<sup>92</sup> For arguments to this effect, see David Lefkowitz, *International Law, Institutional Moral Reasoning, and Secession*, *LAW AND PHILOSOPHY* (forthcoming); ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION* (2007); STEVEN R. RATNER, *THE THIN JUSTICE OF INTERNATIONAL*

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The concept of a social rule is undoubtedly the centerpiece of Hart's analysis of law, and his characterization of law in terms of different kinds of rules marks a critical advance over Austin's reductive account. Perhaps it should not be surprising, then, that Hart relied so heavily on the language of rules when distinguishing primitive from advanced societies in *The Concept of Law*. As I have demonstrated, however, talk of rules often obscures another phenomenon that appears to have been of equal if not greater concern to Hart when he invoked that distinction, namely a division of labor in making, applying, enforcing and identifying law, and so in sustaining the social practice that constitutes a particular legal system. Understood in those terms, Hart's characterization of international law as resembling a simple or primitive legal order was true when he wrote it, and to a lesser but still considerable degree, it remains true today.

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LAW (2015); CARMEN PAVEL, DIVIDED SOVEREIGNTY: INTERNATIONAL INSTITUTIONS AND THE LIMITS OF STATE AUTHORITY; David Weins, *Prescribing Institutions Without Ideal Theory*, 20 JOURNAL OF POLITICAL PHILOSOPHY 45 (2012).