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International Law: ‘A Relatively Small and Unimportant’ Part of Jurisprudence?

JEREMY WALDRON

I. AN EMBARRASSING CHAPTER

Chapter X of Hart’s book, devoted to the subject of international law, presents a frustrating combination of insight and obtuseness. The insights are to be found in Hart’s discussion of national sovereignty and in his consideration of the significance of the absence of organised sanctions to support law in the international realm. The obtuseness – some of it perhaps more obvious to us now, 50 years after the publication of The Concept of Law, than it was in 1961 – has to do with Hart’s attempt to apply the apparatus of secondary rules and, in particular, the idea of a rule of recognition to the international realm, and, as a consequence, his characterisation of international law as, in many respects, more like a system of ‘primitive’ law than like a municipal legal system.\(^1\) Hart is not prepared to dismiss out of hand the question of whether international ‘law’ really is law. He thinks it is an open question whether international law is sufficiently like the standard case of law to be described as law, and his comments have led a number of international jurists to suppose that Hart must have been a sceptic about this subject. Maybe that judgment is made too quickly. But it is clear that theorists of international law have not found much in this chapter to help them with their enterprise.

Nor have Hart’s followers found much here to discuss or elaborate. One can’t help thinking that the feel of this chapter – it seems like an afterthought, it departs quite markedly from the flow of the main argument of the book’s later chapters, and it is not revisited at all in the 1994 Postscript\(^2\) – has contributed to

\(^1\) I use ‘municipal legal system’ as a term for the legal system of a particular state, like France or New Zealand.

\(^2\) The editors of this volume have suggested to me that the best explanation of this is that no prominent objections to Hart’s account of international law had been put forth by the time the Postscript was written. I do not think this is so. The book’s approach to international law had been
a sense among analytic jurists in the positivist tradition that jurisprudential
issues associated with international law are issues of marginal significance,
mostly not worth the attention of serious legal philosophers.\(^3\) Hart notes at the
beginning of *The Concept of Law* that ‘only a relatively small and unimportant
part of the most famous and controversial theories of law’ are concerned with
issues about the propriety of using the term ‘law’ to describe normative arrange-
ments in the international realm.\(^4\) And both Hart and his supporters seem
happy to follow his famous predecessors in that regard.

The agenda set out at the beginning of *The Concept of Law* was ‘to advance
legal theory by providing an improved analysis of the distinctive structure of a
municipal legal system’.\(^5\) Analysis of issues involving international law was
always going to be a distraction from this task, and Hart did not venture in the
chapter to consider the possibility that we would regard international law as a
paradigm of law along with the law of a familiar municipal system; he was
unwilling to raise that possibility and unwilling to consider how different our
philosophical analysis would have to be if both of these were treated as para-
digms instead of only one. So international law was treated from the outset as
a borderline case. And although Hart acknowledged that such borderline
cases generate not only semantic hesitations (about the proper use of the word
‘law’) but also challenging problems, he announced pretty firmly that his dis-
cussion of these problems ‘at various points’ is at best ‘only a secondary con-
cern of the book’.\(^6\) Little wonder that his followers seem to have been
encouraged to infer the instruction – if encouragement were needed – ‘Don’t
waste your time on these topics’.

All of this is a great pity, because in recent decades the nature and status of
international law has emerged as one of the issues in jurisprudence with greatest
importance for real-world political debates. Responses to the terrorist
attacks on the United States in 2011 and events at the United Nations leading
up to the American-led invasion of Iraq led many American lawyers and

\(^3\) This sense is discernible from the paucity of writing about international law by the best and most
recognised analytic legal theorists. For example, the journal *Legal Theory* has had in the past 10 years
at most one article on the central questions of international law jurisprudence – I mean central ques-
tions as opposed to discussions of the basis of human rights or Rawls’s *Law of Peoples*. (And even that article is more an instance of political theory; see P Capps and J Rivers, ‘Kant’s Concept of
International Law’ (2010) 16 *Legal Theory* 229.) This is despite the fact that one of the most discussed jurisprudential questions among legal scholars who are not specialist philosophers in this period (par-
ticularly after 11 September 2001) has been the status of international law as law. See, eg, J Goldsmith


\(^5\) ibid 17.

\(^6\) ibid.
politicians to question the significance and sometimes even the existence as law of what was called ‘international law’. Very few of the legal philosophers working in the field defined by Hart’s *The Concept of Law* saw fit to participate in this debate. No leading modern positivist saw fit to try to map onto these controversies what Hart had said in chapter X of the book. Whether this has been due to embarrassment at the chapter’s inadequacies or to a broader indifference would be difficult to say. (The former explanation is probably implausible, for it would presume a degree of alertness to the detail of Hart’s account, and a knowledge of international law, sufficient to be able to identify the inadequacies of the chapter that positivist jurisprudence has seldom disclosed.) Either way the silence is deafening. Analytic legal philosophy has been disgracefully bereft of good writing on international law, and on adjacent issues such as the rise of global law and global standards (such as human rights) for the legitimacy of national law. That is beginning to change, though it has to be said that there is still no leadership in this regard from Hart’s most prominent followers.

II. HART’S INSIGHTS

Let me begin – as one should – with the insightful aspects of Hart’s discussion. The most important points he makes concern the nature of sovereignty and the role of sanctions in the international order, and their bearing (or the bearing of their absence) on the question of whether the international order can really be described as ‘law’.

The argument about sovereignty involves the transposition of Hart’s argument about Austinian sovereignty in chapter IV of *The Concept of Law*. In that chapter, Hart argued that sovereignty within a legal system must be understood as a construction of rules, not as the precondition for rules. The same is true in the international realm: sovereignty is not something external to international law that limits its operation; it is itself an artefact of international law. There is, says Hart, ‘no way of knowing what sovereignty states have, till we know what the forms of international law are’.\(^7\) This is a helpful insight, no less important for being quite familiar.

The argument about sanctions also involves the sophisticated application of elements developed earlier in Hart’s jurisprudence. The argument is often heard – both today and in Hart’s time – that the norms embodied in the international order cannot really be described as law because they are

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\(^7\) See, eg, J Goldsmith and E Posner, *The Limits of International Law* (n 3).

\(^8\) See, eg, S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010).

\(^9\) *The Concept of Law* (n 4) 224.
not backed up with organised sanctions, regularly enforced and imposed. To these jurists, the absence of ‘centrally organised sanctions’ suggests that the obligations of the international order are not really binding and, as Hart states the objection,

if for this reason the rules of international law are not ‘binding’, it is surely indefensible to take seriously their classification as law; for however tolerant the modes of common speech may be, this is too great a difference to be overlooked.10

Hart does not himself assert that there are no sanctions in the international order; he just accepts for the sake of argument that the critic’s premise is correct. But he puts to good use the arguments made in chapters II and III against John Austin’s jurisprudence. Obligation is not to be understood in terms of command-plus-threat, nor is it to be understood in terms of the predicted imposition of sanctions. Hart’s alternative analysis in terms of standards guiding behaviour understood from the internal point of view will do as well in the international realm as in the realm of municipal law.

I don’t know why, but some of Hart’s critics get this exactly the wrong way round. Alice Ristroph, for example, says that ‘[a]t the time he wrote The Concept of Law, Hart believed that the difference between international law and municipal law was that states could not be said to take the internal point of view toward international obligations’.11 But Hart says exactly the opposite: he says there is evidently ‘general pressure for conformity’ to the rules of the international order, ‘claims and admissions are based on them’, and ‘when they are disregarded, it is not on the footing that they are not binding; instead efforts are made to conceal the facts’.12 These are exactly the behaviours and attitudes one expects so far as the internal aspect of obligation is concerned.

Is this enough to rebut those who are sceptical about international law? Apart from purely conceptual considerations Hart appreciates that our understanding of the minimum content that any system of municipal law must exhibit comprises the availability of organised sanctions to oppose and suppress the human tendency to violence, and he wonders whether this is true also of international law.13 But in an extremely interesting argument, he distinguishes the two cases. Among natural individuals living in close proximity to each other, ‘opportunities for injuring others, by guile, if not by open attack, are so great, and the chances of escape so considerable’,14 that mere natural deterrents are seldom adequate to restrain interpersonal violence. However,

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10 ibid 217.
12 The Concept of Law (n 4) 220.
13 ibid 218.
14 ibid 213.
aggression between states is very unlike that between individuals. The use of violence between states must be public, and though there is no international police force, there can be very little certainty that it will remain a matter between aggressor and victim, as a murder or theft, in the absence of a police force, might . . . In a population of a modern state, if there were no organised repression and punishment of crime, violence and theft would be hourly expected; but for states, long years of peace have intervened between disastrous wars.15

This difference means that the international order has been able to evolve on a different basis, and the long periods of peace that Hart mentions have been ordered by rules which do not have the endemic need for centrally imposed sanctions to maintain the peace that municipal laws have.

III. THE ABSENCE OF SECONDARY RULES?

Given the sophisticated character of the arguments just outlined, one might have expected Hart to cast some original light also on the institutional aspect of international law. But here, unfortunately, it is as though his interest in the subject has just run out. His arguments become careless and their application thoughtless in regard to law in this area.

Hart thinks it is helpful for our understanding of ‘law’ in the international realm to note ‘the absence of an international legislature [and] courts with compulsory jurisdiction’.16 He says that these differences between international law and ordinary municipal legal systems are striking and that they help explain the scepticism that many jurists entertain concerning the ‘legal’ character of international norms. Hart says that he is not himself a fully paid-up subscriber to that scepticism – ‘[W]e shall neither dismiss the doubts, which many feel. . . nor shall we simply confirm them’17 – but his comments in this regard are so supportive of the sceptics’ position as to leave precious little daylight between Hart’s view and theirs. Certainly most working international lawyers who are not philosophers but who have looked at the tenth chapter of Hart’s book come away with the impression that his view is that ‘international law could not be admitted to the law club’.18

Yet Hart’s reasoning in this regard is very poor. Let us concede the point that there is no international legislature, that is, nothing in the international order comparable (say) to the Queen-in-Parliament in the English legal system. Let us concede too that international courts do not have compulsory jurisdiction – though, with the rise of the International Criminal Court and

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15 ibid 218f.
16 ibid 214.
17 ibid.
other such tribunals, this is less so now than it was in 1961. Hart makes a series of fallacious inferences from these facts. His first inference is that ‘international law . . . lacks the secondary rules of change and adjudication which provide for legislature and courts’.

The inference goes through if Hart is interpreted as saying that international law lacks exactly the kind of secondary rules of change and adjudication that are required to set up institutions exactly analogous to municipal legislatures and courts. It will not go through if it is supposed to imply that international law lacks secondary rules of change and adjudication of any kind. On the first reading the inference is trivial. On the second reading, the inference is fallacious, and egregiously so. And Hart makes it plain that he intends the second reading when he goes on to say, in exactly the same passage, that

\[
\text{[t]he absence of these institutions means that the rules for states resemble that}\n\]

\[
\text{simple form of social structure, consisting only of primary rules of obligation,}\n\]

\[
\text{which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system.}\n\]

In other words, because it doesn’t have courts and legislatures exactly like those of a modern state, international ‘law’ is to be understood in terms of its resemblance to a primitive legal system.

In chapter V of *The Concept of Law*, Hart had presented a model of the development of full-blooded legal systems out of ‘primitive legal communities’ that had social rules but no accepted let alone institutionalised mechanisms for changing them or for interpreting and applying them. A primitive legal community, on his model, had primary rules of conduct, but no secondary rules of change and adjudication. And the story he told of the development of a legal system involved the coming into existence of secondary rules of this kind to solve problems of conflict and inflexibility in these primitive communities. Others have commented on the character and plausibility of Hart’s model. For our purposes, the important point is that the relevant kinds of secondary rules are characterised very abstractly at this stage of Hart’s account. For example, to solve problems of conflict and inefficiency of enforcement, Hart

\[19\] *The Concept of Law* (n 4) 214.

\[20\] ibid.

\[21\] I have heard Hart’s defenders protest that he did not use the term ‘primitive’ in chapter X. This is true: the more delicate phrase Hart uses in the context of his sustained discussion of international law is ‘that simple form of social structure, consisting only of primary rules of obligation, which when we find it among societies of individuals, we are accustomed to contrast with a developed legal system’ (see ibid 214). But the connection to his earlier use of the term ‘primitive’, applied to legal systems and the societies in which they exist (see, eg, ibid 3, 4, 91, 156, 291) is unmistakable and it has been noted by some of the most prominent international jurists. See especially TM Franck, ‘Legitimacy in the International System’ (1988) 82 *American Journal of International Law* 751f.

imagines the development of ‘secondary rules empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken’. These rules define, in effect, the institution of courts and the role of judge. But they do so quite abstractly: a number of different kinds of institution and role can be fitted under this abstract heading. It is not part of the abstract understanding of this kind of secondary rule, for example, that the institution in question must have compulsory jurisdiction. There is nothing about that in Hart’s discussion in chapter V. And so an institution like the International Court of Justice, which doesn’t have compulsory jurisdiction, but which can nevertheless issue authoritative determinations of the kind Hart mentioned in chapter V, does seem to satisfy the description Hart gives in that chapter.

I believe Hart thinks he can meet this point in the following way. Towards the end of chapter X, he writes:

The fact that in almost all cases the judgment of the International Court . . . have been duly carried out by the parties, has often been emphasized as if this somehow offset the fact that, in contrast with municipal courts, no state can be brought before these international tribunals without its prior consent. . . . That there is some analogy is plain; but its significance must be assessed in the light of the equally plain fact that, whereas a municipal court has a compulsory jurisdiction to investigate the rights and wrongs of ‘self help’, and to punish a wrongful resort to it, no international court has a similar jurisdiction.

‘Significance’ here seems to indicate the convincingness of the overall analogy between the courts of the international order and the courts of a municipal system. We can grant Hart’s point about the significance of the analogy (though the last few lines of this excerpt seem question-begging). However, whether the overall analogy is significant or not, the fact remains that international courts do

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23 The Concept of Law (n 4) 96.
24 This functional approach to an understanding of secondary rules in Hart’s jurisprudence is argued for in M Payandeh, ‘The Concept of International Law in the Jurisprudence of H.L.A. Hart’ (2010) 21 European Journal of International Law 981:

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, than there is no compelling reason why an international legal order needs to resemble the domestic legal order in form . . . It seems more convincing to evaluate the nature of the international legal system on the basis of whether it contains rules and mechanisms which perform the three functions which Hart deems necessary for the existence of a legal system.

So, Payandeh suggests, we shouldn’t be asking ‘whether international law encompasses legislative, judicative, and executive structures comparable to the municipal system in form’, we should be asking how it performs these functions of recognition, change, and administration. ‘In order for international law to qualify as a legal system it needs to be able to perform these fundamental functions attributed to the law. If it fulfils this requirement there are no grounds to deny international law the status of a legal system’: see ibid 981f.
25 The Concept of Law (n 4) 232f.
make determinations of whether rules of the international order have been broken and these determinations are by and large accepted and acted on. And this could not be the case if there were no secondary rules of adjudication. Remember that at this stage we are evaluating only Hart’s claim that the international order is a primitive legal system, consisting of nothing but primary rules.

I have heard it said that Hart must have thought the relevant distinction here was between institutions that are public or official, in the sense that they have compulsory jurisdiction, and institutions that are private, in the sense that their jurisdiction – like that of an arbitrator – is dependent on consent. In fact there is no evidence of Hart’s having entertained any such thesis. And generally it is remarkable that the International Court of Justice is thought of as something much more than an arbitrator, notwithstanding its lack of compulsory jurisdiction. It is still thought of as a public body, if only because its continued presence and availability differentiates it sharply from arbitration tribunals which are usually set up on an ad hoc basis. Its prestige in the international community, the significance accorded to its decisions, and the basis of appointment of its personnel (the judges of the ICJ) are all indicators of this.

So: the criticism of Hart’s account stands. The constitution of the International Court of Justice as a court is definitely an instance of a secondary rule as Hart understands this category of rule earlier in the book. The operation of such a court, with or without compulsory jurisdiction, cannot be understood except in terms of secondary rules. Since this is undeniable, Hart is not entitled to infer, from the fact that the international order lacks courts of compulsory jurisdiction, that therefore the international order can only be a ‘primitive’ system of primary rules so far as conflict resolution is concerned. To adapt a phrase from David Kennedy, Hart’s logic here is an example of ‘primitive legal scholarship’.

I am afraid much the same has to be said about the alleged lack of a legislature. It is true that the international order lacks any institution that looks like a Parliament. It is true that it lacks exactly the kind of secondary rules that are necessary to constitute an institution of that sort. But again we cannot infer from this – as Hart does – that it lacks secondary rules of change altogether. For there may be other modes of legal change besides legislation. Hart is happy to acknowledge this in other contexts. For example, he insists that rules regarding the formation of contracts and the writing of wills must be regarded as secondary rules. He says, when he is not talking about international law, that ‘the kinship of these rules with the rules of change involved in the notion of legislation is clear’. But patently, the international order includes secondary rules of change of at least this kind. Hart’s point cannot possibly be that there are no secondary rules – in the sense of rules providing that ‘human

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26 This hypothesis was put to me by the editors of this volume.
28 The Concept of Law (n 4) 96.
beings may by doing or saying certain things introduce new rules of the pri-
mary type, extinguish or modify old ones, or in various ways determine their
incidence or control their operations'. As individuals in a municipal order
may enter into contracts, so states in the international order may enter into
treaties and vary their obligations to one another accordingly. Such powers
would be unintelligible if the international order were just a system of primary
rules. So Hart is not entitled to infer – as he does – that the international order
is just a system of primary rules (so far as legal change is concerned) from the
fact that it has no parliament.

Not only that, but the international order has well-established norms about
treaty-making like those set out in the Vienna Convention on the Law of
Treaties. The 85 articles of that convention are all secondary rules: they can-
not be understood in any other way. True, the convention is dated 1969, ten
years after Hart wrote The Concept of Law. But it is widely accepted that the
Convention codified existing customary norms on the subject, many of which
had endured for centuries, and such customary norms were themselves sec-
ondary rules of the international order, in much the same way as secondary
rules are represented (as practices) in Hart’s broader account.

Hart, I think, would want to respond that a treaty is unlike legislation in
many respects. Many treaties are bilateral – affecting the legal position of the
relevant parties only – whereas legislation changes the law for the entire com-
munity. That is true, though it does not mean that the primitive law hypoth-
esis is correct or that the rules empowering states to enter into treaties are not
secondary rules. In any case, it ignores the importance of multilateral treaties,
often involving almost every state in the world: the International Covenant on
Civil and Political Rights is a good example. The closest Hart comes to con-
ceding this point comes at the very end of chapter X, where he acknowledges
that

on many important matters, the relations between states are regulated by muli-
lateral treaties, and it is sometimes argued that these may bind states that are not
parties. If this were generally recognized, such treaties would in fact be legislative
enactments and international law would have distinct criteria of validity for its
rules.

But it is not clear why the point about ‘binding states that are not parties’
should be jurisprudentially so important. Of course there are important dif-
ferences between law-making in the international order and law-making at
the municipal level. The fact remains that the international order has evolved

29 ibid 81.
30 See I Brownlie (ed), Basic Documents in International Law, 4th edn (Oxford, Oxford University
31 See The Concept of Law (n 4) 110–17.
32 ibid 236.
secondary rules which envisage ways of changing the law for the international community on a broad front. The change is done in a different way and on a different basis than legislative change in a modern municipal system: it is plenary rather than representative and it works through a principle of voluntary accession rather than majority-decision. The relevant secondary rules of change are markedly different then from the secondary rules implicated in municipal legislation. They are secondary rules nonetheless and I think it would be a brave legal philosopher who would insist on an analytic link between secondary rules of change as such and principles of representation or majoritarianism.

As I said, to the extent that Hart addresses these issues – which is not very much – he focuses insistently on the point that treaty law is not imposed involuntarily in the way that municipal legislation is imposed. In a rather bewildering passage, he addresses what he imagines would be a way of responding to that point:

[I]t has been claimed that war, ending with a treaty whereby the defeated power cedes territory, or assumes obligations, or accepts some diminished form of independence, is essentially a legislative act; for, like legislation, it is an imposed legal change. Few would now be impressed by this analogy, or think that it helped to show that international law had an equal title with municipal law to be called ‘law’; for one of the salient differences between municipal and international law is that the former usually does not, and the latter does, recognize the validity of agreements extorted by violence.

The last point in this extract is no doubt an interesting one, but again it does not establish – it does not even tend to establish – that the international order is a zone bereft of secondary rules.

Hart knew perfectly well that the modes of legal change in developed municipal legal systems are many and various. As well as the two examples we have considered – the exercise of individual or bilateral powers of contract or testamentary disposition and explicit legislation by a body like a parliament – there is also judge-made law to be considered, a mode of law-making for all the members of a legal system which is quite unlike legislation. There are secondary rules that empower judges to make law. I don’t mean to raise here the question of judge-made law in the international system, but just to stress that the absence of a legislature doesn’t necessarily preclude other secondary rules for law-making organised in a quite different way.

\[33\] At ibid 306 there is an endnote which says: ‘For criticism of the common description of general treaties as “international legislation” see Jennings, “The Progressive Development of International Law and its Codification”, 24 BIBIL (1947) at p. 303. But Jennings’ point is only that the multilateral treaty is a mode of general legal change quite different in character from municipal legislation; he does not deny that it is a mode of general legal change.

\[34\] ibid 232.
IV. NO RULE OF RECOGNITION?

As if the fallacious arguments we have just examined were not enough, Hart introduces another. He writes:

> It is . . . arguable . . . 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.35

I find it harder to evaluate this contention, partly because I am still unsure after all these years what the idea of a rule of recognition is supposed to add to other secondary rules, such as rules of (recognisable) change and rules of adjudication, oriented to the application of rules that are recognised as already existing.36 It is also unclear what the balance is supposed to be, in Hart’s contention, between the importance of the recognition function of the particular kind of secondary rule that is in question here and the unifying function on which he appears to lay great emphasis in the passage excerpted above. (In the chapter on international law, Hart veers towards a Kelsenian view of the rule of recognition that is really quite different from the essential view of its ‘recognition’ function that accompanies its introduction in chapter V.37) Also, whatever its function, it is unclear how important it is for Hart that a legal system have a rule of recognition which is hard and fast and definitely rule-like as opposed to vague and standard-like and tattered around the edges. We will have to address all these points.

The recognition function – a practice shared among practitioners and judges in the international realm that identifies sources of law for that realm – is performed partly by the rules relating to treaties (including those codified in the Vienna Convention) and partly by rules emerging out of judicial practice in institutions like the International Court of Justice. So far as treaty-based law is concerned, the recognition of norms for the international realm is pretty straightforward. Hart’s own general observation that ‘[f]or the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers’ seems entirely apposite here.38

Customary international law has always posed something more of a problem, at least for jurists who are seeking a precise statement of the relevant rule of recognition. But, again, acceptance of the point that Hart is willing to concede...
when international law is not being discussed—namely, that courts mostly use ‘unstated rules of recognition’—helps greatly here. And anyway, we are not dealing with anything like complete indeterminacy. The situation is comparable to the problems surrounding precedent as a source of law. We all know that in common law systems there are problems such as ‘When are precedents binding?’, ‘When is it permissible to depart from them?’, ‘How exactly are the terms of their application settled when they are binding?’, and so on. The contentious character of jurists’ answers to these questions—something conceded by Hart, again when those who want to talk of international law may not be listening—does not and should not lead us to deny that the municipal order lacks a rule of recognition. And it is not clear why similar problems about customary international law should lead to similar conclusions as far as the international order is concerned.

My point is that, so far as recognition is concerned, Hart should not be making greater demands on international law than he makes on municipal law. Any differences here are, I think, differences of degree, not differences of kind as between the various systems in question. As Ronald Dworkin has stressed with regard to precedent in municipal law and as John Finnis has shown with regard to custom in international law, we know how to argue our way through these issues, even if we don’t have a precisely formulated and mechanically applicable meta-rule at our fingertips.

One point that Hart seems anxious to insist on is that the international order lacks a single rule of recognition to perform a ‘unifying’ function, providing not only the criteria we use to identify valid, binding treaties and valid customary norms, but ordering them into a structural unity whereby it is clear which ones have priority over others. He says that ‘[t]he rules of international law are indeed . . . conflicting on many points’, and he seems to imply that this is the upshot of the absence of a unifying rule of recognition. Hart says:

[I]t is submitted 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.

Systematicity is no doubt important, but it has to be acknowledged that almost all legal systems lack it to some degree or other. The tensions and priorities between rules of different provenance are never fully worked out. In Anglo-American systems, we say that statute law prevails over common law and

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39 My emphasis. For ‘unstated’ rules of recognition, see ibid 102, 103, and 110.
40 See ibid 134.
42 See The Concept of Law (n 4) 214.
43 ibid 223.
44 ibid 236.
there are some rules for resolving apparent conflicts among statutes themselves. But the matter is not fully settled. And other jurists working in the wake of Hart’s positivism have not thought it necessary to insist on the singularity of a unifying rule of recognition. As Joseph Raz puts it, ‘there is no reason . . . to assume that a legal system can contain only one rule of recognition’; and ‘there is no reason to believe that valid norms belonging to one system cannot conflict’.

On Raz’s account, the unity of a legal system does not depend on a unifying rule of recognition, but on its containing ‘only rules which certain primary organs are bound to apply’. I don’t mean to suggest that the norm-applying institutions of the internal system (like the International Court of Justice) perform exactly the function that primary organs fulfil on Raz’s account. But they may come close, particularly if attention is paid to them by all states whether they are willing in particular cases to submit to their jurisdiction or not.

Hart’s preoccupation with singularity and the unifying character of rules of recognition seems connected with the fact that some jurists working in the Kelsenian tradition have tried to identify a single ‘basic norm’ for the international system. Hart spends a page or two in chapter X making fun of these efforts. But he seems to want us to forget that it was never part of the philosophical agenda set out in The Concept of Law that a rule of recognition should perform the function that the basic norm was supposed to fulfil in Kelsen’s jurisprudence. To the extent that Hart made a case for a rule of recognition at all, it was in regard to the function of identifying and keeping track of which rules counted as rules of a system given the various dynamics for the making and unmaking of rules. As Raz notes, that might be done in many different ways in one and the same legal system, and it is no reflection on the international order that there too there are several ways in which this recognition function is performed.

One last point: Hart thinks it is important that, in a fully operating legal system, norms can be identified by the rule of recognition as valid norms of

45 Cf A Ross, ‘[Review of] The Concept of Law by H.L.A. Hart’ (1962) 71 Yale Law Journal 1186: ‘The much cherished logical unity of a legal order, in my opinion, is more a fiction or a postulate than a reality. The various sources in actual fact do not make out a logical hierarchy but a set of co-operating factors. Custom and precedents, says Hart, in the British system are subordinate to legislation. I believe that Hart, if he tried to verify this assertion, would find that it squares better with a confessed, official ideology than with facts. International law, according to Hart, is no system but a set of rules. . . . Why is it tacitly assumed that municipal law is a systematic unity?’


47 ibid.

48 ibid 132–37.

49 See The Concept of Law (n 4) 233–36.

50 Again I draw here on the functionalist approach to secondary rules set out by Payandeh in ‘The Concept of International Law in the Jurisprudence of H.L.A. Hart’ (n 24).

51 See also the powerful argument of S Besson, ‘Theorizing the Sources of International Law’ in The Philosophy of International Law (n 8) 181.
the system even in advance of seeing whether they are followed. This is something that is supposed to distinguish a legal system in the full sense from a ‘primitive’ system consisting only of primary 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.\(^{52}\)

He seems to think that this cannot be said of the international system and that therefore the international system is simple or primitive in this regard. However, as a matter of practice in the international system, this characterisation by Hart is simply preposterous. It does not correspond either to the way that states or international lawyers or international organisations behave or to the attitudes exhibited in the judgements of validity that they form.

Someone committed to defending Hart’s account at all costs might say that the so-called secondary rules of the international system are just packaging for the primary rules, that they don’t do any independent work. But this too would be false. As Pierre-Marie Dupuy has pointed out, the secondary rules of change and recognition in the international legal system are fully detached from the primary rules that they concern:

These international secondary norms are fundamentally the same whatever the object of the international primary rules. For instance, the negotiation, adoption, and implementation of a treaty is the same regardless of the treaty’s aim and content.\(^{53}\)

V. EXAGGERATED DIFFERENCES

I have emphasised throughout this discussion that there are important differences between the way municipal legal systems operate and the way international legal systems operate. Hart was right to that extent. But, it seems to me, he grotesquely exaggerated those differences in his characterisation of international law as a primitive system of primary rules.

This exaggeration has done no great harm in itself: international lawyers quickly recognised that Hart’s account could be safely put aside or cited only as an example of the ignorance of analytic legal philosophers. The real harm lies in the opportunity costs of Hart’s negligence. What we miss is what might have been done. It would have been good if Hart had analysed and explicaded

\(^{52}\) The Concept of Law (n 4) 235.

these differences in the sophisticated way in which he analysed and explained the different role that sanctions play in the international order: I mean the explication that I outlined in section II above. It is a pity that the author of *The Concept of Law* ran out of steam or inclination before doing this in his final chapter, for it deprived us not only of comparable insights, but of an example that might have inspired some of Hart’s followers in jurisprudence to take up and pursue this challenge.