The Concept of International Law in the Jurisprudence of H.L.A. Hart

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Abstract

This article analyses H.L.A. Hart's concept of international law from the perspective of anaytical jurisprudence and in light of the state of contemporary international law. The article challenges Hart's view that international law is 'law' but not a 'legal system'. Hart arrives at this conclusion on the basis of a comparison of the international legal order with the municipal legal system. This comparison is distorted by Hart's general focus on private law and criminal law and becomes less convincing when constitutional law is added to the equation. As a consequence, Hart's methodological approach is inconsistent and should be modified. Rather than asking whether international law resembles municipal law in form, it should be asked whether international law encompasses legislative, executive, and judicative structures which are able to perform the same functions as the legal order of a nation state, and which thereby overcome the defects of a primitive social order. Against the background of this modified analytical framework, Hart's analysis is revisited in light of recent developments and changes in the structure of international law at the beginning of the 21st century.

1 The Shadowy Existence of Hart's Concept of International Law

H.L.A. Hart's contribution to analytical jurisprudence is undisputed. His approach to law and the legal system, most comprehensively developed in *The Concept of Law*,[1]

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[1] H.L.A. Hart, *The Concept of Law* (2nd edn, 1994). A further contribution of Hart to international law, which is beyond the scope of this article, is his essay 'Kelsen's Doctrine of the Unity of Law' in which he engages with Kelsen's monist theory of the relationship of international law and municipal law: H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983), at 309–342.

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has shaped the landscape of legal philosophy in the Anglo-American sphere and beyond. It continues to influence and dominate scholarly discussion, most prominently through the 'Hart–Dworkin' debate[2] which revitalizes and fuels the traditional antagonism between legal positivists and natural lawyers. Even lawyers and legal scholars who are not deeply engaged in legal philosophy will regularly be able to attribute keywords like the rule of recognition or the differentiation between primary rules and secondary rules to Hart. One particular aspect of Hart's legal theory, however, remains noticeably underdeveloped in his own work and underexposed in the reception by lawyers and philosophers: his concept of international law, elaborated in Chapter X of *The Concept of Law*.[3] Most recently, Jeremy Waldron has characterized Hart's theory of international law as 'unhelpful' and has criticized his 'carelessness' and 'indifference'.[4] At the same time Waldron criticizes the general lack of engagement of analytical jurisprudence with international law, an engagement which, according to Waldron, could at least to some extent be based on Hart's jurisprudence.[5] In contrast to the significance legal philosophers attribute to Hart's general theory of law, they largely neglect his concept of international law. The same is true with regard to scholars of international law. While they at times refer to Hart's distinction between primary and secondary norms,[6] mention him as one among other legal positivists,[7] or use his concept as a framework for analysis,[8] more comprehensive analysis of his theory of international law is rare.[9]

2 The Question of Relevance: Why Should We Care?

A possible explanation for this lack of a more intensive engagement with Hart's concept of international law could, of course, lie in the possible belief of legal philosophers and international lawyers that such an engagement was irrelevant. Therefore,

2 Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed', in A. Ripstein (ed.), *Ronald Dworkin* (2007), at 22.

3 Hart, *supra* note 1, at 213–237.

4 Waldron, 'Hart and the Principles of Legality', in M.H. Kramer *et al.* (eds), *The Legacy of H.L.A. Hart* (2008), at 67, 68–69.

5 *Ibid.*, at 69.

6 Abbott *et al.*, 'The Concept of Legalization', 54 *Int'l Org* (2000) 401, at 403.

7 Fastenrath, 'Relative Normativity in International Law', 4 *EJIL* (1993) 306, at 307–308; Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', 93 *AJIL* (1999) 302, at 304–305.

8 Sreejith, 'Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism', 9 *San Diego Int'l LJ* (2007) 5; Medrado, 'Renegotiating Remedies in the WTO: A Multilateral Approach', 22 *Wisconsin Int'l LJ* (2004) 323, at 328; Palmeter, 'The WTO as a Legal System', 24 *Fordham Int'l LJ* (2000) 444; Jones, 'The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A. Hart's Model of Law and a Legal System', 17 *Cornell Int'l LJ* (1984) 1; Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', 37 *Harvard Int'l LJ* (1996) 389, at 398–400.

9 But see Morison, 'The Schools Revisited', in R. St. J. Macdonald and D. M. Johnston (eds), *The Structure and Process of International Law* (1986), at 131, 144–155; D'Amato, 'The Neo-Positivist Concept of International Law', 59 *AJIL* (1965) 321; Morss, 'Sources of Doubt, Sources of Duty: HLA Hart on International Law', 10 *Deakin L Rev* (2005) 698; Beckett, 'The Hartian Tradition in International Law', 1 *The Journal Jurisprudence* (2008) 51.

a few preliminary remarks on the relevance of a jurisprudential encounter with international law in general and with Hart's approach to international law in particular seem in order and should precede an analysis of Hart's theory of international law.

A *International Law as 'Law': An Academic Glass Bead Game?*

As much as legal philosophers disagree about the nature of law, they generally agree that there actually *is* a thing called law. Not so in international law. An inquiry into the nature of the international legal system usually starts with the question of the legal quality of international law.[10] And while international lawyers quickly declare the question moot[11] or find the only intelligent way to deal with it in giving up thinking and arguing about it,[12] doubts about the legal quality of international law have the potential to influence contemporary thinking about and attitudes towards international law.

The jurisprudence of international law has long been influenced by the command theory, developed by the English legal philosopher John Austin in *The Province of Jurisprudence Determined*.[13] For Austin law consists of rules issued by a sovereign. Rules are defined as commands, coercive orders, or wishes backed by the threat of imposing an evil in the form of a sanction in the case of non-compliance with the wish.[14] For a rule defined in this way to become law it must be issued by the sovereign.[15] Austin defines a sovereign as habitually obeyed by the bulk of a society and not habitually obeying to another human superior. On the basis of this general command theory Austin does not regard international law as law. According to him international law does not stem from the command of a sovereign but is set by general opinion and enforced by moral sanctions only.[16] International law is therefore not deemed to be positive law – Austin speaks of 'law improperly so called'[17] – but only international morality.[18]

Austin is generally deemed to be the last influential denier of the legal quality of international law. With the effective repudiation of Austin's command theory by Hart[19] a major obstacle in recognizing international law as law seems to be abandoned. However, there have always been and still are approaches which do not fully deny the validity of international law but downplay its role for the reality of international politics significantly. Realist approaches, traditionally advanced, for example, by Hans Joachim Morgenthau and Georg Schwarzenberger, take international law into

[10] M.N. Shaw, *International Law* (6th edn, 2008), at 2; S.D. Murphy, *Principles of International Law* (2006), at 6; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, 1997), at 5.

[11] Malanczuk, *supra* note 10, at 6.

[12] Williams, 'International Law and the Controversy Concerning the Word "Law"', 22 *BYBIL* (1945) 146, at 163.

[13] J. Austin, *The Province of Jurisprudence Determined* (ed. W.E. Rumble, 1995).

[14] *Ibid.*, at 21–22.

[15] *Ibid.*, at 165–166.

[16] *Ibid.*, at 171.

[17] *Ibid.*, at 123, 171.

[18] *Ibid.*, at 112, 124, 175.

[19] See Hart, *supra* note 1, at 18–78.

account but emphasize its limited ability to restrict power exercised by states.[20] In Kenneth Waltz's neo-realist account of international relations, international law does not play any role at all.[21] More recently Jack Goldsmith and Eric Posner have argued in *The Limits of International Law* that a state's interests decisively determine compliance with its international obligations.[22] They thereby challenge the ability of international law to influence and control state conduct only by virtue of its normative quality.

These diverse approaches and tendencies towards taking international law less seriously are not decisively steered by the jurisprudential question of whether international law really is law 'properly so called'. Nevertheless, doubts about the legal quality of international law may endorse and legitimize proponents of more restrictive approaches to the international legal order. Analytical theories of international law, furthermore, not only help one understand the system better; they also influence the methods international lawyers apply when identifying and interpreting the law.[23] Theoretical inquiries thereby entail practical significance. The question about the normative foundations of international law remains relevant even when the legal quality of international law as such is hardly disputed anymore.

B *The Significance of Hart in Particular*

The general relevance of analytical jurisprudence with regard to international law does not necessarily imply the relevance of a deeper engagement with Hart's concept of international law. For a number of reasons, however, an inquiry into Hart's theory seems fruitful, especially from the perspective of international law. As already mentioned, Hart is regarded as the legal philosopher who most effectively refuted Austin's denial of international law's legal validity. Moreover, since positivism is among the most influential theoretical approaches to international law,[24] it seems natural to engage with one of the most influential contemporary legal positivists and one of the few legal philosophers who bothered to approach international law from the perspective of analytical jurisprudence.

One might argue that positivism has such a long and well-established tradition in international law that an inquiry into yet another positivist concept of international law would seem unnecessary and repetitive. This would be a mistake, because Hart's positivism avoids one of the major shortcomings of classical positivism, which is a too close association of the validity and nature of the legal order with the will of sovereign states. The classical positivist accounts of international law, as they were developed in the late 19th and early 20th centuries, basically were voluntarist theories of

[20] Morgenthau, 'Positivism, Functionalism, and International Law', 34 *AJIL* (1940) 260; H.J. Morgenthau, *Politics Among Nations* (6th edn, 1985); G. Schwarzenberger, *The Frontiers of International Law* (1962).

[21] K. Waltz, *Theory of International Politics* (1979).

[22] J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (2005).

[23] Ratner and Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers', 93 *AJIL* (1999) 291; S. J. Shapiro, *Legality* (forthcoming 2010), at 26–30.

[24] Ratner and Slaughter, *supra* note 23, at 293 (characterizing positivism as 'the lingua franca of most international lawyers, especially in continental Europe').

international law. Georg Jellinek, for example, saw the basis for obligations under international law in an act of auto-limitation by states.[25] Heinrich Triepel refined this voluntarist theory surrogating the will of the individual states with the common will of states.[26] This voluntarist approach to international law found its expression in the famous *Lotus* decision of the Permanent Court of Justice in which the court held that '[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law'.[27] Positivism thereby seems to imply not only a strong notion of sovereignty but also a strictly consensual character of international law: no state can be bound by a rule of international law unless it has explicitly or tacitly consented to it.

The traditionally tight relationship between legal positivism and voluntarist conceptions of international law has led many scholars to believe that positivism necessarily implies a voluntarist approach to international law.[28] Such an assessment constitutes a one-sided view of legal positivism which, in its international law dimension, does not have to be equated with voluntarism.[29] The main assertion of legal positivism lies in the perception that all legal facts are determined by social facts alone.[30] Positivists can and do disagree about *what* those ultimate social facts are. For Jellinek and Triepel it was the will of states, for Kelsen it was the *Grundnorm*,[31] for Hart the rule of recognition. This concept of law encompasses the potential for a positivist approach to international law which evades the shortcomings and limitations of voluntarism.[32] Hart, however, did not fully develop the potential of such a theory of international law.

3 Hart's Concept of Law: An Outline

At the outset of *The Concept of Law*, Hart rejects the idea that a jurisprudential inquiry into the law is merely an attempt to find a definition of the term law.[33] He is rather concerned with analysing the nature of law in an attempt to 'advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system'.[34] In doing so he identifies three main recurrent issues of legal jurisprudence: how to distinguish the obligatory force of law from the conduct steering dimension of coercive force? How to distinguish legal obligations from moral obligations? How to distinguish legal rules, or more broadly social rules *requiring* certain behaviour, from

[25] G. Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), at 2, 48–49.
[26] H. Triepel, *Völkerrecht und Landesrecht* (1899), at 32, 81.
[27] *S.S. Lotus*, 1927 PCIJ Series A, No. 10, at 18.
[28] Ratner and Slaughter, *supra* note 23, at 293.
[29] Simma and Paulus, *supra* note 7, at 304, 307.
[30] Shapiro, *supra* note 23, at 26.
[31] H. Kelsen, *Reine Rechtslehre* (2nd edn, 1960), at 196.
[32] For a passionate critique of voluntarist conceptions of international law see Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium (I)', 316 *RdC* (2005) 9, at 45–50.
[33] Hart, *supra* note 1, at 13–17; Shapiro, *supra* note 23, at 22–23.
[34] Hart, *supra* note 1, at 17; Shapiro, *supra* note 23, at 10–12.

rules which merely *describe* a behavioural pattern of people without determining that they are required to act in such a way?[35]

A *Learning from Austin's Mistakes: A Critique of the Command Theory*

Hart develops his legal theory on the basis of a contention of Austin's theory according to which law has to be understood as a set of rules issued by a sovereign. Hart rejects both, Austin's theory of rules as well as his theory of sovereignty. According to Hart not all legal rules can be understood as coercive orders. While the rules of criminal law and torts might be explained in this way, the theory fails with regard to power-conferring rules. Such rules do not establish duties but enable individuals to create or vary legal relations (private powers) or confer public power on judicial, legislative, and administrative officers.[36] Power-conferring rules differ fundamentally in function from orders backed by threat, a difference which is distorted when both kinds of rules are characterized as commands.[37] Restricting legal rules to orders backed by threat, furthermore, could not explain the legal phenomenon that the legislator can issue laws which bind himself.[38] Finally Hart emphasizes that not all legal rules find their origin in a deliberate act of the legislator, and that in particular customary law cannot intelligibly be defined as an order by the sovereign.[39]

With regard to the role of the sovereign in Austin's theory, Hart criticizes the conception of a person or body of persons whose orders are habitually obeyed and who does not habitually obey any other person: First, the requirement of a habit of obedience cannot explain the continuity of law which Hart identifies as a characteristic of every legal system.[40] When the lawmaker changes Austin's theory cannot explain the new legislator's lawmaking power. Since Austin bases law on the habit of obedience and habits are not normative, they cannot confer a right or authority on the new lawmaker to legislate. And since habits of obedience refer only to an individual person, they do not indicate that the new legislator will be habitually obeyed in the way his predecessor was.[41] The command theory also fails to explain the persistence of law.[42] If law is understood as an order by a person habitually obeyed there is no ground for the legal validity of a law issued by a legislature which is no longer in power. Yet, it is one of the characteristics of a legal system that laws enacted by a legislator remain in force even after the legislator cedes his office. Finally, the reliance on a sovereign as the source of legal obligation precludes the idea of legal limitations of the legislature.[43] Under Austin's theory legal limitations of the legislator are conceivable only if the

[35] Hart, *supra* note 1, at 6–13.
[36] *Ibid.*, at 27–29.
[37] *Ibid.*, at 38–42.
[38] *Ibid.*, at 42–44.
[39] *Ibid.*, at 44–48.
[40] *Ibid.*, at 51–61.
[41] *Ibid.*, at 59–60.
[42] *Ibid.*, at 61–66.
[43] *Ibid.*, at 66–71.

sovereign legislator is under the obligation of another legislator. But in that case he would by definition no longer be sovereign because he would habitually obey another sovereign.[44] Thus, law cannot comprehensively be understood as rules issued by a sovereign.[45]

B *Hart's Fresh Start: Law as the Union of Primary and Secondary Rules*

Against the background of this criticism of Austin Hart develops his concept of law as the union of primary and secondary rules. Austin's failure to explain the existence and role of power-conferring rules in a legal system leads Hart to introduce the distinction between primary and secondary rules.[46] Primary rules are rules which require people to engage in or or abstain from a certain conduct. They impose duties. Secondary rules, on the other hand, are rules about rules. They provide how primary rules can be established, changed, or identified and control the operation of primary rules. Secondary rules are power-conferring rules.

Hart illustrates the need for secondary rules by considering a primitive society which follows certain customary rules but does not have a legal system.[47] This society comprises basic rules imposing fundamental duties on its members but it does not have any institutions which authoritatively identify or change the rules, or which determine and enforce obligations in a dispute among its members. Hart assumes that such a rule system could work in a small and homogenous community, but under different conditions it would exhibit its defects:[48] doubts about the content of rules could not be settled, leading to *uncertainty*. Rules could not be changed in a deliberate process in order to react to changes in the social environment, thereby making the rule system *static*. Disputes about whether the conditions of a rule are fulfilled or not could not be settled authoritatively, the rules would not be uniformly enforced, thereby making the rule system *inefficient*.

In order to remedy these defects Hart suggests that the primary rules of obligation be supplemented by a set of secondary rules.[49] The problem of uncertainty of primary rules is to be remedied by introducing a *rule of recognition* for the conclusive and authoritative identification of the primary rules. The static character of a rule system can be overcome by the introduction of *rules of change* which empower a person or a group of persons to formulate new primary rules. And *rules of adjudication* which empower

[44] Hart also rejects Austin's conception that legal obligations of the legislator are possible if one conceives of the people as the sovereign: *ibid.*, at 71–78.

[45] In addition, Hart criticizes Austin's descriptive concept of obligation. According to Hart, to equate an obligation with the prediction of a sanction which might be imposed in the case of non-compliance is to distort the reality of law. It neglects that legal obligations not only predict the imposition of a sanction but also justify it. And it ignores the internal aspect of rules: the fact that people voluntarily accept rules and behave accordingly, irrespective of the prospect of punishment: *ibid.*, at 82–91.

[46] *Ibid.*, at 80–81.

[47] *Ibid.*, at 91.

[48] *Ibid.*, at 92–94.

[49] *Ibid.*, at 94–98.

individuals to make authoritative determinations of a violation of a primary rule in a specific case remedy the inefficiency of a primitive rule system.

In Hart's concept of law the rule of recognition is at the heart of the legal system and provides authoritative criteria for identifying primary rules.[50] In a modern legal system the rule of recognition also specifies the relationship and order of precedence between these criteria as well as the *supreme* criterion.[51] Among the sources of law that are valid within a legal system one source must be supreme and trump law from every other source. The rule of recognition is, furthermore, the *ultimate* rule of the legal system.[52] While it provides criteria for the validity of other rules and the validity of every other rule can be traced back to the rule of recognition, there is no rule providing criteria for the legal validity of the rule of recognition. The rule of recognition can therefore not be valid or invalid but can only be accepted as the guiding standard in determining the validity of other rules. The rule of recognition simply exists as a matter of social fact.

On the basis of the construction of a legal system as the union of primary and secondary rules, Hart develops the necessary and sufficient conditions for the existence of a legal system.[53] As a necessary minimum condition Hart identifies that the law which imposes obligations, that means the primary rules, generally be obeyed by the citizens. With regard to the secondary rules, Hart rejects the assumption that these rules which are addressed to public officials can be 'obeyed'. When legislators conform or fail to conform to the rules which confer lawmaking powers on them it does not seem appropriate to say that they 'obey' or 'disobey' those rules. Neither does it seem an appropriate description to say that a judge 'obeys' the rule of recognition when he identifies and applies a statute. Therefore, Hart requires a unified or shared acceptance of the rule of recognition by public officials.[54] Unlike the primary rules, the legal validity of which depends only on general obedience by the citizens, the existence of the rule of recognition as a social rule is dependent upon its acceptance by public officials as a common and general standard of legal validity.[55]

4 Basic Elements of Hart's Concept of International Law

On the basis of his general theory Hart develops his concept of international law in Chapter X of *The Concept of Law*. In this chapter Hart approaches the question whether international law constitutes law or international morality. Only in the last section of Chapter X does Hart ask whether international law is sufficiently analogous to the municipal legal order to be qualified as a legal system.

[50] *Ibid.*, at 100–101.
[51] *Ibid.*, at 105–106.
[52] *Ibid.*, at 107–110.
[53] *Ibid.*, at 112–117.
[54] *Ibid.*, at 115.
[55] *Ibid.*, at 116–117.

A *International Law as 'Law'?*

Hart identifies the absence of an international legislature, of courts with compulsory jurisdiction, and of centrally organized sanctions as the main sources for doubting the legal quality of international law.[56] According to Hart, these differences make international law resemble the 'simple form of social structure' which can be found in primitive societies. For Hart international law consists mainly of primary rules, and he expresses doubts whether any secondary rules exist on the international level.

He then examines in greater detail whether the lack of centralized sanctions precludes the characterization of international law as law. According to Hart, no such sanctions exist in international law. Even the powers of the United Nations Security Council under Chapter VII of the UN Charter would not establish such a system due to the probability of the Council being paralysed by the veto.[57] Hart, nevertheless, rejects the conclusion that the absence of sanctions entails the absence of obligations in international law. Such a conclusion would be intelligible only if obligations were to be equated with the likelihood of a sanction in the case of disobedience. And this result, implied by the command theory, had already been repudiated by Hart.

Hart similarly rejects a different objection. According to Hart it may be argued that the existence of primary rules prohibiting the free use of force and rules providing for the official use of force as a sanction are a necessary condition for every municipal legal system. Since communities of individuals consist of human beings approximately equal in strength and with lots of opportunities to injure each other, natural deterrents alone would not be enough to guarantee observation of by the rules.[58] However, on the international level the situation presents itself differently. Violence between states is much more public than violence between individuals and entails the risk of third states getting involved. Adding the unpredictability of war, there is a naturally high level of deterrence for states to engage in violence. On the other hand, international reality is characterized by an unequal distribution of power and strength among states.[59] The existence of sanctions would therefore not guarantee that powerful states always obeyed the rules, and sanctions would add little deterrent effect.[60] Sanctions play a different role within the municipal and the international systems. Their absence on the international level is therefore no reason to deny the legal quality of international law.

The second obstacle to recognizing international law as law is the sovereignty of states. The conception of a state which is at the same time sovereign and bound by law is deemed to be radically inconsistent.[61] This inconsistency is based on the assumption that the sovereign is, by definition, above the law. Hart rejects this assumption

[56] *Ibid.*, at 3–4, 214.
[57] *Ibid.*, at 217.
[58] *Ibid.*, at 218–219.
[59] *Ibid.*, at 198–199.
[60] *Ibid.*, at 219.
[61] *Ibid.*, at 220.

and adopts an understanding of sovereignty as autonomy.[62] Sovereignty exists only within the limits of international law and only to the extent that the rules of international law allow. Hart rejects voluntarist theories of international law which, emanating from the concept of absolute sovereignty, view the basis of international legal obligations in an act of auto-limitation of the state.[63] Proponents of this approach could not offer a compelling explanation or an inquiry into the actual character of international law. And they would fail to explain how an act of self-limitation could generate legal obligations. For such an act to result in a legal obligation there would need to be an already binding rule stating that such acts generate binding obligations. Finally, international law would not present itself as a legal order comprehensively based on state consent. In some cases this consent was only tacit consent and no more than a fiction.[64] The binding force of international law for newly emerging states or with regard to newly acquired territory would fully escape the conception of legal obligation requiring consent, and thereby challenge the theory of auto-limitation. In the conception of Hart sovereignty is a legal concept. Unlike Austin, who claimed that the sovereign makes the rules, Hart claims that the rules define the scope of sovereignty.[65]

B *International Law as 'Morality'?*

Finally, Hart rejects the proposition that international law should best be understood as international morality.[66] In appraising each other's conduct states differentiate between moral and legal assessments. Like rules of municipal law rules of international law are often morally indifferent. They draw arbitrary distinctions which cannot be explained by moral standards. Formalism and legalism are characteristic features of international law and do not coincide with characteristics of morality. Unlike the rules of morality the rules of international law are subject to deliberate change. A moral foundation is also not needed to explain the binding force and obligatory character of international law. While it is necessary that the rules of international law are generally followed, there can be a variety of reasons why states obey their obligations. A moral obligation to abide by international law may be one of the reasons. But there is no compelling reason why it has to be a necessary feature of international law.

C *An International 'Legal System'?*

In the last section of Chapter X Hart turns to a closer analysis of the nature of international law.[67] According to Hart international law resembles, in form though not in content, a simple regime of primary rules. And it resembles a municipal system though only in function and content and not in form. Hart first emphasizes the differences

[62] *Ibid.*, at 223–224.
[63] *Ibid.*, at 224–226.
[64] *Ibid.*, at 226.
[65] Waldron, *supra* note 4, at 67, 83; Shapiro, 'What Is the Rule of Recognition (And Does It Exist)?', in M.D. Adler and K.E. Himma (eds), *The Rule of Recognition and the U.S. Constitution* (2009), at 235.
[66] Hart, *supra* note 1, at 227–232.
[67] *Ibid.*, at 232–237.

between international law and municipal law. He does not see any structures of international legislation which resemble a legislature in the constitutional system of the modern state. Neither is there a system of adjudication. That judgments of the International Court of Justice are generally followed by the parties could not compensate for the lack of a compulsory and comprehensive jurisdiction of any international court. The same was true for decentralized sanctions in international law because the resort to war or other forms of forceful self-help could not be comprehensively adjudicated on in the international order. These defects had also not been overcome by the formation of the United Nations due to the general paralysis of the UN Charter enforcement provisions.[68]

Hart also rejects the proposition that international law contains a rule of recognition. Proposals to formulate a unified rule of recognition had not been successful. The *pacta sunt servanda* principle could not be considered the rule of recognition because not all obligations under international law result from contractual relationships.[69] And the rule that 'States should behave as they customarily behave' is dismissed by Hart as an empty repetition of the fact that international society abides by a set of rules.[70] However, Hart rejects the assumption that the existence of a rule of recognition is necessary for international law. The rules of international law had only to be accepted as standards of conduct and supported with appropriate forms of social pressure in order to be regarded as obligatory, binding, legal rules.[71] However, since there is no secondary rule which stipulates the criteria of legal validity of rules, their existence depends on whether they are accepted as a rule or not.[72] International law therefore consists of rules which 'constitute not a system but a set of rules'.[73] If international law evolved in such a way that multilateral treaties could bind states which are not party to the treaty, Hart would consider such a mechanism to be a legislative enactment.[74] In that case international law would comprise a rule of recognition which would be more than an empty repetition of the fact that the rules of international law have to be obeyed. International law would develop into a system more strongly resembling the municipal legal order also in form.

5 A Critical Assessment of Hart's Concept of International Law

At first view it seems that international lawyers can be satisfied with Hart's theory of international law. After all, Hart rejects Austin's doubts with regard to the legal validity of international law and affirms that international law is law. He refuses to limit

[68] *Ibid.*, at 233.
[69] *Ibid.*, at 233–234.
[70] *Ibid.*, at 236.
[71] *Ibid.*, at 234.
[72] *Ibid.*, at 235.
[73] *Ibid.*, at 236.
[74] *Ibid.*, at 236–237.

international law to morality. He refuses to equate it with power. His only caveat, that international law is different in form from the municipal legal system, is an assessment which international lawyers generally share. Should the expansion of Hart's general theory of law to the sphere of international law not therefore be welcomed by international lawyers?[75]

One of the reasons for international lawyers not to embrace Hart's concept of international law more euphorically is surely his refusal to accord international law the status of a legal system. Throughout *The Concept of Law* Hart repeatedly contrasts the developed municipal legal system with primitive social structures and with international law. And although Hart shies away from explicitly characterizing international law as a primitive legal system, the general notion of international law as a less developed and thereby inferior set of social rules is clearly noticeable. In Hart's conception international law is on a par with the social rules of a primitive society, not with the more sophisticated municipal legal system.

This characterization raises the same relevance question as the qualification of international law as law. Just as one can deny the relevance of the question whether international law is law, one can doubt the relevance of the question whether international law is a legal system. But apart from a general jurisprudential interest in conceptual clarity and in theoretical concepts which fit legal practice, the latter question does have similar practical implications to the former question. The assumption that international law does not constitute a legal system but is rather composed of a set of rules has the potential of consolidating the view of politicians and lawyers that international law is inferior to municipal law. Such a persuasion 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. It would also be easier politically and publicly to justify such a violation: after all, it is 'just' international law they are neglecting, a law which is inferior to the municipal legal system. And judges in domestic courts, which in the age of globalization are increasingly confronted with the task of applying international law and determining the relationship between international law and their domestic legal system,[76] might in a similar way be less inclined to award international law a significant meaning: Why should inferior international law trump conflicting norms of domestic law? Why should judges interpret domestic law and even constitutional law in compliance with international law when the last is deemed to be inferior?

Against this background Hart's 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. Although Hart emphasizes that international law is law one might get 'the impression that Hart, like Austin, did not believe there was any

[75] See, e.g., Palmeter, *supra* note 8, at 451–452.

[76] Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', 20 *EJIL* (2009) 73.

such thing as international law'.[77] Therefore, an inquiry into whether his objections against international law sustain seems necessary.

A *Preliminary Remark: Possible Grounds for Indulgence*

Before we analyse and criticize Hart's account of international law two grounds for a humble treatment of Hart need to be emphasized. Hart published *The Concept of Law* for the first time in 1961. At that time Hart was still under the influence of the end of World War II which, with the collapse of the League of Nations and its failure to prevent the war, hardly offered much inducement for a euphoric view on international law. The founding of the United Nations did not brighten the prospects due to the almost immediate paralysis of the system of collective security at the beginning of the Cold War.[78] Hart could not possibly foresee the developments and advancements that international law would experience in the second half of the 20th century. Evaluating Hart's theory at the benchmark of the current state of international law is therefore less a critique of Hart than an attempt to convey his theory to the contemporary international system.

Hart, furthermore, did not pretend to develop a genuine and comprehensive theory of international law. He concedes that the integration of international law – and other 'borderline cases' – into his jurisprudence is of only secondary concern to him.[79] He does not analyse the structure of international law in greater depths, but limits himself to some rather general remarks about the peculiarities of the international system. While this subordinate treatment of international law may by itself be subject to criticism it helps to explain potential shortcomings in Hart's theory.[80]

B *A Doubtful Starting Point: Modifying Hart's Framework of Analysis*

A critical assessment of Hart's concept of international law has to begin with the basic premises of Hart. Hart presents his theory as a general theory of law, as a theory which understands law as a social phenomenon which has to be captured not only by way of analytical jurisprudence but also by means of descriptive sociology.[81] Hart considers himself to be, at least in part, an external beholder who views and analyses law. And yet, Hart narrows his perspective and focuses strongly on a specific kind of law, namely the law of the municipal legal order of the modern state.[82] While he employs the term law in a broad way, encompassing also the obligatory rules of a primitive

[77] Waldron, *supra* note 4, at 68. This may also explain statements which equate Hart with Austin's denial of the legal quality of international law: see, e.g., Gray, 'Rule-Skepticism, "Strategery," and the Limits of International Law', 46 *Virginia J Int'l L* (2006) 563 (book review).

[78] This attitude is noticeable in Hart, *supra* note 1, at 233; see also Morss, *supra* note 9, at 699.

[79] Hart, *supra* note 1, at 17.

[80] For a harsher critique see Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations', 255 *RdC* (1995) 9, at 26 (allocating Hart to the group of 'general theorists who fit international law into their theories but do so from a position of relative ignorance and non-involvement in foreign affairs').

[81] Hart, *supra* note 1, at p.vi.

[82] N. Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (2010), at 2–3.

society and of international law, he uses these 'doubtful cases' mainly as a contrast to the 'clear standard cases constituted by the legal systems of modern states'.[83] Focusing on this form of law in the specific nation state context he nevertheless claims to have derived general characteristics of law as a social phenomenon which he then transposes onto the international law context.

This approach exhibits three shortcomings. First, while it presumes to be concerned with law in general it is strongly influenced by the peculiarities of law in the context of a municipal political system. However, there is no compelling reason why the concept of law as a general phenomenon should be more closely attributed to the modern state than to international law or to the law of more primitive societies. In applying his general concept of law to the international legal system, Hart conveys an archetypical theory of municipal law on the international level. As a consequence Hart implies that the international legal system should be measured against the model of a municipal legal system. He presents deviations from this domestic model as pathologies of the international system. And he also seems to imply that the international legal system should develop in a way similar to the municipal role model. In light of the differences between the municipal and the international systems – both in function and in social structure – such an assumption is in need of a more compelling rationale which Hart does not offer.

Secondly, while Hart does not claim to develop a theory of the law of a specific municipal legal system, his model is designed to fit the modern constitutional state. But even with regard to this eclectic approach, Hart's analysis is significantly incomplete. It focuses almost exclusively on private law and criminal law. Relations governed by administrative law or constitutional law do not play a significant role in Hart's concept. For a general theory of law such an omission is remarkable and challenges the persuasiveness of Hart's antagonistic treatment of municipal law and international law. The structural weaknesses of international law may seem distinctive if international law is compared with municipal private and criminal law. But are these differences similarly convincing when one compares international law with municipal public law? Does public law not structurally resemble international law more than it does private or criminal law?[84]

Thirdly, the strong connection between the idea of a legal system and the municipal legal order is also doubtful in light of the way Hart arrives at his conception of a legal system. Hart starts his analysis with a description of a primitive social order which contains a minimum of primary rules but which does not have a legislature, courts, or officials. Such a society is deemed to be defective in three ways: there is the problem of uncertainty, of the static character of the rules, and of inefficiency.[85] What defines a more sophisticated legal system in contrast to a primitive social order is the ability

[83] Hart, *supra* note 1, at 3.

[84] For an in-depth development of this argument see Goldsmith and Levinson, 'Law For States: International Law, Constitutional Law, Public Law', 122 *Harvard L Rev* (2009) 1791.

[85] Hart, *supra* note 1, at 91–94.

to address and remedy these defects. Within the context of the municipal legal order Hart finds the remedy for these deficits in the secondary rules of recognition, change, and adjudication.[86]

When this methodological approach is transposed to the analysis of the international legal order a weakness in Hart's line of argument is revealed: 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* – the lack of which is the main reason for Hart to qualify international law not as a system but only as a set of rules. 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.

To formulate it more generally: assume that *A* is the prototype of a primitive social order. According to Hart, *A* will become a more sophisticated legal system if it embraces certain criteria *(x)* which help it overcome its defects. *A* plus *(x)* therefore equals a more sophisticated legal system *A(x)*. Assume furthermore that *B* is a primitive municipal social system. In order to become a sophisticated legal system it must embrace the criteria *(x)* and turn into *B(x)*. According to this logic, the same should apply to the international social order *C*. If *C* is to develop from a primitive social order into a legal system it needs to incorporate the criteria *(x)*. There may be a strong probability that *C(x)* will, at least to a certain degree, resemble *B(x)* in structure and form. But this is not a necessary result. The differences between *C* and *B* as social systems can be so significant that *C(x)* and *B(x)* are very different in structure and form. But this does not mean that *C(x)* is less of a legal system than *B(x)*. What makes *C(x)* a legal system is *(x)* and not a similarity to *B(x)*.

Therefore, Hart's framework for analysing international law should be viewed in a different light and modified. Rather than asking whether international law encompasses legislative, judicative, and executive structures comparable to the municipal system in *form*, it is more convincing to ask whether the international order comprises structures which effectively fulfil legislative, judicative, and executive *functions* which overcome the defects of a primitive social system. 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. Hart offers no compelling reason why a legal system necessarily would have closely to resemble the archetype of the municipal legal order of a modern constitutional state.

In the following I will therefore analyse whether at the beginning of the 21st century the international legal system contains structures of law-making, adjudication, and law-enforcement which distinguish it from a simple social system and which help overcome the defects of such a primitive system.

[86] *Ibid.*, at 94–98.

C *The Structure of International Legislation*

In light of these considerations, are Hart's objections against the existence of international legislation sustained? Or does the international legal order consist of secondary rules of change?[87] Hart does not offer an in-depth analysis of the international law-making process. He rather stipulates that international law resembles in form a simple regime of primary law or custom, and that some theorists have minimized the formal differences and exaggerated the analogies between international law-making and municipal legislation.[88] He furthermore rejects the claim that agreements forced upon the defeated power after a war could be recognized as a legislative act comparable to the form of legislation in municipal law. In this last statement Hart exposes his conception of legislation as 'imposed legal change'. For Hart legislation necessarily contains a vertical element of subordination between the legislator and the persons or entities governed by the law.

At first sight international law does not seem to contain such law-making mechanisms comparable to those of the domestic legal system.[89] The primary rules of international law mainly come into existence through contractual agreements between states or through the cumbersome process of customary international law.[90] However, in the age of globalization this traditional characterization of the international law-making process has to be reconsidered.[91] The treaty-making process has been professionalized and institutionalized in a way which prohibits its characterization as a merely bilateral process. International treaties are regularly adopted by majority vote or by consensus without a formal vote.[92] These institutional features cannot overcome the requirement of states signing and ratifying the treaty. But they challenge the idea of the treaty-making process as solely dominated by the will of sovereign states.[93] From a formalist legal perspective it might be argued that this change does not entail an element of international legislation because it is technically still the states which decide whether they want to be bound. But a more empirical perspective, in line with Hart's commitment to 'descriptive sociology',[94] has to take into account that the fora in which multilateral treaties are negotiated resemble more an institutionalized parliamentary setting of law-making than the traditional ad hoc bargaining procedure characteristic of treaties.

[87] Hart's assessment that international law does not encompass secondary rules has been challenged by legal scholars: see, e.g., Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', 31 *NYU J Int'l L & Pol* (1999) 791, at 793; A. D'Amato, *The Concept of Custom in International Law* (1971), at 41.

[88] Hart, *supra* note 1, at 232.

[89] But see Goldsmith and Levinson, *supra* note 84, at 1801–1822 (pointing out, that the same can be said about constitutional law).

[90] Art. 38 of the ICJ Statute.

[91] I have analysed the transformation of the international law-making process in the age of globalization in more depths in M. Payandeh, *Internationales Gemeinschaftsrecht* (2010), at 177–367.

[92] Zemanek, 'Majority Rule and Consensus Technique in Law-Making Diplomacy', in MacDonald and Johnston (eds), *supra* note 9, at 857; Wolfrum and Pichon, 'Consensus', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2006).

[93] Alvarez, 'The New Treaty Makers', 25 *Boston College Int'l & Comp L Rev* (2002) 213.

[94] Hart, *supra* note 1, at p.vi.

Hart uses the notion of custom as a contrast to the more flexible and sophisticated process of legislation in a modern municipal legal system. With regard to the contemporary understanding of customary international law, this antagonism has to be relativized. International practice has incrementally softened the two constitutive elements of customary international law: general practice of states and *opinio juris*. According to the ICJ state practice over a short period of time may be sufficient if the conduct of states is in general consistent.[95] Moreover, when the Court identifies norms of customary international law, it relies heavily on the voting behaviour of states within international organizations as well as directly on decisions and resolutions of international organizations.[96] In the reality of international law the development of customary international law does not constitute a slow and incremental process from conduct first being optional, then habitual, and eventually obligatory. The identification of a norm of customary international law is a highly subjective and often result-oriented process.[97] Customary international law is not the cumbersome law-making mechanism it is deemed to be.

A further development which Hart could hardly have foreseen is the emerging law-making activity of international organizations. Insofar as international organizations are capable of adopting legally binding decisions they can be understood as first occurrences of a centralized international legislature.[98] In the years after the founding of the United Nations the discussion about legislative functions of the organization revolved around the question whether the General Assembly can be understood as a global lawmaker. But although it is generally recognized that the General Assembly contributes to the development of international law in manifold ways, its resolutions are not formally binding.[99] The scholarly focus on the General Assembly has blocked the view of international lawyers on legislative processes which have been taking place within the specialized agencies of the United Nations.[100] More importantly, the UN Security Council has developed ways of exercising legislative functions. Legislative elements can be found in the creation of the *ad hoc* tribunals for the former Yugoslavia and

[95] *North Sea Continental Shelf* [1969] ICJ Rep 3, at 43; *Military and Paramilitary Activities in and against Nicaragua*, Merits [1986] ICJ Rep 14, at 98; D'Amato, *supra* note 87, at 42; K. Wolfke, *Custom in Present International Law* (2nd edn, 1993), at 59.

[96] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, at 255; *Military and Paramilitary Activities in and against Nicaragua*, Merits [1986] ICJ Rep 14, at 99–100; *Fisheries Jurisdiction*, Merits [1974] ICJ Rep 175, at 195.

[97] Bernhardt, 'Customary International Law', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1992), at 898, 901; D'Amato, 'Trashing Customary International Law', 81 *AJIL* (1987) 101, at 101–102; Kelly, 'The Twilight of Customary International Law', 40 *Virginia J Int'l L* (2000) 449, at 526; Kirgis, 'Custom on a Sliding Scale', 81 *AJIL* (1987) 146, at 147–148; Koskenniemi, 'The Pull of the Mainstream', 88 *Michigan L Rev* (1990) 1946, at 1952–1953.

[98] Bryde, 'International Democratic Constitutionalism', in R. St. J. MacDonald and D.M. Johnston (eds), *Towards World Constitutionalism* (2005), at 103, 111–112.

[99] Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241-IV *RdC* (1993) 195, at 330–333.

[100] E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies* (1969); T. Buergenthal, *Law-Making in the International Civil Aviation Organization* (1969).

for Rwanda.[101] In the aftermath of September 11 the Security Council adopted Resolution 1373 (2001) which characterizes terrorism as a threat to international peace and security and obliges the member states to adopt far-reaching measures in order to prevent future terrorist acts.[102] Similarly, Security Council Resolution 1540 (2004) determines Weapons of Mass Destruction to be a threat to international peace and security and commits member states to take action against their proliferation.[103] With almost all states of the world being members of the United Nations and resolutions of the Security Council being legally binding under Article 25 of the UN Charter, this practice of the Security Council constitutes legislation in the sense of Hart.

Another development which calls into question Hart's assessment of the international legal order lacking legislative structures is the incremental rise of importance of peremptory norms of international law (*jus cogens*). At the core of this concept – which was for the first time formally recognized as part of international law in Article 53 of the 1969 Vienna Convention on the Law of Treaties[104] – lies the insight that some rules of international law incorporate values and interests so fundamental to the international community that they have to be kept from the disposal of individual states.[105] Scope and content of the concept of *jus cogens* are subject to controversial debates.[106] Nevertheless, Article 53 of the Vienna Convention makes clear that it is not the will of *all* states that decides about the peremptory status of a norm, but rather the will of the international community *as a whole*. The dissent of individual states is therefore no obstacle in the development of a peremptory norm.[107] However, the text also makes clear that first there needs to be a norm of international law, brought into existence by the general law-making processes, which is then in a second step elevated to the status of a peremptory norm by the international community as a whole.[108] The instrument of *jus cogens* therefore constitutes no law-making mechanism in the strict sense. It is, however, a mechanism of the international community – albeit of rather limited practical relevance – normatively to incorporate and entrench fundamental community values in international law.[109]

In conclusion, the international legal order encompasses mechanisms of law-making which transcend the image of a primitive social order as painted by Hart. While it lacks a comprehensive centralized legislature comparable to the legislative branch of government in a municipal system, it consists of manifold instruments to translate community values into binding community rules. This system is far from perfect and

[101] Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?', 28 *Fordham L Rev* (2005) 542, at 562; Kirgis, 'The Security Council's First Fifty Years', 89 *AJIL* (1995) 506, at 522.

[102] SC Res. 1373 (2001).

[103] SC Res. 1540 (2004).

[104] 1155 UNTS (1969) 331.

[105] Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994) 217, at 292.

[106] A. Orakhelashvili, *Peremptory Norms in International Law* (2006).

[107] Gaja, 'Jus Cogens beyond the Vienna Convention', 172-III *RdC* (1981) 271, at 283; Pellet, 'The Normative Dilemma: Will and Consent in International Law-making', 12 *Australian Yrbk Int'l L* (1992) 22, at 38; UN Doc. A/CONF.39/11 (1969), at 472.

[108] Shelton, 'Normative Hierarchy in International Law', 100 *AJIL* (2006) 291, at 300.

[109] Simma, *supra* note 105, at 293.

cannot in every case avoid factional interests obstructing legislation in the interest of the international community. Yet, it is far more sophisticated than Hart suggests.

D *The Structure of International Adjudication*

The fact that no state can be brought before an international court or tribunal against its will is reason enough for Hart to dismiss any insinuation that international law consists of a system of adjudication.[110] Compared with the ideal type of the domestic legal order this diagnosis may seem accurate. The international legal order does not comprise an international judiciary with comprehensive and compulsory jurisdiction. However, the comparison loses its persuasive force if it is extended to public and constitutional law within the municipal legal order. Municipal legal orders do not generally contain comprehensive mechanisms of adjudication with regard to the rights and duties of public officials and bodies of government.[111] In the United Kingdom, for example, the principle of parliamentary sovereignty for a long time categorically prevented judicial review of legislative acts.[112] France only incrementally developed structures of judicial review.[113] There are no indications that Hart viewed these legal systems as inferior to other municipal legal systems which embodied judicial or constitutional review already at an earlier point in time.

And again, an evaluation of the structure of international adjudication has to be seen in light of the specific function Hart ascribes to adjudication. For Hart the introduction of secondary rules of adjudication is necessary to overcome the problem of inefficiency. Primitive social systems do not contain mechanisms authoritatively to determine whether a primary rule has been violated.[114] Accordingly, such disputes can continue over a long period of time. To remedy this defect, rules of adjudication identify persons or bodies which authoritatively determine violations of primary rules and stipulate procedures for the identification of such violations.[115] However, the question arises whether international law has developed mechanisms which can mitigate the inefficiency problem even in the absence of a comprehensive and compulsory international judiciary.

The International Court of Justice is the principal judicial organ of the United Nations.[116] It is the only international judicial body with general jurisdiction in international disputes. Its jurisdiction is limited to disputes between states[117] and requires the consent of the states which are parties to the dispute.[118] However, the ICJ is not the only court in international law. The international judiciary consists of a multitude of

[110] Hart, *supra* note 1, at 232.
[111] Goldsmith and Levinson, *supra* note 84, at 1801–1822.
[112] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (5th edn, 1897), at 38.
[113] A. Stone, *The Birth of Judicial Politics in France* (1992).
[114] Hart, *supra* note 1, at 93.
[115] *Ibid.*, at 96–97.
[116] Art. 92 of the UN Charter.
[117] Art. 34(1) of the ICJ Statute. In addition, the Court may give advisory opinions upon the request of the GA or the SC: Art. 96 of the UN Charter.
[118] Art. 36 of the ICJ Statute.

courts and tribunals with specialized jurisdiction, at both the universal and the regional level.[119] In international investment protection law international arbitration tribunals gain importance and can apply, depending on the circumstances of the investment dispute, general international law.[120] Decisions of these international courts and tribunals are usually final and authoritative determinations of whether the law has been violated.[121] Furthermore, domestic courts increasingly refer to and apply international law.[122] Reports of institutionalized and *ad hoc* commissions which evaluate the legality of specific events complement these judicial structures.[123] These developments cannot account for comprehensive and compulsory adjudication in every case in which a violation of international law is in question. Nevertheless, they constitute remarkable progress which could not have been possible even a few decades ago. International law is no longer characterized by an absolute absence of adjudication. Violations of the law can be determined authoritatively in an ever increasing number of cases.

Does this suffice for rules of adjudication in the sense of Hart? It certainly does not if the evaluation of international adjudication is based on a comparison with domestic criminal and private law. In a domestic legal system the rules of adjudication identify the persons who are to adjudicate and the procedure to be followed.[124] International law, on the other hand, does not determine forums of adjudication for every case. However, the same is true for the realm of national constitutional law. Constitutional courts are usually courts of limited jurisdiction. Not every case that arises under constitutional law can be adjudicated in a judicial forum. The constitutional system of the United States, for example, does not provide for a general procedure in which disputes between the branches of government could be solved. Even if such cases reach the US Supreme Court the political question doctrine will prevent an authoritative judicial decision. In *Goldwater v. Carter*, for example, the Supreme Court declined to decide a dispute between the Senate and President Carter with regard to the rescission of a treaty, declaring it to be a political question.[125] Large parts of utterly relevant disputes within a polity are thereby precluded from adjudication.

Against this background international law – just like constitutional law – cannot be expected to offer a comprehensive system of adjudication comparable to municipal private and criminal law regimes. However, this does not necessarily make it a primitive system with regard to adjudication. While international law has, for a long time, tried to emulate domestic legal systems, it becomes incrementally clear that the differences between the international and the national social orders pose limits to such an approach. The international social order is, by its very nature, much more diffuse than

[119] For an overview see Tomuschat, 'International Courts and Tribunals', in Wolfrum (ed.), *supra* note 92, at paras 11–32.

[120] Schreuer, 'Investment Disputes', in Wolfrum (ed.), *supra* note 92, at paras 38, 41.

[121] For further details see Thirlway, 'Judgments of International Courts and Tribunals', in Wolfrum (ed.), *supra* note 92.

[122] Shany, *supra* note 76, at 73.

[123] See, e.g., the 'Goldstone Report', UN Doc. A/HRC/12/48 (2009).

[124] Hart, *supra* note 1, at 97.

[125] *Goldwater v. Carter*, 444 US 996 (1979).

a national community. The relevant international actors and subjects differ significantly in size, power, interests, and internal structure. The diffuse international order is characterized by fragmentation[126] and pluralism.[127] This reality cannot be ignored by excessive demands for centralized international adjudication.

E *The Structure of International Sanctions and Law Enforcement*

According to Hart, the problem of inefficiency is mitigated further by the centralization of social pressure. In a more sophisticated legal system the primary rules prohibit or limit the use of force and self-help by private actors. In exchange the system introduces additional secondary rules of adjudication which specify or limit possible penalties for the violation of primary rules and which direct the application of penalties by public officials.[128] Domestic legal orders thereby establish a centralized system of sanctions.

Among the most important accomplishments of modern international law is the absolute prohibition of the use of force laid down in Article 2(4) of the UN Charter and recognized as customary international law and even part of peremptory international law (*jus cogens*).[129] Self-defence is allowed only under narrow and exceptional circumstances.[130] International law has until now withstood all attempts undertaken by state representatives and scholars to restrict the scope and content of the prohibition of the use of force.[131]

However, international law encompasses only an embryonic system of centralized sanctions.[132] The obligation of the UN member states to make armed forces available to the Security Council[133] has never been implemented. As a result, the practice of the Security Council is characterized by a tendency of decentralization. Instead of directing the use of force itself, the Security Council authorizes the use of force by individual states or groups of states, as in the case of military action against Iraq following the invasion of Kuwait in 1990.[134] Cautious attempts in other fields of international law and on regional levels to established centralized enforcement mechanisms cannot conceal that a comprehensive system of sanctions does not exist.

The development of international law does therefore not fully follow the evolution of a centralized system of sanctions within the municipal system. While in the municipal system – following the philosophical insights of Thomas Hobbes and Jean Bodin – the

[126] Pauwelyn, 'Fragmentation of International Law', in Wolfrum (ed.), *supra* note 92.

[127] Berman, 'A Pluralist Approach to International Law', 32 *Yale J Int'l L* (2007) 301; Burke-White, 'International Legal Pluralism', 25 *Michigan J Int'l L* (2004) 963; International Law Commission, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (2006), at paras 491–493 (characterizing pluralism as a constitutive value of the international legal system).

[128] Hart, *supra* note 1, at 97–98.

[129] *Military and Paramilitary Activities*, Merits [1986] ICJ Rep 14, at 99–102.

[130] Art. 51 of the UN Charter.

[131] Randelzhofer, 'Article 2(4)', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn, 2002), i, at paras 14–37.

[132] Payandeh, *supra* note 91, at 375–384.

[133] Art. 43 of the UN Charter.

[134] SC Res 678 (1990); D. Sarooshi, *The United Nations and the Development of Collective Security* (1999).

enforcement of the primary rules is, for the most part, monopolized in the state and its representatives, international law is characterized by a diffusion of enforcement mechanisms. The system still relies on self-help. States are primarily responsible for enforcing the obligations that other states owe to them.[135] But while under classical international law only the state which is directly affected by a violation of the primary rule is allowed to take action against the violating state, modern developments open this bilateral enforcement mechanism for other, not directly affected states.[136] In the case of an armed attack not only the attacked state is allowed to use force against the aggressor but every state.[137] A similar development takes place with regard to violations of obligations *erga omnes*, obligations that a state owes not only to another state but towards the international community as a whole.[138] When such an obligation is violated international law opens the bilateral enforcement mechanisms to all states. All states are to cooperate to bring serious breaches of norms which incorporate community values to an end; and all states are prohibited from recognizing as lawful a situation created by such a serious breach and from rendering aid or assistance in maintaining such a situation.[139] International law exhibits, furthermore, the tendency to allow all states – even states which are not directly affected by such a violation – to claim the violation of obligations *erga omnes* before international courts and to resort to peaceful countermeasures, such as diplomatic, political, or economic sanctions, in order to force a state to cease the violation of international law.[140] While the enforcement mechanisms of international law are, therefore, not centralized they are characterized by a process of multilateralization, thereby leaving the enforcement of important obligations not only to directly affected states but to all states as members of the international community.

Just as in the case of judicial adjudication, law enforcement in international law does not follow the municipal model of centralization. Again this departure of international law from the municipal model can be explained by the different social structure of the international system which limits the prospects of success of a more centralized system of sanctions and suggests a more diffuse exercise of social pressure. And while sanctions remain an important part of law enforcement, the changing nature of international law has shifted the emphasis of enforcement mechanisms: in the age of globalization the exclusion of a state from international cooperation may be a much harsher sanction for violations of international law than a 'classical' coercive sanction.[141]

[135] Simma, *supra* note 105, at 230–233.

[136] Payandeh, *supra* note 91, at 384–426.

[137] Art. 51 of the UN Charter; see also Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', 248-IV *RdC* (1994) 345, at 367.

[138] *Barcelona Traction, Light and Power Co.*, Second Phase [1970] ICJ Rep 3, at 32.

[139] Art. 41 of the Articles on Responsibility of States for Internationally Wrongful Acts, GA Res 56/83, 28 Jan. 2002.

[140] C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005); Payandeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking', 35 *Yale J Int'l L* (2010) 469, 508–513.

[141] This argument is advanced in more detail by W. Friedmann, *The Changing Structure of International Law* (1964); A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

F *The Rule of Recognition in International Law*

The rule of recognition lies at the core of Hart's concept of law. Hart develops it as a response to the deficit of a simple society which has a set but not a system of social rules.[142] In such a society there is no 'common mark' which would identify these rules, other than the fact that the rules are accepted by the community. Disputes about the rules can therefore not be settled by reference to an authoritative text or a person who could authoritatively declare a rule to be valid. This uncertainty could be solved only by introducing a rule of recognition, a rule which determines which rules are binding.[143] Where a system consists of more than one source of law the rule of recognition also regulates the relationship between these rules, thereby unifying them into a system of rules.

Hart rejects the proposition that international law consists of a unifying rule of recognition.[144] However, the reasons he gives in support of this conclusion are not persuasive. Hart sees a first indication of the lack of an international rule of recognition in the problems international lawyers have in formulating such a rule. The *pacta sunt servanda* principle could not be the rule of recognition because not all international obligations arise from treaties or agreements.[145] And a rule with the content 'States should behave as they have customarily behaved' is deemed to be nothing more than an empty repetition of the fact that states accept certain rules as binding.[146] This criticism has to be seen in light of the ambiguity with which Hart himself endows his conception of the rule of recognition.[147] Throughout *The Concept of Law*, Hart does not explicitly and comprehensively formulate the rule of recognition for any municipal legal system. Legal scholars have the same problems formulating a rule of recognition for a specific municipal legal system as they have for the international system.[148] These problems seem to be due more to Hart's failure more clearly to substantiate his concept of the rule of recognition than they are due to the structure of international law.

The core function of the rule of recognition in Hart's concept of law is to identify criteria for the validity of primary rules and to provide criteria for governing the relationship between different sources of law.[149] If viewed in this way, there is no reason to deny the existence of a rule of recognition in international law. Article 38(1) of the ICJ Statute lists, in a declaratory manner, the generally recognized sources of international law: international treaties, customary international

[142] Hart, *supra* note 1, at 92.

[143] *Ibid.*, at 94–95.

[144] *Ibid.*, at 233–236.

[145] *Ibid.*, at 233–234.

[146] *Ibid.*, at 236.

[147] For present purposes it suffices to address those aspects of the rule of recognition which affect Hart's concept of international law. For a more comprehensive critique see Shapiro, *supra* note 65, at 235.

[148] See, e.g., the contributions in M.D. Adler and K.E. Himma (eds), *The Rule of Recognition and the U.S. Constitution* (2009).

[149] For a more complete examination of the functions of the rule of recognition see Shapiro, *supra* note 65, at 242–245.

law, and general principles of law.[150] The mere fact that international law consists of a variety of sources does not oppose the existence of a rule of recognition. Hart also recognizes that the municipal legal order can consist of multiple sources of law – for example statutes, customary law, and judicial precedents. In the United States, common law coexists with statutory law. Neither should the recognition of sources other than those listed in Article 38(1) of the ICJ Statute be considered problematic. Legislation by an international organization, for example, can be recognized as deriving its legitimacy from the constituent treaty of that international organization, therefore from a recognized source of international law. In a municipal legal system similar forms of derivative law-making exist, for example with regard to ordinances which derive their legal validity from statutes. According to Hart, a new law-making mechanism is incorporated by the rule of recognition if it is generally accepted in society.

A possible objection to a rule of recognition in international law could be that the international legal order does not contain a written constitution which provides general criteria of validity for the rules of international law.[151] One answer to this objection could be seen in recent theoretical approaches to international law which identify a process of constitutionalization of international law.[152] Early proponents of such a constitutionalist approach to international law, such as Hermann Mosler for example, regarded the rules of law-making as part of the constitution of the international community.[153] Notwithstanding the question whether such approaches are persuasive, the absence of a written constitution does not provide an argument against an international rule of recognition. Hart himself does not require the rule of recognition to be written.[154] He also recognizes legal systems which, like those of the United Kingdom or Israel, do not have a written constitution as legal systems with a rule of recognition. Furthermore, written constitutions usually do not provide for an exhaustive list of the sources of primary rules. While Article I of the US Constitution, for example, provides for the enactment of statutes, it does not contain any provisions with regard to customary law or judicial precedents as sources of law.

A further source of doubt with regard to an international rule of recognition could be seen in the indeterminate character of the sources of international law. While there is little dispute about the criteria of validity for international treaties,[155] the requirements

[150] I. Brownlie, *Principles of Public International Law* (7th edn, 2008), at 3–5.

[151] Art. 38(1) of the ICJ Statute cannot be regarded as such a constitutional rule, because it is itself part of an international treaty.

[152] B. Fassbender, *UN Security Council Reform and the Right of Veto* (1998), at 19–159; Bryde, *supra* note 98, at 103; see also Payandeh, *supra* note 91, at 43–51.

[153] H. Mosler, *The International Society as a Legal Community* (1980), at 16.

[154] Nonetheless, it should be emphasized that Hart understands the rule of recognition as an existing rule. This distinguishes his approach from Kelsen's *Grundnorm* which is only a hypothetical or fictional norm.

[155] These criteria are, to a large extent, codified in the Vienna Convention on the Law of Treaties. Even states which, like the United States, are not party to the Convention regard it as a declaratory codification of the universally valid rules of treaty-making: see, e.g., *Sale v. Haitian Centers Council, Inc.*, 509 US 155, 191 (1993).

for the emergence of customary international law are characterized by severe incertitude.[156] However, the rule of recognition cannot be expected comprehensively to remedy this defect. Even in municipal constitutional systems which codify the process of statutory law-making disputes about the rules of the law-making process persist. And even the most fundamental questions of law-making are not fully settled. Under the US Constitution, for example, it is still debated whether amendments outside the procedure laid down in Article V are possible.[157]

The comparable level of uncertainty with regard to criteria for the validity of primary rules becomes even more obvious when the analysis is extended to the interpretation of the primary rules. Martti Koskenniemi has famously argued that the existence of different patterns of argument in international law leads to an incoherence in methodology which challenges the objectivity of international law.[158] If taken seriously, does this criticism not oppose the notion of an international rule of recognition which provides criteria for the validity of a legal rule and thereby overcomes the primitive society's uncertainty defect? Regardless of how persuasive this criticism against the existence of a rule of recognition is,[159] it would be no less an argument against the existence of a rule of recognition within the municipal legal system. Within the United States, for example, there are no generally recognized rules or modalities of interpreting the Constitution or statutes.[160] Judges and scholars disagree about the significance of the text of a norm, whether the legislative history and the original intent of the legislature or Founding Fathers should play a role, and whether prudential or even moral considerations may legitimately influence the process of interpretation. These uncertainties are no more pressing in international law than they are in municipal legal systems.

It might be argued that the lack of an authoritative interpreter in international law constitutes a structural difference when compared with the municipal legal system. But on the one hand, the jurisprudence of the ICJ has contributed to the identification and clarification of a number of important rules in international law, and its decisions are generally considered to have a high degree of authority. And on the other hand,

[156] Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law', 39 *German Yrbk Int'l L* (1996) 198 (characterizing customary international law as 'a riddle inside a mystery wrapped in an enigma').

[157] See, e.g., Tribe, 'Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation', 108 *Harvard L Rev* (1995) 1221 (arguing for the exclusivity of the Art. V amendment procedure); A.R. Amar, *America's Constitution: A Biography* (2005), at 295–299 (accepting the theoretical possibility of constitutional amendments outside Art. V); B. Ackerman, *We The People: Foundations* (1991), at 266–294 (arguing in favour of higher lawmaking through constitutional moments outside Art. V).

[158] Koskenniemi, 'The Politics of International Law', 1 *EJIL* (1990) 4, at 7–9; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue 2006).

[159] Dworkin has famously invoked the lack of a consensus with regard to the modalities of interpretation as an argument against the positivist concept of law: see R. Dworkin, *Law's Empire* (1986). In the present analysis I remain agnostic to the persuasiveness of Dworkin's criticism. For present purposes it is sufficient to point out that the criticism applies to municipal law in the same way as it applies to international law.

[160] For an overview of the debate about constitutional interpretation in the US see E. Chemerinsky, *Constitutional Law: Principles and Policies* (3rd edn, 2006), at 15–28.

municipal legal systems also do not clearly establish an authoritative interpreter of statutes or the constitution. Can the US Supreme Court interpret the Constitution authoritatively for all branches of government?[161] Can every branch interpret the Constitution autonomously?[162] Or is every branch the authoritative interpreter for certain parts of the Constitution?[163] In international law the identification of the primary rules is often problematic. But structurally similar problems arise within municipal legal systems. It is therefore not convincing to deny the existence of a rule of recognition in international law on the basis of the lack of certainty such a rule can provide within the international legal order.

The second function of the rule of recognition is to govern the relationship between the different sources of law.[164] And while Hart does not explicitly address the question whether international law contains mechanisms which fulfil this function, his description of international law as a set of primary rules which are not united in a system suggests a negative answer.[165] However, such an assessment would not realistically mirror the state of international law, as it has been analysed recently in a report of the International Law Commission on the *Fragmentation of International Law*.[166] In light of the incremental development of regional and specialized regimes in international law, the question of the coherence and unity of international law receives increasing attention. However, while the report emphasizes that normative conflicts are endemic to the unhierarchical and decentralized nature of international law,[167] it also highlights the function of interpretative mechanisms in mitigating the consequences of the fragmentation of international law. Although there is no formal hierarchy of the sources of international law,[168] normative order is maintained by conflict rules such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori*.[169] And while international law consists of 'much fewer and much less robust hierarchies',[170] it nevertheless consists of mechanisms which, like the concept of *jus cogens* or Article 103 of the UN Charter, establish a hierarchical or quasi-hierarchical relationship between different rules and rule-systems and introduce the notion of normative superiority in international law.[171]

These secondary rules of international law may not be able to prevent or solve every rule conflict in a general way, but they significantly decrease the negative consequences of the diffuse and decentralized nature of international law. And again,

[161] Alexander and Schauer, 'On Extrajudicial Constitutional Interpretation', 110 *Harvard L Rev* (1997) 1359.
[162] Meese, 'The Law of the Constitution', 61 *Tulane L Rev* (1987) 979.
[163] Chemerinsky, *supra* note 160, at 30–31.
[164] Hart, *supra* note 1, at 95.
[165] *Ibid.*, at 233.
[166] International Law Commission, *supra* note 127.
[167] *Ibid.*, at para. 468.
[168] *Ibid.*, at para. 85.
[169] *Ibid.*, at paras 46–323.
[170] *Ibid.*, at para. 26.
[171] *Ibid.*, at paras 324–409.

it may be emphasized that national law exhibits comparable developments which undermine its internal coherence.[172] Not all questions of the hierarchy between different sources of law are comprehensively determined. In the United States, for example, Article VI, section 2 of the US Constitution appears clearly to establish such a hierarchy. Nevertheless, the status of international treaties within the domestic legal order is open to doubt. While according to the US Supreme Court treaties share the same rank as federal statutes, scholars have argued both for a higher as well as for a lower rank of treaties.[173]

G *Law Without a Legal System?*

Finally, Hart's conclusion that international law is law but does not constitute a legal system is problematic in light of Hart's understanding of the two concepts.[174] While his analysis of international law in Chapter X of *The Concept of Law* suggests an independent existence of the two concepts, parts of his general theory of law do not reflect this understanding, but rather imply a more intimate relationship between the two. In Chapter V he describes law – and not a legal system – as the union of primary and secondary rules.[175] And the primitive society he describes is characterized as a society which has social rules, but nonetheless as a *pre-legal* society.[176] It is difficult to see how on Hart's account international law can be law without a rule of recognition. Hart sees the existence of secondary rules as a luxury which is necessary for the existence of a legal system but not for characterizing a set of social rules as law.[177] The primary rules of international law are 'binding if they are accepted and function as such'.[178] However, the basic function of the rule of recognition is to determine the validity of primary rules. While in a primitive society the validity of primary rules depends on their social acceptance, the rule of recognition in a legal system can account for the legal validity of primary rules even if they are not comprehensively practised by society.[179] Without the rule of recognition, therefore, international law would be reduced to those primary rules that are generally recognized and practised. However, such an approach would give only an incomplete account of international law, a system which consists of some norms which are practised never or at least not over a considerable period of time. Parts of Chapter VII of the UN Charter, for example,

[172] *Ibid.*, at para. 493.

[173] *Edye v. Robertson* (The Head Money Cases), 112 US 580, 598 (1884); *Whitney v. Robertson*, 124 US 190, 194 (1888) (arguing for an equal status of treaties and statutes); Henkin, 'Treaties in a Constitutional Democracy', 10 *Michigan J Int'l L* (1989) 406, at 424–426 (arguing for the superiority of treaties over statutes); Amar, *supra* note 157, at 302–307 (arguing in favour of the superiority of statutes over treaties).

[174] See also Beckett, *supra* note 9, at 57 (characterizing the relationship between law and legal system in Hart's theory as 'unsure').

[175] Hart, *supra* note 1, at 79.

[176] *Ibid.*, at 91–94.

[177] *Ibid.*, at 235.

[178] *Ibid.*, at 235.

[179] Shapiro, *supra* note 23, at 85 (referring to the example of jaywalking in New York City which is legally prohibited although social practice in New York City suggests otherwise).

have never been implemented. Article 94(2) of the UN Charter which grants the Security Council the authority to decide upon measures to enforce judgments of the ICJ has hardly been used in practice. It is doubtful whether states accept and practise their obligation to prevent and punish the crime of genocide under Article I of the Genocide Convention.[180] Hart's approach to international law casts into doubt whether these legal texts constitute legally binding primary rules.

International legal practice, however, does not reflect such doubts. Legal norms are considered normatively valid when they come into being in the generally recognized procedures according to Article 38(1) of the ICJ Statute. Whether they are subsequently implemented or adhered to is a question which is not considered to have an influence on the normativity or legal validity of norms. Following Hart's general concept of law, only a characterization of international law as a legal system, consisting of secondary rules of recognition, change, and adjudication, does justice to international law as it presents itself as a normative order in practice and scholarship.

6 Conclusion: Hart's Concept of International Law Revisited

Hart claimed that international law could not be regarded as a legal system because of the differences in form between municipal law and international law, due to the lack of an international legislature, judiciary, and centralized system of sanctions, and the absence of a uniform rule of recognition. This claim of Hart has to be challenged. His methodological approach does not imply the consequence that a legal system has closely to resemble a municipal legal order in form and structure. And even if Hart's assumption is accepted, he presents only an incomplete account of the municipal legal order. If Hart's analysis is extended to the sphere of public law, and in particular constitutional law, the divide between municipal law and international law does not seem as antagonistic as Hart's different characterization of municipal law as a legal system and international law as a mere set of primary rules suggests. Applying Hart's concept to international law with these shortcomings of Hart's theory in mind, secondary rules of recognition, change, and adjudication can be identified in international law. However, international law is, to a larger extent than municipal law, characterized by unhierarchical structures and a fragmentation of legal regimes. This plurality of international law should be viewed not only as a defect but as an endemic feature of international law as a legal system. A jurisprudence which chooses the municipal legal system as the sole baseline and point of reference for an evaluation of international law will necessarily misconceive these characteristics and regard them as pathologies.

International law has deficits which challenge its efficiency and significance as a social rule system with the function of governing the conduct of states and state officials and of containing the use of force and power in international relations. These deficits

[180] GA Res 260 (III) A, 8 Dec. 1948.

are openly visible and, in the case of blatant violations of fundamental community values and displays of power by individual states, frustrate international lawyers and external beholders of the system alike. However, structurally comparable deficits exist within municipal legal orders, to a varying degree and with varying intensity. The differences between the two legal orders justify a conceptual distinction. But they do not challenge the notion that the international order is founded on an international legal system, just as the national polity is governed by a municipal legal system.