

# Introduction

Throughout the 20th century, a transcendent system of international law has begun to form, with massive multilateral treaties and intergovernmental organisations taking on the job of codifying and maintaining international law.<sup>1\*</sup> The development of this overarching, and above all unique, legal system has sparked skepticism over whether it really *is* a legal system in the proper sense of the word ‘law’. My aim in this paper is to dispel this doubt as it pertains to one particular type of law – international criminal law.

There are two distinct, but related brands of skepticism over international law. One line of skepticism holds that the system is trivial, and that it accomplishes nothing more than would be accomplished without it in any case. An example of this type of skepticism might, as Oona Hathaway says, hold that ‘[s]tates don’t give up the right to engage in torture unless they have no intention of using it anyway. And once they join treaties like the Convention against Torture, states will act no differently from if they had not done so’.<sup>2</sup> In this paper, I will call this ‘soft skepticism’. The other brand of skepticism, with which I will be more concerned in this paper, is more conceptually devastating, in that it holds that there are no grounds for the authority of international law, and that international law is not a real source of legal obligation.<sup>3</sup> While soft skepticism trivialises whatever obligations may come from international law, the second type of skepticism, what I will call ‘hard skepticism’, denies that international law is a source of obligation at all. A skeptic in this case might hold that ‘. . . international law is nothing more than a weakened form of international morality situated in an imperfect and unfriendly world of sovereign states’.<sup>4</sup> For the hard skeptics there are certain criteria which establish the validity of a legal system, and they argue that international law does not meet these criteria; as such, it is not authentically law and does not generate binding legal obligation.

If international law in general does not generate legal obligations, then it would follow that international criminal law, as one type of international law, does not command genuine legal

<sup>1</sup>\* See, for example, the International Law Commission established in 1947 by the United Nations General Assembly. An overview can be found in: Shaw, Malcolm. (1997). *International Law*, Fifth Edition, Cambridge: Cambridge University Press, 2004., 112-113

<sup>2</sup> Hathaway, Oona. (2004). ‘The Promise and Limits of the International Law of Torture’, in *Torture: A Collection*, ed. Sanford Levinson, New York: Oxford University Press, 2004. [Online], 200

<sup>3</sup> Bederman, David. (2002). *The Spirit of International Law*, Athens: University of Georgia Press, 2002., 222

<sup>4</sup> Bederman, *The Spirit of International Law*, 222

obligation. I will argue that this skeptic is wrong because, on a particular model of legal positivism, international criminal law meets the criteria of a valid legal system. Thus the skeptic I am addressing is one who holds that (1) legal obligation does exist, and is present in some municipal systems of law, but that (2) legal obligation does *not* exist in the international system. My argument is a parity argument, which takes this form: *if* one takes certain criteria to be indicative of a legal system in one place, then one must *also*, in the name of consistency, take those same criteria to be indicative of a legal system elsewhere. In this case, one who takes *municipal* legal systems to be valid based on certain criteria must also take an *international* legal system to be valid if it meets the same criteria. My claim is that the criteria by which municipal systems are defined on a legal positivist model do, in fact, exist at the international level. There are two things I have mentioned here that deserve some further clarification before continuing. One item is the difference between international criminal law and international law in general, the other item is the legal theory known as ‘positivism’. I will briefly describe each of these items before continuing.

International law has traditionally held only states, and certain non-state international actors, to be the subjects of the law.<sup>5</sup> Thus, the responsible parties in much of international law are states. International criminal responsibility has been increasingly assigned, however, to individuals.<sup>6</sup> The branch of international law that deals with cases of international criminal responsibility is, of course, international criminal law. International criminal law is a particularly unique type of international law, because obligations generated in this system are imposed on individuals, not states.<sup>7</sup> It should be further noted that international criminal law is a *new* branch of international law, and has only been intensively developed since World War II.<sup>8</sup> The scope of this paper thus focusses on a young, narrow sliver of international law, and I will argue that *this* type of law, international criminal law, does constitute an authentic legal system, contrary to the claim of hard skepticism.

As mentioned, I will develop my argument based on a legal positivist model. Legal positivism is distinct from natural law theories in that it holds that there is ‘no necessary conceptual connection between law and morality’.<sup>9</sup> Natural law theories hold that ‘given the natural order

<sup>5</sup> Shaw, *International Law*, 177, 232

<sup>6</sup> Shaw, *International Law*, 232

<sup>7</sup> Shaw, *International Law*, 232

<sup>8</sup> Cassese, Antonio. (2003). *International Criminal Law*, Oxford: Oxford University Press, 2003., 16

<sup>9</sup> Bix, Brian. (2002). ‘Natural Law: The Modern Tradition’, in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro, 61-103, Oxford: Oxford University Press, 2004., 93

of the cosmos (or of human nature) certain things follow (prescriptively).<sup>10</sup> Natural law takes there to be a necessary connection between law and morality, while positivism does not. In other words, positivism maintains a fundamental distinction between what the law *is* and what the law *ought to be*, while natural law theories generally hold that what the law is and what it ought to be are ‘indissolubly fused’.<sup>11</sup> This is a crude generalisation of the two theories, but it is just to forewarn the reader that my argument will adopt the positivist side of this divide. I will discuss both of these theories in more detail when I argue that a particular form of positivism, ‘moral attitude positivism’, is most plausible.

This paper will be divided into two parts. I will begin with a relatively general discussion of natural law and positivism. Both schools of analytical jurisprudence have a massive pedigree, and my treatment of them here will touch only on the major points developed over a long period of time. I will present natural law theory and the positivist challenge to it, and then will substantively discuss a few criticisms of positivism, leading to progressively more plausible formulations of the theory. Since this part of the paper will provide background on the legal theory I will *apply* to international criminal law, there will be scant mention of international criminal law itself. In this part, I will also address the complex issue of legal authority, and why it is important for international criminal law to be recognised as a legal system. For this, I will also discuss issues of moral normativity and legal normativity, and how ‘legal obligation’ might be distinguished from ‘moral obligation’. This first part will culminate with the conclusion that Richard Holton’s moral attitude positivism gives the most plausible view of positivism to date, and is thus an appropriate lens through which to develop a positivist account of international criminal law.

The second part of the paper will partly take the form of a history lesson. In the first section of this part, I will give an overview of how international criminal law has developed, beginning with the Nuremberg Trials (1945-46), and will explain how the various parts of the system function in relation to each other today. Providing this background is crucial to the next step, where I will argue that the system of international criminal law can legitimately be construed as a valid legal system in positivist terms. Analysing the features of international criminal law through a positivist lens, I will argue that the criteria by which the positivist defines ‘law’ are present in the

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<sup>10</sup> Bix, ‘Natural Law: The Modern Tradition’, 94

<sup>11</sup> Hart, H.L.A. (1958). ‘Positivism and the Separation of Morals’, in *An Anthology: Philosophy of Law and Legal Theory*, ed. Dennis Patterson, 69-90, Oxford: Blackwell Publishing, Ltd., 2003., 69

international system, and that the skeptic who I am addressing must, as a result, accept that international criminal law constitutes a legal system commanding legal obligations.

Since this argument will be made using a particular strand of positivism, moral attitude positivism, I will end the second part by looking at five traditional challenges to the application of positivism in international law. I will argue that, with regard to international criminal law, these objections can be resisted through the argument that I make in this paper. The conclusion will be, of course, that moral attitude positivism can successfully be applied to international criminal law in a way that forces the hard skeptic to accept it as a valid legal system.

## **Part I:**

### **Natural Law, Positivism, Authority, and Normativity**

#### **1.1 Natural Law and Glimpses of the Positivist Challenge**

This first part of the paper will be dedicated to a discussion of two sides of a divide in analytical jurisprudence, natural law theory and positivism, as well as the implications they may have for legal authority and normativity in general. This first section introduces natural law theory, and the original positivist challenge from John Austin. It is important to remember something throughout this section, and throughout the paper generally. While I will give some reasons here why positivism might be preferable to natural law as a method of understanding law, I do not intend to present a knockdown argument against natural law here. I intend only to show that the positivist can resist many major criticisms by adopting moral attitude positivism, and that Richard Holton succeeds in demonstrating that this position is both coherent and plausible. With this caution in mind, I now turn to my exposition of natural law and positivism.

The term ‘natural law’ is actually a broad term that can be applied to any number of normative projects. As John Finnis says, natural law can be properly applied as a term when analysing ‘. . . criteria of right judgment in matters of practice (conduct, action), any standards for assessing options for human conduct as good or bad, right or wrong, desirable or undesirable, decent or

unworthy'.<sup>12</sup> Natural law may indeed be a term properly used in discussions of this sort, and Finnis certainly uses it as such, but the use of the term in this paper is confined to the narrower, legal understanding of natural law as the idea that there is a necessary conceptual connection between law and morality.<sup>13</sup> On this model, law is law insofar as it tracks 'higher' laws of morality, whether we define those laws as divine commands, metaphysical facts, or some ideal toward which all humans must strive.<sup>14</sup> This is a standard use of natural law as it is discussed in analytic jurisprudence.

Perhaps the most stark depiction of natural law, and one that is referred to frequently, is that given by Sir William Blackstone when he says: '[t]his law of nature . . . is of course superior in obligation to any other . . . no human laws are of any validity, if contrary to this'.<sup>15</sup> Furthermore, continues Blackstone, those laws that *are* valid only maintain their force and authority through the original law of nature (which was for him the commands of God). In other words, an immoral law is not a law at all. This claim led John Austin to respond with a scathing criticism. Austin asks us to consider an act forbidden by a sovereign under penalty of death, an act for which he has just been tried and convicted for performing. He goes on to say:

[i]f I object to the sentence, that it is contrary to the law of God . . . the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.<sup>16</sup>

The example may be extreme, and as we will see does not do ample justice to the concept of law, but Austin's point is that Blackstone's claim simply seems to be empirically false. Austin is happy to agree with Blackstone if he means either that human laws *ought* to conform to Divine (natural) laws, or that human lawmakers are obliged to model their laws on Divine (natural) laws on pain of God's punishment.<sup>17</sup> Yet neither of these seem to be what Blackstone says. What Austin takes Blackstone to be saying is that 'no human law which conflicts with Divine law *is a law*. . .', and it is this claim with which Austin takes issue, giving rise to the positivist

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<sup>12</sup> Finnis, John. (2002). 'Natural Law: The Classical Tradition', in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro, 1-60, Oxford: Oxford University Press, 2004., 1

<sup>13</sup> Bix, 'Natural Law: The Modern Tradition', 75-76

<sup>14</sup> Bix, 'Natural Law: The Modern Tradition', 66

<sup>15</sup> Blackstone, Sir William. (1765). *Commentaries on the Laws of England* [Online], Introduction, Section 2

<sup>16</sup> Austin, John. (1832). *The Province of Jurisprudence Determined Etc.*, London: Weidenfeld and Nicolson, 1971., 185

<sup>17</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 184-185

school.<sup>18</sup> I will come back to Austin's positivism shortly, but I first want to discuss further Blackstone's claim that an immoral law is not law.

Brian Bix summarises two major problems with Blackstone's position. The first issue is essentially Austin's criticism – it is obvious that there are systems in the world where immoral laws are both enforced, and are recognised to be binding.<sup>19</sup> The default response to this might be that in *those* systems, the laws are not *really* valid laws but, as Bix points out, it is almost nonsensical to claim that all of the legal officials in a system are patently wrong about what is legally valid in their system.<sup>20</sup> The second problem with this position is one for which Bix credits Philip Soper. Even by the standards of natural law, the objection goes, the moral/legal judgements will still be made by fallible officials who work in fallible systems. As such, the judgements of the officials derive their force from the fact that an authorised group has made the decision, and this puts us on the road to positivism (the force of law does not reduce to morality).<sup>21</sup> This second objection need not be a problem for natural law. The natural law theorist might well reply that only those laws which were *correct* decisions by the officials are binding, and that their fallibility is not really a problem – whenever their judgement is 'incorrect' by moral standards, that judgement carries no legal force. The threat that law is positive (created by officials bearing authority) turns out to be no threat at all, especially for natural law theorists like Finnis, who fully acknowledge the positivity of law.<sup>22</sup> This response, however, still leaves the first problem raised by Austin unanswered.

Bix seems to offer a response to this problem, which is to essentially deny that natural law theorists must subscribe to the view that immoral laws are not laws when he says:

[m]any opponents of natural law theory portray it as arguing that immoral laws necessarily lack *legal* validity . . . [o]ccasionally, one even finds an assertion along those lines (or at least one open to such interpretations) among the less sophisticated advocates of natural law theory.<sup>23</sup>

He goes on to cite Blackstone's quote, although he seems doubtful as to whether Blackstone

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<sup>18</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 185

<sup>19</sup> Bix, 'Natural Law: The Modern Tradition', 72

<sup>20</sup> Bix, 'Natural Law: The Modern Tradition', 72-73

<sup>21</sup> Bix, 'Natural Law: The Modern Tradition', 73

<sup>22</sup> Finnis, 'Natural Law: The Classical Tradition', 33

<sup>23</sup> Bix, 'Natural Law: The Modern Tradition', 72

really meant what Austin took him to mean, suggesting that what he really meant might have been that ‘immoral laws create no *moral* obligations, whatever legal obligations they might create’.<sup>24</sup> I think that this interpretation of Blackstone is probably too generous; the bigger question is: do natural law theorists hold that laws are invalid if they are immoral? I don’t see how they couldn’t, and we need not rely on a single quote from Blackstone to ascribe this position to natural law theorists.

We find in Lon Fuller’s ‘Positivism and Fidelity to Law’ a rejection of the possibility for a situation where one may be faced with a choice between doing what the law demands that they ought, and doing what morality demands that they ought.<sup>25</sup> His complaint seems to be that we are given no concept of what, exactly, the obligation demanded by the law could be in such a case, relative to the obligation demanded by morality. Finnis makes a similar point when he claims that ‘[t]he normativity of the obligatory is the normativity of the first principle of practical reason or natural law: that good is to be pursued and done, and bad avoided . . .’.<sup>26</sup> He goes on to say that an action can only be obligatory ultimately through its moral worth, if there are moral reasons to be bound to do it.<sup>27</sup> This second claim may certainly be true, and is one that a positivist can, and likely would, coherently accept. The second claim also does not indicate any *necessary* connection between law and morality, which is the staple point of natural law. What it looks like Finnis is doing here, rather than taking moral obligation to trump legal obligation as a positivist might do, is saying that there *is* no legal obligation without moral obligation. Indeed, earlier in the same paper he explicitly says, with regard to laws, that ‘. . . their moral authority is also truly *legal* authority. Laws that, because of their injustice, are without moral authoritativeness, are not legally authoritative in the focal sense of ‘authoritative’.<sup>28</sup> This looks like an unequivocal statement that immoral laws are not truly laws, from a philosopher who has developed what is probably the most sophisticated account of natural law in history, largely building on that of Thomas Aquinas.

It seems disingenuous, then, to claim that only the less sophisticated advocates of natural law theory subscribe to the view that immoral laws are not legally valid. Furthermore, lest I be

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<sup>24</sup> Bix, ‘Natural Law: The Modern Tradition’, 73

<sup>25</sup> Fuller, Lon. (1958). ‘Positivism and Fidelity to the Law: A Reply to Professor Hart’, in *An Anthology: Philosophy of Law and Legal Theory*, ed. Dennis Patterson, 91-115, Oxford: Blackwell Publishing, Ltd., 2003. (Originally in *Harvard Law Review* 71, 631-72, 1958), 104

<sup>26</sup> Finnis, ‘Natural Law: The Classical Tradition’, 34

<sup>27</sup> Finnis, ‘Natural Law: The Classical Tradition’, 34

<sup>28</sup> Finnis, ‘Natural Law: The Classical Tradition’, 22

accused of ‘quote sniping’, it is important to remember that positivism rose against a position that holds there to be a necessary conceptual connection between morality and law – and it is hard to see what this *necessary* connection could be, if not a case where a legal claim entails a moral claim. As such, I think it is fair to treat natural law as the position that holds a legal claim to be false if it violates a moral claim. This stance does not immediately exclude the possibility of positive law, the idea that law is created by officials. Indeed, it is a tribute to the sophistication of Finnis’ theory that he fully and coherently accepts the positivity of the law. What the position *does* rule out, however, is the idea that an immoral law can still be considered a valid law. I will elaborate more on what I take to be the natural law theorist’s motivations in section 1.5. For now, suffice it to say that the position against which the positivist school has oriented itself is that which holds that immoral laws are legally invalid.

## 1.2 Classical Positivism and Hart’s Challenge

I now turn back to the challenge raised by John Austin against the natural law theorist, and his positivist definition of law. Recall that Austin’s response to Blackstone was simply that he would still be hanged in the name of the law, regardless of how unjust the law may be. This is meant to show that there is no necessary conceptual connection between the law and morality – that we are still bound by the law, even if the law is immoral. This objection to natural law developed into the school of legal positivism, the central tenet of which is that a law may still be valid even if it is immoral. Of course, as Austin repeatedly says, the law *ought* to be made in accordance with morality, but this does not mean that it *is* made in accordance with morality, although what law demands and what morality demands may certainly coincide frequently.<sup>29</sup> If the morality of a law does not determine its validity then, we still lack an account of *what* makes a law valid. Austin provides one, which has become known as the ‘command theory’ of law, or classical positivism.

For Austin, the ‘key’ to jurisprudence is the notion of a command.<sup>30</sup> For him, a command is an expression of a desire for one to perform or abstain from performing an action, but crucially this expression of a wish must be backed by the threat of a sanction in the case that one fails to comply.<sup>31</sup> This means that a wish expressed in the imperative form (e.g. ‘go over there’) fails to

<sup>29</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 159; 162-163

<sup>30</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 13

<sup>31</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 13-14

be a command if there is no threat of harm in the event of disobedience. Furthermore, even if there is a threat of harm behind the order, it fails to be a command if the orderer is not capable of delivering on the threat or refuses to do so.<sup>32</sup> Thus, a command must entail both (1) a *sincere threat of harm* in the event of failure to comply, and (2) the *capacity and will to deliver harm* in the event of failure to comply. These are the necessary and sufficient conditions of a command for Austin, so it need not even be uttered in the imperative form – a polite request linguistically is still a command so long as there is a deliverable threat of harm behind the request (e.g. ‘would you please move over there’ whilst a gun is aimed at your head).<sup>33</sup> If this is a command, what makes it the ‘key’ to jurisprudence? Law without obligation is a ‘contradiction in terms’, as Austin correctly notes.<sup>34</sup> What makes commands key to jurisprudence is the significant correlation that Austin takes there to be between commands and duties. He claims the following: ‘wherever a duty lies, a command has been signified; and wherever a command is signified, a duty is imposed’.<sup>35\*</sup> Furthermore, and contrary to his fellow positivist Jeremy Bentham, it is only through the threat of harm, and not through the promise of reward, that Austin thinks one can be obligated to comply.<sup>36</sup>

From this correlation between commands and obligations, Austin expounds his theory of law. It is not simply that laws are merely commands, but they are commands of a specific type. Austin takes there to be two types of command – commands which hold *generally* for a *class* of actions, and commands which hold *specifically* for a *specifically determined* action.<sup>37</sup> Commands of the first sort are, roughly speaking, *laws* or *rules* while commands of the second type are termed *occasional* or *particular* commands.<sup>38</sup> While both types of command, by the correlation Austin takes there to be between command and obligation, serve to impose duties – but only general commands can be taken to be laws. Both of these types of obligation can be imposed on one individual by another. For example, a master could command his slave to always serve breakfast at eight in the morning (generally applies to a class of act), or the master could command his slave to just

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<sup>32</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 14

<sup>33</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 14

<sup>34</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 185

<sup>35</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 14; \* It is important to note that, pursuant to this statement, Austin held moral duties to be derived from the commands of God. Thus, to cite moral principles as examples where duty might exist with no explicit command would not constitute a fair objection to this claim. Austin’s response would simply be that there is duty in morality because moral principles are *commands* from God. This moral claim is open to debate, of course, but within Austin’s system the claim that duty comes from commands is consistent with his moral philosophy.

<sup>36</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 16-17

<sup>37</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 19

<sup>38</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 18-19

serve breakfast *tomorrow* at nine in the morning (specifically applies to an individually determined act).<sup>39</sup> Part of the meaning of ‘command’, argues Austin, is that it stems from a ‘superior’ and binds an ‘inferior’.<sup>40</sup>

Legal systems, then, are systems of *laws* in that they are *general* commands stemming from the sovereign (superior) over the masses (inferior), which serve to obligate the latter to perform or forbear classes of action. Importantly, the sovereign is the person or group habitually obeyed by the populace at large, so as H.L.A. Hart summarises: ‘. . . law is the command of the uncommanded commanders of society – the creation of the legally untrammelled will of the sovereign who is by definition outside the law’.<sup>41</sup> Of course, Austin would have still held that the sovereign was subject to the commands of God – but this does not guarantee that the commands of the sovereign will be in line with the commands of God, and thus we get a separation of human law and morality. On Austin’s account, it is clear that law still binds by virtue of being commanded by the sovereign, *even if* those commands are contrary to Divine (natural) laws.

This ‘command theory’ form of positivism clearly gives an account where law and morality are not, as a matter of necessity, conceptually connected. It is, however, argued that it also does not describe an accurate concept of law. H.L.A. Hart provided what is undoubtedly the most sophisticated criticism of Austin, but before I turn to it I want to note one thing here. If Austin’s positivism is plausible, and if it accurately describes the nature of law, then it is unlikely that international criminal law could qualify as law by his standards. I will come back to this again after introducing the structure and history of international criminal law properly, but we will see that the ‘legal bodies’ in international criminal law do not really have an independent mechanism for *enforcing* the law. In Austinian terms, they do not really have the independent capacity to deliver on any threats of harm backing their commands. Whatever ability the legal bodies in international criminal law have to enforce the ‘law’ is dependent on the will and capacity of individual states, rather than the will of the legal body itself. Furthermore, there is no genuine sovereign in international law, so it is hard to match the structure of the system against an Austinian model of law. If positivism were to stop here, then the skeptic whom I am addressing might be correct, and international criminal law would command no legal obligation.

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<sup>39</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 19-21

<sup>40</sup> Austin, *The Province of Jurisprudence Determined Etc.*, 25-26

<sup>41</sup> Hart, ‘Positivism and the Separation of Morals’, 73

While it is important to bear this in mind, it need not trouble my argument, since I will not be applying Austinian positivism to international criminal law. As Hart demonstrates, classical positivism does not give a plausible account of law.

Hart begins by likening Austin's position to a case where a gunman commands someone to relinquish their possessions, threatening to kill the victim if they do not comply.<sup>42</sup> The basis of classical positivism formed by the sovereign, commands, and sanctions seems to be the 'gunman situation writ large'.<sup>43</sup> For the gunman situation to be 'writ large' enough to be analogous to the command theory, the gunman's orders backed by threats would, of course, apply generally for a class of action, to a group who habitually obey him.<sup>44</sup> Hart emphatically doubts that this is a good account of law, or that legal order could simply be mere compulsion.<sup>45</sup> I will introduce two of Hart's criticisms here before describing the revised model of positivism he suggests to replace that of Austin.<sup>46\*</sup> The first criticism is simply that the 'command theory' cannot account for a number of laws that we find in many legal systems, and thus does not give a full account of the range of the term 'law'. Hart's second criticism is essentially that commands, as orders backed by threats, do not actually correlate to *obligation* in the way that Austin thinks, and this leads into his own formulation of positivism, where there are two separate classes of rule.

The first major objection from Hart is that it would be deceiving to say that all laws require that certain acts be done or forbore. In response to such a portrayal of law he says: '[i]s it not misleading so to classify laws which confer powers on private individuals to make wills, contracts, or marriages, and laws which give powers to officials . . .?'.<sup>47</sup> Criminal laws certainly demand that individuals forbear from classes of actions, under pain of sanction, and as such they resemble most closely the concept of orders backed by threats.<sup>48</sup> Tort law also, to some extent, resembles commands to forbear certain actions, or to perform actions (as in the case of the 'duty to rescue' which exists in the United States and many European countries). Criminal law and

<sup>42</sup> Hart, 'Positivism and the Separation of Morals, 73

<sup>43</sup> Hart, 'Positivism and the Separation of Morals, 73

<sup>44</sup> Hart, H.L.A. (1961). *The Concept of Law*, Second Edition, Oxford: Oxford University Press, 1997., 22-24;

Hart, 'Positivism and the Separation of Morals, 73

<sup>45</sup> Hart, 'Positivism and the Separation of Morals, 73

<sup>46</sup> \* The criticisms I describe are not Hart's only criticisms of Austin, but they are the ones on which I will focus here. Hart also objects, for example, to Austin's notion of the sovereign because of problems with the continuity of law, and with legal limitations on legislative power. For these kinds of objections, see Hart, *The Concept of Law*, 50-78.

<sup>47</sup> Hart, *The Concept of Law*, 26

<sup>48</sup> Hart, *The Concept of Law*, 27; Hart, 'Positivism and the Separation of Morals, 74

tort law are not exhaustive of a legal system, however, and there are other legal rules which simply do not resemble orders backed by threats at all. Some laws are not backed by sanctions at all, and do not require a party to perform or forbear an act, but are rather rules which may confer powers upon individuals to perform certain actions through, for example, marriages, or contracts, or wills.<sup>49</sup> A case given by Hart is that of s. 9 of the Wills Act (1837). This section specifies the number of witnesses required for a will to be validated, and failing to comply with this law will not result in any sanction by Austin's terms.<sup>50</sup> No one is *required* to abide by the Wills Act under pain of sanction, though their will would be invalid if they do not, and it is distorting to treat laws like this as orders from the sovereign backed by the threat of harm.<sup>51\*</sup> While criminal and tort laws may say something like 'do or do not do X, under penalty of Y', these other types of power-conferring rules say something like '*if* you wish to do A, *then* do B'. If laws are merely commands, then the legal rights and powers we find in legal systems, conferred by laws, are not properly explained.<sup>52</sup> Hart presents the argument far more comprehensively, but the general objection is that 'command theory' simply cannot explain many aspects of a legal system which still require explaining.

The second criticism presented by Hart is more conceptual, and rejects Austin's assertion that commands, by nature, generate obligation. He does, of course, agree with Austin that where there is *law* there must necessarily be *obligation*, but denies that commands by themselves are genuine sources of this obligation. If this is the case, it follows that commands issued by the sovereign could not be constitutive of law. Hart distinguishes between cases where someone might be *obliged* to act and cases where they might be *obligated* to act. In the case of the gunman analogy, it is proper to say that the victim was *obliged* to hand over their money, meaning that the result of handing over the money (keeping their life) overrides what would, in other circumstances, be their preference (keeping their money *and* their life).<sup>53</sup> This means that the victim might not be so obliged if the gunman were incapable of delivering his threat (perhaps the gun is not loaded), or if the threat were not significant enough to override their original preference (if the threat were merely to yell at the victim, for example).<sup>54</sup> An *obligation* to do something is of a

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<sup>49</sup> Hart, *The Concept of Law*, 27-28

<sup>50</sup> Hart, *The Concept of Law*, 28

<sup>51\*</sup> Hart mentions the possibility of 'nullity' as a sanction (that is, the idea that the will is invalidated if the law is not followed is, in and of itself, a sanction). He provides an argument against regarding nullity as a sanction (Hart, *The Concept of Law*, 33-35). He provides further argument against attempts to reduce all legal rules to the same type at pages 35-42 of the same text.

<sup>52</sup> Hart, 'Positivism and the Separation of Morals', 74-75

<sup>53</sup> Hart, *The Concept of Law*, 82

<sup>54</sup> Hart, *The Concept of Law*, 82-83

different nature. The gunman's victim is *obliged* to comply based on their beliefs or motives with regard to doing so, but an *obligation* to do something does not depend on such underlying beliefs or motives.<sup>55</sup> Thus, to use another example, the obligation to refrain from murder remains in place even if a murderer believes that she will never be discovered, caught, or punished. Furthermore, the question of whether she had such an obligation is completely independent of whether she actually commits murder, while the question of whether she was *obliged* to commit murder is usually tied up in an analysis of whether or not she did in fact do so.<sup>56</sup>

In the command theory, it is evident that Austin is taking an 'external' view to obligation, treating obligation as a *prediction* about the likelihood that a person holding an obligation will suffer harm if they do not obey.<sup>57</sup> Someone is obligated, on this account, if there is a high chance that they will be punished if they fail to comply. Hart criticises this notion of obligation on two counts. The simpler objection is that if obligation simply entails a high chance of punishment in the event of failure to comply, then it would not make sense to say something like 'he had an obligation not to steal that car, but now that he has escaped the country, there is no chance that he will be caught or punished'. Statements like this are frequently made and understood – and this points to a flaw in a notion of obligation where the obligation is directly tied to the threat backing a command.<sup>58</sup> The second objection to this 'predictive' view of obligation rests in the fact that failure to meet obligations does not merely support a prediction that a sanction is likely to follow, but also entails that there is a *reason to justify* the application of that sanction.<sup>59</sup> Appeals to the fact that it was a command will not avail us, since this would only give us a reason to predict that harm will follow, *not* a reason to say that the application of that harm was justified. This lack of a notion of justification in Austin's account of obligation means that his account is inaccurate, and the command theory cannot provide a sufficient model of law without a proper account of obligation. This attention to the 'internal aspect of rules', this demand for an evaluation of the reasons for enforcing the rule, is what leads Hart to reformulate the positivist position in a way that maintains the fundamental separation of law and morality, as Austin did, while also accounting for obligation in law.<sup>60</sup>

I have introduced classical positivism, and Hart's objections to it, specifically to show why we

<sup>55</sup> Hart, *The Concept of Law*, 83

<sup>56</sup> Hart, *The Concept of Law*, 83

<sup>57</sup> Hart, *The Concept of Law*, 83

<sup>58</sup> Hart, *The Concept of Law*, 84

<sup>59</sup> Hart, *The Concept of Law*, 84

<sup>60</sup> Hart, *The Concept of Law*, 88

ought to accept Hart's own position as the more plausible model of law. Austin's positivism, as I mentioned, would likely not define international criminal law as a proper legal system. I will argue that Hart's position, with some changes, can identify international criminal law as a proper legal system. As the more plausible position of the two, it is appropriate that I use it as a lens of analysis instead of the command theory. I will now introduce Hart's positivism, and follow it with an account of the necessary modifications made by moral attitude positivism in order to make it the most plausible form of positivism.

### 1.3 Hart's Positivism and an Objection

Hart reformulates the legal positivist position to hold that a legal system must possess three features: (1) a complex of what he calls 'primary' and 'secondary' rules, (2) general obedience, and (3) legal officials must adopt what he calls an 'internal point of view' toward the law.<sup>61</sup> It is these features that are the hallmark of modern positivism, and the third is particularly important. As I introduce Hart's positivism here, bear in mind that I will be applying his criteria to my analysis of international criminal law, albeit with the revisions made to his position by moral attitude positivism.

The first criterion is that a legal system must have a complex of primary rules. Primary rules are those which require individuals to perform or abstain from classes of act, so they are what most resemble Austin's commands (although this is not the entirety of what they are, as we have seen).<sup>62</sup> Secondary rules, on the other hand, are those which in a sense govern the primary rules, regulating their creation, modification, deletion, and range of application.<sup>63</sup> Primary rules impose obligations, while secondary rules confer powers, or rights, or allow for the creation of obligations – in short, secondary rules are those which cannot coherently be understood as 'orders backed by threats'.<sup>64</sup> Legal systems must have a complex of these two types of rules, and there must be 'general obedience' among the populace, though this obedience may easily amount to a mere fear of punishment – there need be no sense of obligation among the citizens who obey.<sup>65</sup> The legal officials *necessarily cannot* simply regard the law as something to be obeyed,

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<sup>61</sup> Holton, Richard. (1998). 'Positivism and the Internal Point of View', in *Law and Philosophy* Vol. 17, No. 5/6, 597-625, 1998., 600

<sup>62</sup> Hart, *The Concept of Law*, 81

<sup>63</sup> Hart, *The Concept of Law*, 81

<sup>64</sup> Hart, *The Concept of Law*, 81

<sup>65</sup> Hart, *The Concept of Law*, 116

however, and this brings us to the third and most crucial criterion for a legal system – the legal officials must adopt an ‘internal point of view’ toward the law.<sup>66</sup>

The internal point of view, as was hinted in Hart’s distinction between ‘obligate’ and ‘oblige’, is in contrast to an external, predictive point of view. Recall that on a predictive account of legal obligation the view went something like: ‘if person *p* does *x*, then person *p* will be criticised/punished’. This is, for Hart, viewing the law externally.<sup>67</sup> Officials who adopt an *internal* point of view, however, *accept* the secondary rules of law, and perhaps by extension the primary rules as well.<sup>68</sup> The internal point of view entails acceptance of the rules, where ‘acceptance’ means that legal officials take there to be good reason for maintaining a standard – reasons which *justify* demands for conformity to the standard, and *justify* the criticism or punishment of those who deviate from that standard.<sup>69</sup> Remember that it was exactly the lack of *justification* for punishment that precluded Austin’s commands from generating obligations by themselves. The internal point of view, then, says something like: ‘there is good reason to ban *x* such that criticism/punishment of person *p* who performs *x* is justified’. If the officials do not adopt an internal point of view to the law, then they cannot hold there to be any obligation in the law, and they cannot hold themselves to be justified in enforcing it. Law without obligation is no law at all. Acceptance of the secondary rules is therefore vital to the existence of a legal system, properly understood.

There is one type of secondary rule that is fundamental for Hart, because it underlies and *authorises* the entire legal system. Such a rule, when it is accepted by the legal officials, is called a ‘rule of recognition’, and is initially defined by Hart simply as ‘a rule for conclusive identification of the primary rules of obligation’.<sup>70</sup> Perhaps a slightly more sophisticated definition is that given by Hart somewhat later, when he says: ‘[w]herever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation’.<sup>71</sup> Rules of recognition *validate* the laws of a legal system because they are an *authoritative* rule for *identifying* what is required for the primary rules to genuinely be *law*.<sup>72</sup> Without a rule of recognition, no legal system could be validated because there would be no authoritative

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<sup>66</sup> Hart, *The Concept of Law*, 116-117

<sup>67</sup> Hart, *The Concept of Law*, 89-90

<sup>68</sup> Holton, ‘Positivism and the Internal Point of View’, 600

<sup>69</sup> Hart, *The Concept of Law*, 57; Holton, ‘Positivism and the Internal Point of View’, 601-602

<sup>70</sup> Hart, *The Concept of Law*, 95

<sup>71</sup> Hart, *The Concept of Law*, 100

<sup>72</sup> Hart, *The Concept of Law*, 94-97

way to identify anything as *law*.

The nature of a rule of recognition is not static. It may be codified in text, or it may simply be something referenced as a ‘general characteristic possessed by the primary rules’.<sup>73</sup> How many ‘rules of recognition’ a legal system has is, I think, somewhat ambiguous as presented by Hart. For much of the time he refers to ‘the rule of recognition’ in the singular.<sup>74\*</sup> At other times, he refers to the ‘rules of recognition’ of a system in the plural, as when he says: ‘[i]n a developed legal system the rules of recognition are of course more complex’.<sup>75</sup> It seems that this simply reflects the fact that there are more sources of law in a modern system (processes of custom/precedent or legislation could each be a rule of recognition in its own right) than in a simpler system, where the only rule of recognition may be: whatever the King orders.<sup>76</sup> I think that it is simplest to take every legal system to have one rule of recognition, which may be increasingly complex to reflect the multiplicity of sources of law. By this account, a rule of recognition can have one clause (e.g. ‘what the King orders is law’), or multiple clauses as in an example like this:

(1) Rule of recognition:

- (a) a primary rule dictated by custom or precedent is law, *unless* (b) conflicts, in which case (b) is superior.
- (b) a primary rule dictated by statute is law.

I think this is what Hart meant all along, but for the sake of clarifying the terms of this paper, I will take a rule of recognition to refer to the minimum set of rules which serve as authoritative criteria to identify the primary rules of a legal system. As such, I will take every legal system to have just *one* rule of recognition, however complex it may be, of the form ‘a rule *r* is a law at time *t* if and only if it meets these criteria [*x, y, z*] at time *t*’.<sup>77\*</sup>

Here we have the fundamental features of law in Hart’s estimation. A complex of primary and secondary rules *accepted* by the legal officials, including an accepted rule of recognition to validate

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<sup>73</sup> Hart, *The Concept of Law*, 95

<sup>74</sup> \* For example: Hart, *The Concept of Law*, 94, 95, 100, 103, 236

<sup>75</sup> Hart, *The Concept of Law*, 95; other examples can be found on pages 96 and 101

<sup>76</sup> Hart, *The Concept of Law*, 95-96, 100-101

<sup>77</sup> \* I am very grateful to Dr. Campbell Brown for help in formulating this clarification.

the primary rules.<sup>78\*</sup> The inclusion of secondary rules supplements Austin's original positivism with the types of law he left out in his command theory. The inclusion of the internal point of view, the necessary *acceptance* of the rules by the legal officials, provides justification for the officials to make and enforce the law. These were the main elements of a legal system missing from Austin's account, which Hart has now provided, creating a very different looking system. For Hart, a legal system is necessarily composed of one rule of recognition, and the rules that are validated through it.<sup>79</sup> Hart answered many of the objections to positivism, a few of which I have not even mentioned here, but one criticism of his own system does hit home.<sup>80\*</sup>

As a positivist, Hart stuck by the separation of law and morality. In his formulation of law, he was careful to avoid the conflation of morality. This may not seem like an issue, until we reflect on what it really means for a legal official to *accept* a rule, to take there to be *reasons* to justify the formulation and enforcement of the law. Hart gives some examples of what he takes to be sufficient non-moral reasons for officials to accept the law. The objection is that the non-moral reasons simply do not constitute genuine reasons in the sense that they could *justify* the creation and enforcement of law. Hart's reasons for accepting the law do not constitute justification, and thus cannot account for obligation. This is exactly the objection raised by John Finnis when he says:

Hart's reasons for suspending all the legal system's *oughts* from the sheer *is* of official practice are weak. Undoubtedly, some or even many officials and others can abandon the search for good reasons for allegiance to the law, and make do with sub-rational motivations such as conformism, traditionalism, or careerism. But such attitudes fail to make full sense of the law's demands.<sup>81</sup>

Finnis goes on to assert that Hart's positivism is incapable of coherently accommodating any acceptable reasons, because it is not a natural law theory:

The central case of reasons is not what are commonly accepted as

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<sup>78</sup> \* Hart repeatedly ties the rule of recognition to the validation of *primary* rules, but Joseph Raz says (correctly, I think) that Hart means for the rule of recognition to validate all of the other secondary rules as well, although it is itself a secondary rule. See Raz, *Practical Reasons and Norms*, 146-147.

<sup>79</sup> Raz (Practical), 146

<sup>80</sup> \* For further reading on the 'other objections', including the objections of 'formalism' and 'rule-skepticism', one may find Hart's discussion in the paper 'Positivism and the Separation of Morals' and the book *The Concept of Law*, both of which have been cited and included in the references list.

<sup>81</sup> Finnis, 'Natural Law: The Classical Tradition', 34

reasons, but reasons good *as reasons*. The central case of the internal attitude is the rationally warranted acceptance of law as obligatory in conscience, as speaking with true authority at the moment of choice. Only a natural law theory traces the rational warrant for such an acceptance.<sup>82</sup>

The charge that Hart's positivism does not directly furnish sufficient reasons for *acceptance* of the law is a good one, but the charge that no positivist theory could account for such reasons is false. Richard Holton levels exactly the same objection against Hart, with a greater degree of sophistication, but then introduces a way for the positivist to account for such reasons, yet still maintain the fundamental separation of law and morality. That is, Holton proposes a position that is *not* a natural law theory, but is a positivist account which (1) provides appropriate reasons to qualify for a true internal point of view (making it more plausible than Hart's positivism), and (2) maintains the positivist distinction between what the law *is* and what the law *ought to be*. I will explain Holton's criticism of Hart in the rest of this section and then give an exposition of Holton's solution for positivism, called *moral attitude positivism*. This is crucial for my argument, as I am now trying to demonstrate that this form of positivism is a strong theory of law, and therefore appropriate for analysis of international criminal law.

Holton begins by laying out the non-moral reasons given by Hart by which legal officials could accept the law, to include: 'calculations of long-term interest; disinterested interest in others; an unreflecting or traditional attitude; or the mere wish to do as others do'.<sup>83</sup> For Hart, legal officials could accept a legal system for reasons like this, and still believe that, morally, they ought not to.<sup>84</sup> The general question raised by the natural law theorists, and phrased specifically by Holton is: '[h]ow can one both think that one morally ought not to accept the law, and yet still think that its demands are justified?'.<sup>85</sup> While it could be true in any given case that a legal official actually does accept the law for one of the reasons listed by Hart, they would not *cite* such a consideration as their reason for accepting it.<sup>86</sup> Holton points to an ambiguity in what is meant by a 'reason' for accepting the law, and appropriately distinguishes three types of reason, drawing on Michael Smith and Thomas Nagel: (1) *genetic reasons for action*, (2) *motivating reasons for action*, and (3) *normative reasons for action*.<sup>87</sup> These reasons are described below.

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<sup>82</sup> Finnis, 'Natural Law: The Classical Tradition', 34

<sup>83</sup> Hart, *The Concept of Law*, 203

<sup>84</sup> Hart, *The Concept of Law*, 203

<sup>85</sup> Holton, 'Positivism and the Internal Point of View', 603

<sup>86</sup> Holton, 'Positivism and the Internal Point of View', 603

<sup>87</sup> Holton, 'Positivism and the Internal Point of View', 603

Holton uses the example of a drunken person who punches her flat mate to help elucidate the nature of each type of reason. In assessing the case where she drunkenly hits her flat mate, we might speak of the reason for her action in three different ways. We could say that she hit her flat mate because she was drunk. This would be a *genetic reason* for her action – genetic reasons appeal to causal explanations (in this case, her blood alcohol level) rather than referencing any intentional explanation.<sup>88</sup> Another reason we might give for her attack is that she believed her flat mate was a robber. This is a *motivational reason* for her action – motivational reasons appeal to intentional explanations (in this case, her belief state), citing the agent’s beliefs or desires as the reason for action.<sup>89</sup> The third reason to give could say that she had no reason to hit her flat mate. This is a *normative reason* for her action – normative reasons do not attempt to *explain* her action; by ‘citing the presence or absence of such reasons we are evaluating the action: we are saying whether or not it was justified’.<sup>90</sup> Normative reasons are evaluations of whether an action ought to be done. It is significant to note that these types of reasons can come apart, as in this case, but they do not necessarily have to – it could be the case that a motivating reason is also a genetic reason, or that a genetic/motivating reason also qualifies as a normative reason.<sup>91</sup>

How does this distinction help us in analysing Hart’s reasons for acceptance of a rule? It is clear that when Hart speaks of a reason for acceptance that he intends such reasons to *justify* the formulation of a standard, and to *justify* the criticism/punishment of those who deviate from that standard. This was the whole point of the internal point of view in the first place – to bring justification, and thus obligation, to the rules of law. On Holton’s account of reasons, Hart must be talking about *normative reasons* for accepting the law. Officials may well have genetic/motivational reasons for acceptance, but they must also take these to be normative reasons if they are sincerely adopting an internal point of view to the law. Hart must therefore describe normative reasons that are also not moral reasons, if he is to maintain that the internal point of view is not a moral point of view. The problem is that he does not do so.

The considerations listed above by Hart (calculations of long-term interest, etc.) are surely not

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<sup>88</sup> Holton, ‘Positivism and the Internal Point of View’, 603

<sup>89</sup> Holton, ‘Positivism and the Internal Point of View’, 603

<sup>90</sup> Holton, ‘Positivism and the Internal Point of View’, 604

<sup>91</sup> Holton, ‘Positivism and the Internal Point of View’, 604

moral reasons – but they are not normative reasons either!<sup>92\*</sup> Hart has given us no good reason to think that the internal point of view is not a moral point of view.<sup>93\*</sup> It is impossible to see, simply by Hart’s account, how an official could accept the law while thinking that, morally, they ought not to – the normative reasons (moral reasons) in such a case must mean that they believe they are *not* justified.<sup>94</sup> If a plausible account could be given of normative reasons that are not moral reasons, then Hart’s position might stand.<sup>95\*</sup> In the absence of such an account, however, we are forced to concede that the internal point of view must be a *moral* point of view.<sup>96</sup> Does this refute positivism or force us into accepting a natural law theory as Finnis thought it might? It does not. Holton offers *moral attitude positivism* as a position which integrates the internal point of view as a *moral* point of view, while still maintaining the separation of law and morality. This might seem incoherent at first, but Holton gives a plausible account of moral attitude positivism demonstrating that it is both coherent and consistent with the fundamental tenets of positivism.

#### 1.4 Moral Attitude Positivism

Holton’s strategy for demonstrating the coherence of moral attitude positivism is simple. He introduces a constraint, the moral attitude constraint (MAC), which specifies that the attitude taken toward the law by officials adopting an internal point of view is a *moral* attitude.<sup>97\*</sup> He then introduces the three core theses of positivism (social thesis, separation thesis, and semantic thesis) and demonstrates how the MAC is fully compatible with each of these theses. The result is a position that remains positivist, maintaining the fundamental separation of law and

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<sup>92</sup> Holton, ‘Positivism and the Internal Point of View’, 605 \* Holton mentions that the second of Hart’s reasons (disinterested interest in others) might be a normative reason, but hints that this is only because it might also be a moral reason. Its status as a normative reason (or not) seems linked to its status as a moral reason (or not).

<sup>93</sup> \* Joseph Raz also attempts to provide non-moral reasons for acceptance, including prudential reasons or an intention to destroy the system from within. These are motivational reasons, not normative reasons. See page 148 of: Raz, Joseph. (1975). *Practical Reason and Norms*, London: Hutchinson; reprinted: Princeton: Princeton University Press, 1990.; and also page 155 of: Raz, Joseph. (1979). *The Authority of Law: Essays on Law and Morality*, Oxford: Oxford University Press, 2002.

<sup>94</sup> Holton, ‘Positivism and the Internal Point of View’, 605

<sup>95</sup> \* It has been suggested to me that perhaps some kind of ‘non-moral rationality’ could produce normative, but non-moral reasons. If a theory of rationality did generate truly non-moral normative reasons, then it would simply mean that Hart’s position might be able to stand as it is, without appealing to moral attitude positivism. I suspect, however, that a ‘non-moral rationality’ could only ultimately provide *motivating reasons* for action, not normative reasons. This question is unfortunately too large to deal with adequately in this paper, so I will leave it. I am very grateful to Evan Butts for giving this issue shape, and to Dr. Campbell Brown for discussion of it.

<sup>96</sup> Holton, ‘Positivism and the Internal Point of View’, 606

<sup>97</sup> \* Holton never refers to the moral attitude constraint as the ‘MAC’. I will often refer to it as the MAC in this paper.

morality, while also meeting the criticism of Hart's position, namely that the internal point of view must be a moral point of view in order to generate normative reasons for accepting the law. This makes it the most plausible form of positivism, and thus the one which I will apply to my analysis of international criminal law. I provide the main points of Holton's argument below.

The first step is to introduce the moral attitude constraint. Holton defines it:

*Moral Attitude Constraint*

If it is a law in S that P, then the officials of S must believe that they are morally justified in enforcing the requirement that P, and that the subjects of S are morally obliged to conform to it.<sup>98\*</sup>

Holton is quick to note that this does *not* necessarily entail that the officials believe every law in the system to be morally good or just. There could be a law that was passed (or developed in the case of common law) which the officials do not think should have been passed (or developed in the way it was), and yet *still* believe that they ought to apply to law so long as it stands *because it is part of the legal system*.<sup>99</sup> In other words, the officials may actively wish to change an immoral law, while still believing that they are morally justified in enforcing it in order to maintain the integrity of the system that is morally good as a whole. This is the concept of 'systemic validity' discussed by Joseph Raz – where the individual normative merits of a law are one thing, but the merit of that same law as part of a *system* is something separate, dependent on whether it was issued by a legitimate authority.<sup>100</sup> Thus, Raz says: '[w]hile the direct (i.e. non-systemic) validity of a rule turns on the goals and values which it serves or harms, its legal, systemic, validity depends on the fact that it belongs to a given legal system and that it is justified as such'.<sup>101</sup> We should definitely not take the MAC to imply that the officials take *every* individual law to be morally good, since they may believe that they morally ought to enforce it because of its systemic validity, to uphold the authority of a morally good legal system.

With this said, let us move on to the core theses of positivism, to which Holton will apply the

<sup>98</sup> Holton, 'Positivism and the Internal Point of View', 607 \* Holton proceeds to argue that this formulation of MAC is not too strong (pp. 607-608). Law is a 'cluster concept', he argues, so there is some indeterminacy about the extent of the boundaries. Hart says the same. This means that it is enough for a large majority of officials to have attitudes in accordance with MAC, and not every official must have such an attitude. This being said, Holton remains confident that, even if the constraint were somewhat weaker, it would still be compatible with the theses of positivism.

<sup>99</sup> Holton, 'Positivism and the Internal Point of View', 608

<sup>100</sup> Raz, *The Authority of Law*, 152-153

<sup>101</sup> Raz, *The Authority of Law*, 152

MAC. The three central tenets, as presented by Holton, are:

- (i) *the social thesis*: the question of what the law is in any given society ultimately reduces to questions of social fact, i.e. facts concerning the existence of institutions within the society, and the behaviour and attitudes of the members of the society, etc.
- (ii) *the separation thesis*: there is no guarantee that a law, or a legal system, is just, or otherwise morally good, simply in virtue of being a law or a legal system; and there is no guarantee that a subject morally ought to do what the law requires of them.
- (iii) *the semantic thesis*: the sense of normative terms in legal claims is distinct from their sense in moral claims.<sup>102</sup>

I will follow Holton's arguments for the compatibility of the MAC with each of these theses in that order, beginning with the social thesis.

The social thesis claims that what the law is reduces to social facts. Positivism with the MAC attached is reducible to the rule of recognition and the attitudes of the officials – both of which are social facts, so the MAC is certainly compatible with this thesis.<sup>103</sup> The more interesting question is: could an official accept the MAC and still accept the social thesis? That is, could an official have a moral attitude toward the law and still maintain that the law is reducible to matters of social fact? The worry is that when a judge makes a legal claim, they might necessarily *entail* a moral claim if they accept the MAC (e.g. saying 'legally, you must do *x*' entails 'morally, you must do *x*'). If an official's legal claim entails a moral claim, then the law is reducible not just to social fact, but to moral fact as well – we are back to a natural law account where the legal claim is also a moral claim, and thus false if the moral claim is false.<sup>104</sup> Holton's answer to this is simply to deny that the legal claim really does entail a moral claim, even if the judge accepts the MAC. The MAC demands only that a legal claim entails that the legal officials *believe* that the people under that legal system are morally obliged – not that they actually *are* morally obliged.<sup>105</sup> A judge accepting the MAC will think that her statement of 'you are legally obliged to do *x*' entails the claim 'the officials of this legal system think that you are morally obliged to do *x*', but does *not* entail the claim 'you are morally obliged to do *x*'.<sup>106</sup> As one of the legal officials, it may be likely that the judge's claim of legal obligation pragmatically

<sup>102</sup> Holton, 'Positivism and the Internal Point of View', 600 (my emphases)

<sup>103</sup> Holton, 'Positivism and the Internal Point of View', 609-610

<sup>104</sup> Holton, 'Positivism and the Internal Point of View', 610

<sup>105</sup> Holton, 'Positivism and the Internal Point of View', 610

<sup>106</sup> Holton, 'Positivism and the Internal Point of View', 610

*implies* that she believes that a subject is morally obliged, but it by no means entails this – it is not even necessary that she does believe this.<sup>107</sup> It is perfectly possible for an official to reject the moral claim while still upholding the legal claim, although such a judge would have to be in the minority amongst the officials, and in a sense ‘parasitic’ upon the rest.<sup>108\*</sup> Holton gives a more extensive argument than I have reproduced here, but this should be sufficient to demonstrate that the MAC does not require a judge to take their legal claims to *entail* moral claims, and thus that an official can coherently accept both the social thesis and the MAC.

The separation thesis is the now familiar positivist claim that the law may diverge from morality – there is no guarantee that a law is morally good. There is no real problem here, since the MAC is just about moral beliefs which may be wrong, thus entailing no necessary connection between the law and morality. Furthermore, the officials can easily accept both the MAC and the separation thesis. By accepting the MAC, the officials necessarily believe that their laws are morally binding. It does not follow from this, however, that they believe that necessarily their laws are morally binding.<sup>109</sup> That is, although the officials must believe that their laws are morally binding according to the MAC, they do not have to believe that it is a necessary truth that their laws are binding – they will still think that *if* their laws were immoral, *then* they would not be morally binding.<sup>110</sup> They will think that it is only contingently true that their laws are morally binding, not that their laws are morally binding as some necessary truth inherent to the universe. The legal officials can easily accept both the MAC and the separation thesis.

This brings us to the third and final thesis – the semantic thesis – which claims that ‘obligation’ means something different in legal terms than it does in moral terms. The account of normativity in a legal sense versus a moral sense is a huge issue. Recall that this is a consistent line of objection by natural law theorists like Fuller and Finnis, who question the existence of legal obligation as distinct from moral obligation. Indeed, the primary *motivation* of the natural law theorist (not necessarily the primary objection) seems to be that separating law and morality removes any true obligation from law. Because of the importance of this issue, I will offer some further discussion of it in section 1.5. For now, I will only show how Holton’s MAC can be

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<sup>107</sup> Holton, ‘Positivism and the Internal Point of View’, 611

<sup>108</sup> Holton, ‘Positivism and the Internal Point of View’, 611-612 \* See these pages for a further, more complete discussion of this concept.

<sup>109</sup> Holton, ‘Positivism and the Internal Point of View’, 615

<sup>110</sup> Holton, ‘Positivism and the Internal Point of View’, 616

consistently accepted alongside the semantic thesis.

Holton is quick to note that merely pointing out that ‘legal obligation’ means something different from ‘moral obligation’ does not show that ‘obligation’ has a distinct sense in each construction.<sup>111</sup> What shows the difference in the meaning of the word between constructions is that the social thesis guarantees that questions of what is ‘obligatory’ in law are reducible to social facts; questions of what is ‘obligatory’ in morality are not necessarily reducible to social facts – they have different truth conditions (dependent on the moral theory applied).<sup>112</sup> Raz gives an account of the difference by suggesting that we should distinguish between detached and committed legal statements. Holton disagrees with this approach, and suggests that we should instead take normative language in legal claims to be wholly descriptive. I will summarise both accounts here.

Raz thinks we should distinguish between two different types of moral statements – internal statements and statements from a point of view.<sup>113</sup> Holton calls them committed and detached statements respectively.<sup>114</sup> To illustrate the difference, Raz introduces the example of his vegetarian friend.<sup>115</sup> If, at a social dinner, Raz leans over and tells his vegetarian friend ‘this dish contains meat, you should not eat it’, then Raz will have made a detached statement. Raz himself is not a vegetarian, and so does not take the fact that the dish has meat to be a reason not to eat it, and he is not stating to his friend that he has a reason not to eat the dish. What he *is* telling his friend is: ‘*from your point of view*, you ought not to eat that dish’. It is not stating what ought to be done, he is stating what his friend ought to do *from his point of view*.<sup>116</sup> The exact same sentence (‘this dish contains meat, you should not eat it’) could be used, however, to make a committed statement. If another vegetarian says to Raz’s friend ‘this dish contains meat, you should not eat it’ then that statement will be a committed statement, made with the internal conviction that the fact that the dish contains meat is a genuine reason not to eat it – not simply a reason from Raz’s friend’s point of view.<sup>117</sup> Raz’s point is that we can understand statements of legal obligation to have the same disjunctive normative status as detached moral statements. A legal claim about what one ought to do can be made by a speaker who does not think that the

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<sup>111</sup> Holton, ‘Positivism and the Internal Point of View’, 617

<sup>112</sup> Holton, ‘Positivism and the Internal Point of View’, 617

<sup>113</sup> Raz, *The Authority of Law*, 153-157

<sup>114</sup> Holton, ‘Positivism and the Internal Point of View’, 617

<sup>115</sup> Raz, *Practical Reason and Norms*, 175

<sup>116</sup> Raz, *Practical Reason and Norms*, 175-176

<sup>117</sup> Raz, *Practical Reason and Norms*, 176

claim is a valid normative claim, but believes that there are people who think that it is (e.g. a majority of legal officials).<sup>118</sup> In other words, a committed legal claim can be made by one who takes the claim to be genuinely normative, as when an official adopts an internal point of view to the law. The exact same claim can be made by one who is describing that point of view without actually endorsing it, without thinking that the claim is valid. The sense of ‘obligation’ in such a legal claim would be a descriptive sense ([the law says that] you must do *x*) rather than a prescriptive sense (you must do *x*). Only committed statements are normative statements in that they entail a prescriptive claim.

Holton diverges from Raz on this point. While Raz holds there to be a class of committed legal statements, where the speaker endorses the moral authority of the law in making the statement, Holton’s account does not hold that there is such a class of committed statements.<sup>119</sup> An official making the legal claim ‘legally, you must do *x*’ is only entailing this claim: ‘the officials of the legal system believe that, morally, you must do *x*’, but this does not entail the official actually making the moral claim.<sup>120</sup> The official may be pragmatically implicating that she is committed to the moral authority of the law, but her statement is not a committed statement in the sense that it *means* that she is committed to the moral authority of the law.<sup>121</sup> Holton’s objection seems to be that *all* legal statements are detached statements, because they do not *entail* moral claims *even if* the speaker thinks that the normative claim is valid.<sup>122</sup> Thus, when a legal official, even one who adopts the internal point of view, makes the claim ‘you are legally obligated to do *x*’ the sense of obligation is descriptive; it means ‘the law says that you ought to *x*’. From the fact that it is a committed legal official making the statement, we can imply that they also take you to be morally obligated to do *x*, but this is a separate statement altogether and is not entailed by the claim about what the law says – the claim of legal obligation. Holton concludes that we do not need to think that there are two types of legal statements (committed and detached), but that we should think that claims of legal obligation are descriptive, and none of them involve the ‘mock assertion of a normative claim’.<sup>123</sup> This is the sense in which ‘obligation’ has a different sense in claims of ‘legal obligation’ than in claims of ‘moral obligation’ – legal obligations *describe* what action the law demands, while moral obligations *prescribe* action. The final tenet of positivism then, the semantic thesis, is clearly consistent with MAC.

<sup>118</sup> Raz, *Practical Reason and Norms*, 177

<sup>119</sup> Holton, ‘Positivism and the Internal Point of View’, 618

<sup>120</sup> Holton, ‘Positivism and the Internal Point of View’, 618

<sup>121</sup> Holton, ‘Positivism and the Internal Point of View’, 618-619

<sup>122</sup> Holton, ‘Positivism and the Internal Point of View’, 618

<sup>123</sup> Holton, ‘Positivism and the Internal Point of View’, 619

I have summarised Holton’s argument for the internal coherence and consistency of positivism with the moral attitude constraint. It not only shows that moral attitude positivism is a coherent position, but that it can account for the major weakness in Hart’s positivism – the lack of an account of normative reasons. As such, I take moral attitude positivism to be the most plausible form of positivism to date. I thus take myself to be justified in applying this theory to the structure of international criminal law in order to assess its validity *as law*. Before moving to the second part of this paper, I will briefly close with some further discussion of the normativity of law.

### 1.5 Normativity in Law and Other Clarifications

It is important to come back to the idea of normativity in law in order to clear up any confusion. I take the main motivation of the natural law theorist to be that we cannot be obligated to perform something that is immoral. We may be motivated to perform an immoral action, but we cannot be *obligated* to perform that action, unless by some more powerful moral reason (e.g. I was obligated to break my promise because otherwise I would have been unable to fulfill my obligation to save her life). To say: ‘I am *obligated* to own that slave, even though I know that I ought not to’ looks like an open contradiction. This seems to be the underlying motivation for natural law theorists to deny valid legal status to immoral laws – a law that obligates us to act contrary to morality does not obligate us at all, and so it cannot truly be a law.<sup>124\*</sup>

The positivist motivation, by contrast, is really to maintain clarity when we speak of law. Take a case where one is tried, condemned, and sentenced to death in accordance with the rules of a legal system that does, as a matter of empirically verifiable fact, exist. It confuses the issue to then state ‘well, there was no law applied here’ or ‘that person broke no law’ or ‘there is no law in accordance with which she was condemned’. The positivist is after a more honest description of the scenario, for example: ‘it is the law, but it is unjust, and she was right not to obey it, whatever the consequences’.<sup>125</sup> To simply deny that it is a law at all is to confuse the issue, and

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<sup>124</sup> \* They can still hold that the phrase ‘immoral law’ does not imply a contradiction any more than ‘forged banknote’ does. We can refer to a forged banknote as a banknote, even if we know that it is not a real banknote. We may apply predicates to things to which they do not strictly apply, and this allows the natural law theorist to coherently refer to an ‘immoral law’ while still holding that it is not really a law. I am exceptionally grateful to Dr. Campbell Brown for this helpful way of phrasing the idea.

<sup>125</sup> Hart, *The Concept of Law*, 207-208

everyone involved. Furthermore, it is to obscure the underlying moral evaluation which must take place in such circumstances. As Hart eloquently says:

Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are. The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.<sup>126</sup>

To deny the status of law to something which, as a social fact, does exist, on the grounds that it is morally wrong, is misleading. This is the motivation for the positivist objection to natural law. This does not mean that evaluation of what to do stops with knowledge of what the law demands – beyond establishing what the law says to do, one must still ask ‘what should I do?’. The positivist can hold that the law does not fully answer the question of what one ought to do. The difference between the natural law theorist and the positivist, then, seems to hinge on a relatively small point – the question of what is meant by ‘legal obligation’.

Recall that natural law theorists like Finnis and Fuller take there to be a genuine positive aspect to the law, accepting that matters of social fact are part of the necessary conditions for law. The most sophisticated natural law theorists and the positivists agree that the existence of a legal system depends on social facts. They differ in that positivists take this to be not only necessary, but *sufficient* to establish a legal system, while natural law theorists think that the further question of whether the law is morally permissible is also necessary.<sup>127</sup> Natural law theorists hold that immoral laws cannot obligate, therefore they cannot be laws in the sense that they command legal obligation. This is why the semantic thesis of positivism is so important – the positivist cannot hold that ‘obligation’ in law has the same normative meaning as ‘obligation’ in morality and still maintain that law and morality are conceptually separate. The positivist must show that ‘legal obligation’ could not obligate someone to do what they ought not to do; it is not normative in the sense that it fully answers the question of what to do.

Coming back to the discussion of the semantic thesis will help to clarify. Raz held there to be

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<sup>126</sup> Hart, ‘Positivism and the Separation of Morals’, 82

<sup>127</sup> MacCormick, Neil. (1978). *Legal Reasoning and Legal Theory*, Oxford: Oxford University Press, 2003., 61-62

two classes of legal statements, but Holton rejected the idea that there are committed statements at all. In saying that someone is legally obligated to do *x*, even a committed legal official is not making a ‘committed statement’. The official may think that the person is morally obligated to do *x*, but this is not what they are saying when they say that they are legally obligated. Their statement of legal obligation entails a purely descriptive claim about what the legal officials *believe* an individual ought to do, *not* a prescriptive claim about what the individual actually ought to do. Obligation is different in the legal sense than it is in the moral sense, so the natural law theorist should not reject the validity of an immoral law on the grounds that it cannot obligate; the sense in which ‘obligation’ is used in the context of legality is not a prescriptive sense at all! It cannot actually be a statement of ‘obligation’ in the same sense as ‘moral obligation’, and the natural law theorist should not worry about a contradiction. This does not mean that the law is not normative.

Holton gives us three different ways in which we might take the law to be normative. It could be normative if it justifies the actions of those obeying it – if it provides normative reasons for action.<sup>128</sup> It could be normative for an individual if they *believe* that they have normative reasons for obeying the law, or we might call the law normative when obeying it factors into an agent’s motivating reasons for action.<sup>129</sup> These can all be ways in which the law is considered to be normative. The third sense of normativity fits easily with the positivist model. The law will often factor into a citizen’s motivational reasons for action, because most citizens, most of the time, have prudential reasons to obey the law.<sup>130\*</sup> The legal officials themselves will have similar prudential reasons to obey and apply the law, and by the MAC they must believe themselves to have normative reasons to do so, which could also factor in their motivational reasons.<sup>131</sup> So the law is certainly normative, even on a positivist account, in the sense that obeying the law may often factor into an agent’s motivating reasons for action. For the moral attitude positivist, the law must also be normative in the sense that the legal officials *believe* that they have normative reasons to obey and enforce the law. This does not mean that the officials actually do have normative reasons for obeying or enforcing the law – whether or not they do is dependent on separate criteria of evaluation.<sup>132</sup> On the account given here, there is no normative reason to obey the law just because it is the law – although any official who *accepts* the law will believe there

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<sup>128</sup> Holton, ‘Positivism and the Internal Point of View’, 620

<sup>129</sup> Holton, ‘Positivism and the Internal Point of View’, 620

<sup>130</sup> \* For further discussion of prudential reasons to obey the law, see Raz, *The Authority of Law*, 242-245

<sup>131</sup> Holton, ‘Positivism and the Internal Point of View’, 622

<sup>132</sup> Holton, ‘Positivism and the Internal Point of View’, 621

to be normative reasons to maintain it. The law is normative in the sense that the officials, at least, believe that they have normative reasons to make and enforce the law, and in the sense that most people will often factor obedience to the law into their motivational reasons for action. Put differently, a claim of legal obligation is normative in the sense that it entails a description of a belief in normative reasons from a point of view, and a description of something which might factor into an agent's motivating reasons for action. A claim of legal obligation is *not* normative in the sense that it actually constitutes a normative reason for action.

Indeed, Raz argues that there can be no general obligation to obey the law in the sense that obedience to the law is a normative reason for action.<sup>133</sup> To see this, assume that law *L* demands that citizens do *x*. This means that the legal officials believe that there are normative reasons to accept *L* in order to ensure that people do *x*. If there *are* normative reasons to ensure that people do *x*, then it follows that there are normative reasons for people to do *x*. If there are normative reasons for a person to do *x*, then that person ought to do *x*, *regardless of whether L exists or not*. The formulation of *L* is incidental to whether a person ought to do *x*. *L* does not create any new obligation to do *x*, even though the officials had normative reason to create *L*, and even though they may continue to have normative reason to enforce *L*. Such a situation fits with the *mala per se* role of law, where the role of law is to provide alternative motivational reasons (sanctions) to abstain from certain actions, since some people fail to be motivated by the normative reasons that already exist.<sup>134</sup>

Another role of law is to specify duties of *mala prohibita*, or duties concerning participation in cooperative schemes, or to pursue solutions to coordination problems.<sup>135</sup> For *mala prohibita* duties, there are no normative reasons independent of the existence of schemes of cooperation.<sup>136</sup> For example, there are no independent normative reasons for driving my car on the left-hand side of the road as opposed to the right-hand side of the road. The society in which I live, however, has solved a specific coordination problem by requiring all inhabitants and visitors to drive on the left-hand side of the road. The normative reasons for driving on the left-hand side of the road come from the fact that in doing so I uphold a system of cooperation.<sup>137\*</sup> If I did not have

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<sup>133</sup> Raz, *The Authority of Law*, 233

<sup>134</sup> Raz, *The Authority of Law*, 247

<sup>135</sup> Raz, *The Authority of Law*, 247

<sup>136</sup> Raz, *The Authority of Law*, 248

<sup>137</sup> \* Obviously not just *any* system of cooperation could generate normative reasons like this. There would, of course, be no normative reasons to uphold a system of cooperation whereby citizens can execute outsiders more efficiently. The systems of cooperation to which I refer are those which make people's lives better, not worse.

normative reasons to uphold such a system of cooperation, then I would have no *normative* reasons to obey the law mandating that I drive on the left-hand side of the road. The law is instrumental in solving the original coordination problem, thereby establishing a system of cooperation. My normative reasons for driving on the left-hand side of the road are tied to a duty to uphold systems of cooperation like this; they are not simply constituted by obedience to the law. Though the law provides for the source of the normative reasons in this case, obeying the law is not itself a normative reason for action.

It should be noted, however, that officials can have legitimate normative reasons to institute and enforce laws. The importance of law is in its ability to motivate those who are not motivated by normative reasons, or to solve coordination problems by establishing cooperative schemes. To the extent that it does this, it is good law. But, of course, it need not do this just because it is a law. Laws may fail, as we have seen, to be morally good. Laws, when morally sound, are crucial to the protection of normative reasons for action, because they provide motivational reasons for those who might otherwise ignore the normative reasons. Legal systems are thus crucial to human society. The world is now, more than ever, a global society, and it is important that international law be recognised as genuine law because of the role that law can play in protecting morally sound action in this society.

I have followed Raz's argument that obeying the law cannot constitute a normative reason. Obedience to the law can, however, still be *believed* to be a normative reason, and thus be truly normative in this sense. Someone who takes the law to be a normative reason for action likely respects, or defers to, the authority of the legal officials. Raz calls such an attitude 'respect for the law', and takes it to be morally permissible (even if having no such attitude is also morally permissible).<sup>138</sup> I think that it is perhaps more accurate, though not in contradiction to what Raz says, to describe such an attitude as a type of deference to authority. When a person sees no independent normative reason to act in a certain way, but takes the fact that the law tells them to act in that way to be a normative reason, it seems implicit that they are deferring to what they take to be the 'normative expertise' of the legal officials.

For example, take a doctor who does not know where he stands on performing abortions. He thinks that it is permissible sometimes, but he has no idea on what occasions. Legislation is

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<sup>138</sup> Raz, *The Authority of Law*, 250

passed which determines that abortion is always illegal, *except* in incidences of rape. The doctor might take obedience to this law to be a normative reason for action – he might think that he is now morally obligated to only perform abortions in cases of rape, *because the law says so*. If the doctor believes this, then it seems likely that he is deferring to the normative authority of the legal officials. He had no belief beforehand about when he should and should not perform abortions, but now he genuinely believes that he ought only to perform them in cases of rape. What he believes to be a normative reason is the fact that the law says this is what he ought to do – so it seems plausible that he is implicitly deferring to the moral judgement of the legal officials. Perhaps he habitually defers to the authority of the law, and this is just one instance of such deference. Of course, he may defer on this occasion, but not on others. He may think that the authorities got it wrong when they said he should not euthanise patients who willingly asked for it. He may break the law to perform euthanasia because he thinks that, morally, he ought to euthanise patients who willingly ask for it. This is not inconsistent with his deferring to the moral authority of the officials on other issues.

The position I have drawn above is similar to the idea of scientific authority sketched by Richard Posner. As Posner points out: ‘[w]e believe in the heliocentric theory only because scientists are unanimous in believing it and because we are taught to defer to scientific consensus on matters classified as scientific . . .’.<sup>139</sup> Most people do defer to the consensus of science on a regular basis, and believe this to be a justified reason to believe certain things about the natural universe. Posner thinks that scientific authority is different from legal authority. He claims that even if all judges in a legal system agreed on a legal decision, their consensus would still be less persuasive than consensus among scientists on scientific matters. He goes on to cite a comment, from Justice Robert Jackson, saying that if there was a court higher than the United States Supreme Court then many of the Supreme Court decisions would likely be reversed.<sup>140</sup> This is supposed to support the idea that consensus among judges is not solid ground for authority, since judges who are higher up (with better access to all of the facts, and possessing better decision making abilities) would disagree with inferior judges.<sup>141</sup> I do not see how this supports the claim at all. It would be like saying that if there were scientists with better instruments and more access to the facts of the universe, they would likely dismiss many scientific conclusions made by our current scientists. This may be true, but it does not in any way undermine the authority of the scientists

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<sup>139</sup> Posner, Richard. (1990). *The Problems of Jurisprudence*, Cambridge: Harvard University Press, 1993., 79

<sup>140</sup> Posner, *The Problems of Jurisprudence*, 79-80

<sup>141</sup> Posner, *The Problems of Jurisprudence*, 79

we do have, and the parallel claim should not undermine the authority of the judges we have.

We generally take judges to have an expertise in making normative decisions – this is how they become judges. We see their decisions as frequently reliable, and this is the source of their normative authority. This does not mean that judges are always right, or even right most of the time, any more than it means that scientists are always right, or right most of the time. Much of the seventeenth century scientific consensus has been overturned, but that does not mean that the findings of those scientists were not authoritative in their own time. I agree with Posner that legal authority is not identical to scientific authority, and scientific authority may be more reliable than legal authority. Nevertheless, when an individual *believes* that obeying the law constitutes a normative reason for action, it seems implicit that he is deferring to the decision-making authority of the legal officials who endorse that law. In this sense, legal authority can be regarded in a similar way to scientific authority – those who defer to it believe that this justifies whatever belief is contingent on that deference.

I have argued here, with Holton and Raz, that ‘obligation’ means something different in the construction ‘legal obligation’ than it does in the construction ‘moral obligation’. Legal obligation is descriptive, while moral obligation is prescriptive. I have argued further, however, that legal obligation can still be *normative* in two different ways. People can *believe* that obeying the law is a normative reason for action, as in cases where they defer to the decision-making authority of the legal officials. People can also factor obedience to the law into their motivational reasons for action. These can come together, as when believing something to be a normative reason constitutes a motivating reason.<sup>142</sup> In both of these senses, ‘legal obligation’ is normative. It is *not* normative in a third sense. Obedience to the law is not truly a normative reason for action, as I argued above, in line with Raz. This leaves the door open for the natural law theorist to agree that a law is still a law, even if it is immoral, since ‘legal obligation’ could never actually obligate one to do something that they ought not to. Indeed, John Finnis is often credited with hinting at this view.<sup>143</sup>

I have included this section to help clarify what, exactly, is meant when we say that a legal system commands legal obligation. We mean that it is normative in the ways argued here, and

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<sup>142</sup> Holton, ‘Positivism and the Internal Point of View’, 620

<sup>143</sup> Posner, *The Problems of Jurisprudence*, 231 n.18; Tamanaha, Brian. (2007). ‘The Contemporary Relevance of Legal Positivism’, in *Australian Journal of Legal Philosophy* 32, No. 07-0065, 2007. [Online], 9

that the legal officials believe that they have normative reasons to make and enforce the laws of the system. My argument, which follows this section, is aimed at the skeptic who takes there to be legal obligation at the domestic level, but not in the international system, and who accepts the positivist criteria for law. Two things might now be kept in mind with regard to my argument. One is that many people who reject the idea of legal obligation are rejecting the idea that obedience to the law is a normative reason for action. Understanding ‘legal obligation’ in the sense that has been argued here may change how such people regard the argument in general. The second thing to bear in mind is that this argument may have significance for natural law theorists as well as positivists. Many natural law theories admit that positivist criteria are a necessary, if not sufficient, condition for law.<sup>144</sup> Such natural law theorists should regard it as significant, then, if the system of international criminal law possesses sufficient features for a positivist to accept it as law. I will now turn to the second part of this paper. I will argue, in contrast to the skeptic, that international criminal law is valid law on the grounds that it possesses the necessary criteria on a moral attitude positivist account.

## Part II: Positivism in International Criminal Law

### 2.1 International Criminal Law: History Cliff-notes

I will begin the second part of this paper with a brief history of international criminal law (ICL), from its first practical application at Nuremberg in 1945. I will not pretend to give a full account of international criminal law, its history, or all of its mechanisms. I intend to provide only as much background information as is necessary to make my argument. After introducing this history, I will specify the positivist criteria constituting necessary and sufficient conditions for ICL to be a valid legal system, and proceed to demonstrate the form they take in ICL.

At the start of the paper I distinguished between international law and international criminal law. The two important distinctions to recall at this point are: (1) ICL is a *young* branch of international law, and (2) ICL assigns responsibility to individuals, not states. The first

<sup>144</sup> McCormick, *Legal Reasoning and Legal Theory*, 61-62

practical application of international criminal law was at the International Military Tribunal (IMT) in Nuremberg, established by the 1945 London Agreement.<sup>145</sup> Until this time, international law was primarily applied to states. At the IMT, the conscious decision was made to try individuals in an international court for the first time.<sup>146</sup> The crimes for which the defendants at Nuremberg were tried included: crimes against peace, war crimes, and crimes against humanity – these were defined in Article 6 of the IMT Charter.<sup>147\*</sup> The IMT marked the first instance of international law being applied criminally to individuals, and the findings of the court served to clarify and consolidate the rules of international criminal law.<sup>148\*</sup> This directly facilitated the drafting of treaties built on the proceedings of the IMT, such as the 1948 Convention on Genocide.

Shortly before the 1945 London Agreement was made to establish the IMT, the 1945 United Nations Charter was signed, which now bears the signatures of 192 state parties.<sup>149</sup> This created the United Nations (UN), and gave one organ of the UN, the Security Council, specific authority as a legal body through Chapters V and VII of the Charter.<sup>150</sup> Particularly, Article 25 of Chapter V states: '[t]he members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.<sup>151</sup> Article 48 of Chapter VII gives the Security Council the authority to determine action for the 'maintenance of international peace and security', and binds the Members of the United Nations to act in accordance with the decisions of the Security Council.<sup>152</sup> The Charter, ratified by nearly every nation on the planet, thus grants to the Security Council *de facto* authority as a legal body when it comes to matters of peace and security. This is of critical importance, because the next major development in ICL came in 1993 when the Security Council used this power to establish the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) as a measure to protect

<sup>145</sup>Birdsall, Andrea. (2009). *The International Politics of Judicial Intervention: Creating a More Just Order*, Abingdon: Routledge, 2009., 41; Cassese, *International Criminal Law*, 376-383

<sup>146</sup> Birdsall, *The International Politics of Judicial Intervention*, 43

<sup>147</sup> Birdsall, *The International Politics of Judicial Intervention*, 42; \* Since the crimes themselves were defined in the IMT Charter, not all of them technically existed as crimes before they were committed – and this has led to allegations that the IMT applied law retroactively, violating the legal principle of *nullem crimen sine lege, nulla poena sine lege* ('no crime, no punishment without a previous penal law'). These allegations are debated, but this need not concern us at present.

<sup>148</sup> \* A similar, less well known Tribunal was conducted in Tokyo through the International Military Tribunal of the Far East, though with arguably less significant influence. See Schabas, William. (2001). *An Introduction to the International Criminal Court*, Second Edition, Cambridge: Cambridge University Press, 2006., 6-8

<sup>149</sup> Birdsall, *The International Politics of Judicial Intervention*, 49-50

<sup>150</sup> Charter of the United Nations. (26 June, 1945). [Online], Chapter V, Chapter VII; Cassese, *International Criminal Law*, 3

<sup>151</sup> Charter of the United Nations, Chapter V, Article 25

<sup>152</sup> Charter of the United Nations, Chapter VII, Article 48

international peace and security.<sup>153</sup> A second *ad hoc* court, the International Criminal Tribunal for Rwanda (ICTR) was established under the same power in 1994.<sup>154</sup> The ICTY and the ICTR were both created to prosecute the worst criminal offences perpetrated in the conflicts which they respectively followed.

The ICTY was granted jurisdiction over breaches of the 1949 Geneva Conventions, violations of the laws and customs of war (war crimes), genocide, and crimes against humanity occurring in the former Yugoslavia from 1 January, 1991 onward.<sup>155</sup> The tribunal was created authoritatively through Resolution 827 of the Security Council, wherein all States are bound to cooperate in full with the ICTY and to make whatever changes necessary to their domestic systems in order to implement the provisions of the Resolution and the ICTY.<sup>156</sup> The Statute of the ICTY was adopted through this resolution, specifying the parameters of the court, including definitions of the crimes within its jurisdiction.<sup>157\*</sup>

The ICTR was established through Security Council Resolution 955 in a similar manner to the ICTY, again determining that all States are bound to comply with the ICTR and the Statute of the ICTR authorised by the Resolution.<sup>158</sup> The range of crimes over which the ICTR was given jurisdiction are defined in the statute, and include genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions, and violations of the Second Additional Protocol.<sup>159</sup> The ICTR and the ICTY each has its own statute, but they share the same Prosecutor and the same Appellate Chamber, evidence of some uniformity in the Security Council's creation of *ad hoc* courts.<sup>160</sup> Both of these courts drew upon a body of previously established treaties (e.g. the 1949 Geneva Conventions and the 1948 Convention on Genocide) in order to bring together, consolidate, and clarify the crimes which were being prosecuted. Out of the proceedings of these courts came a clear definition of the rules of international criminal law, as seen in the comprehensive definitions of the rules common to both statutes.

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<sup>153</sup> Cassese, *International Criminal Law*, 336

<sup>154</sup> Cassese, *International Criminal Law*, 336

<sup>155</sup> Cassese, *International Criminal Law*, 336

<sup>156</sup> United Nations Security Council Resolution 827. (25 May, 1993). [Online], esp. operative paragraph 4; Cassese, *International Criminal Law*, 336-338

<sup>157</sup> \* The crimes are defined in Articles 2-5 of: Statute of the International Criminal Tribunal for the Former Yugoslavia. (25 May, 1993). Updated Statute: February, 2008. [Online]

<sup>158</sup> United Nations Security Council Resolution 955. (8 November, 1994). [Online], esp. operative paragraph 2; Cassese, *International Criminal Law*, 339-340

<sup>159</sup> Statute of the International Criminal Court for Rwanda. (8 November, 1994). [Online], Articles 2-4

<sup>160</sup> Cassese, *International Criminal Law*, 340

The creation of the ICTY and ICTR placed considerable strain on the Security Council, and it has been argued that this left the Security Council less inclined to create similar *ad hoc* courts.<sup>161</sup> Situations elsewhere were considered by the Security Council, and a statute was drafted in 2000 to establish a Special Tribunal for Sierra Leone, but the ICTY and ICTR remained the only *ad hoc* courts of their caliber.<sup>162</sup> The ICTY and the ICTR were also always limited in their jurisdiction, as Cassese notes, both temporally and geographically.<sup>163</sup> However, the comprehensive consolidation and clarification of international criminal law that was facilitated by these Tribunals led directly to the creation of the 1998 Rome Statute.<sup>164</sup> The Rome Statute looked to establish, in clear terms, a criminal court with global jurisdiction over a set of defined crimes. It was not, however, created through the legal authority of the Security Council. It was first drafted in 1994 by the International Law Commission (a body established through the UN General Assembly), and was modified and finished in 1998 by the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom), which was established by the General Assembly in 1996.<sup>165</sup>

The Statute was debated at the Diplomatic Conference at Rome in 1998, where agreement was exceptionally hard to achieve. Some states wanted to include crimes such as drug trafficking and terrorism in the Statute, while others wanted to exclude the crime of ‘aggression’.<sup>166</sup> States also disagreed over what could trigger the jurisdiction of the proposed International Criminal Court (ICC), with the United States in particular, objecting to the empowerment of the Court to initiate its own proceedings.<sup>167</sup> Compromises were made to the Statute in order to encourage a majority of states to accept it, and ultimately the Statute was adopted by the states present at the negotiations through a vote of 120-7, with 21 abstentions.<sup>168\*</sup> The final version of the Statute included four crimes in the jurisdiction of the ICC, classified under Article 5: genocide, crimes against humanity, war crimes, and aggression.<sup>169\*</sup> Clear definitions of the crimes are given in Articles 6, 7, and 8. The final Statute granted the ICC jurisdiction over these crimes

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<sup>161</sup> Cassese, *International Criminal Law*, 340

<sup>162</sup> Cassese, *International Criminal Law*, 340

<sup>163</sup> Schabas, *An Introduction to the International Criminal Court*, 12-14; Cassese, *International Criminal Law*, 341

<sup>164</sup> Cassese, *International Criminal Law*, 341-342

<sup>165</sup> Schabas, *An Introduction to the International Criminal Court*, 13-18; Cassese, *International Criminal Law*, 341-342

<sup>166</sup> Cassese, *International Criminal Law*, 342

<sup>167</sup> Cassese, *International Criminal Law*, 342

<sup>168</sup> Schabas, *An Introduction to the International Criminal Court*, 18; Cassese, *International Criminal Law*, 342-343 \* The states voting against the Statute were: the United States, Libya, Israel, Iraq, China, Syria, and Sudan.

<sup>169</sup> Rome Statute of the International Criminal Court. (17 July, 1998). [Online], Article 5 \* The crime of aggression is as yet undefined by the Statute, and the ICC does not have jurisdiction over the crime until it has been defined.

when a case is referred to the Prosecutor by a state which is party to the Statute, or by the Security Council.<sup>170</sup> The ICC finally acquired enough ratifications to come into force on 1 July 2002.<sup>171\*</sup>

One final event in the history of ICL is important to note, which is the 2004 Negotiated Relationship Agreement between the International Criminal Court and the United Nations. The ICC was created independently through the 1998 Rome Statute, but the 2004 Relationship Agreement established a working relationship between the ICC and the UN. Crucially, the Relationship Agreement states: '[t]he United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.'<sup>172</sup> The Agreement goes on to stipulate that the ICC and the UN are obligated to cooperate and coordinate with each other in all relevant matters. Furthermore, the Security Council may use its Chapter VII power to refer criminal incidents to the ICC for trial, and the Court itself may propose items to the UN for consideration.<sup>173</sup> In short, the 2004 Relationship Agreement marks the official recognition of the ICC as a legitimate international legal entity by the United Nations, and provides a working relationship between the two institutions. The Security Council, through this agreement, now has direct access to a permanent international court with clearly defined rules of criminal law, and it need not rely on the strenuous creation of *ad hoc* tribunals as it had done in the past.

The picture of ICL that I have drawn here is not complete or comprehensive. It is a rough account of how the system grew to where it is at present. It is important to remember that, as a young branch of international law, ICL is still growing and developing. Where it stands now *will* change in the future as the system expands and solidifies. The question at present is: can we see the essential features required for a positivist to accept this system as a genuine legal system? Or are we, as Hart himself suggested, faced with something that is a mere set of rules, with no rule of recognition to validate them as a legal system?<sup>174</sup> I turn now to this question.

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<sup>170</sup> Rome Statute of the International Criminal Court, Articles 12-15

<sup>171</sup> Schabas, *An Introduction to the International Criminal Court*, 19; \* The ICC does not have jurisdiction to prosecute any crimes occurring before it officially came into force in 2002.

<sup>172</sup> Negotiated Relationship Agreement between the International Criminal Court and the United Nations. (10 April, 2004). [Online], Article 2

<sup>173</sup> Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Article 17, Article 7

<sup>174</sup> Hart, *The Concept of Law*, 236

## 2.2 Primary Rules and the Rule of Recognition in ICL

As I now develop a positivist account of ICL, it will be helpful to recall the crucial features of a legal system for the positivist: (1) a complex of primary and secondary rules, (2) general obedience, and (3) legal officials must adopt an internal (moral) point of view to the law, accepting the secondary reasons. I will not be concerned here with the criterion of general obedience – most people, most of the time, do not violate the primary rules of international criminal law. That is not an ambitious claim. What I *will* be concerned with is the secondary rule which validates the primary rules – the rule of recognition. This rule must, of course, be accepted by the legal officials. It is the rule of recognition which serves to validate the primary rules of any legal system, and this makes it the only *necessary* secondary rule for a genuine complex of secondary and primary rules in a legal system. Some rule of recognition, some fulfillment of what Neil MacCormick calls the ‘validity thesis’, is of utmost importance for a positivist legal system – and also for the systems of natural law which agree that law is necessarily positive, whatever other conditions there may also be.<sup>175</sup> Indeed, Hart states:

A basic rule of recognition could then be formulated which would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states. Perhaps international law is at present in a stage of transition towards acceptance of this and other forms which would bring it nearer in structure to a municipal system. If, and when, this transition is completed the formal analogies, which at present seem thin and even delusive, would acquire substance, and the sceptic’s last doubts about the legal ‘quality’ of international law may then be laid to rest.<sup>176</sup>

The method, then, is to find a rule of recognition through which the primary rules of international criminal law could be validated. Hart claimed that there was no such rule in international law, although on rather shaky grounds, as G.J.H. van Hoof points out when he says: ‘[o]n what grounds does Hart conclude that international law does not possess a rule of recognition? In fact no grounds are adduced and Hart’s view in this respect cannot really be called a conclusion; it is rather a presumption’.<sup>177</sup> My contention is that Hart was wrong, with respect to ICL at

<sup>175</sup> McCormick, *Legal Reasoning and Legal Theory*, 62

<sup>176</sup> Hart, *The Concept of Law*, 236-237

<sup>177</sup> van Hoof, G.J.H. (1983). *Rethinking the Sources of International Law*, Deventer: Kluwer Law and Taxation Publishers, 1983., 53

least, and that there is an identifiable rule of recognition.

The first thing to do, of course, is to identify the ‘legal officials’ in ICL. We must know who it is that takes an internal point of view to the law, and who accepts the rule of recognition. The legal officials in ICL are, quite simply, states.<sup>178\*</sup> The treaties drawn upon to explicate the primary rules of ICL are signed and ratified by states. It might also be conceded that certain non-state institutions are also legal bodies, for example the Security Council and the ICC. The legal officials, then, are roughly states and certain non-state bodies with explicit status as legal personalities. The next step is to identify candidates for a rule of recognition.

Hart suggests two possibilities, and subsequently rejects them. One is the idea that ‘states should behave as states customarily behave’.<sup>179</sup> If this were the rule of recognition, it looks like we would have to agree with the soft skeptic introduced at the start of the paper, and say that international law is simply states acting as they would anyway, and that any legal obligations are empty. A rule of recognition that simply reported the fact that states take some rules to be obligatory rules of conduct would not be a true rule of recognition at all, since it could not serve as an authoritative rule of identification for such rules.<sup>180</sup> The second possibility that Hart suggests is the principle of *pacta sunt servanda*, the principle that agreements, or treaties, must be kept.<sup>181</sup> Hart rejects this as a rule of recognition, but I think that it is the most significant part of a rule of recognition for ICL. Indeed, I take the *pacta sunt servanda*, coupled with another principle – *clausula rebus sic stantibus* (‘things thus standing’) – to be two components comprising a good candidate for a rule of recognition in ICL. I will now discuss these principles further, before arguing that we can use them as authoritative criteria for identifying the primary rules of ICL.

The *pacta sunt servanda* is an old principle, and one which has no higher legal principle governing it.<sup>182</sup> The principle is stipulated clearly in Article 26 of the 1969 Vienna Convention on the Law of Treaties, which claims: ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’.<sup>183</sup> While this definition was officially agreed in the treaty, the

<sup>178</sup> Arend, Anthony Clark (1999). *Legal Rules and International Society*, New York: Oxford University Press, 1999., 45-48; \* One might wonder here whether or not states can be agents, and therefore officials. It is far beyond the scope of this paper to answer that worry, so I must go along with the tradition in international law and assume that states can be agents in this sense.

<sup>179</sup> Hart, *The Concept of Law*, 234

<sup>180</sup> Hart, *The Concept of Law*, 236

<sup>181</sup> Hart, *The Concept of Law*, 236

<sup>182</sup> van Hoof, *Rethinking the Sources of International Law*, 75

<sup>183</sup> Vienna Convention on the Law of Treaties. (23 May, 1969). [Online], Article 26

principle itself had been in place long before as a basic norm, across all nations in all times of civilization, as argued by Hans Wehberg.<sup>184</sup> The principle itself has never been disputed, and objections to treaties or agreements never impugn the *pacta* itself, but rather focus on ‘the existence or exact content and interpretation of the rule or *pactum* concerned.’<sup>185</sup> The *pacta* is a fundamental norm of international law, depending on no higher norm, admitting of no exceptions, and identifying rules created through treaties to be binding.<sup>186\*</sup> If we are to use it as a rule of recognition, however, it seems prudent to qualify agreements to which it applies, through the *clausula rebus sic stantibus*.<sup>187\*</sup>

*Clausula rebus sic stantibus* allows not for exception to the rule of the *pacta*, but for release from valid agreements when there is a change in the fundamental circumstances upon which the agreement was based.<sup>188</sup> A treaty may be terminated, by the *clausula*, when an unforeseen change of fundamental circumstances occurs, where those circumstances both ‘. . . constituted an essential basis of the consent of the parties’ and ‘the effect of the change is radically to transform the extent of obligations still to be performed under the treaty’.<sup>189</sup> The *clausula* is thus a small, but important, qualification on the *pacta* which dictates the grounds on which a treaty may be terminated.<sup>190\*</sup> When the conditions of the *clausula* are not met, the *pacta* holds.

I will take these two principles to be the core of the rule of recognition for ICL. Combining the two, the rule of recognition (referred to as *pacta/clausula*) should look something like this: a rule *r* is a law at time *t* if and only if it adheres to the conditions of [(a) and (b)] at time *t*, where (a) and (b)

<sup>184</sup> Wehberg, Hans. (1959). ‘Pacta Sunt Servanda’, in *The American Journal of International Law* 53, 775-786, 1959., 775-786

<sup>185</sup> van Hoof, *Rethinking the Sources of International Law*, 76

<sup>186</sup> \* For some further discussion of this claim, see: van Hoof, *Rethinking the Sources of International Law*, 75-76; Kunz, Josef. (1945). ‘The Meaning and the Range of the Norm Pacta Sunt Servanda’, in *The American Journal of International Law* 39, 180-197, 1945., esp. 197; Arend, *Legal Rules and International Society*, 52-53; Wehberg, ‘Pacta Sunt Servanda’, 786

<sup>187</sup> \* It may be a concern, at this point, that I am not admitting *jus cogens* rules (peremptory norms) to this qualification. Rules of *jus cogens* are extremely contentious, their sources are not clear, and there is no general agreement as to what constitute rules of *jus cogens*. This is despite the fact the definition of *jus cogens* is: ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . .’ (Vienna Convention on the Law of Treaties, Article 53). Since no such norms are undisputedly agreed upon, except perhaps the *pacta sunt servanda* itself, it seems unlikely that there are any *jus cogens* rules by the definition given. The *pacta* could hardly be coherently cited as a way to qualify itself, and I leave discussion of *jus cogens* out of this on the grounds that there is no clear account of any rules constituting *jus cogens*.

<sup>188</sup> van Hoof, *Rethinking the Sources of International Law*, 129

<sup>189</sup> Vienna Convention on the Law of Treaties, Article 62; van Hoof, *Rethinking the Sources of International Law*, 129

<sup>190</sup> \* Suggestions of cases where it seems that the *clausula* might come into effect can be found in: Lowe, Vaughan. (2007). *International Law*, Oxford: Oxford University Press, 2007., 74-80. It might be asked whether a treaty could be invalidated through mutual consent of all parties. Such consent could either be argued to change the basis for the initial consent, and to change the nature of the obligations of the treaty, thus triggering the *clausula*.

are as follows:

- (a) Every agreement is binding on the involved parties, and the conditions of the agreement must be performed and respected by them in good faith, *unless* the necessary conditions for (b) are met. As such, if the necessary conditions for (b) are not met, then rules established through agreements are laws, binding on parties to the agreement.
- (b) A treaty does not hold if the following necessary conditions are met: (1) there has been an unforeseen change in fundamental circumstances, where these circumstances were an essential basis for the consent of the parties, *and* (2) the changes radically transform the nature and extent of the obligations established by the treaty.

This rule of recognition plays out by identifying the primary rules of ICL as those which are established through treaties that have not been terminated through the *clausula*. I take this *pacta/clausula* hybrid to be the rule of recognition in ICL, and I will now argue that this gives us sufficient reason to take ICL to be a valid legal system on the positivist criteria.<sup>191\*</sup>

### 2.3 ICL as a Positivist Legal System

The form of the argument goes like this: (1) the legal officials (states/non-state legal bodies) believe that they have *normative reasons* to accept the *pacta/clausula*; (2) the *pacta/clausula* is thus an *accepted* rule of recognition, providing authoritative criteria for identifying the primary rules (the rules of obligation) in ICL; (3) the relationship between the *pacta/clausula* and the primary rules of obligation thus constitutes a complex of primary and secondary rules, toward which the legal officials have an internal point of view (moral attitude); (4) the system of international criminal law possesses the necessary and sufficient features of a positivist legal system, and should be regarded as a proper legal system commanding *legal* obligation. This argument applied in practice goes as follows.

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<sup>191</sup> \* It might be objected that I have not adequately accounted for customary international law and/or *opinio juris*. I do not doubt that customary law and *opinio juris* are important concepts in international law, but I doubt the extent to which they prove to be genuine sources of international criminal law. I am sympathetic to van Hoof's argument that customary law and *opinio juris* are inadequate as genuine ways to identify laws in the international system, being too general and vague for the most part, although customary rules certainly can be argued to be rules and be taken to be binding (van Hoof, *Rethinking the Sources of International Law*, 113-116). The fact that they are taken as binding rules implies a mere set of rules, however, and not a legal system.

Customary law and *opinio juris* do play a major role in international law, but it would be difficult to relate them to any type of rule of recognition – if they are to be taken as a legal system for the positivist, a rule of recognition would need to be posited in order to validate them as a system. It may be far harder to determine a rule of recognition in international law broadly speaking than in ICL for this very reason. I think, however, that the rules of ICL are best identified through the treaties that give rise to them, which is why my focus is on the *pacta/clausula*. This should hopefully become clear as my argument progresses.

The proposed rule of recognition (*pacta/clausula*) determines that treaties are binding, and thus identifies the primary rules of international criminal law as those established through treaties. There seems to be a problem here at the outset, leading many, including Hart, to reject this candidate for a rule of recognition. The problem is that the *pacta/clausula* clearly only validates the rules of ICL with regard to the parties of a given treaty.<sup>192\*</sup> We might worry, then, that this rule of recognition reduces ICL to a patchwork of laws that are binding on some (parties to a treaty) but not on others (non-parties to that treaty), and does not accurately reflect the way that ICL is practiced or regarded. By this rule, only those within the jurisdiction of states obligated to uphold the law established in a particular treaty would be bound by the relevant criminal laws. It would seem that, by the *pacta/clausula*, the rules established by the 1948 Convention on Genocide, for example, would not apply to non-party states, and the perpetration of genocide would not be unlawful in these non-party states. Such a picture of ICL as a selective system of rules does not seem accurate, and led Hart to reject the *pacta* as a potential rule of recognition on the grounds that such a rule of recognition would only be apparent if multilateral treaties could bind non-party states as well, simulating a legislative enactment.<sup>193</sup> With what is perhaps an unfair advantage in perspective over Hart, writing nearly fifty years later, I will now argue that the laws of ICL are *not* limited only to the jurisdiction of parties to treaties as the *pacta/clausula* might at first suggest, but are binding on everyone – and it is still the *pacta/clausula* that validates them.

The United Nations Charter is a treaty, so by the *pacta/clausula* all UN member states are bound by the UN Charter and must adhere to its terms. There are 192 member states in the UN, with two non-member observers, constituting an overwhelming majority, if not the *de facto* entirety, of countries on the planet.<sup>194\*</sup> These member states are, as a result, bound by the *pacta/clausula* to recognise the authority of the Security Council as a legal body with global jurisdiction, as

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<sup>192</sup> \* Vaughan Lowe offers an interesting example of a case where the obligations of a treaty may have been extended to apply to non-party states in the 1949 *Reparations* case of the International Court. See Lowe, *International Law*, 82-83

<sup>193</sup> Hart, *The Concept of Law*, 236

<sup>194</sup> \* This information is readily available from the United Nations website ([www.un.org](http://www.un.org)). The non-member observers are the Holy See and Palestine, the latter of which is not a fully recognised independent state. There are only two independent countries in the world that are not members or observers of the United Nations – Kosovo and Taiwan. Kosovo was only officially established in 2008, and so has had virtually no opportunity at this time to join the UN. Kosovo's status as a country is also still contested by some. The status of Taiwan as a country is hotly contested as well. This means that the only two independent countries that are neither members nor observers of the UN are also not fully recognised by the international community as independent countries. In other words, every fully recognised state in the world, except for the Holy See, is a member of the UN – and the Holy See is an observer. It seems fair to claim on these grounds that UN membership is comprised of the *de facto* entirety of states on the planet.

granted through Chapter VII of the UN Charter. Furthermore, Chapter VII gives the Security Council the authority to act on a global scale in order to facilitate international peace and security, giving clear authority for it to act even on non-members – and binding members to uphold the resolutions of the Security Council. In obligating UN members to adhere to the UN Charter, the *pacta/clusula* thus directly validates resolutions by the Security Council as globally binding law. The argument does not stop here, but can be extended through the authority of these resolutions to apply to the proceedings of the ICTY and ICTR.

The ICTY and ICTR were directly established and authorised through resolutions from the Security Council. The crimes over which these *ad hoc* courts had jurisdiction were effectively defined as crimes by the Security Council through the Statute of the ICTY and Statute of the ICTR. The crimes over which the ICTY and ICTR had jurisdiction are thus crimes recognised by the authority of the Security Council – which, as I argued above, has *global jurisdiction* in its rulings by virtue of the UN Charter and the *pacta/clusula*. No matter who was party to the original treaties defining the laws (e.g. 1948 Convention on Genocide, 1949 Geneva Conventions, etc.) the consolidation and clarification of these laws through the ICTY and ICTR mark the validation of these rules as binding on *all* parties through the global authority of the Security Council. The primary rules of international criminal law identified in the Statutes of the ICTY and ICTR can be identified as law by the binding force of the UN Charter, and thus ultimately through the *pacta/clusula* which identifies the binding force of the Charter itself. In this way, the *pacta/clusula* is a rule of recognition, ultimately serving as the authoritative criteria by which we can identify the primary rules of ICL as consolidated and explicated in the proceedings of the ICTY and ICTR.

It might be objected that the ICTY and ICTR, as the courts with jurisdiction over the crimes established by law in this way, were limited both geographically and temporally. It might be argued from this that even if the laws are part of a legal system verified by the *pacta/clusula*, the system has no general court through which to apply the law. This is not the case. The legal obligations of states to uphold these laws in their own borders notwithstanding, the establishment of the International Criminal Court and the subsequent 2004 Relationship Agreement provide the Security Council with clear access to a permanent court in which violations of the law may be tried. While the ICC only has direct legal jurisdiction over parties which have ratified the 1998 Rome Statute, the Court's jurisdiction can be triggered if the

Security Council refers a situation to it. The Security Council, as I have argued, has global jurisdiction and can thus refer any situation to the ICC when the laws of international criminal law are alleged to have been broken. Furthermore, the rules established through the Rome Statute (regarding genocide, crimes against humanity, war crimes, and, provisionally, aggression) should be taken to be law through the same process of validation applied to the rules recognised in the ICTY and ICTR. The ICC is recognised as a legitimate legal personality by the Security Council, so the violation of laws over which it has jurisdiction would be grounds for a referral to the Court from the Security Council – even if the violator is not related in any way to a state party to the Rome Statute. The laws of the ICC are part of the legal system in the same way that the laws of the ICTY and ICTR are part of the legal system. They are ultimately validated through the rule of recognition.<sup>195\*</sup>

I have argued here that international criminal law is a genuine legal system, possessing the necessary and sufficient features of the positivist model. The essential criteria required for a positivist legal system are that there be an accepted rule of recognition to identify primary rules of obligation (a complex of primary and secondary rules), and that the legal officials adopt an internal point of view to the law. Of course, on the most plausible form of positivism, moral attitude positivism, this internal point of view is a moral attitude – the officials must think that they are justified in accepting and enforcing the law. I have argued that the *pacta/clausula* constitutes a rule of recognition, which the legal officials in ICL think that they have normative reason to accept, and that through the *pacta/clausula* the UN Charter and the international criminal laws that follow from it are validated. The primary rules of ICL are thus those consolidated and presented through the proceedings of the ICTY and the ICTR, as well as those adopted by the ICC. A positivist hard skeptic therefore cannot deny that the international criminal legal system truly is a legal system, commanding legal obligation. That said, there is some traditional resistance to the idea that ICL is a genuine legal system in positivist terms, which can be overcome when placed relative to the argument I have presented here.

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<sup>195</sup> \* It may perhaps be wondered at this point how treaties that are binding on the *states* through the rule of recognition can be binding on *individuals*, the subjects of ICL. States are bound through the *pacta* to recognise and respect the rules of ICL. This means that the law applies in the jurisdiction of all states, since they are bound to enforce it. Legal obligations from ICL are thus binding on every individual who is in the jurisdiction of states. This means that every individual is bound by the rules of ICL (I doubt that anyone is ever outside the jurisdiction of a state).

## 2.4 Resistance to Positivist ICL

I will consider five lines of argument that have been taken against a positivist classification of ICL as a legal system. These arguments have all been directed at international law generally, and perhaps they still hold for the broader field of international law. I will make no claim here as to whether they do or do not. What I will claim is that they do not hold for international criminal law. I stress that this does not necessarily make them ineffective as arguments against international law in a wider sense.

The first is simply Hart's assertion that the *pacta* could not be a rule of recognition in the international system, because treaties could not bind non-party members. I have argued that this assertion is false, and that a variation of the *pacta* (with the *clausula*) is the rule of recognition in the system of international criminal law. The second line of argument is related to this, and is raised by Anthony D'Amato against Hart. This line of argument roughly says that it is pointless to look for a rule of recognition in international law because international law is different from municipal law and need not have one.<sup>196</sup> Again, I think that my argument shows that it is not pointless to look for a rule of recognition in the international system. International law and municipal law are certainly different, I do not deny this. This is precisely part of the motivation for the hard skeptic's insistence that international law is not really law – it often does not resemble municipal law. Against the hard skeptic, and against this objection from D'Amato, I have argued that international criminal law does, in fact, possess the necessary criteria to count as a legal system in the same way as a municipal system – an identifiable rule of recognition, accepted by the legal officials.

I gather, from some of D'Amato's comments, that at least part of his objection is that Hart's account cannot succeed because it does not properly recognise the role that morality can play in law.<sup>197</sup> This is the third line of argument. D'Amato says: 'the rule of *pacta sunt servanda* cannot always be satisfactorily applied without reference to its moral purpose'.<sup>198</sup> Fernando Tesón similarly argues that the role of the *pacta* cannot be coherently described in international law unless we take it to be a moral norm.<sup>199</sup> Martin Totaro also cites some criticism of Hart's

<sup>196</sup> D'Amato, Anthony. (1965). 'The Neo-Positivist Concept of International Law', in *American Journal of International Law* 59, 321-324, 2003., 322-323

<sup>197</sup> D'Amato, 'The Neo-Positivist Concept of International Law', 323

<sup>198</sup> D'Amato, 'The Neo-Positivist Concept of International Law', 323

<sup>199</sup> Tesón, Fernando. (1998). *A Philosophy of International Law*, Boulder: Westview Press, 1998., 89-90

positivism applied in international law because of his emphasis on secondary rules, and his exclusion of moral rules.<sup>200</sup> It should be clear that the account I have developed here, based on moral attitude positivism rather than Hart's positivism, is apt to resist this line of argument. Moral attitude positivism requires that the legal officials believe that they are morally justified in accepting the law – including the rule of recognition. The *pacta* is therefore genuinely *believed* to be a moral norm in this sense by the legal officials. On the positivist account I have been applying here, the 'moral purpose' of the *pacta*, as D'Amato calls it, is implicit to the adoption of the rule itself. The arguments advanced against Hart on the grounds that his positivism does not account for morality have already been advanced, and the moral positivist account that I have endorsed here need not be troubled further by this line of argument.

The fourth type of argument is against a classical positivist account, like Austin's. This objection simply argues that there is no sovereign in international law to enforce the threat of the law. I mentioned this objection in my discussion of Austin. The simple reply is that I have not applied Austin's account here, because of the very weaknesses identified in his account by Hart. I have applied moral attitude positivism, which requires no sovereign or orders backed by threats. However, it is not quite that simple. To take this line of argument further, it might be objected that international law is not enforceable. In part 1.5 of this paper I suggested, in agreement with Raz, that one of the most important functions of the law is its ability to provide motivational reasons for agents who fail to be motivated by normative reasons. If international criminal law cannot enforce sanctions, then the worry here is that it cannot really provide the motivational reasons which are so important to its function. It might be an empty legal system, failing in its purpose. This is reminiscent of the claim of the soft skeptic, that the obligations of international law are empty.

The response to this argument is simply to deny that international criminal law is not enforceable. While the Security Council has no police force or standing army to enforce the law, the UN Member states are obligated under the UN Charter to provide such martial power whenever the Security Council requires.<sup>201</sup> Furthermore, the Security Council does have access to judicial courts, whether through the ICC or *ad hoc* tribunals created through resolutions. Not only are the laws enforceable, but it is important to remember that *they have been enforced*, and

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<sup>200</sup> Totaro, Martin. (2008). 'Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development', in *Virginia Journal of International Law* 48, 719-765, 2008., 724

<sup>201</sup> Charter of the United Nations, esp. Chapter VII, Article 43

repeatedly. The results of the Nuremberg trials notwithstanding, the last 16 years have seen the arrest of more than 200 individuals accused of violating international criminal law. To date, 161 people have been indicted by the ICTY and 120 cases have been decided, with continuing proceedings for 41 of the accused.<sup>202</sup> The ICTR saw the arrest of 79 people, 37 of whom are still detained by the court for criminal proceedings and 24 of whom have been convicted and are serving sentences.<sup>203</sup> The first case to be tried in the ICC, against Thomas Lubanga Dyilo from the Democratic Republic of the Congo, began in January of 2009, and two more cases are scheduled to begin in September of 2009.<sup>204</sup> There is ample evidence to show that international criminal law is enforceable, and is being enforced, so this fourth line of argument is simply predicated on an empirically false claim.

The final objection to a positivist account of international criminal law that I will address here is that of the natural law theorists. Natural law theorists may not be convinced that international criminal law commands legal obligation by the argument that I have presented. I will not rehash the arguments presented in the first part of the paper here. What I will say is that the argument should still be significant for some natural law theorists. Those, like Finnis, who hold that the law must necessarily be positive, even if this is not a sufficient condition for them, can take this argument to be an argument for the positivity of international criminal law. Of course, such natural law theorists will still want to evaluate the moral virtue of ICL before calling it 'law'. Given the relatively modest range of ICL (covering genocide, war crimes, crimes against humanity, etc.) I doubt that the natural law theorist would ultimately discount it as law for its moral content. The content of ICL does not seem to be particularly morally contentious, but I will leave that debate aside for now. My only response to the natural law theorist here is to say that, whatever other conditions may be taken to be necessary for law, I have argued that ICL is genuinely a positive legal system, and this is significant if the positivity of law is a necessary condition for natural law theorists.

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<sup>202</sup> Available from the ICTY website ([www.ICTY.org](http://www.ICTY.org))

<sup>203</sup> Available from the ICTR website ([www.ICTR.org](http://www.ICTR.org))

<sup>204</sup> Available from the ICC website (<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/>)

## Conclusion

I have argued in this paper that a positivist should not be skeptical of international criminal law as a legal system. I gave some background on the history of positivism and how it differs from natural law. I concluded this part by presenting the arguments for moral attitude positivism as the most plausible form of the theory, and as the one which I endorse as a strong theory of law. I then applied this form of positivism to an analysis of ICL, arguing that a variation of the *pacta/clausula* constitutes the rule of recognition in the system of international criminal law. By adopting moral attitude positivism over other forms of the theory, I was able to avoid the traditional objection that Hart's positivism cannot work because the *pacta sunt servanda* must be viewed as a moral principle, not merely a legal principle. The conclusion to this argument is that international criminal law is a valid legal system, and ought to be regarded as such; the hard skeptic should abandon the view that it is not authoritative law. A further consequence of my argument is that the soft skeptic is also wrong. The soft skeptic holds that states only sign treaties agreeing to act as they would anyway. The argument I have presented here demonstrates how past agreements have become binding even on non-party states through the resolutions of the Security Council, thus disrupting the soft skeptic's underlying assumption that treaties cannot come to bind non-party states.

Establishing ICL as a valid legal system is significant; law is fundamental to our social structure in that it provides motivational reasons for those who fail to be motivated by perceived normative reasons. Through expansive globalisation and the rapid development of technology, the 20th century saw the world become a true international society. As such, systems of international law have become as vital to the functioning of the world as municipal law ever was for the functioning of domestic society. Accepting that ICL is truly an authoritative system of law is to accept that there is a genuine international authority to protect the peace and security of our global society. The argument I have presented in this paper should encourage us to reject the hard skeptic's claims that there is no such authority, and accept international criminal law for what it is – a valid legal system.

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