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Causal Loops, Ontological Crises, and Customary International Law

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Abstract: For a norm of customary law to exist, a group of legal subjects must believe that it imposes an obligation to perform a specific action. Yet, until such a norm emerges, no obligation can arise. If the norm does not exist, it cannot impose any obligation, and so the subjects are not obligated. Without obligation, there can be no customary norm. This causal loop leads to an ontological crisis in international law: customary law should not exist, and yet it apparently does. This article examines two explanations for the origin of customary law. The first, the error thesis, argues that the initial belief in obligation is mistaken. The second, the biconditional thesis, suggests that customary law and legitimate expectations are co-constitutive, each depending on the other for existence. Drawing on research in social ontology, the biconditional thesis reinterprets the relationship between the collective recognition of legal subjects, the social world, and international norms.

Keywords: Customary Law, International Law, *Opinio Iuris*, *Diuturnitas*, Social Ontology

I. Introduction

At first glance, M.C. Escher's *Waterfall* presents a seemingly ordinary scene: a watermill powered by a continuous flow of water set against a quaint landscape. However, a closer examination reveals an impossible construction that defies the laws of physics and challenges the viewer's perception of cause and effect. Escher masterfully employs geometric manipulation and perspective distortion to create a causal loop where water

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falls into a mill and then flows into a pool; the force of the falling water powers the mill, which pushes water through an aqueduct all the way back to the top of the waterfall where the water falls again, *ad infinitum*. The key to this illusion lies in the use of the Penrose triangle. Integrating this impossible figure into the structure of the aqueducts and towers, Escher crafts a visual trick that makes the ascending waterway seem plausible within the two-dimensional plane of the lithograph.

Such causal loops are not exclusive to art, however. In the legal sphere, there is a well-known problem of customary law that follows a similar paradoxical structure. Customary law depends on two elements.[1] One, the repeated practice of certain acts (*diuturnitas*). Two, the belief that this practice is obligatory (*opinio iuris*). One element is contingent on the other; obligation without practice does not lead to custom, and practice without obligation leads to mere habit, not norms.[2] The causal loop is that for a new customary law to arise, subjects must believe they are legally obligated to act in a certain way. However, until that law exists, there is no legal obligation to perform the act, as the law that would impose it has yet to be created. In other words, for a customary norm to exist, a group of legal subjects must believe the norm imposes an obligation to perform a specific action. Yet, before the norm is established, no such obligation exists. Therefore, the norm is caught in a causal loop, never coming into existence. If the norm does not exist, it cannot impose any obligation on legal subjects to perform the action, and consequently they are not obligated to perform it.

In domestic law, particularly in civil law systems, this loop is often forgotten, as customary law has decreased in importance in recent decades. However, in international law, the opposite is true; customary law is a crucial source of international obligations.[3] International lawyers frequently rely on customary law as the most fundamental norms governing interactions between States have emerged from international customs. As such, the international norms of customary law are not of secondary importance. They are the cornerstones of the international legal order.[4] The prohibitions of genocide, torture, and slavery, for example, were all enshrined as

[1] The interplay between these two elements and the practical difficulties they bring has been a source of enduring debate. See Karol Wolfke, *Custom in Present International Law* (2nd ed., 1993), at 40 – 44.

[2] In this article, the term 'norm' is used as a broad category that includes (legal and non-legal) rules and principles.

[3] For an overview of the relevance of customary law in international law, see Tullio Treves, 'Customary International Law', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedias of International Law* (November 2006).

[4] See, generally, Hans Kelsen, *Principles of International Law* (1952). See also François Rigaux, 'Hans Kelsen on International Law', 9(2) *European Journal of International Law* (*EJIL*) (1998) 325.

customary norms years before they were transcribed into treaties.[5] Also, many norms of customary law are elevated to the status of *ius cogens*, meaning that they are binding on all States, regardless of whether they signed a specific treaty.[6] Similarly, customary law plays a crucial role when treaties exist but are not universally ratified. The United Nations Convention on the Law of the Sea (UNCLOS)[7] is an illustrative example. While the United States (US) has not ratified this convention, since many of UNCLOS' core standards are customary law, the US is still bound to them.[8] Consequently, the US is obligated to respect the peaceful purposes reservation of the oceans, prohibiting it from conducting military exercises or manoeuvres in other States' Exclusive Economic Zones (EEZs).[9] Finally, customary law serves a critical role in gap-filling in international law,[10] which is particularly relevant in scenarios involving previously unexplored topics and new technologies. While there are no specific treaties governing the use of autonomous weapons systems, for example, well-established customary law on armed conflicts can still provide a general framework for regulating these new challenges.[11]

Understanding the paradoxical nature of customary law is crucial for both the practice and theory of international law. As customary law serves as one of the foundations of international law,[12] questions about the origin of customary law are intertwined with the essence of international law itself.[13] Similar to the decentralised law-making process of international law, where sovereign States are both subjects and legislators, customary law emerges organically from the ground up. This bottom-up approach is further complicated by the informal and implicit nature of the way

[5] Maurice H. Mendelson, 'The Formation of Customary International Law', 272 *Recueil des Cours de l'Académie de Droit International de La Haye* (1999) 155.

[6] Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?', 18(5) *EJIL* (2007) 853.

[7] United Nations Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3.

[8] Martin Lee, 'The Interrelation between the Law of the Sea Convention and Customary International Law', 7(2) *San Diego International Law Journal* (2006) 405.

[9] Henrique Marcos and Eduardo Cavalcanti de Mello Filho, 'Peaceful Purposes Reservations in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone', 44(2) *University of Pennsylvania Journal of International Law* (2023) 417.

[10] Panos Merkouris, 'Interpreting the Customary Rules on Interpretation', 19(1) *International Community Law Review* (2017) 126.

[11] Natalia Jevglevskaja, 'Weapons Review Obligation under Customary International Law', 94 *International Law Studies* (2018) 186.

[12] Eyal Benvenisti, 'The Conception of International Law as a Legal System', 50 *German Yearbook of International Law* (2008) 393.

[13] John Tasioulas, 'Customary International Law and the Quest for Global Justice', in Amanda Perreau-Saussine and James B. Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (2007) 307.

customary law is created.[14] Unlike treaties, there are no formal gatherings or conferences to establish new customary norms; the creation of customary norms is inherently informal.[15] While international officials may recognise existing customs at formal meetings, this recognition is merely a description or a confirmation, not the source of customary law. Thus, different from formal legislation with a clear signing date, ratification, and entry into force, customs seem to appear out of nowhere. They show up without a specific starting point, leaving subjects unsure of exactly how long a particular custom has been around.[16]An interesting example of the complex process by which customary law is recognised is the acceptance of the priority of international humanitarian law (IHL) over human rights law (HRL) as international custom. As Milanovic notes, the mainstream acceptance of this relationship between the two branches of law largely arose after the International Court of Justice's (ICJ) *Nuclear Weapons* advisory opinion.[17] Prior to this decision, there was no strong evidence to suggest that the priority of IHL over HRL was entrenched in long-standing custom. In the *Nuclear Weapons*, only the United Kingdom (UK) argued that IHL should prevail over HRL, citing IHL's specificity in regulating armed conflicts. However, this assertion lacked significant historical or scholarly support.[18] Despite this, the ICJ adopted the UK's framing, and the idea subsequently gained prominence in legal scholarship and practice.[19]

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[14] Mot and Parisi call this 'direct legislation through action'. See Jef De Mot and Francesco Parisi, 'Customary Law', in Michael T. Gibbons (ed.), *The Encyclopedia of Political Thought*, vol. 1 (2014) 792.

[15] Wolfke, *supra* note 1, at 52 – 60.

[16] Jean d'Aspremont, *The Discourse on Customary International Law* (2021), at 1.

[17] In Milanovic's words: '*lex specialis* was mainstreamed after the ICJ's Nuclear Weapons opinion, but this was largely because of the opinion itself. The timing of that mainstreaming should not be forgotten. It is simply factually incorrect to say that *lex specialis* was always "there" somewhere in the ether, that it represents the "traditional" position that its alternatives have the burden of disproving, or that it is entrenched in long-standing custom.' See Marko Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', in Jens D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (2016) 78. See also International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, 226.

[18] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom, 16 June 1995, available at https://www.icj-cij.org/sites/default/files/case-related/95/8802.pdf, at para. 3.108.

[19] For critiques of this depiction, see Silvia Borelli, 'The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship Between International Human Rights Law and the Laws of Armed Conflict', in Laura Pineschi (ed.), *General Principles of Law – The Role of the Judiciary* (2015) 265; Yuval Shany, 'Co-Application and Harmonization of IHL and IHRL: Are Rumours about the Death of Lex Specialis Premature?', in Robert Kolb, Gloria Gaggioli, and Pavle Kilibarda (eds.), *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives* (2022) 9.

With varying levels of success, previous scholars have examined the philosophical problems pertaining to customary law.[20] Gény,[21] Kelsen,[22] and Verdross[23] are some notable examples. In recent scholarship, Lefkowitz's work stands out as a meaningful contribution.[24] Drawing from Hart's theoretical framework, Lefkowitz explained how a new customary norm is integrated within the international legal system. He separates the creation of a new customary norm from the incorporation of that norm into international law, thus illuminating how emerging customary norms are valid under the rule of recognition. However, Lefkowitz's publication does not focus on the socio-ontological question of how customary norms are created; it is concerned with their validity. Here, it is important to distinguish between two closely related facets of the ontological question in relation to customary norms: their validity-membership and their validity-existence.[25] Many scholars frame their work as addressing the ontological nature of customary norms.[26] However, upon closer examination, it becomes evident that their focus is primarily on the validity-membership of norms – how customary norms are incorporated and accepted as norms of the international legal system. This focus is distinct from the ontological question of validity-existence – how customary norms exist in the first place, independently of their recognition as norms of international law. While both facets of the ontological question are relevant, this article focuses on validity-existence.

[20] For an overview of the problems pertaining to their investigations, see László Blutman, 'Conceptual Confusion and Methodological Deficiencies: Some Ways That Theories on Customary International Law Fail', 25(2) *EJIL* (2014) 529.

[21] François Gény, Raimundo Saleilles, and José Luis M. Pérez, *Método de Interpretación y Fuentes en Derecho Privado Positivo* (2000), at 285 – 286.

[22] Hans Kelsen, *General Theory of Law and State* (1949), at 114; Kelsen, *Principles of International Law*, *supra* note 4, at 307.

[23] Alfred Verdross, 'Das Völkerrechtliche Gewohnheitsrecht', 7 *Japanese Annual of International Law* (1963) 1; Alfred Verdross, *Völkerrecht* (1963), at 84 et seq.

[24] David Lefkowitz, '(Dis)Solving the Chronological Paradox in Customary International Law: A Hartian Approach', 21(1) *Canadian Journal of Law & Jurisprudence* (2008) 129.

[25] Guastini differentiates between validity-membership and -existence, criticising Kelsen for not adequately distinguishing between these concepts. Guastini argues that conflating existence with mere membership leads to the conclusion that all norms within a legal system are valid by default, rendering the concept of validity meaningless. Guastini emphasises that validity as a whole involves more than just being part of a legal system; a norm must also be authorised by a superior legal norm. See Riccardo Guastini, 'Kelsen on Validity (Once More)', 29(3) *Ratio Juris* (2016) 402.

[26] For example, Lefkowitz speaks of the 'ontological function' of making customary norms legal. See Lefkowitz, *supra* note 24, at 136 and 146. For another explanation of the paradox with a focus on the validity of new customary norms of international law, see Henrique Marcos, 'Addressing the Chronological Paradox of CIL: From Good Faith to Opinio Juris, and Opinio Juris to New Customary Rules', in Marina Fortuna et al. (eds.), *Customary International Law and Its Interpretation by International Courts: Theories, Methods and Interactions*, vol. 3 (2024) 24.

Unfortunately, neither facet of the ontological question is thoroughly addressed by official sources.[27] For example, in its 2018 report on customary international law, the International Law Commission (ILC) did not tackle the ontological question. Instead, it merely restated the two elements constituting customary law without clarifying their interaction.[28] This omission is problematic and risks an ontological crisis in customary international law.[29] Failing to address the question of validity-membership leaves open the unsettling possibility that norms widely regarded as customary may lack normative force or may not be norms of international law at all. Moreover, focusing solely on validity-membership without engaging with validity-existence may lead to an even more significant problem: accepting the normativity of international legal norms while being unable to explain how these norms even exist. This scenario is critical, as legal subjects would be governed by norms whose existence cannot be adequately accounted for – a theoretical gap that undermines the coherence of international law.[30] Few authors have adequately addressed the existence facet of the ontological question, with the creation of new customary norms often being assumed but never explicitly established, to the point where d'Aspremont has raised the hypothesis that new customary norms are created 'out of time and out of space.'[31]

The present article seeks an account more grounded in social reality. It presents two possible answers to the existence question. The first answer is that legal subjects are mistaken (or pretend to be mistaken) in their beliefs about the obligation imposed by some norm of customary law. There is no obligation at all, but due to their continued mistake, custom surfaces, and from that custom, a legal norm is born, which would now impose a legal obligation. So, in reality, the whole edifice of customary law is built on top of an error. This article refers to this answer as the 'error thesis.' The second answer rejects the notion that customary law is based on a mistake. Instead, it argues that the origin of customary norms depends on legitimate expectations – which itself is a customary norm. This creates a recursive, co-con-

[27] As Kunz surmises, 'there is here, certainly, a challenging theoretical problem which, as far as this writer can see, has not yet found a satisfactory solution.' See Josef L. Kunz, 'The Nature of Customary International Law', 47(4) *American Journal of International Law* (1953) 662, at 667.

[28] International Law Commission (ILC), 'Draft Conclusions on the Identification of Customary International Law, with Commentaries', UN Doc. A/73/10 (2018), at 122 et seq.

[29] On international law and crises, see Hilary Charlesworth, 'International Law: A Discipline of Crisis', 65(3) *The Modern Law Review* (2002) 377. See also Jörg Kammerhofer, 'Between Pragmatism and Disenchantment: The Theory of Customary International Law after the ILC Project', in Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi (eds.), *The Theory, Practice, and Interpretation of Customary International Law* (2022) 3.

[30] Merkouris, *supra* note 10, at 126.

[31] Jean d'Aspremont, 'The Custom-Making Moment in Customary International Law', in Merkouris, Kammerhofer, and Arajärvi (eds.), *supra* note 29, 29.

stitutive relationship between customary law and legitimate expectations; thus, this article refers to this second answer as the 'biconditional thesis.'

Drawing insights from social ontology, the biconditional thesis reinterprets the relationship among collective practices, the social world, and legal norms. It builds upon the concept of collective recognition – the human ability to acknowledge certain states of affairs as existing, thereby granting them standing in (social and legal) reality.[32] Through collective recognition, individuals jointly create, maintain, or change elements of the (social and legal) world, such as norms, institutions, or obligations. This approach clarifies the co-constitutive relationship between legitimate expectations and customary law by means of the social processes that underpin their mutual dependence. This article uses the method of rational reconstruction to develop the biconditional thesis.[33] This method aims to analyse human practices by making their implicit inner workings explicit. Rather than providing a purely descriptive account of how the formation of customary law is typically understood, this approach translates the tacit and often unarticulated elements of these processes into an explicit and coherent framework, revealing the deeper structures that inform the creation of customary norms. Through this rational reconstruction, the biconditional thesis provides a logical explanation of the recursive interplay between legitimate expectations and the norms of customary international law.

This article proceeds as follows. Section II. focuses on explaining the pieces of the causal loop as understood by international lawyers. Section III. develops the first explanation, the error thesis. Section IV. provides the second explanation, the biconditional thesis. It argues that the origin of new customary norms depends on legitimate expectations as derived from good faith (IV. A.). However, legitimate expectation also has a customary origin. To explain the relationship between legitimate expectations and customary law, this section examines the role of constitutive rules (IV. B.). It concludes by grounding the origin of customary norms in collective recognition (IV. C.). Section V. presents some final remarks.

[32] For an introduction to collective recognition (also referred to as 'collective acceptance'), see John R. Searle, *Making the Social World: The Structure of Human Civilization* (2010).

[33] On rational reconstruction, see Gregg A. Davia, 'Thoughts on a Possible Rational Reconstruction of the Method of "Rational Reconstruction"', 37 *The Paideia Archive: Twentieth World Congress of Philosophy* (1998) 44.

II. Piecing the Causal Loop of Customary (International) Law

The ICJ Statute, in Article 38(1)(b), lays out the two elements of how customary international law norms are created.[34] The first element is *diuturnitas* or general practice. It refers to the repeated performance of specific acts by States over time. Traditionally, scholarship has focused solely on State practice for this element. However, there are ongoing discussions about the potential contribution of non-State actors to forming customary law. For instance, the ILC acknowledges that international organisations can also play a role in shaping and forming the norms of customary international law.[35] Nevertheless, whether the behaviour of non-State actors ultimately qualifies as practice in the strictest sense is beyond the scope of this article. While it is a noteworthy debate, it does not directly impact the core explanation of how customary norms are created. Therefore, this article will primarily focus on State practice for clarity while keeping in mind that the concept could potentially be broadened to encompass non-State actors.

The second element is *opinio iuris*, which is the belief in something as law. *Opinio iuris* refers to the widespread belief among States that their repeated practice is not just a habit but actually carries a legal obligation. In other words, the practice goes beyond simply repeating an action; States must believe they are legally bound to act that way.[36] It implies a creed that this repeated pattern carries legal weight, transforming it from mere routine behaviour into a normative practice.[37] It is important to note, however, that *opinio iuris* is not synonymous with explicit consent.[38] While

[34] Statute of the International Court of Justice 1945, 33 UNTS 993. As Wolfke explains, while *diuturnitas* and *opinio iuris* are conceptually intertwined, their practical application often reveals tensions that challenge the coherence of customary international law. See Wolfke, *supra* note 1, at 38 – 41. Recent scholarship, notably by Kammerhofer, critiques these dual elements by emphasising the ambiguities in identifying consistent State practices and the subjective belief that these practices are legally binding. Despite acknowledging the significance of these critiques, this article adopts the mainstream view that affirms the necessity of both elements. See Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15(3) *EJIL* (2004) 523; Kammerhofer, *Between Pragmatism and Disenchantment*, *supra* note 29.

[35] ILC, *supra* note 28, Conclusion 4.1, at 130.

[36] Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (1976), at 49; H. L. A. Hart, *The Concept of Law* (3rd ed., 2012), at 3.

[37] Similar to Kammerhofer's critique of *diuturnitas* and *opinio iuris*, there is an ongoing debate about whether these two elements required to determine the existence of customary law are limited to social facts, or if it is necessary to also consider normative propositions, such as statements of what ought to be. However, this article can bypass this discussion as it does not focus on how the two elements of customary law are collected or should be collected. Instead, this article aims to determine how these two elements, once collected, contribute to establishing a new customary norm. On this debate, see Emmanuel Voyiakis, 'Customary International Law and the Place of Normative Considerations', 55(1) *The American Journal of Jurisprudence* (2010) 163.

[38] Wolfke, *supra* note 1, at 40 et seq.

States may consent to a customary norm, *opinio iuris* does not require such consent to be explicit. Demanding explicit consent would conflate customs with treaties.[39] In this sense, already in *Lotus*, the Permanent Court of International Justice (PCIJ) clarified that international law emanates not only from 'free will as expressed in conventions' but also from 'usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.'[40]

Two terms mentioned above deserve more clarification. The first term is 'belief,' which stands for the general attitude that we have when we take something to be the case or regard it as true.[41] For instance, Mary believes that today is Sunday insofar as Mary takes the statement 'today is Sunday' to be true. Beliefs, however, can be true or false, as we can hold right and wrong beliefs about things in the world.[42] Mary could believe that today is Sunday when, in fact, it is actually Monday. While some might find it problematic to attribute beliefs to States (and other non-human entities like international organisations), this should not be considered contentious. It can be seen as similar to how we can say that the car ran a stop sign when, in reality, it was the driver behind the wheel who did so. It is also akin to how a teacher can say that their class – a collective of individual students – is misbehaving.[43] Attributing beliefs to a State, as a collective of agents, allows us to simplify complex interpersonal dynamics and focus on the established patterns of State behaviour that ultimately shape international law.[44]

The second term that deserves clarification is 'obligation.' This article uses it as a basic deontic element that implies some normative requirement towards a particular behaviour. For example, when we say that Mary has an obligation to work on Mondays, it means there is a binding requirement for Mary to go to work on Mondays. In this respect, when we say that a subject is obligated to perform some

[39] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), at 410 et seq.

[40] Permanent Court of International Justice (PCIJ), *The Case of the S.S. 'Lotus'* (*France v. Turkey*), Judgment, 7 September 1927, Series A, No. 10, at 18.

[41] Nishi Shah and J. David Velleman, 'Doxastic Deliberation', 114(4) *The Philosophical Review* (2005) 497; Pascal Engel, 'The Doxastic Zoo', in Annalisa Coliva, Paolo Leonardi, and Sebastiano Moruzzi (eds.), *Eva Picardi on Language, Analysis and History* (2018) 297.

[42] This is related to beliefs having a 'word-to-world' direction of fit. See I. L. Humberstone, 'Direction of Fit', 101(401) *Mind* (1992) 59; Kim Frost, 'On the Very Idea of Direction of Fit', 123(4) *Philosophical Review* (2014) 429.

[43] In truth, the human brain does not possess a singular, overarching decision-maker. Therefore, when we attribute a belief to a collective of individuals, we are essentially extending this concept beyond attributing mental actions to individual humans rather than to specific regions of their brains. See Daniel C. Dennett, *Consciousness Explained* (1991), at 102 – 103.

[44] Antonio Cassese, *International Law* (2nd ed., 2005), at 4.

action, we are saying there is a normative force between that subject and that action in the sense that the subject ought to perform that action. It is also important to observe that obligations are not only legal in nature; there are also less formal, non-legal obligations, such as keeping a promise to a friend or arriving on time at a party. As a basic deontic element, obligations can be used to derive permissions and obligations.[45] If we are prohibited from arriving late, that means we are obligated not to arrive late. If we are permitted to arrive late due to special reasons, then we are not obligated not to arrive late. These transformations of permissions and prohibitions into obligations and vice versa are also applicable to the law. For example, customary law generally recognises a State's immunity from the jurisdiction of foreign courts.[46] This immunity can be read as a prohibition for foreign courts to exercise jurisdiction over a State, which translates to an obligation for foreign courts not to exercise jurisdiction over another State. There are, however, exceptions to State immunity, such as when States engage in commercial activity or when they waive their immunity.[47] These exceptions can be read as permissions to exercise jurisdiction, which translates to the absence of an obligation for the foreign court not to hear a case.[48]

Opinio iuris acts as a filter that separates mere habitual practices from those practices that can constitute customary law (*diuturnitas*).[49] As mentioned above, *opinio iuris* hinges on the fact that the relevant practice for customary law is not simply a set of consistent acts, but consistent acts performed on the basis of an obligation. On these terms, it is easy to see the causal loop at work: *opinio iuris* requires a pre-existing customary norm, but this customary norm cannot exist without *opinio iuris*. To illustrate, suppose there is a widespread practice between

[45] Sven Ove Hansson, 'The Varieties of Permission', in Dov M. Gabbay et al. (eds.), *Handbook of Deontic Logic and Normative Systems* (2013) 195; Chris Johns, 'Leibniz and the Square: A Deontic Logic for the *Vir Bonus*', 35(4) *History and Philosophy of Logic* (2014) 369.

[46] Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd ed., 2015), at 4.

[47] *Ibid.*, at 13.

[48] This article treats obligations as the fundamental deontic element from which permissions and prohibitions are derived. This approach aligns with traditional deontic logic, which holds that, in the absence of obligations, the default state is permissive. In other words, actions are generally permitted unless a specific obligation creates a prohibition against them. See Georg H. von Wright, *Norm and Action: A Logical Enquiry* (1963). This approach also aligns with the position articulated by the PCIJ in the *Lotus* case, where it was held that States are free to act unless expressly prohibited by international law. In the absence of such prohibitions, their actions are presumed permissible, reinforcing the principle that permissiveness is the default state in the international legal order. See PCIJ, *The Case of the S.S. 'Lotus'*, *supra* note 40.

[49] Unger, *supra* note 36, at 49; Hart, *supra* note 36, at 3.

States of not interfering with uncontacted tribes.[50] States from all around the globe engage in this practice due to the prevalent belief that the law prohibits them from (or obligates them not to) contact these tribes. Due to their practice (*diuturnitas*) and belief in this practice as required by law (*opinio iuris*), a new norm of customary law emerges, prohibiting all States from interfering with uncontacted tribes. The problem is that if States are only legally prohibited from contacting these tribes due to this emerging new norm, then why and how did States initially believe that they were prohibited from contacting these tribes in the first place?

The situation creates a causal loop with ontological complications, where the belief in a legal obligation appears to precede the emergence of the norm itself.[51] The loop can be distilled into two propositions with a circular dependency: (1) subjects are obligated to perform an action if there is a norm that obligates them to do so. (2) A customary norm exists if subjects are already obligated to perform an action and they consistently practise that action. The first proposition implies a causal relationship in which the norm creates the obligation. Meanwhile, the second proposition suggests that the obligation and the practice are necessary for the norm to exist, thus reversing the causality. For a new customary norm to emerge, subjects need to believe that it is already law, meaning there is a legal obligation compelling them to act in a certain way. Yet, until that new customary norm is created, the act itself is not legally binding – there is no obligation to act. The act in question is not required by a legal norm because the norm that would require it does not yet exist.

In the next sections, we will examine two potential explanations for this paradox. But before moving on, we should consider the need to keep referring to a 'belief of obligation' or simply an 'obligation.' When considering the belief of obligation, there are two potential outcomes: the belief can either be true or false. If the belief is false, then there is no obligation (as suggested by the error thesis, which we will discuss next). If the belief is true, however, there is an obligation, thus eliminating the need to continuously reference the belief of obligation; we can simply refer to the obligation itself.

III. The Error Thesis

The error thesis presents a simple explanation for the paradox. According to this thesis, there is no inherent legal obligation present at the outset. Subjects are mis-

[50] On uncontacted tribes' right to be 'left alone', see Libby Gerstner, 'The Right to Be Left Alone? Protecting "Uncontacted" Tribes of India and Brazil Comments', 28(1) *Tulane Journal of International and Comparative Law* (2019) 81.

[51] Wolfke, *supra* note 1, at 44 et seq.

taken (or strategically feigning mistake)[52] in their belief that customary international law imposes obligations upon them. Gény is a prominent proponent of this thesis. He argues that if the customary norm is not simply a confirmation of existing written law, then the belief in obligation is based on a mistake; this error is *conditio sine qua non* for the formation of customary law.[53] Summarising the error thesis, Kunz explains that 'the very coming into existence of [a customary] norm would presuppose that the States acted in legal error.'[54] In a similar way, Wolfke offers a compelling view of customary law as a dynamic process of mutual claims and responses among States.[55] He explains that States advance unilateral claims through their actions, while other States evaluate and ultimately accept or reject these claims, often through tacit tolerance or explicit protest. This iterative process suggests that even mistaken beliefs or initial uncertainties about legal obligation can contribute to the eventual emergence of customary norms.

The error thesis holds that States are wrong when they believe their actions are driven by legal obligation; their *opinio iuris*, as the belief in the legal character of their practice, is simply incorrect.[56] Nonetheless, when a large number of States repeatedly engage in the same action under the belief that this action is legally required, it fosters a sense of shared expectation. Over time, these expectations solidify into a genuine legal obligation embedded in a new norm of customary law. On these terms, the error thesis is based on two propositions: (1) if subjects believe – whether mistakenly or not – that they are obligated to perform a certain action and they practise it consistently, then a norm comes into existence. (2) Once that norm exists, subjects are genuinely obligated to perform the action. Initially, subjects hold a possibly false belief about their obligation. This belief, coupled with their consistent practice, leads to the creation of a new, real customary norm. Once the norm is established, they are truly obligated to perform the action regardless of the truth or falsehood of their initial belief. Applying this explanation to the uncontacted tribe example mentioned

[52] Tasioulas, *supra* note 13, at 321.

[53] Gény, *supra* note 21, at 285–286. See also Peter E. Benson, 'François Gény's Doctrine of Customary Law', 20 *Canadian Yearbook of International Law* (1983) 267; Thomas J. O'Toole, 'The Jurisprudence of Francois Gény', 3(4) *Villanova Law Review* (1958) 455.

[54] Kunz, *supra* note 27, at 667.

[55] Wolfke, *supra* note 1, at 55 et seq.

[56] Along similar lines, Kammerhofer raises concerns about the role of *opinio iuris* in customary law. He argues that its subjective nature introduces significant theoretical instability, as it depends on beliefs about legal obligation that are frequently unsubstantiated or inconsistent. This indeterminacy, Kammerhofer suggests, undermines efforts to establish a coherent theoretical framework for understanding the formation of customary norms. Such critiques align with the error thesis, which posits that mistaken beliefs about legal obligation may contribute to the creation of customary norms. See Kammerhofer, *Uncertainty in the Formal Sources of International Law*, *supra* note 34 and Kammerhofer, *Between Pragmatism and Disenchantment*, *supra* note 29.

above, the initial widespread practice between States of not interfering with uncontacted tribes is based on a mistake. States are all engaging in this practice due to the prevalent but erroneous belief that the law prohibits them from contacting these tribes, while in truth, no such law exists. However, due to their continued practice, based on this false belief, a new norm of customary law emerges, and this norm indeed prohibits States from interfering with uncontacted tribes.

It is possible to raise at least two criticisms against the error thesis. First criticism: the error thesis is implausible from a sociological point of view. It is unlikely that States which can count on the support of a crowd of legal experts and diplomats would be consistently mistaken about their legal obligations. It is similarly doubtful that the multitude of observers and researchers of international law who are constantly commenting on all new developments in the field would collectively fail to point out that States are falsely believing that a particular action is legally obligatory. This first criticism also accounts for States that are feigning a mistaken belief. While some States might strategically adopt certain practices that imply a belief in a legal obligation, it is unlikely that none of their political and economic adversaries would notice this or fail to accuse them of such scheming behaviour.

However, the earlier discussion on the relationship between IHL and HRL could counter this first criticism. As previously noted, the assertion that IHL prevails over HRL in armed conflicts gained prominence after the ICJ's *Nuclear Weapons* advisory opinion.[57] Despite lacking evidentiary support, the UK framed the priority of IHL over HRL as if it were an established custom.[58] The ICJ adopted this perspective, and the idea became mainstream. Notably, the UK was the only State to mention that the precedence of IHL over HRL is determined by the specificity of the former over the latter.[59] It is possible that the UK made this claim to persuade other States that this priority was already firmly established as international custom. However, at the time, no such custom existed; it only became customary after the UK's assertion and its acceptance by the international community following the ICJ's advisory opinion. As Goldsmith and Posner also explain, customary law 'reflects patterns of international behaviour that result from States pursuing their national interests. These interests, along with the relative power of each State and other exogenous features of the international environment, determine which [customary norms] emerge in equilibrium.'[60] If this analysis is correct, and if this was indeed the UK's strategy

[57] ICJ, *Nuclear Weapons*, Advisory Opinion, *supra* note 17.

[58] ICJ, *Nuclear Weapons*, UK Comments, *supra* note 18, at para. 3.108.

[59] Milanovic, *supra* note 17.

[60] Eric A. Posner and Jack L. Goldsmith, 'Understanding the Resemblance between Modern and Traditional Customary International Law', 40(2) *Virginia Journal of International Law* (2000) 639, at 641.

during the *Nuclear Weapons* proceedings, this example provides strong evidence supporting the dynamics described by the error thesis.

Second criticism: the error thesis poses a significant risk to the legitimacy of international law.[61] If customary law, a cornerstone of the international legal system, rests on a foundation of widespread mistakes (whether genuine or deceptive), then the very norms derived from customary law are in a precarious position. This precariousness is particularly concerning as customary law is increasingly invoked against States in international legal practice. If the error thesis holds true, then the legitimacy of customary law to bind the behaviour of States is jeopardised. A legal system's legitimacy hinges, in part, on a modicum of rationality in its norms and obligations.[62] Therefore, if customary law is indeed built on widespread error, this creates a situation where the obligations created by customary norms are themselves illegitimate, as the basis on which it stands – the belief in such an obligation (*opinio iuris*) – is itself flawed.

This second criticism is relevant, but it is directed at the implications of the thesis, not its theoretical validity. The potential negative consequences for the legitimacy of international law cannot serve as a measure to determine whether the error thesis is correct or incorrect. That is, if the error thesis is analytically correct, its impact on legitimacy cannot be used to justify disregarding it (conversely, if the thesis is incorrect, its ability to enhance legitimacy would not render it analytically acceptable). Nonetheless, this article takes the view that it is possible to provide an alternative explanation that accounts for the creation of customary norms while safeguarding the rationality and legitimacy of international law. The remainder of this article develops and explores this alternative explanation.

IV. The Biconditional Thesis

The biconditional thesis incorporates the two original propositions: (1) subjects are obligated to perform an action if there is a norm that obligates them to do so, and (2) a customary norm exists if subjects are already obligated to perform an action and they consistently practise that action. These propositions are not logically contradictory; they can both be true simultaneously. More precisely, there is a term for statements that establish a two-way relationship between propositions: biconditionals.[63] Logical

[61] Kelsen, *General Theory of Law and State*, *supra* note 22, at 114.

[62] Fuller refers to this modicum of rationality as the 'inner morality of law.' See Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', 71(4) *Harvard Law Review* (1958) 630; Lon L. Fuller, *The Morality of Law* (rev. ed., 1965).

[63] On biconditionals, see Dave Barker-Plummer et al., *Language, Proof, and Logic* (2nd ed., 2011), at 183.

consistency between the two propositions might be straightforward. Yet further clarification is still needed on how customary norms can lead to the existence of subjects' obligation to act and, at the same time, how subjects' belief in such an obligation can also cause the existence of said customary norms.

In the following sections, this article will attempt to shed light on this problem. It begins by arguing that the origin of new customary norms is dependent on a norm protecting legitimate expectations (IV. A.). But this norm itself has a customary origin. To explain this recursive relationship between legitimate expectations and customary law, this article examines the role of constitutive rules in building the law (IV. B.). It concludes by grounding the origin of customary norms on collective recognition (IV. C.).

A. Legitimate Expectations

Suppose that a group of friends gets together on Thursday nights at each other's houses to play poker. Whoever hosts the game provides their guests with beverages and snacks. This casual habit can gradually transform into a social norm within the friend group if the friends feel a sense of obligation towards this tradition. Even though this feeling may not be explicitly discussed or acknowledged, if the participants in this practice believe that the host is expected to provide beverages and snacks, then it can be considered a customary norm within the group. It goes without saying that this obligation is merely social, and this norm is non-legal in nature. But the narrative of how this banal norm came into existence within this friend group follows the same structure as customary norms of international law. As already explained, new customary norms arise from two elements, the repeated practice of acts by individuals in a group (*diuturnitas*), and the collective belief that this practice is obligatory (*opinio iuris*).

The initial belief in obligation does not originate from the customary norm itself. Instead, it is derived from good faith, specifically from one of its corollaries, the protection of legitimate expectations. Here, good faith is not limited to its strict legal definition but also encompasses the broader concept of a social norm that aims to safeguard diverse values, including the expectations of others. In the example of the poker game, the sense of obligation does not initially arise from the social norm within the friend group that requires them to provide snacks and beverages when hosting poker night. Rather, it is rooted in a sense of social responsibility to acknowledge and reciprocate the benefits they have received. The host provides snacks and beverages to their guests because, when they were guests themselves, someone provided them with snacks and beverages. Furthermore, the current host provides their guests with snacks and beverages with the expectation that, in the future, when

they become guests, their host will reciprocate the gesture. This cycle of hosting and being hosted continues until the practice fades away.[64]

Good faith is a fundamental principle in contemporary legal systems and is considered a general principle of international law[65] under Article 38(1)(c) of the ICJ Statute.[66] Good faith has a wide scope and allows for deriving various international legal obligations. In *Nuclear Tests*, the ICJ affirmed that good faith governs the creation and performance of all legal obligations, regardless of their source.[67] One such offspring of good faith is the protection of legitimate expectations, which prohibits actors from acting inconsistently with the expectations they create for other parties.[68] Numerous international precedents support the protection of legitimate expectations. For example, in *Certain German Interests in Upper Silesia*, the PCIJ ruled that Germany was prohibited from frustrating expectations in violation of good faith.[69] The award by the Arbitral Tribunal in *Megalidis* linked the protection of legitimate expectations to a prohibition against frustrating the purpose of a treaty before it enters into force, recognising this prohibition as an expression of good faith.[70] Similar references to the protection of legitimate expectations can be found in the cases of *Preah Vihear*[71] and *North Sea Continental Shelf*.[72] On these terms,

[64] A comparable practice exists in nature. Vampire bats engage in reciprocal behaviour by initially grooming each other – a low-cost act that fosters trust. This lays the groundwork for more costly cooperation, like sharing meals, minimising the risk of exploitation through gradual escalation. See Gerald G. Carter et al., 'Development of New Food-Sharing Relationships in Vampire Bats', 30(7) *Current Biology* (2020) 1275.

[65] On the role of general principles in international law, see Jean d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law', in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds.), *Global Justice, Human Rights and the Modernization of International Law* (2018) 163; Henrique Marcos, 'From Fragmented Legal Order to Globalised Legal System: Towards a Framework of General Principles for the Consistency of International Law', 3(1) *Athena: Critical Inquiries in Law, Philosophy and Globalization* (2023) 90.

[66] On good faith as a general principle of law, see Robert Kolb, *Good Faith in International Law* (2017); Steven Reinhold, 'Good Faith in International Law', 2(1) *UCL Journal of Law and Jurisprudence* (2013).

[67] ICJ, *Nuclear Tests* (*Australia v. France*), Judgment, 20 December 1974, ICJ Reports 1974, 253, at para. 46.

[68] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), at 5.C; Reinhold, *supra* note 66, at 54.

[69] PCIJ, *Case Concerning Certain German Interests in Polish Upper Silesia* (*Germany v. Poland*), Merits, Judgment, 25 May 1925, Series A, No. 7.

[70] Turkish-Greek Mixed Arbitral Tribunal, *A.A. Megalidis v. Turkey*, Award, 26 July 1928, 4 Annual Digest of Public International Law Cases (1932) 395.

[71] ICJ, *Case Concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*), Merits, Judgment, 15 June 1962, ICJ Reports 1962, 6, Separate Opinion of Vice-President Alfaro, at 41 et seq.

there is a close relationship between good faith and the protection of legitimate expectations by means of a norm that obligates States to honour the legitimate expectations of other States.[73] This legitimate expectations norm prohibits States from acting contrary to these expectations by obligating them to act in accordance with them.

The legitimate expectations norm can be formulated as follows: if subjects create legitimate expectations that they will perform a specific action, then they have an obligation to perform that action. This norm helps unravel the causal loop as it provides a clear foundation for the obligation that prompts States to develop their *opinio iuris*.[74] Returning to the example of uncontacted tribes, the initial prohibition against interference with such tribes – the obligation not to interfere – stems from the legitimate expectations that States have created regarding non-interference. Because States have fostered these legitimate expectations, they are bound by legitimate expectations to refrain from interfering with the tribes.

Some may dispute the notion that uncontacted tribes, who lack recognition as actors within international law, can generate legitimate expectations capable of imposing obligations on sovereign States. These legitimate expectations are not solely of the uncontacted tribe members, but of the other States in the international community. While these tribes may not be formal participants on the international stage, the mutual expectations among States that they will not contact these tribes create an obligation on States themselves to refrain from interfering with these tribes. This is similar to how a group of friends can establish an understanding that they will all chip in for a generous tip when dining out. The waiter, who may vary with each outing, is not a party to these expectations. The expectations are formed within the group of friends, even if none of them directly benefit from the tips. If a friend refuses to contribute to the tip, they will be violating the expectations of the friend group, regardless of how it will negatively impact

[72] ICJ, *North Sea Continental Shelf* (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*), Judgment, 20 February 1969, ICJ Reports 1969, 3, Separate Opinion of Judge Fouad Ammoun, at paras. 39 et seq.

[73] While good faith may not, by itself, serve as the source of substantive obligations in international law, it plays a critical role in shaping and determining such obligations through its influence on other norms. In this context, the obligation arises from the norm of legitimate expectations, which is shaped by and draws upon good faith. Thus, while good faith informs and supports this obligation, it is not, strictly speaking, its independent source. See Reinhold, *supra* note 66, at 41.

[74] In criticising the error thesis, Kelsen points out that the initial obligation does not necessarily have to be based on the customary norm itself. It can be imposed by a different norm. In his words: '[t]his doctrine is not correct. It implies that the individuals concerned must act in error: since the legal rule which is created by their conduct cannot yet determine this conduct, at least not as a legal rule. They may erroneously believe themselves to be bound by a rule of law, but this error is not necessary to constitute a law-creating custom. It is sufficient that the acting individuals consider themselves bound by any norm whatever.' See Kelsen, *General Theory of Law and State*, *supra* note 22, at 114.

the waiter. In a comparable way, as Guzman explains, customary norms in international law often arise not simply from altruistic intentions, but from States acting as rational agents with a vested interest in maintaining reciprocity, reputation, and credibility.[75] In the case of uncontacted tribes, States' mutual expectations are tied to broader considerations of reciprocal obligations and reputational integrity. By respecting international norms, States strengthen their reputations as reliable and cooperative members of the international community. Failure to uphold these norms risks reputational damage and the possibility of reciprocal actions from other States in unrelated areas. So, even in cases where the direct beneficiaries of norms are not States, the interplay of self-interest and reciprocity among States fosters the creation and maintenance of such obligations.

The legitimate expectations norm is itself a customary norm.[76] Same as any other customary norm, it originates from the two already explained elements: *diuturnitas* and *opinio iuris*. The obvious retort is that if legitimate expectations is a customary norm, then it does not solve the causal loop; it only reinstates the problem. This is true; the legitimate expectations norm does not by itself solve the paradox. Alongside it, the biconditional thesis also depends on the functioning of a constitutive rule that creates all customary norms.

B. Constitutive Rules

Norms are commonly seen as tools to regulate behaviour. Norms can obligate individuals to perform certain actions, such as paying taxes, and they can prohibit certain behaviours, like etiquette norms that forbid putting feet on a table. Alongside these regulatory norms, there is another category of norms referred to as 'constitutive rules.' Constitutive rules do not primarily aim to guide behaviour and, as such, cannot be complied with in the sense of doing what they prescribe one to do.[77] Instead, constitutive rules are norms that create things in the world. A common example used to illustrate constitutive rules is the rules of games like chess.[78] Chess is only possible because of the rules that govern it, making these rules constitutive of the game as they dictate the possible moves that can be made in chess. For instance,

[75] Andrew T. Guzman, 'Saving Customary International Law', 27 *Michigan Journal of International Law* (2005) 115; Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (2008).

[76] Whether it is an enforceable norm of international law is a different matter (see Section IV. C.).

[77] It is theoretically possible, as Kelsen suggests, to construe any norm as a behaviour-guiding norm. However, it still would not be the case that every norm's primary aim is to guide behaviour. See Kelsen, *General Theory of Law and State*, *supra* note 22, at 143 – 144; Hans Kelsen, *Pure Theory of Law* (1967), at 238 – 242.

[78] The game of chess has been used at least since Wittgenstein as a case of practices that come out of nothing other than a set of rules. Ludwig Wittgenstein, *Philosophical Investigations* (3rd ed., 1968), at paras. 31 and 108.

the rule that the rook can only move forward, backward, or sideways makes it that it is not possible for the rook to move in any other direction. In this respect, constitutive rules hold ontological priority over the things they deal with – these rules are necessary for the existence of what they govern.[79]

Constitutive rules also play an important role in the legal sphere. Think, for example, of the UNCLOS norm providing that the EEZ extends 200 nautical miles from the baseline.[80] Even though this EEZ norm has impacts on how States behave, influencing aspects like resource exploration within the EEZ, this norm is not primarily concerned with guiding State conduct. Instead, its core function lies in constituting the EEZ itself. This norm establishes the very existence of this legal space within international law by making it that the area of 200 nautical miles from the baseline counts as the EEZ.[81] Another example of a constitutive rule with critical relevance within international law is the rule that bestows on States the competence to conclude treaties.[82] This rule establishes that States, as the primary actors of international law, can enter into binding agreements with other States. The operation of this rule, alongside other specific norms governing treaty formation – such as the rule that determines which official agents are authorised to sign a treaty on behalf of a State, as well as rules defining the formal procedures for incorporating treaties within domestic regulation – defines the foundational practices of treaty-making in international law.[83]

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[79] It might be argued that chess rules also regulate behaviour by determining what is allowed and forbidden in the game. However, this argument falls short when we realise that regulatory norms can be violated, whereas constitutive rules cannot be violated in the same way. For instance, moving the rook diagonally does not count as a valid move in chess; it is simply impossible within the context of playing chess. See Jaap Hage, 'Two Concepts of Constitutive Rules', 4(1) *Argumenta* (2018) 21. One could think of playing chess with a distinct set of rules that allow the rook to move diagonally. Then, it would be possible for the rook to move in that way. But, as Hart asks, if one begins to change the rules of chess, how long will it still be chess? See Hart, *supra* note 36, at 4.

[80] Art. 57 UNCLOS.

[81] Searle calls this kind of constitutive rule 'count-as rules.' See Searle, *Making the Social World*, *supra* note 32, at 97.

[82] Dionisio Anzilotti referred to similar foundational norms as '*regole costitutive*', emphasising their role in establishing the essential capacities and structures within international law. According to Anzilotti, these rules are not merely regulatory but are instrumental in creating the legal relationships and competencies that make international law possible. For instance, he explained that the capacity of States to enter into treaties is grounded in such *regole costitutive*, which constitute the very normative framework among Dtates. Anzilotti considered that these *regole costitutive* were logically presupposed to other rules of international law and thus were, in a sense, outside of international law itself. This article will return to this discussion of rules outside of international law and different levels of hierarchy in Section IV.C. See Dionisio Anzilotti, *Corso di Diritto Internazionale*, vol. III (1923), at 64.

[83] Rawls uses the expression 'practice concept' to refer to these 'practice-defining rules.' See John Rawls, 'Two Concepts of Rules', 64(1) *The Philosophical Review* (1955) 3.

There is a special type of constitutive rule that creates new norms.[84] These are second-order constitutive rules, as they are norms (rules) about norms. One such example is the rule mentioned earlier, which grants States the power to conclude treaties. This rule enables States to introduce new norms into the international legal system by entering into treaties. Therefore, new treaty norms are, in a sense, brought about by this treaty-making rule. Another example is the constitutional rule that when a competent legislature passes a new law, it leads to the creation of new norms within that constitutional order. This domestic rule, just like the treaty-making rule in international law, operates as a second-order constitutive rule by establishing the process for generating new legal norms. This type of constitutive rule aligns with Hart's concept of secondary rules, specifically the rules of change, which empower certain actors to introduce, modify, or repeal primary norms, thereby enabling the creation of new law.[85]

For what interests us, there is a second-order constitutive rule at the origin of all customary law norms. This customary constitutive rule can be formulated as follows: if subjects create legitimate expectations that they will perform a specific action, and those subjects have an obligation to perform that action, then there exists a norm obligating them to perform that action. Together with the legitimate expectations norm, the customary constitutive rule helps explain how new customary norms come into being. Revisiting once more the uncontacted tribe example, the initial obligation not to interfere stems from the legitimate expectations that States have created regarding non-interference with such tribes. Due to these legitimate expectations, States are obligated not to interfere with the tribes. Assuming that States comply with the legitimate expectations norm, thus engaging in a practice of not interfering with uncontacted tribes, that practice instantiates the customary constitutive rule, resulting in a new customary law norm that obligates all States not to interfere with uncontacted tribes.

Note that the legitimate expectations norm and the customary constitutive rule have distinct scopes of application. On the one hand, the legitimate expectations norm specifically applies to States actively engaged in the practice of an act, thereby generating legitimate expectations that they will continue this practice. On the other hand, the customary constitutive rule establishes a customary norm that obligates all States to engage in the practice of that act, regardless of whether they are currently

[84] Hage refers to these new norms as 'rule-based rules.' See Jaap Hage, *Foundations and Building Blocks of Law* (2018), at 87.

[85] While the second-order constitutive rules discussed here align with Hart's rule of change, it is important to note that Hart also identifies two other types of secondary rules with different purposes: the rule of recognition and the rule of adjudication. The rule of recognition provides criteria for identifying valid legal norms within a system, and the rule of adjudication establishes procedures for resolving disputes and interpreting laws. See Hart, *supra* note 36, at 79 et seq.

involved in the practice or have created legitimate expectations to continue it. For example, if Australia, Brazil, Canada, and some other States refrain from interfering with uncontacted tribes, thereby creating a legitimate expectation that they will continue this practice, the legitimate expectations norm obligates this group to maintain non-interference. Therefore, the legitimate expectations norm serves as the basis for their *opinio iuris*. Assuming this group of States continues practising non-interference (*diuturnitas*), the customary constitutive rule is instantiated, creating a customary norm that obligates all States – not just those in the initial group – to refrain from interfering with uncontacted tribes.[86]

Like many other constitutive rules, the customary constitutive rule works in the background. Most constitutive rules function behind the scenes without requiring explicit effort from their subjects. For example, when playing chess, players do not need to assert that they are using a specific rule before moving their pieces. Similarly, when lawyers discuss international treaties, they seldom refer to the underlying rule that empowers States to conclude treaties. Just like these rules, the customary constitutive rule does not require explicit efforts or even a full understanding of its existence. It is sufficient that there are some implicit notions of how new customary norms are formed. As Brandom explains, norms are not necessarily consciously endorsed or explicitly formulated by individuals; they are sedimented in the inferential entitlements constitutive of social practices.[87] In this manner, it is enough that individuals can recognise what counts as conforming to and deviating from the norms underlying such practices, even if they cannot explicitly articulate the rules that determine conformity and deviance.[88]

As mentioned above, the legitimate expectations norm is itself a customary norm. In this respect, it is interesting to see how the legitimate expectations norm can recursively apply to itself, which instantiates the customary constitutive rule to also apply, thus creating the legitimate expectations norm. If States create legitimate expectations that States will act on legitimate expectations, then States are obligated to act on legitimate expectations. If States engage in the practice of acting on le-

[86] However, if a State objects to the creation of a new customary norm, then that norm does not apply to that State as long as it maintains its objection. The exception to persistent objectors occurs when the new customary law norm is a *ius cogens* norm, which applies to persistent objectors as well. See ILC, *supra* note 28, at 152.

[87] Robert Brandom, *Making It Explicit: Reasoning, Representing, and Discursive Commitment* (1994).

[88] Drawing from Habermas' work, Pedersen explains that there is 'an obvious difference between an actor's (implicit) ability to perform certain actions and his explicit knowledge of why he is able to perform the same action. A competent language user may be able to express meaningful sentences and develop consistent arguments without knowing the rules he or she necessarily follows when performing these (speech) acts.' See Jørgen Pedersen, 'Habermas' Method: Rational Reconstruction', 38(4) *Philosophy of the Social Sciences* (2008) 457, at 462.

gitimate expectations, and States are obligated to act on legitimate expectations, then there exists a (customary) norm obligating States to act on legitimate expectations. This new norm is nothing other than the legitimate expectations norm. In a comparable way, the legitimate expectations norm also helps define the customary practice of recognising customary norms embedded in the customary constitutive rule. If States create legitimate expectations that States will recognise customary norms, then States are obligated to recognise customary norms. If States recognise customary norms, and States are under the obligation to recognise customary norms, then there exists a (customary) norm obligating States to recognise customary norms.

C. Out of the Loop

As already explained, the causal loop of customary law was that for a customary norm to exist, a group of legal subjects must believe that the norm imposes on them an obligation to engage in the practice of an act. But until the norm is created, there is no obligation imposed on them to engage in the act. Therefore, the norm can never come into existence. If the norm does not exist, it cannot impose any obligation on the subjects to engage in the act, and so, ultimately, the subjects were never obligated to engage in the act. By introducing the legitimate expectations norm and the customary constitutive rule, this article explained that there are, in fact, two obligations. The initial obligation to engage in the act is not imposed by the newly formed customary norm but arises from a background norm that imposes an obligation to act on legitimate expectations (the legitimate expectations norm). The operation of the legitimate expectations norm explains how States develop a belief in obligation (*opinio iuris*) even before a customary norm is created. The first obligation (imposed by the legitimate expectations norm) and the continued practice (*diuturnitas*) instantiate a second background norm, the customary constitutive rule, to finally constitute the new customary norm, which then imposes the second, general obligation to engage in the act. This explanation would be sufficient if it were not for the fact that both the legitimate expectations norm and the customary constitutive rule are also customary norms.

How can the legitimate expectations norm and the customary constitutive rule co-constitute themselves? This question arises from the expectation of a clear unilateral relationship between cause and effect, creator and creation, constitutive and constituted norm. When faced with the intertwined relationship between those two norms, it is natural to assume that something is wrong, as it challenges the idea of

a neat, hierarchical world. Such tangled hierarchies[89] occur when something within the system starts to act on the system as if it were outside of it, which seems to be impossible as it implies a paradox. But the truth is that beyond these tangled hierarchies, there exists a more basic, untangled level that serves as a foundation for this seemingly paradoxical structure. This basic level acts as a bedrock that grounds the tangled hierarchy, allowing it to function without collapsing the entire system.

In the relationship between customary norms, the legitimate expectations norm, and the customary constitutive rule, the basic level grounding the whole edifice is the collective recognition of the actors engaged in the practice of international law. This article has defined a belief as the general attitude that we have when we take something to be the case. In this respect, beliefs can be true or false depending on whether they correspond to reality. For instance, Mary's belief that today is Sunday is true if today is Sunday, but false in the case it is any other day of the week. Alongside beliefs, however, there are other mental states that operate in a different way. Desires, for example, cannot be true or false in the same way that a belief can.[90] In this context, a specific mental state warrants closer examination: recognition. Recognition amounts to a stance we take when we intend to make something the case.[91] For example, when the chairperson proclaims that the meeting is adjourned, their declaration is not a description of a pre-existing fact, but a performance that makes it the case that the meeting is adjourned. Collective recognition is the shared attitude that groups of individuals hold in the form of being mutually committed to what they consider to be taking place.[92] It is because of this mutual commitment that things in the social world can exist. Money, corporations, frontiers, nation-States, and the law, for example, only exist because individuals collectively recognise that they exist.[93]

While some elements of the social world are directly grounded in individuals' collective recognition, there are significant aspects that are more complex, as they are indirectly grounded in collective recognition and directly dependent on other social facts.[94] For example, a group of friends may agree to meet every Thursday night to

[89] The expression 'tangled hierarchies' is taken from Douglas R. Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (1999), at 20. See also Douglas R. Hofstadter, *I Am a Strange Loop* (2007).

[90] Frost, *supra* note 42.

[91] Raimo Tuomela, 'Collective Acceptance, Social Institutions, and Social Reality', 62(1) *The American Journal of Economics and Sociology* (2003) 123.

[92] John R. Searle, *The Construction of Social Reality* (1995); John R. Searle, *Mind, Language, and Society: Philosophy in the Real World* (1998); Searle, *Making the Social World*, *supra* note 32.

[93] Searle, *Making the Social World*, *supra* note 32, at 57. On international law and collective recognition, see Jean d'Aspremont, *International Law as a Belief System* (2017).

[94] The literature on social ontology would refer to these as, respectively, 'conventional' and 'institutional facts.' See G. E. M. Anscombe, 'On Brute Facts', 18(3) *Analysis* (1958) 69; Neil Mac-

play poker. This agreement establishes a social fact within the group: their game takes place on Thursday nights. This fact is directly grounded in their collective recognition of the arrangement. However, many other social facts are not immediately dependent on such explicit agreements or conventions. Instead, they are indirectly grounded in collective recognition by being based on pre-existing social facts. For instance, in the same group of friends, it is a social norm that whoever hosts the poker night has an obligation to provide beverages and snacks. This obligation is not necessarily the result of an explicit agreement or a formal acknowledgment by the group. Rather, as already explained, it emerges from a pattern of behaviour and mutual expectations that the host will fulfil this role. More importantly, that obligation to provide beverages and snacks is instantiated when a specific individual is hosting the poker night. For example, if Mary is the host on a particular Thursday, then on that night Mary has the obligation. This obligation does not arise from direct recognition of Mary's specific obligation by the group but indirectly, through their shared recognition of the general norm that applies to whoever is hosting. International law is full of facts indirectly grounded in collective recognition. Take the fact that António Guterres is the Secretary-General of the United Nations, for example. His position rests on the rules outlined in the Charter of the United Nations, which determines how the Secretary-General is chosen.[95] But the Charter itself is just another link in this chain. It exists due to the ratification by the five permanent members of the Security Council, which are themselves dependent on the agreements held during the 1945 United Nations Conference on International Organization,[96] and so on.

No matter how complex the social world becomes because of these layers of interdependence, everything is ultimately grounded in collective recognition. At face value, the relationship of co-dependence between these social facts becomes convoluted, but this is because, within practice, the hierarchy becomes confusingly tangled. Nevertheless, by stepping away from practice and looking at the relationship between its elements from a distance, it becomes possible to see how the system operates. A way to see this more clearly is by dividing the system into object- and meta-level components.[97] For example, lawyers engage in object-level discussions

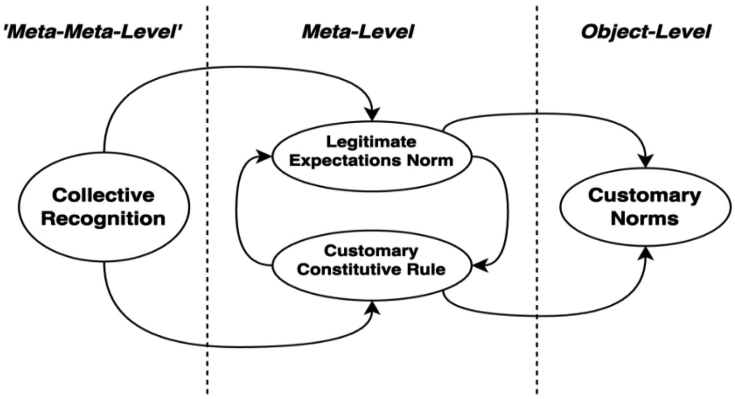
Cormick, 'Law as Institutional Fact', in Neil MacCormick and Ota Weinberger (eds.), *An Institutional Theory of Law: New Approaches to Legal Positivism* (1986) 49.

[95] Art. 97 of the Charter of the United Nations 1945, 1 UNTS XVI.

[96] United Nations, *Documents of the United Nations Conference on International Organization*, UNX.341.13 U51, LSA 341.13 U51 (1945), available at https://digitallibrary.un.org/record/1300969.

[97] Object- and meta-level distinctions refer to different levels of abstraction. Object-level discussions focus on specific topics (such as international law), while meta-level discussions involve debating the act of debating a topic (for instance, discussing the discussion of international law). See Philippe De Brabanter, 'What Do We Mean When We Talk of *Object-Language* and *Metalanguage* in Theory of Natural Languages?', 248 *Logique et Analyse* (2019) 351.

within the system of customary law when they apply customary norms to specific cases. This includes recognising when a concrete State action follows or violates a particular customary norm, for example. At the meta-level, the causal loop of customary law becomes evident, particularly when discussing how customary norms are formed. This is where debates arise about whether the customary norm precedes the obligation or vice versa. It is also where we may have doubts about the explanation that the legitimate expectations norm and the constitutive customary rule constitute each other. However, if we delve into the next level – a 'meta-meta-level' discussion about customary norms – we realise that it is all based on collective recognition (Figure 1).



This explanation does not result in a vicious circle or infinite regress. At the meta-level, it may seem that the legitimate expectations norm and the customary constitutive rule share an inherently circular relationship. However, this perception changes when we examine the connection between collective recognition at the 'meta-meta-level' and the two norms. Stepping back, it becomes clear that collective recognition influences the functioning of these two norms from outside their inner circle. As mentioned, the distinction between levels becomes blurred in practice, leading to a seemingly paradoxical relationship between these elements. Despite this apparent entanglement, the fundamental layer of collective recognition is untangled as the system's foundation. Note that although collective recognition strongly impacts the functioning of the system, it is not itself an element of the system of customary law; it exists outside this system. As a result, there is no infinite regress; the system relies on collective recognition.[98]

[98] One might draw a comparison between collective recognition and Kelsen's concept of the basic norm (*Grundnorm*), but these concepts serve different purposes. Kelsen's basic norm is a presupposed fundamental norm from which all other norms in a legal system derive their validity. It is not enacted

How can a norm apply to itself without resulting in a self-referential paradox? An example of such a paradox is the liar's antinomy: 'this statement is not true.' If the statement is indeed not true, then it is true and cannot be not true. If, instead, it is not true, then it is true, as the statement asserts that it is not true.[99] One way to avoid such paradoxes is by introducing explicit hierarchies. This is the approach Tarski took when he developed his hierarchy of languages for formal systems.[100] Tarski's central insight was that certain statements – especially those involving predicates such as truth and falsehood – can lead to contradictions if they are allowed to refer to themselves. To avoid these contradictions, Tarski proposed dividing the universe of discourse into levels, each of which is distinct and separate from the others. At the base of his hierarchy is the object-language, which contains statements about a specific domain or system. Above it is the meta-language, consisting of statements about the object-language, including whether those statements are true or false. Further up, there is a 'meta-meta-language,' which evaluates the meta-language, and this process can theoretically continue indefinitely. The key to this hierarchy of languages is that a statement in one level cannot determine the truth of itself or of other statements within the same level. In the object-language, a truth predicate cannot evaluate the truth of statements within that same object-language. Instead, it must be evaluated by the meta-language. Statements in the meta-language are evaluated by the 'meta-meta-language' and so on. This ensures that no statement determines its own truth or falsity, thereby solving paradoxes like the liar's antinomy.[101]

through any formal process but is hypothetically assumed by legal actors as the ultimate foundation of the legal system. Similarly, collective recognition serves as a foundational layer upon which elements of the social (and legal) world are built, relying on the shared attitudes and mutual commitments of relevant actors. While the basic norm is a hypothetical construct necessary for the coherence of a legal system, collective recognition is grounded in observable social practices. The basic norm exists outside the positive legal system as a necessary presupposition; collective recognition also exists outside positivised law but emerges from the actual interactions of actors within a given community. Thus, while the basic norm is a theoretical presupposition, collective recognition is an empirical explanation for how actors create entities in the social world. For instance, on how collective recognition can be identified in children's games, see Corrado Roversi, 'Cognitive Science and the Nature of Law', in Bartosz Brożek, Jaap Hage, and Nicole Vincent (eds.), *Law and Mind: A Survey of Law and the Cognitive Sciences* (2021) 99. On the basic norm, see Kelsen, *Pure Theory of Law*, *supra* note 77, at 193 et seq.

[99] On such paradoxes, see Graham Priest, 'The Structure of the Paradoxes of Self-Reference', 103(409) *Mind* (1994) 25.

[100] On Tarski's escape from the self-reference antinomy, see Monika Gruber, *Alfred Tarski and the 'Concept of Truth in Formalized Languages': A Running Commentary with Consideration of the Polish Original and the German Translation* (2016).

[101] Marian David, 'Tarski's Convention T and the Concept of Truth', in Douglas Patterson (ed.), *New Essays on Tarski and Philosophy* (2008) 133.

This article adopts a comparable hierarchical approach, dividing the system into multiple levels. Although norms – including the legitimate expectations norm and the constitutive customary rule – can be self-referential, their applicability is always determined at a different level. Crucially, these norms may reappear at successive meta-levels. Thus, the legitimate expectations norm or the constitutive customary rule at the 'meta-meta-level' would determine the application of their counterparts at the meta-level, and this pattern could continue indefinitely. In other words, multiple intermediate layers can exist, with the same types of norms recurring at other levels and governing those at different levels, ultimately tracing their existence back to collective recognition at the base level. Therefore, collective recognition remains the foundation, providing the bedrock upon which all other levels rest.

Why not dispense with the intermediate layers altogether and retain only collective recognition as the bedrock, along with the customary norms at the object-level? The answer lies in the distinction between facts that are directly grounded in collective recognition and those that are indirectly grounded in it. Unlike facts that arise from explicit acts of recognition, customary norms do not emerge from intentional decisions. They appear without a clear moment of explicit agreement because they are not immediately dependent on direct recognition; rather, they are indirectly grounded in collective recognition through patterns of behaviour and shared expectations. Consider the customary social norm within the poker friend group that the host must provide snacks and beverages. While undoubtedly grounded in collective recognition, this norm need not stem from any explicit decision or formal acknowledgment. Instead, it arises indirectly through the group's repeated behaviour and mutual expectations. Similarly, customary norms in international law emerge through indirect processes, making them seem disconnected from explicit acts of recognition. This explains why these norms appear to come out of nowhere and why their origins often remain elusive. The intermediate layers thus bridge the foundational level of collective recognition and the object-level norms, capturing the processes through which customary norms form and endure without explicit consent.

As pointed out above, collective recognition should not be seen as an element of international law but rather as a feature of human interactions that underpins the constitution of all components of the social world, including international law. This raises the question of whether the intermediary levels between collective recognition and the object-level (where international law resides) themselves are part of international law. International law operates at the object-level. However, the meta-level, where discussions about international law occur, would not necessarily be a part of international law. That said, distinguishing certain norms as entirely outside international law proves challenging, as international law itself provides norms for its constitution. In this respect, some meta-level norms are simultaneously norms of

international law at the object-level. As such, the safest approach would recognise that certain norms of international law, particularly second-order norms, operate at both the object- and meta-levels.

The customary constitutive rule and the legitimate expectations norm function primarily at the meta-level but may also have a presence within international law at the object-level. The customary constitutive rule, for instance, reflects the contents of Article 38(1)(b) of the ICJ Statute, where the two elements necessary for the creation of customary norms (*opinio iuris* and *diuturnitas*) are articulated. Legitimate expectations, as mentioned above, are referenced explicitly in numerous international legal documents and precedents as a norm of international law. However, not every instance of the legitimate expectations norm necessarily leads to obligations that qualify as international legal obligations. As previously explained, the legitimate expectations norm generates obligations, but the nature of these obligations can vary widely – from simple social obligations, such as those arising within a group of friends, to legally binding obligations under international law. For example, the obligation of non-interference with uncontacted tribes could potentially lead to the formation of a customary norm of international law. But whether it is indeed a norm of international law would itself depend on the recognition of the obligation imposed by legitimate expectations as a legal obligation, which is not a matter of the existence of that norm but of its membership in the legal system.

Finally, new norms of customary law can themselves be constitutive rules. While this article focuses primarily on examples of customary norms that impose obligations, this does not preclude the possibility of customary norms with a constitutive character. For example, the norms defining the criteria for statehood (later codified in the Montevideo Convention)[102] are cases of customary norms playing a constitutive role. The interplay between the legitimate expectations norm and the customary constitutive rule is equally applicable to the formation of such customary norms, as they explain customary norm creation regardless of whether the resulting norm imposes obligations or establishes constitutive parameters. In fact, the existence of customary norms with a constitutive character reinforces the biconditional thesis, as it demonstrates that the obligation associated with such customary norms cannot originate from the norms themselves (insofar as they do not impose obligations). Instead, under the biconditional thesis, such obligations must be attributed to the legitimate expectations norm.

[102] Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States 1933, 165 LNTS 19.

V. Concluding Remarks

This article began by drawing a parallel between M. C. Escher's *Waterfall* and the causal loops found in the formation of customary international law. At first, the creation of customary norms appears circular: subjects must believe themselves obligated before the norm can exist, yet such obligation cannot arise before the norm takes shape. To address this paradox, the article offered two explanations, the error thesis and the biconditional thesis. The error thesis explains this paradox by positing that the initial belief in obligation is simply a mistake, one that creates genuine norms over time.

The biconditional thesis introduced the norm of legitimate expectations and a constitutive rule to explain how customary norms emerge. Legitimate expectations create an initial obligation that drives *opinio iuris*, while the constitutive rule ensures that, once consistently practised, these expectations acquire legal form as a customary norm. This article explained that the interplay between legitimate expectations and the constitutive rule does not result in infinite regress, as they are ultimately grounded in collective recognition. Thus, this article clarified how customary norms seem to appear out of nowhere. They do not arise from explicit agreements, but from patterns of practice indirectly grounded in mutual expectations. Although the resulting structure may seem like a network of self-creating norms, careful analysis reveals that each level, including the co-constitutive relationship between legitimate expectations and the constitutive rule, rests on collective recognition. The latter exists outside the system, providing the stable base from which the apparent circularity of norm creation can be rationally explained.

In the end, the creation of new customary norms according to the biconditional thesis resembles another of Escher's lithographs, *Drawing Hands*.[103] Escher presents two hands sketching each other into existence: one emerges from the flat plane of the paper to draw the contours of the second hand, which in turn reaches back to draw the first. This generates a paradoxical relationship where each hand is simultaneously creator and creation, blurring the boundaries between cause and effect. Yet this apparent paradox dissolves when the viewer recognises that Escher himself drew both hands. Likewise, the entire edifice of customary law, with its seemingly paradoxical origins, stands firmly on the bedrock of collective recognition, allowing custom to function as a source of the international legal system.

[103] Hofstadter also uses this lithograph to illustrate his theory of consciousness. See Hofstadter, *Gödel, Escher, Bach*, *supra* note 89, at 689 – 691.