Human Dignity and the Foundations of International Law

Patrick Capps

STUDIES IN INTERNATIONAL LAW

HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW

International lawyers have often been interested in the link between their discipline and the foundational issues of jurisprudential method, but little that is systematic has been written on this subject. In this book, an attempt is made to fill this gap by focusing on issues of concept-formation in legal science in general with a view to their application to the specific concerns of international law.

In responding to these issues, the author argues that public international law seeks to establish and institutionalise a system of authoritative judgment whereby the conditions by which a community of states can co-exist and co-operate are ensured. A state, in turn, must be understood as ultimately deriving legitimacy from the pursuit of the human dignity of the community it governs, as well as the dignity of those human beings and states affected by its actions in international relations. This argument is in line with a long and now resurgent Kantian tradition in legal and political philosophy.

The book shows how this approach is reflected in accepted paradigm cases of international law, such as the United Nations Charter. It then explains how this approach can provide insights into the theoretical foundations of these accepted paradigms, including our understanding of the sources of international law, international legal personality and the design of global institutions.

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OXFORD AND PORTLAND, OREGON
2009

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1-503-287-3093 or toll-free: (1)-800-944-6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: www.isbs.com

Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530 Fax: +44(0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84113-357-7

Typeset by Hope Services, Abingdon, Oxon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

For Luke

Acknowledgements

In writing this book I have accumulated many debts. First, I would like to thank the School of Law at the University of Bristol for providing me with an exceptionally friendly intellectual environment in which to work. The University also provided me with research leave in the year 2005–2006, some of which was spent at the Universities of Melbourne and Cambridge, which provided me with the time to get this book started.

Many of my colleagues at the University of Bristol have been subjected to the ideas set out in this book and I am grateful for their thoughts in response. Specifically, I would like to thank Chris Bertram, Malcolm Evans, Steven Greer, Dean Machin, Harry McVea, Oliver Quick, Bronwen Morgan, Marc Moore, Lisbeth Witthofft Nielsen, Tony Prosser, Phil Syrpis, Tonia Novitz, John Parkinson, Achilles Skordas and Brenda Sufrin. I must also single out Julian Rivers who has read drafts of this book many times and has provided encouragement every step of the way. In broader academia, I should mention friends and colleagues who have read portions of this book or discussed my ideas with me: Philip Allott, Samantha Besson, Deryck Beyleveld, Roger Brownsword, Basak Cali, Tony Carty, Rob Cryer, Keith Graham, Dino Kritsiotis, Therese O'Donnell, Henrik Palmer-Olsen, Stanley Paulson, Amanda Perreau-Saussine, Arthur Ripstein, John Tasioulas, Stuart Toddington, Stephen Tierney, Colin Warbrick and Chanaka Wickremasinghe. My publisher, Richard Hart, has been incredibly supportive of the project and patient with me as an author. Kate Grady's help with the editing process was first rate.

This book is based upon some essays which have already been published. Some of the methodological claims I defend in Chapters 1 to 5 of this book were first written about in the articles 'Incommensurability, Purposivity and International Law' (2000) 11 *European Journal of International Law* 637, 'Methodological Legal Positivism in Law and International Law' in K Himma (ed), *Law, Morality, and Legal Positivism* (Stuttgart, F Steiner, 2004) 9–19 and 'Sovereignty and the Identity of Legal Orders' in C Warbrick and S Tierney (eds), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (London, British Institute of International and Comparative Law, 2006) 19–73. The substantive arguments made in Chapters 5 to 10 were first written about in 'The Kantian Project in International Legal Theory' (2001) 12 *European Journal of International Law* 1003 and 'The Rejection of the Universal State' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge, Cambridge University

Press, 2007) 17–43. The ideas set out here have also been presented in a number of papers delivered at the University of Bristol, Brunel University, the University of Copenhagen, the University of Edinburgh, the University of Lund, the University of Nottingham, the University of Sheffield and also at University College, London and the London School of Economics and Political Science. What is offered here substantially elaborates on the arguments found in these essays and papers.

Finally, I would like to thank my family. Specifically, I must mention my parents, Alan and Naomi Capps, as well as my brother, Ben Capps. It is Lisa Branney, however, who should receive my principal thanks. I have found this a difficult project and at no point has her support wavered. I am immensely grateful to her.

Bristol, February 2009

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Introduction

IN A PAPER THAT was presented in 2007 to a conference to mark the centenary of the birth of Herbert Hart, Jeremy Waldron remarked that:[1]

> [t]he neglect of international law in modern analytical jurisprudence is nothing short of scandalous. Theoretically it is the issue of the hour; there is an intense debate going on in the legal academy about the nature and character of customary international law, for example. This is the one area where the skills of analytical legal philosophers might actually have a contribution to make. Yet all the important philosophical work on it is being done by people other than those in the core of modern positivist legal philosophy.

This book contains an attempt to apply debates in analytical legal philosophy to the study of international law and, at least in part, to remedy the problem which Waldron identifies. In order to do this, I consider the points of common concern which arise in debates on methodology in both legal philosophy and international law. I then develop a concept of international law which responds to these concerns. To begin with, though, I want to consider how legal philosophy can have a practical use when considering the nature of international law.

Waldron's comment reflects a broader view which is often expressed by modern legal philosophers. It is often thought that its central focus has become quite esoteric, parochial and disconnected from the concerns which might be considered interesting to those in other aspects of legal practice or research. This is especially true of modern positivist legal philosophy.[2] However, there are many legal philosophers who would agree that legal philosophy—which is mainly concerned with the debate over the

[1] J Waldron, 'Hart and the Principles of Legality' (unpublished conference paper, 2007) at 3. A significantly revised version of this paper, which does not include this paragraph, is published in M Kramer, C Grant, B Colburn and A Hatzistavrou (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford, Oxford University Press, 2008) ch 5. Also, Buchanan writes: 'Contemporary philosophers of law usually have even less to say about international law than contemporary political philosophers have to say about international relations. In fact, the major contemporary figures in this field largely have proceeded as if there were no international legal system to theorize about.' A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford, Oxford University Press, 2004) 17.

[2] See, most polemically, R Dworkin, 'Thirty Years On' (2002) 115 *Harvard Law Review* 1655.

concept of law—is of practical significance in at least two cases. The first case is concerned with how judges deal with rules which are unjust in some way, and the second case concerns the development of nascent legal orders, like the international legal order. The first case arises, for example, when legal philosophers or legal scientists consider how post-war German courts dealt with, or should have dealt with, the 'grudge informer' cases, in which Nazi criminal statutes were employed by private individuals to get rid of spouses, siblings and colleagues.[3] The same problem was recently faced by post-unification German courts when considering the disproportionate force used by East German border guards adopting a shoot to kill policy against those attempting to escape over the Berlin Wall.[4] In these cases, as well as many others in diverse jurisdictions, one's concept of law can help determine what the judge should do faced with this sort of case.

To explain in more detail, the concept of law is an account of its essential features. So, for example, if a norm has these features, it can be correctly called a law. Often the contents of the concept of law are debated at a conceptual level and this debate has no influence on that which legal officials might actually do or decide. However, when a judge decides a case, he will equally employ a concept of law. This concept allows him to identify what is peculiarly legal about the various norms invoked by litigants. These norms are then employed to determine the outcome of the case. While this is normally unconscious, non-contentious and routine, the judge's concept of law becomes critical when deciding 'hard cases' like those just described. It could be that one judge thinks that an essential characteristic of law is that it is just. Another may think that valid law is that which is enacted by a sovereign will. In hard cases, the judge's concept of law will help him to consider whether to apply norms which have been duly enacted but which are substantively immoral. Divergence in the concepts of law held by judges leads to a different account of the norms which are to be applied and the outcome of the case.[5] In this context, philosophical debates concerning the correct concept of law may well have a significant practical effect on, or be the source of criticism of, judicial practice in hard cases.

[3] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593 and LL Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630; D Dyzenhaus, 'Recrafting the Rule of Law' in *Recrafting the Rule of Law: the Limits of Legal Order* (Oxford, Hart Publishing, 1999) ch 1; J Rivers, 'The Interpretation and Invalidity of Unjust Laws' in Dyzenhaus, *ibid*, ch 3; G Radbruch, *Legal Philosophy* (K Wilk (trans), first published in 1932) in *The Legal Philosophies of Lask, Radbruch and Dobin*, with an introduction by E Patterson (Cambridge, Mass, Harvard University Press, 1950) 43–224. G Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 *Oxford Journal of Legal Studies* 1. See also, S Paulson, 'Radbruch on Unjust Laws: Competing Earlier and Later Views?' (1995) 15 *Oxford Journal of Legal Studies* 489; S Paulson, 'On the Background and Significance of Gustav Radbruch's Post-War Papers' (2006) 26 *Oxford Journal of Legal Studies* 17.

[4] See Rivers, above n 3.

[5] Compare, eg, the judgments made by Lord Nicholls of Birkenhead and Lord Scott in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883.

The second case, which is the central focus of this book, is how legal philosophy might inform debates over the development of nascent and burgeoning legal orders. This debate is often had with regard to international law. Work in mainstream legal philosophy on this matter has not got much past the old debate over whether international law is really law; a question which John Austin and Herbert Hart, amongst others, both discussed in detail. This straightforward question, which every student of international law asks, has practical significance for international lawyers in a number of ways.

There are all kinds of normative practices which are often referred to as law. These can be called, after Dworkin, paradigm cases of law.[6] The concept of law helps us to distinguish those paradigm cases which are centrally, or essentially, law, from peripheral cases of law or cases which are incorrectly called law. Hart and Austin use their concept of law in exactly this way when they claim that international law is incorrectly described as a form of law. It is also what Kelsen does when he interprets such practices as a form of law.[7]

This sort of inquiry is intended to help the legal scientist refine language-use about the norm systems which govern our lives. But like the way in which judges consider hard cases, so this sort of jurisprudential analysis can have a practical impact. This impact is felt in three ways. First, it allows the legal subject to determine the scope of its *legal* obligations. So, if international law is not really law, this means that the norms which govern international relations do not give rise to legal obligations. This, then, has implications for the way in which states act. Secondly, it also can explain how our paradigm cases and normative practices can be made *more legal*. To take Austin's command theory as our concept of law, our paradigm cases of international law are not law because they lack a sovereign will. But it also implies that if there was a global sovereign power there could, genuinely, be international law. So, while our paradigm cases of international law are best described as positive morality for Austin, he does, implicitly, have a concept of international law which is derived from his command theory.[8] Thirdly, if one accepts that such practices are not

[6] R Dworkin, *Law's Empire* (Oxford, Hart Publishing, 2004, first published in 1986) ch 2.

[7] See H Kelsen, *Introduction to the Problems of Legal Theory* (S Paulson and B Litschewski-Paulson (trans), Oxford, Clarendon Press, 1992, first published in 1934) ch 9. For a detailed discussion of my views on Kelsen's legal philosophy in relation to international law, see P Capps, 'Sovereignty and the Identity of Legal Orders' in C Warbrick and S Tierney (eds), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (London, British Institute of International and Comparative Law, 2006) 53–63.

[8] Hart quite explicitly adopts this view when he writes: 'It is true that, on many important matters, the relations between states are regulated by multilateral treaties, and it is sometimes argued that these may bind states that are not parties. If this were generally recognized, such treaties would be in fact legislative enactments and international law would have distinct criteria of validity for its rules. A basic rule of recognition could then be formulated

law, then one must consider how we should characterise them. What are self-styled international lawyers really up to? They might simply be deluded figures, who think that they are able to constrain the self-interested actions of states. Alternatively, they might be 'noble liars'[9] who use a set of moral principles, coupled to the public commitments of states, to criticise state behaviour. But in such circumstances, we should recognise that state action is unconstrained by law and that international relations are largely the product of power-relations. It seems to me that in such circumstances there is a prima facie moral reason to render the normative practices of international lawyers more like a form of law so as to effectively constrain the actions of states. Here, debates over the concept of law can have a crucial practical role to play.

Bringing these ways of thinking about the practical use of analytical jurisprudence in the study of international law together, it can be said that the concept of law can be used to critically analyse various paradigm cases of, and normative practices often called, international law. To begin with, it must be noted that this analysis can be undertaken with regard to any putatively legal normative practice. Our normative practices and paradigm cases will usually fall within the extension of most mainstream accounts of the concept of law, whether they are positivist or idealist, but some may not. So, for example, when the UK executive imprisons terror suspects and denies them access to courts we might wonder, for a variety of reasons, whether the actions of the government are legal acts.[10] However, I do not think that this implies that the UK legal order is, somehow, 'not law'. It is better, in my view, to use one's concept of law to critically analyse such practices. Many of these practices may be clear examples of legal phenomena. Others may be fundamentally misguided, aberrant or pathological: they do not look like, or do the sort of things that we characterise as, law. But either way, this sort of interpretative analysis presupposes a concept of law.

Exactly the same sort of analysis can be employed to interpret the practices and paradigm cases which are called international law. As we saw with Austin, the concept of law implies a concept of international law. This concept of international law may or may not be an accurate characterisation of our familiar practices which we refer to as international law. However, the concept of international law provides a critical device to

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.' See HLA Hart, *The Concept of Law* (2nd edn, Oxford, Clarendon Press, 1994, first published in 1961) 236 [231] (square brackets refer to the first edition).

[9] See A Perreau-Saussine, 'Foreign Views on Eating Aliens: the Roots and Implications of Recent English Decisions on Customary International Law as a Source of Common Law Limits on Executive Power' in C Warbrick and S Tierney (eds), *Towards an 'International Legal Community'? The Sovereignty of States and the Sovereignty of International Law* (London, British Institute of International and Comparative Law, 2006) ch 3.

[10] *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2004] UKHL 56.

engage in the sort of interpretative analysis just set out. That there are no effective and centralised enforcement mechanisms, that norms are created through state consent, or that morally dubious states are able to create such norms, may all be reasons to deny that such practices are distinctly legal practices. However, the identification of these failings offers a way of reforming our practices so that international relations can be governed by law. But it should also be noted that by adopting a different concept of international law we may come to the opposite conclusion: that is, that our normative practices fall within the extension of the concept of international law and nothing much needs reforming. Once again, the way we interpret various normative practices as forms of international law relies upon our underlying legal concepts.

This way of thinking about the role of the practical significance of debates in analytical philosophy is at the heart of what follows. In the remainder of this Introduction, I will outline the argument made in this book. This argument has two closely interconnected parts. The first part (Chapters 1 to 5) has a methodological focus. I consider the issue of how we can have knowledge of international law as a practical phenomenon. The fundamental problem which we (as legal scientists or international lawyers) face is that the meaning, significance or value of international law as a normative practice varies from international lawyer to international lawyer. International lawyers may consider that international law is a normative practice which attempts to uphold certain fundamental values associated with human dignity or, alternatively, establish the conditions by which states can co-operate and co-exist. Others may be sceptics or noble liars. Given this divergence, how then is it possible to generate a concept of international law from these disparate understandings of its nature?

The answer which is often either immanently or explicitly given in the literature is that the legal scientist must conceptualise law from a non-arbitrary viewpoint. This rests upon the idea that the meaning of practical activity must be conceived in terms of ends which are practically reasonable, rather than being rooted upon our varied and subjective beliefs about what is important or significant about such activity. This approach is explicitly accepted by Weil, Oppenheim, Lauterpacht and McDougal, amongst others. I think that they are right in taking this general methodological approach. Furthermore, I argue that a judgment like this is implicit in any attempt to make sense of the disparate 'raw data' which comprise the various value-orientations which international lawyers use to describe the practice they are part of.

The second part of this book (Chapters 6 to 10) builds upon these methodological claims. Specifically, I argue that it is practically reasonable to conclude that international law is normatively orientated towards a fundamental respect for human dignity. I then advance an institutional theory of international law. Through an analysis of Kant and Rousseau,

I argue that international law must be seen as an attempt to subject the complex social relations which comprise international relations, and which are often damaging to human dignity, to regulation. This implies institutions which are able to create and interpret a set of enforceable and general norms which restructure international relations so as to be conducive to this end. It also implies the sovereignty of international law. This means that international legal institutions are the ultimate authority for how states should act in international relations.

In the form of legal order associated with the modern state, these various legal functions are performed by institutions which take a hierarchical and vertical form. However, there is widespread scepticism as to whether an international legal order based upon institutions like these can be established. In response, I claim that international legal order can be, in part, achieved by states adopting a dual role as subjects and as organs of the international legal order. Thus, an international legal order can be largely instituted on the basis of an interstate system. This system must, however, be founded on a set of constitutional norms which determine when the state acts as subject, or as organ, of the international legal order. It also implies that states are internally structured in a way so as to be able to perform this role. That states are not like this in our world implies the need for greater levels of suprastate governance. This form of governance can be argued to closely resemble institutions like, for example, the Security Council and the General Assembly of the United Nations. However, there are strong grounds for holding that the effectiveness, as well as the procedural and substantive legitimacy, of these institutions must be strengthened so as to establish an international legal order. But it is not the case that international legal order must imply some sort of global or universal state and my substantive claims are not meant to be radical. Rather, I show how international legal order can be established through the reform of those institutions described by paradigm cases of international law, as well as of the role of the state in the administration of international law.

Underlying these arguments is the general claim that the concept of international law *mediates* between one's conception of the ontology of international relations and the institutional structure of international law. Kant, in my view, recognised this when he argued that the 'right of nations' (or international law) consists of 'independent, universally valid laws that restrict the freedom of everyone'.[11] However, this could only be administered by a federation of republican states where international legal norms emerge through 'common acceptance' (ie consent).[12] I think that his

[11] See I Kant, 'To Perpetual Peace: a Philosophical Sketch' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992, essay first published in 1795) 116 [8:355].

[12] See I Kant, 'On the Proverb: That May be True in Theory, but is of no Practical Use' in *ibid* at 88 [8:311].

view is that if states adopt a particular internal structure, so international law can adopt an interstate form. This, he also thought, was feasible, or what Rawls calls, a 'realistic utopia'. However, a universal or global state was unrealistic and prone to injustice. To put it bluntly: Kant thought that if we could make states better, they could undertake institutional roles in the administration of the international legal order. He did not, however, consider what sort of institutions would be required in a world like ours in which not all states are republican but in which most states play important roles in the creation of international legal norms. These considerations are explored in this book.

Building upon the points about the practical use of legal concepts set out above, the concept of international law just set out can be employed in 'progressive interpretation' of various normative practices which are normally referred to as international law. This interpretative approach, which was first described by Hersch Lauterpacht, employs the concept of international law to interpret our various paradigm cases and normative practices as *attempts* to establish an international legal order.[13] To the extent that they are *successful* in doing this we can say that the international legal order, in an ontological sense, *exists*. He thought that many aspects of our paradigm cases and normative practices are consistent with his concept of international law which, as will be seen, is very similar to that which I offer in this book. By using this methodology, I will argue that it is plausible to interpret the Charter of the United Nations, the Vienna Convention on the Law of Treaties, and the Articles on State Responsibility, as constitutional documents of the international legal order.

In sum, the foundations of international law comprise (i) the concept of international law; (ii) a theory of institutional design; and (iii) a method by which to interpret various paradigm cases or normative practices which are normally described as international law. This book makes a case for the foundations of international law which is fundamentally rooted in a respect for human dignity.

In my attempt to defend the thesis just set out, I have taken a synthetic approach. I develop my argument through the discussion and analysis of many old and well-established, as well as modern, texts. I have not done this with a view that this book should be seen as a survey of the literature on this subject, and I do not aim to be inclusive. But my argument is firmly built upon the foundations laid by some of the most influential thinkers in modern history; centrally Kant, but also Rousseau, Hobbes and Weber. I also draw heavily upon the work of some important recent philosophers like Finnis, Gewirth, Rawls, Postema, Simmonds, Beyleveld and Brownsword, as well as upon the ideas of some of the most significant international

[13] H Lauterpacht, *International Law, Being the Collected Papers of Hersch Lauterpacht*, vol II, *The Law of Peace, Pt 1* (E Lauterpacht (ed), Cambridge, Cambridge University Press, 1975) 44.

lawyers of the twentieth century: amongst others, Oppenheim, Scelle and Lauterpacht. In this sense, much of what is argued for in this book is based upon the arguments and ideas which have a familiar and distinguished place in the history of legal thought. I can only hope that I have done justice to their contributions to debates about how we should organise our social, political and legal lives in ways that are consistent with a fundamental respect for humanity.

1

Philosophical Problems for International Lawyers

AS STATED IN the Introduction, this book has two main aims. The first is to elucidate certain methodological problems which are often ignored by, or hidden within, international law scholarship. The second is to defend the claim that the concept of international law is a social institution that governs international relations, thereby restructuring state action so that it is consistent with the dignity of all human beings. This claim can be understood as being broadly Kantian. One reason for this is because I argue that international law, at least in part, must be conceived of as an a priori but practical concept. A second reason is that I argue, in line with Kant's *The Metaphysics of Morals*,[1] that international law is appropriately conceived of as an artificial[2] and general system of legal norms which is authoritatively (rather than subjectively or unilaterally) interpreted and enforced by legal institutions.[3] A third reason is that I argue that international law must be rooted in a respect for human dignity.[4] This said, the first aim of this book is to set out how international law can be conceptualised, and the second aim is to attempt to do it.

[1] I Kant, *The Metaphysics of Morals* (M Gregor (trans), Cambridge, Cambridge University Press, 1996, first published in 1797).

[2] The word artificial is not meant to indicate 'false, fake, not genuine, not real, and the like'. Rawls defines the word with reference to an example: 'When the king [Charles II] went for the first time to look at St. Paul's Cathedral in London, rebuilt by Christopher Wren after the great fire of 1666, he said solemnly, after having stood some time under the dome: "It's awful and artificial", meaning that it inspired awe but was at the same time a work of reason.' See J Rawls, *Lectures on the History of Moral Philosophy* (Cambridge, Mass, Harvard University Press, 2000) 52.

[3] This claim about the nature of law can be attributed with plausibility to most legal philosophers. Kant, however, is one of the few philosophers who has applied such reasoning to inquiry into the concept of international law.

[4] Although I do not discuss this notion in detail in what follows, it can also be said that this approach is 'cosmopolitan' in the sense that international law is based upon a fundamental respect for human dignity and a commitment to universal legal institutions which attempt to ensure that states act within these substantive constraints. This is described by Pogge as 'legal cosmopolitanism'; see T Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 *Ethics* 48, 49. See also A Verdross, 'On the Concept of International Law' (1949) 43 *American Journal of International Law* 435.

This is philosophically abstract stuff and it is unlikely to impress the international lawyer who would be inclined to see this book as merely the latest in a long list describing a utopian but unrealisable view of order in international relations.[5] I will say more about this point in this chapter and generally throughout this book, but two remarks can be made to clarify the overall trajectory of my argument and explain why it is useful. The first is that it is well-acknowledged that international lawyers do not tend to think enough about the philosophical foundations of their subject. As early as 1923, Roscoe Pound commented that international lawyers had come to consider 'international law as a separate subject, apart from jurisprudence and political science with which formerly it had been associated through a common philosophical foundation'.[6] What Pound, I think, was getting at was that, at the time he was writing, international lawyers began to think of their subject almost as if it stood up by itself. They thought that it could be disconnected from issues concerning philosophical method; that international law was an autonomous discipline of study. Sixty-eight years later, Warbrick said something similar: '[t]he modern English tradition in international law has been wary of theory'.[7] So, whether or not the reader agrees with my substantive conclusions about international law, there is a well-acknowledged gap in modern international legal thought. In light of this, a sustained work on methodological issues, which examines the various ways that legal science[8] might be possible and applied to the study of international law, is useful.

The second remark is that the conclusions I come to, however logically rigorous they purport to be, are unlikely to be *persuasive* unless they cohere, to some extent, with international lawyers' self-constituted view of their own subject. Of course, it is always possible that the way international lawyers see their subject may, at a fundamental philosophical

[5] Koskenniemi writes '[s]uch "grand narratives", sociologists have noted, fail to carry conviction: they must either remain so abstract as to justify any conceivable practice, or they will inevitably fail to reflect the practitioners' collective experience'. M Koskenniemi, 'Theory: Implications for the Practitioner' in *Theory and International Law: an Introduction* (London, British Institute of International and Comparative Law, 1991) 3.

[6] R Pound, 'Philosophical Theory and International Law' (1923) II *Bibliotheca Visseriana* 73.

[7] C Warbrick, 'Introduction' in *Theory and International Law: an Introduction* (London, British Institute of International and Comparative Law, 1991) xii.

[8] The methodological problem for legal science is how it is possible to have knowledge of law as a practical phenomenon. Some may disagree with this view and argue that legal science concerns the investigation of doctrine. However, this inquiry, at the abstract level, presupposes a way of distinguishing the legally valid from the legally invalid and this is the subject of legal philosophy. Thus, the aims of legal philosophy and legal science are at an abstract level coterminous. By using the term 'legal scientist' I am using it in a broad sense to consider the foundational enterprise of how we can have knowledge of law from either an internal and external perspective. See HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Oxford University Press, 1983) 88 for a discussion. I do not draw the distinction between legal science and jurisprudence which is outlined by S Coyle and G Pavlakos, *Jurisprudence or Legal Science?* (Oxford, Hart Publishing, 2005) 1–15.

level, be wrong. Hart and Austin, for example, think just that. But as I set out in the Introduction, I think that it is possible to show that some of the basic claims about their subject which international lawyers consider fundamental—sovereign equality, the consent-based theory of obligation, and the like—are often consistent with the claims I defend in this book.

In the rest of this chapter, I want to expand upon these brief comments just made about the relevance or usefulness of this book. I focus on three types of scepticism about the two main aims of this book. The first type of scepticism is often held by those who think that international law is fundamentally an expression of various competing ideologies. They argue that international law is constitutively rooted on radically divergent conceptions of international law in both space and time, even though such conceptions may have an enormous impact on how states act and how public power has been, or is, exercised. The second type of scepticism is more extreme: that attempts to conceptualise international law are at root merely verbal quibbles and based upon arbitrary judgments of belief or value. Both of these forms of scepticism have it that an attempt to set out conclusive reasons why we should accept one conception of international law over another is fundamentally misguided. Neither position, however, can be said to show why there cannot be conclusive reasons for supporting one conception over another. Furthermore, there are good reasons why both of these sceptical positions are worrying given that such conceptions of international law often purport to justify the wielding of coercive power by states. The third type of scepticism is that which was alluded to by Pound: that international law can maintain its character as a discipline which is autonomous from moral, political or legal philosophy. This scepticism of the usefulness of theory is, I argue, equivalent to sticking one's head in the sand. In sum, the description and analysis of these three forms of scepticism indicates why the argument set out in this book is valuable for the international lawyer.

CONCEPTIONS OF INTERNATIONAL LAW IN SPACE AND TIME

Martti Koskenniemi writes '[m]odern international lawyers are no enthusiasts over theory. There may even be a general sense that "theory" is over; or that it serves best as a label to pin on ideas ("theories") of past jurists but that it plays (and should play) little or no role in our present international legal practice'.[9] I will consider the sceptical position which Koskenniemi summarises in the next section. In this section, the focus is on how the way in which 'ideas of past jurists' can have an important impact upon the development of 'our present legal practice' and, specifically, the exercise

[9] Koskenniemi, above n 5, at 3.

and control of state power in international relations. This explains why arguments about the plausibility of various theories are of crucial importance to our present practice rather than being merely an exercise in the classification of past theories.

It has often been said, and it is intuitively plausible to hold, that law justifies the use of coercive force against those subject to it.[10] International law can be thought of in the same way in that it justifies the exercise of state power (or collective state power) against other states. So, for example, international law provided a normative reason why the governments of NATO states considered the bombing of Serbian forces in Kosovo as justified, or why the English House of Lords considered itself justified in allowing the extradition of General Augusto Pinochet to stand trial in Spain. There may have been other non-legal motives behind these ostensibly legal justifications, but international law provided a strong, if not conclusive, reason why coercion should be, or may be, undertaken.

Taking this point further, it can be said that throughout history, various international legal norms have been employed to justify coercive acts on the part of states. So, for example, Grotius argued that all states were justified in using coercive force to punish wrongs committed in violation of the law of nations. Specifically, he argued that 'the state inflicts punishment for wrongs against itself, not only upon its own subjects but also upon foreigners; yet it derives no power over the latter from civil law, which is binding upon citizens only because they give their consent; and therefore, the law of nature, or law of nations, is the source from which the state receives the power in question'.[11] Some 370 years later, Jennings and Watts claim 'intervention is, as a rule, forbidden by international law . . . Its prohibition is the corollary of every state's right to sovereignty, territorial integrity and political independence'.[12] The use of force, employed unilaterally by a state to punish wrongs, is illegal on their account. So the legal norms which justified intervention in Grotius' account are no longer valid if the claim made by Jennings and Watts is correct. However, for both Grotius and Jennings and Watts, international law sets out the *circumstances* and *conditions* when it is legal for states to exercise coercive power at any particular time.

How should we explain this divergence between these international lawyers? Obviously, the political and moral contexts in which these two statements were made are very different. These contexts render a particu-

[10] See R Dworkin, *Law's Empire* (Oxford, Hart Publishing, 1998, first published 1986) ch 4 and N Simmonds, *Law as a Moral Idea* (Oxford, Oxford University Press, 2007) 1–14.

[11] H Grotius, *De Iure Praedae Commentarius* in R Tuck's Introduction to H Grotius, *The Rights of War and Peace* (Indianapolis, Liberty Fund, 2005, first published in 1625) xx–xxi. On this, see C Tams, *Enforcing Obligations* Erga Omnes *in International Law* (Cambridge, Cambridge University Press, 2005) 48–9.

[12] R Jennings and A Watts, *Oppenheim's International Law*, vol I, *Peace* (9th edn, London, Longman, 1996) 428.

lar range of issues problematic for international lawyers. Furthermore, the *intellectual context*—the inherited assumptions and contemporary debates—is equally different. As Quentin Skinner writes about the use of ideas in history in a more general sense: 'it is evident that the nature and limits of the normative vocabulary available at any given time will also help to determine the ways in which particular questions come to be singled out and discussed'.[13] This much is clear: we could say that both Grotius' and Jennings and Watts' statements are accepted as statements of international law in the sense that they are legally valid given the normative vocabulary of the time in which they are writing. These works both *describe* and *justify* the circumstances in which states may use coercive force. This is why state representatives, lawyers or activists can employ such writings in order to tailor 'projects . . . to fit the available normative language'.[14]

A history of international law might delineate influential constellations of reasons which have been offered to legally justify action. The philosopher of international law, true to Koskenniemi's suggestion, might attempt to systematise these constellations of reasons so that they can be categorised into various schools of thought or ideologies. Then it might be possible to chart how various schools became influential and popular by being employed by state officials or international lawyers to justify various coercive acts under the banner of international law. We might be able to characterise a set of ideas (for example, German, Hegelian influenced, public international legal scholarship) as crucial in explaining the development of absolute sovereignty and the auto-limitation conception of legal obligation which was, in turn, employed by the judges of the Permanent Court of International Justice to justify the decision in, for example, the *Lotus* case.[15] Alternatively, the policy science school of international law, which arguably has had considerable influence on more permissive approaches to military intervention in the late twentieth century, purported to establish a different set of ideas by which various acts in international relations could be justified.[16] Koskenniemi's work, *The Gentle Civilizer of Nations*, is a good

[13] Q Skinner, *The Foundations of Modern Political Thought* (Cambridge, Cambridge University Press, 1978) xi.

[14] *Ibid* at xiii. For a good example of this argument with regard to the Security Council's deliberations over the Kuwait crisis in 1990 see V Lowe, *International Law* (Oxford, Oxford University Press, 2007) 31–3. See also A Nussbaum, *A Concise History of the Law of Nations* (New York, Macmillan, 1947) 162 for the use of old writers on international law in judicial decision-making. See also M Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge, Cambridge University Press, 2001) 293–4 on how Neo-Hegelian thought was employed to justify German aggression prior to the First World War.

[15] See J Brierly, 'The "Lotus" Case' (1928) 174 *Law Quarterly Review* 154.

[16] See, eg, M Reisman, 'Kosovo's Antinomies' (1999) 93 *American Journal of International Law* 860 and 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866. On the policy science approach, see N Duxbury, *Patterns of American Jurisprudence* (Oxford, Oxford University Press, 1995) ch 3 and below 80–82.

example of this way of approaching theory, as is Grewe's classic, *The Epochs of International Law*.[17] But note that this is not simply a classificatory exercise: rather, it describes the kinds of reasons which have been employed by international lawyers to legally justify coercive acts undertaken by states.

This way of thinking about the relationship between ideas and coercive force is intuitively plausible. However, it can only provide us with a range of *conceptions* of international law which have justified state action in history. Each might be based upon first principles, such as the inviolability of state sovereignty, or the universality of basic human rights, and each may be internally logically coherent. Each contains ideological positions, value-structures, as well as sets of rules, principles, institutions, functions or purposes which are consistent with each other. However, such conceptions have been employed, or intuitively accepted, by practising international lawyers to describe the nature of international law and, as a result, claim what normatively ought to be the case. Therefore, such conceptions are crucial in explaining the outcome of any historical act in international relations which relies upon a legal justification.

What is true about how conceptions of international law have been employed *over* time is also true between a group of international lawyers at the *same* time. Koskenniemi sets out this idea clearly: 'In crucial doctrinal areas, treaties, customary law, general principles, *jus cogens* and so on conflicting views are constantly presented as "correct" normative outcomes. Each general principle seems capable of being opposed with an equally valid counter-principle'.[18] Different conceptions of international law which underpin such views merely replicate the problem. Koskenniemi writes: 'these conflicting views and principles are very familiar and attempts to overcome the conflicts they entail seem to require returning to "theory" which, however, merely reproduces the conflicts at a higher level of abstraction'.[19] From this observation, Koskenniemi shows how radically divergent conceptions of international law lie at the heart of current international legal practice. This divergence leads to equally radically different interpretations of 'paradigm cases' of international law.[20] It also shows that

[17] See Koskenniemi, above n 14, and W Grewe, *The Epochs of International Law* (M Byers (trans), Berlin, Walter de Gruter, 2000, first published in 1944). Kosekenniemi may, however, disagree with the historical method advanced here (see *ibid* at 6–10). Koskenniemi's social theory is based upon the methodology of critical legal studies. My approach, as will be seen, is essentially actionist and rationalist. In this sense, I argue from the view of human agency, rationality and methodological individualism advanced by Hollis amongst others. See M Hollis, *Models of Man* (Cambridge, Cambridge University Press, 1977). See also Skinner, above n 13.

[18] M Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge, Cambridge University Press, 2005, first published 1989) 3.

[19] *Ibid*.

[20] Two good recent examples of this approach are *Ibid* and G Simpson, *Great Powers and Outlaw States* (Cambridge, Cambridge University Press, 2004). See below 35–9, for a discussion of the nature of paradigm cases.

the underlying conceptions are crucial to how international lawyers determine what should be the case in 'our present legal practice'.

A familiar example of this divergence can be found in the different approaches to the legal personality of states under international law. The constitutive theory holds that the existence of a state is contingent upon recognition by other states. This is fundamentally rooted on the positivist conception of international legal obligation which arose in the late-nineteenth century.[21] The alternative declaratory theory reflects the contrary view: states come into existence independently of recognition of other states once certain factual criteria, like stable territory, are satisfied. But such a theory implies, in part, that legal obligations can bind states (to respect new states' rights) independently of their consent. Therefore, declaratory theory contradicts the constitutive theory at a fundamental level.

With these two conceptions of international legal personality set out, the international lawyer can employ various examples of state practice over time and space to reflect one, the other, or neither, view.[22] Inquiry into state practice, in this sense, might be shorthand for inquiry into the normative vocabulary accepted by state officials and international lawyers as to what constitutes a good reason for a particular state of affairs to be recognised as legally valid (ie when and how a new state has come into existence). The problem is that state practice over time and space only partially reflects one view over the other. So, for example, while declaratory theory (on the basis of criteria of effectiveness) is widely accepted as being a clear expression of much state practice about how states come into existence, it has to compete with contrary practice which reflects constitutive theory or, indeed, further theories which introduce other criteria of legitimacy as regards the way in which the state came into existence.[23] Furthermore, often these competing normative vocabularies and conceptions are prima facie incommensurable: international lawyers vary as to where they stand and this must throw into question the proposition that international law is an autonomous set of norms which can be unequivocally stated, somehow, as 'fact'. This is because choices have to be made

[21] See L Oppenheim, *International Law* (1st edn, London, Longmans, 1905) vol 1, 264: 'The formation of a new State is, as will be remembered from former statements, a matter of fact, and not of law. It is through recognition, which is a matter of law, that such new States become a member of the Family of Nations and subject to International Law. As soon as recognition is given, the new State's territory is recognized as the territory of a subject of International Law, and it matters not how this territory is acquired before the recognition.' (Quoted from Crawford, below n 23, at 16). See also below 258–65.

[22] An excellent example of this style of argument is to be found in J Crawford, *The Creation of States in International Law* (2nd edn, Oxford, Oxford University Press, 2006) ch 1.

[23] Questions of legitimacy normally arise concerning situations where the state has been (i) created through the use of force; (ii) founded upon systematically racist principles; or (iii) created through a denial of the right of self-determination.

about the nature of the system, which practice constitutes legal practice, and the norms which govern the conduct of states.

This observation alone may lead one to the conclusion that international law is essentially or constitutively a pragmatic discipline. It merely describes a number of normative vocabularies, which draw on various fundamental conceptual distinctions. However, it is also the case that the underlying conceptions of international law are crucial in determining what is legally the case for international lawyers. In this sense theory plays a crucial role in 'our present international legal practice' contrary to what Koskenniemi's 'modern international lawyer' might think. It is for this reason that an inquiry into whether some conceptions of international law might be preferable to others is important.

A stronger claim which Koskenniemi accepts is that international law is *constitutively* a conjunction of various incommensurable conceptions of international law, none of which have epistemic primacy. What is the case about international law at any one time is a reflection of the various, often contradictory, conceptions of international law that are more or less accepted at any one time. To hold that the role of theory is merely to 'pin on ideas ("theories") of past jurists' seem to imply this stronger view. But while it is the case that it is a useful exercise to chart the rise and fall of various conceptions of international law, it does not immediately follow that none takes epistemic primacy and thus support his strong claim. I think that there are conclusive reasons for claiming that one conception of international law can be held to have epistemic primacy. However, the stronger claim just set out is a popular theory about international law and it is to this that I now turn.

SCEPTICISM IN THE PHILOSOPHY OF INTERNATIONAL LAW

The most obvious example of when the issue of concept formation has arisen in relation to international law is in the debate over whether international law is really law. A famous early discussion of this question is to be found in the work of John Austin. Austin thought international law was not a form of law because international law lacked a global sovereign, which commanded states, as political inferiors, to act. Instead, Austin thought that international law consisted of a class of rules which were better described as 'law improperly so called' or, elsewhere, 'positive international morality', and thus could be conceptualised by analogy or metaphor to 'law strictly so called'.[24] So, for him, international law was a system of rules which could not be claimed to be *really* or *essentially* law.

[24] J Austin, *The Province of Jurisprudence Determined* (Cambridge, Cambridge University Press, 1995, first published 1832) 160.

In a similar fashion, albeit on both a different methodological basis and substantive set of conclusions about the concept of law, Hart argued that 'no other social rules are so close to municipal law as those of international law'.[25] There are plenty of other examples. All of these claims, and in fact all claims of this type, are plausible only if the essential features of the concept of law can be conclusively established. From here, international law, it can be concluded, does or does not have these features, and therefore is, or is not, an instance of law.

Glanville Williams was highly sceptical about such claims and wrote an essay on the subject in 1945. It was his view that the question of whether international law is really law 'is purely a verbal one, although few of the parties to the controversy seem to have realized it'.[26] He went on to say '[t]he word "law" is simply a symbol for an idea. This idea may vary with the person who uses the word. Austin defined what the word meant for him, which he was entitled to do, but he was not entitled to adopt a legislative attitude and declare what the word should mean for other people'.[27] Hence, Austin's 'opponents could . . . have challenged him on the simple and unassailable ground that he was assuming a power that no man possessed: the power of dictating to others the meanings in which they should use words'.[28] To talk of essential features 'simply means "important feature", and what is important is a subjective or emotional matter'.[29] Williams' view is that legal science can only, at root, reflect verbal quibbles and this scepticism would similarly be directed at the claims I defend in this book.

Williams' claims are not as simple as has just been set out. His view is locked into other sceptical approaches found in the philosophy of the legal and social sciences. This is especially clear when he claims that conceptions of law and international law 'are simply mental abstractions from the raw material of the universe'.[30] I take this to mean that he thinks that concept-building in legal science is an exercise in gathering together certain miscellaneous facts which are then brought together into conceptions through a priori judgments by which the important is distinguished from the unimportant; the essential from the unessential; the central from the peripheral. But, against rationalism, he clearly thinks that this is ultimately a judgment that is subjective and, in this sense, Williams adopts a non-cognitivist position.

[25] H Hart, *The Concept of Law* (Oxford, Clarendon Press, 1994, first published in 1961) 237 [231].

[26] G Williams, 'International Law and the Controversy Concerning the Word "Law"' (1945) *British Yearbook of International Law* 146, 147.

[27] *Ibid*.

[28] *Ibid* at 147–8.

[29] *Ibid* at 149.

[30] *Ibid* at 159.

This non-cognitivist position in legal theory cannot simply be claimed to be unassailable without being dogmatic. If Williams is saying that this is a thorny philosophical problem then he would be right: there is a real problem with what can be referred to as the multi-significance of language and this is something which will be very seriously addressed in this book. But at a straightforward level, Williams cannot a priori rule out the possibility that language can capture the essence of those collective and institutionalised forms of social activity which are normally called international law. Furthermore, it seems as likely that ordinary language does place limits on the possible range of linguistic usages that are permissible to *define* international law; for example, to define international law as something that Martians do on Mars is to speak nonsense: it is to commit a linguistic error. So, there might be boundaries to ordinary language beyond which certain usages are meaningless. Therefore, Williams' scepticism must be, to some extent, limited. However, within these boundaries there are a large number of possibilities which can be disputed over by international lawyers.

To cast disputes over these possibilities as mere verbal quibbles, as Williams wants to claim, carries with it some dangerous implications. These arise because, as has just been argued, such conceptions determine when states are *legally entitled to exercise coercive power*; to simply dismiss such conceptions as verbal quibbling over the use of words is worryingly trite (especially considering his article was published in 1945). Put bluntly, for an international lawyer to take a Grotian or Kelsenian approach to their subject may substantially alter what legally is the case. Therefore, to rule a priori that all conceptions of law and international law reflect verbal quibbles is a dangerous claim to make because it renders enlightened and humane claims about the nature of international law or inhumane, racist or imperialist claims about international law epistemically identical in nature. This seems like a good reason for international lawyers to take seriously attempts to provide conclusive reasons to choose one conception of international law over others. However, as Koskenniemi tells us, international lawyers remain unconvinced by the value of such an inquiry. Why might this be?

THEORY AND PRACTICE

International lawyers sometimes claim that international law is an autonomous social practice which can be isolated from concerns of political, moral or legal philosophy. Put more straightforwardly (and perhaps provocatively), it is the view that theory gets in the way of practice and should not be of central concern. In 1983, Brownlie set out this position when he said that '[t]here is no doubt room for a whole treatise on the

harm caused to the business of legal investigation by theory'.[31] Brownlie's position is put more generally by Koskenniemi who proposes that international lawyers often believe that 'there is room for a specifically "legal" discourse between the sociological and the political—a law "properly so called", as Austin puts it—and that this is the sphere in which lawyers must move if they wish to maintain their professional identity as something other than social or moral theorists'.[32] This view, therefore, seeks to isolate the study of international law from wider philosophical inquiry for pragmatic reasons.

There are many reasons which lie behind this impulse to isolate the practice of international law from philosophical inquiry about its nature. An important one could be the anxiety built into the question of whether international law is really law. This anxiety has a long tradition. By way of example, Koskenniemi remarks with regard to the legal method of the late nineteenth century French international lawyers, that 'they wished to prove international law's seriousness by demonstrating that it could be practiced as technically as any other law . . . as if justifying their profession could be achieved only by a condescending nod from the legal center'.[33] This reflects the more general point that international lawyers have sometimes sought to actualise their activities as distinctly legal activities by allying themselves to mainstream (and domestic) legal practice rather than consider existential questions about the nature of law. Can the international lawyer who does this be accused of sticking his head in the sand?

My view is that he can. The earlier analysis of the history of international law discussed how a conception of international law, which is employed by the international lawyer, forms the basis of a normative vocabulary about the circumstances in which states are justified in legally exercising coercive power. Moreover, such a conception is not given and has varied through history and from international lawyer to international lawyer. One example already considered concerns legal personality. Another is the disagreement over the reasons why *jus cogens* is binding. One international lawyer may consider that the state she represents is a persistent objector to *jus cogens* and therefore not bound, or that *jus cogens* does not bind third parties without their consent. On the other hand, others may consider that such norms are binding independently of state consent and are constitutional norms of the international legal order qua order. Each of these claims is based upon fundamentally different conceptions of the nature of the international legal order. One adopts a consent-based approach to legal validity; the other does not. Which view one takes

[31] I Brownlie, 'Recognition in Theory and Practice' in R St J Macdonald and D Johnston (eds), *The Structure and Process of International Law* (The Hague, Martinus Nijhoff, 1983) 627.

[32] Koskenniemi, above n 18, at 1.

[33] Koskenniemi, above n 14, at 281.

determines the obligations which states have. This problem cannot simply be ignored through appeals to pragmatic wisdom.

Another, stronger, way of putting the pragmatist argument is that international lawyers conventionally agree on a normative vocabulary and its underlying principles. To suggest alternative conceptions of international law has the potential to undermine the stability and cohesion of the international legal order, thus undermining its capacity to regulate conduct. Brownlie does not make this claim, even though it has been made by other important international lawyers such as, for example, Prosper Weil, whose work is considered in detail in this book.[34] But whether this kind of claim can be substantiated or not, it remains the case that practitioners base their claims about what ought to be the case on an underlying conception of international law. It should be clear from the foregoing that I side here Roscoe Pound's view on the relationship between theory and practice: '[e]very treatise, every legal opinion, every bit of legislation, and one might say every judicial decision, is consciously or unconsciously a bit of philosophical exposition'.[35] To claim that by ignoring questions of theory international law can be advanced with one, pragmatic, voice is unconvincing. This is because it is simply not the case that international lawyers have one voice or conception of international law. As we have seen, there is serious disagreement about the contents and underlying principles of the international legal order, and thus when states are legally justified in acting in particular ways or employing coercive force. The nature of the normative practice which we call international law is contested rather than it being characterised as a set of clear and objective legal norms which international lawyers apply. In this sense, the pragmatic practitioner's account is the equivalent to sticking one's head in the sand. We can be sceptical about whether there are good reasons to prefer one conception of international law over another, but to argue that such inquiry is not implied by any claims made by international lawyers about the constitutive nature of international law must be false.

CONCLUSION

In this book, I aim to show that beyond the sceptical positions just set out, it is possible to say something determinate—and, indeed, conceptually necessary—about international law. My position is that the sceptical account is right in that the concept of law is in part a priori and that the historical account is also right to hold that law can have a normative impact for those wielding, or seeking to prevent the wielding, of coercive force.

[34] See Chapter 6.
[35] Pound, above n 6, at 73.

But both are wrong to consider that such conceptions are essentially subjective.

The Kantian view which is set out in this book holds that it is possible to conceive of international law as a set of institutions which provide a framework for authoritative decision-making so as to restructure international relations in a way that is consistent with a broader concern for the dignity of all human beings. This concept of international law can be used to mediate between competing and subjectively-held conceptions of international law and determine the legality, or otherwise, of paradigm cases. Methodologically, this same point is well described by Kant in the following famous discussion of method in legal science:[36]

> Like the much-cited query 'what is truth?' put to the logician, the question 'what is right?' might well embarrass the *jurist* if he does not want to lapse into a tautology or, instead of giving a universal solution, refer to what the laws in some country at some time prescribe. He can indeed state what is laid down as right . . ., that is, what the laws in a certain place and at a certain time say or have said. But whether what these laws prescribed is also right, and what the universal criterion is by which one could recognize right as well as wrong . . ., this would remain hidden from him unless he leaves those empirical principles behind for a while and seeks the sources of such judgments in reason alone, so as to establish the basis for any possible giving of positive laws (although positive laws can serve as excellent guides to this). Like the wooden head in Phaedrus's fable, a merely empirical doctrine of right is a head that may be beautiful but unfortunately it has no brain.

It is my view that it is extremely useful to set out and reconstruct various conceptions of international law that have been used through history. They tell us something important about how people have used words like 'international law' at various times, and the intellectual and social context in which such conceptions provided a normative vocabulary which justified state action. But such conceptions, or the methodology underpinning them, do not sort out the basic problems about how it is possible to have knowledge of international law as a form of human activity in a way that goes beyond mere historical contingency. Obviously those advancing historical accounts, alongside Williams' sceptical account, might think that what I offer here is merely the latest in a long list of failed attempts to argue for a concept of international law. I hope to provide good reasons why such scepticism is unfounded. I will argue that it is possible to defend a *concept* of international law which mediates between various *conceptions* of international law which exist amongst international lawyers. To put it another way, I think that it is indeed possible to cut through the warp and weft of practice over time and space and talk instead about a concept of international law.

[36] I Kant, *The Metaphysics of Morals* (M Gregor (trans), Cambridge, Cambridge University Press, 1991, first published in 1797) 23 [6:229–30].

2

The Methodological Problem

METHODOLOGICAL QUESTIONS ARE fundamentally concerned with how legal science is possible: that is, how objective knowledge can be had of law as a practical phenomenon. In this book it is argued that legal science is possible, and that we can have objective knowledge of practical concepts like law and international law. In the first chapter, the historical, sceptical and practitioner accounts were shown to throw doubt on the very possibility, or practical usefulness, of such a project. It was shown that none of the claims made by these accounts could be obviously vindicated. However, these positions, which are sceptical about the worth or viability of the central claim made in this book, all resolve down to one central methodological problem. Setting out this problem, as well as two distinct ways of answering it, is the subject of this chapter.

The description of the methodological problem begins with the acknowledgement that international law is a practice which is meaningful to those involved in it. For the sake of convenience, those involved in this practice can be called international lawyers, but it can obviously involve a much wider array of individuals and groups. The job of the legal scientist is to articulate general concepts about this practice which take into account its meaning for those involved in it. This is a well-known starting point which unifies a wide range of positions in legal and social science.

The idea that law should be conceptualised as a meaningful practice reflects a variety of familiar ways of thinking about international law. One is that to conceptualise international law adequately one must understand the purpose(s) or function(s) of the practice from the point of view of those engaged in it. For some this might be, for example, the protection of fundamental human rights, while for others, the function of international law is to secure the conditions in which states can peacefully co-exist. Alternatively, it may be that the international legal order is constituted by various conventional understandings which define the role of various participants in the practice (international lawyers), their use of particular linguistic forms (international law speak) or the normative constraints associated with this practice (the content of international law).

International law is a practice that comprises a complex set of implicit or explicit judgments made by international lawyers about the content and

relative importance of these attributions of function or convention. In this sense, all international lawyers have a conception of the practice they are involved in which defines and structures their role and the way they speak, as well as establishing what they ought to do and what they consider valuable objectives qua international lawyer. This multitude of self-conceptions can be called the raw data and it is from this that our conceptual distinctions can be drawn. The methodological problem is that these judgments found in the raw data vary from international lawyer to international lawyer and from time to time. How is it possible to draw a concept of international law from these disparate social practices? Put this way, the methodological problem unites the historical and sceptical views set out in Chapter 1. It also brings to the fore the difficulty of providing a solution to it.[1]

Any solution to the methodological problem provides a methodology which allows the legal scientist to apprehend, and make sense of, the dense, contradictory and multi-significant internal world of those involved in the practice of international law in a non-arbitrary way. The first part of this chapter discusses this problem in detail through an examination of the work of Anghie and Franck. In the second part of this chapter, two ways of solving this problem are set out. The first solution is that there are certain *conventions* which are constitutive of international law. These conventions, which are understood to be relatively stable, refer to the ways in which international lawyers use language to self-characterise the social practices in which they are involved and the conceptual distinctions which they draw. *Conceptual analysis* refers to a range of analytical techniques which allow the legal scientist to make sense of these conventions held by international lawyers. The second is that international law has a *purpose* which is either explicitly or implicitly held by all international lawyers. To conceptualise international law this way can be called *focal analysis*. The possibility that either of these forms of analysis can solve the methodological problem is then considered. In Chapters 3 and 4, I explore two powerful versions of these two forms of analysis which find their inspiration in the work of Hart and Weber respectively, and show how their approaches have been, or could be, applied to consider the concept of international law.

[1] The practitioner, who adopts a pragmatic approach to international law, could be said to realise the potential for this problem to undermine any claims made by international lawyers about what ought to be the case. Thus, public international law should be isolated from such sources of theoretical confusion or scepticism. However, as was seen in Chapter 1, this approach seems to ignore the problem rather than solve it.

THE METHODOLOGICAL PROBLEM IN LEGAL SCIENCE

Before moving to this central argument it is necessary to describe the methodological problem in more detail. It has two facets. The first facet, which has already been mentioned, concerns how concepts of practical phenomena, like international law, might be able to be drawn from a complex set of multi-significant social practices. The second facet, which is equally as important, is how law is related to other similar practical phenomena. Legal science, for instance, is centrally concerned with the relationship between law and morality. So, positivists have argued that law and morality are fundamentally distinct phenomena even though there may be some contingent connections between them. For natural lawyers or legal idealists, law must necessarily have a specific moral content and the two concepts are necessarily connected. This facet will be considered through a similar problem faced by international lawyers when they ask whether international law is really law. They, alongside a number of prominent legal philosophers, have argued, for instance, that international law is best understood as a peripheral example of law, as essentially unrelated to law, or that international law is a form of law in the same way as state legal orders are.

The Methodological Problem

The first facet of the methodological problem concerns how practical concepts—like law and international law—can be drawn from social practice. To begin with, it is often said that international law has this or that specific purpose, that it is engaged in protecting certain values, or that is has certain constitutive features which are jointly held by those involved in its practice. Here are some familiar examples: the policy science school which was developed by, among others, Myres McDougal, explicitly claims that international law must be purposively orientated towards the protection of substantive values associated with the liberal, democratic, tradition.[2] From a radically different perspective, feminists, cultural relativists or international lawyers inspired by the insights of critical legal studies, all think that international law endemically reflects certain values associated with patriarchy, Western imperialism, or other hegemonic interests.[3]

[2] See H Lasswell and M McDougal, 'Criteria for a Theory about Law' (1970) 44 *Southern California Law Review* 362 and below, 80–82.

[3] See C Chinkin and H Charlesworth, *The Boundaries of International Law: a Feminist Analysis* (Manchester, Manchester University Press, 2000); A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press, 2005); D Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' (1996) 65 *Nordic Journal of International Law* 341.

International law, then, can be said to be constituted by this value orientation, even though this may be contrary to the interests of those affected by it. Finally, positivist international lawyers often rely upon the conventional claim, which they hold is generally accepted by international lawyers, that the foundation of international law is connected to the will of sovereign states.[4]

At the heart of the methodological problem is that claims about the nature of international law, like those just set out, normally are held as being true. Implicitly or explicitly, these claims support a view of what international law is *really* like. Obviously, all of these accounts cannot be true. It can then be plausibly asked how it is possible to say that one account is preferable to another. The beginning of an answer, one would think, is to be found in the raw data which has already been described as comprising the practices, attitudes, values, purposes or language-use of international lawyers. The raw data is characterised this way by John Finnis:[5]

> [The] object [of legal science] is constituted by human actions, practices, habits, dispositions and by human discourse. The actions, practices, etc., are certainly influenced by the 'natural' causes properly investigated by the methods of the natural sciences, including a part of the science of psychology. But the actions, practices, etc., can be fully understood only by understanding their point, that is to say, their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc. And these conceptions of point, value, significance, and importance will be reflected in the discourse of those same people, in the conceptual distinctions they draw and fail or refuse to draw.

It is plausible to suggest that it is from this raw data that claims about the constitutive nature of international law can be held to be valid or invalid. So, for example, claims that international law is constitutively racist, sexist, or is a system of legitimate dispute settlement between states are true to the extent that they reflect the raw data. While this seems plausible and intuitive, it is, for Finnis, highly problematic. This is why: 'these actions, practices, etc., and correspondingly these concepts, vary greatly from person to person, from one society to another, from one time and place to other times and places. *How, then, is there to be a general descriptive theory of these varying particulars?*'.[6] To put this problem at its most stringent, it seems that there is no obvious sense in which there is coherence in various

[4] See Chapters 3 and 6 on positivism and international law.

[5] J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980) 3–4.

[6] *Ibid* at 4. Endicott puts the same point nicely: 'The reconciliation lies in the purposes of the theorist, and in the nature of the subject-matter. That matter, being a complex variety of aspects of human practices, presents the theorist with a potentially bewildering task of deciding how to find or impose an intelligible order or pattern'. See T Endicott, 'How to Speak the Truth' (2001) 46 *American Journal of Jurisprudence* 229, 231.

international lawyers' viewpoints, nor are there intensional[7] properties of international law to be gleaned from these viewpoints. Other ways might be found of conceiving of the essential features of international law, but the viewpoints of international lawyers are simply too divergent, varied and disparate to be subsumed to one concept of international law. The viewpoint of the international lawyer seemed like a good starting point: it now seems to unravel into an incoherent myriad of subjective viewpoints. Furthermore, any judgment made about the essential nature of the raw data is one that is *imposed by the legal scientist* on the raw data.[8] This is the case whether one claims that international law is racist, sexist or morally benign. This is perhaps the strongest way of putting the sceptical account detailed in the last chapter.

This general point can be further explored through the use of an example. The particular example I want to look at is Antony Anghie's strident and polemical book *Imperialism, Sovereignty and the Making of International Law*.[9] Here he advances an interpretation of the nature of international law rooted in critical race theory and Third-World approaches to international law. He attempts to show that dominant discourses, which are portrayed (on the practitioner's account) as intuitive and common-sense, mask or justify oppression of non-Western societies. For these reasons his work can be said to be a radical re-interpretation of many familiar examples of international law. Because Anghie takes this familiar material and presents it through a very different lens to that offered in traditional accounts, it is a useful way of revealing how and why conceptions of international law vary and to expose the kind of judgments which must be made to provide an answer to the methodological problem.

Is International Law Racist?

Anghie's argument is that international law is constitutively racist and is ideologically supportive of the colonial project which European or Western elites have been embarked upon over the last 600 years. So, for example, the sovereign state which is, by-and-large, a European phenomenon, is considered 'civilised', 'developed' or 'universal' against non-European forms of governance which are, in turn, characterised as 'uncivilised', 'underdeveloped' or 'parochial'. International law, which is parasitic upon this conception of sovereignty, is a tool used to legitimise, justify or hide European oppression of non-European peoples through the process of

[7] The word 'intensional', in this context, refers to the set of attributes which are the necessary and sufficient conditions by which something can be said to be international law.

[8] See J Dickson, *Evaluation and Legal Theory* (Oxford, Hart Publishing, 2001) 19.

[9] Anghie, above n 3.

colonialism. His central claim is that the 'dynamic of difference'[10] between European and non-European peoples is the crucible in which the essential features of international law as it is known to, for example, textbook writers, theorists and state officials, have been forged. He supports this claim by taking six paradigm examples (natural law tradition, nineteenth-century positivism, the League of Nations, the UN Charter system, global economic governance and the war on terror) in the development of international law to demonstrate that they all are best understood as phenomena reflecting this central claim.

To take nineteenth century positivism as an example, Anghie claims that 'positivists were engaged in an ongoing struggle to define, subordinate and exclude the native'.[11] It might seem at first blush difficult to see how the work of John Austin, who is a positivist from this period which Anghie focuses on, can be used to support this claim.[12] I cannot see without a detailed biographical analysis (which is not found in Anghie's work) how it is possible to say that Austin was himself 'engaged' in a project which had a *purpose* that was *essentially* racist. Of course, it is plausible to hold that Austin was ignorant of examples of social regulation which fell outside his definition of law and which existed elsewhere in the world or in history. This point was in fact well-made in the nineteenth century by Henry Maine in his *Ancient Law*.[13] But Maine's point does not go far in supporting Anghie's claim that nineteenth century positivism is racist.

A stronger charge is that if Austin's work was internalised by European state officials in their colonial endeavours, it could became a normative theory about what does and does not count as a state or legal order which, in turn, could justify patronising and oppressive acts against non-Western peoples. As just mentioned, it is hard to attribute any such intention to Austin's austere analytical jurisprudence, but this claim does better capture the essence of Anghie's charge. Therefore, it is not Austin himself, but positivist international lawyers, who have used his approach to justify racist and colonialist policies, who are the subject of Anghie's vitriol. For example, he defends his claim about the relationship between positivism and imperialism by looking at Westlake's work in which an Austinian conception of statehood was used to defend the claim that African tribes do not have legal personality, as well as other correlative rights, under international law.[14] However, what happened was that Westlake's

[10] *Ibid* at 4.

[11] *Ibid* at 38.

[12] J Austin, *The Province of Jurisprudence Determined* (Cambridge, Cambridge University Press, 2001, first published in 1995). Austin presents a definition of law in terms of the sovereign commands backed by threats which are habitually obeyed.

[13] H Maine, *Ancient Law* (London, Dent, 1954, first published in 1861) 6–8. See also W Rumble's introduction to *The Province of Jurisprudence Determined*, above n 12, at xxii.

[14] See Anghie, above n 3, at 340 and J Westlake, *Chapters on the Principles of International Law* (Cambridge, Cambridge University Press, 1894) preface and ch 1.

'anthropological insight with taxonomic precision' about the social organisation of African tribes was used by state officials and international lawyers to 'facilitat[e] the racialization of law by delimiting the notion of law to very specific . . . institutions'[15] which are found in Europe.

I do not want to belittle Anghie's substantive contribution: the influence of Western powers' imperialist endeavours was often denigrating and racist against non-Western societies. My question is methodological: how does Anghie demonstrate the truth of his claims about the nature of international law? Well, in once sense, he does not attempt to. He says, for instance, that '[i]n adopting a particular . . . method and framework I disregard the many other histories and themes that could have been explored'.[16] So it would seem that his view is simply an account of the history of international law which rests alongside other, more orthodox, accounts. Whether one takes a radical or orthodox account might simply be a function of the way in which it 'speaks' to the reader, given his worldview.[17] However, in other places, Anghie's claims are much stronger. With regard to the development of a universal system of state sovereignty and legal equality (which might appear from some perspectives to help rectify the problems he identifies with nineteenth century positivism), he says 'imperialism has *always* governed international relations, [and] rather than seeing imperialism as having ended with formal decolonization . . . [i]t is almost as though any attempt to create a new international law must somehow return to and reproduce, the colonial origins of the discipline' and that the history of international law 'continuously disempowers the non-European world'.[18] It would seem that his claim is not simply an interpretation, but is an interpretation that is *true* about international law: the normative practice we call international law is constitutively (in the sense of being essentially characterised) by colonialism and racism. This point is made very clear when he considers Tuck's analysis of the scholastic and humanistic influences on seventeenth and eighteenth century writers on international law, as well as Koskenniemi's analysis of the move by international lawyers from formalism to pragmatism during the nineteenth and twentieth centuries. He says that '[t]he disturbing point for me is that, whatever the contrasts and transitions, *imperialism is a constant*'.[19]

Anghie's stronger claim is that international law is, and always has been, *constitutively* racist and imperialist. This claim is inductive in that it is an attempt to draw from various social practices theoretical conclusions

[15] Anghie, above n 3, at 55.

[16] *Ibid* at 12.

[17] P Allott, 'Language, Method and the Nature of International Law' (1971) 45 *British Yearbook of International Law* 79 at 96–98 on what this process might involve.

[18] Anghie, above n 3, at 309 and 312.

[19] *Ibid* at 315. R Tuck, *The Rights of War and Peace* (Oxford, Oxford University Press, 1999); M Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge, Cambridge University Press, 2002).

about the nature of international law. Furthermore, it is against this totality of social practices that his claims, or any other interpretations of the constitutive features of international law, must be judged. But at this point, it is necessary to return to the methodological problem faced by international lawyers. If we assume for the moment that Finnis is right, the raw data does not obviously lead to any one particular conception of international law being the case. The problem is that the social world does not 'appear' in any meaningful sense: it is mediated through a complex set of concepts and categories which are based upon our judgments of purpose, significance, function or importance as legal scientists, international lawyers, legal officials or subjects. This is highly variable and cannot give rise to, or be reduced to, simple explanations of its nature, purpose and function given by Anghie. If this is correct, it might be better to see Anghie's claim as an a priori judgment on his part qua legal scientist about what is most important about the raw data under consideration.

This argument belies a more general point. The totality of social facts which make up the raw data cannot be unambiguously used as the arbiter of our theoretical controversies.[20] For all concepts have built into them certain assumptions about what, within this totality of social facts, is to be considered relevant or important for the theoretical modelling of social phenomena. Take, for example, Anghie's claim that the development of international standards for the protection of foreign investment (which 'pop up' from state practice or are enshrined in bilateral investment treaties) simply replicate imperialist attitudes found in earlier periods.[21] Once this claim is made, positive developments in international law which might well protect poorer states (such as, for example, the principle of sovereign equality or the dominance of 'Third World' states in the UN General Assembly) are rendered *relatively* unimportant when it comes to the *essentially constitutive* features of international law. Other international lawyers and scientists may put greater emphasis on other features, and similarly consider them to be essentially constitutive of international law. This is what varies about various claims about international law.

The point is that Anghie's interpretation of international law, alongside any other which draws its conclusions from the raw data, has built into it four related judgments. First, there is a judgment of *relevance*. This judgment requires the theorist to determine, from the totality of social facts that

[20] See K Popper, *Conjectures and Refutations* (London, Routledge, 2000, first published in 1963) and M Hollis, *Models of Man* (Cambridge, Cambridge University Press, 1977). See also Finnis, above n 5, at 17.

[21] So, eg, he uses the way in which English common law principles were elevated to the international plane in the *Abu-Dhabi Arbitration* or the way in which the *Texaco v Libya Arbitration* elevated foreign multinationals to the international plane for the purposes of protecting Western interests. He does, however, acknowledge that the development of ICSID, alongside other developments, 'have gone far towards resolving many of the practical questions that created the debates I have examined here'. See Anghie, above n 3, at 236.

constitute the raw data, those which are relevant to international law. Secondly, there is a judgment of *importance*. As Katz states, a hungry animal will divide its environment into edible and inedible things and to this we might add that within the class of edible things the animal might consider some things more nutritious than others. By analogy, a liberal, pragmatist, formalist, positivist, critical race theorist, are animals who eat radically different things.[22] Once imbibed, this judgment can fundamentally alter one's view of the nature of international law, whether it exists or not, what its function or purpose is, and what counts as legally valid. Thirdly, there is a judgment of *continuity*. Are the social practices which are usually given (in ordinary language-use) the same name (eg international law) essentially the same social practices through time or are there shifts in their constitutive identity? Anghie and the positivist Weil, for very different reasons, think that there have been no real constitutive shifts in the essential nature of international law.[23] Others, such as Koskenniemi or Fassbender, from equally different perspectives, would fundamentally disagree and see various conceptions of international law rise and fall through history.[24]

These three points are well summarised by Karl Popper's analogy of an 'induction machine' by which we can formulate models which can then be tested for validity against the raw data. As 'the architects of the machine' Popper argues, we 'must decide a priori what constitutes its "world"; what things are to be taken as similar or equal; and what *kind* of "laws" we wish the machine to be able to "discover" in its "world" '.[25] This exact problem is familiar to some international lawyers. Koskenniemi argues that 'the facts which constitute the international social world do not appear "automatically" but are the result of choosing, finding a relevant conceptual matrix'.[26] Carty makes a similar point. He states, '[o]ne cannot simply study the practice of States as evidence of law because it is logically inconceivable to examine any evidence without *a priori* criteria of relevance and significance'.[27] All of these theorists would acknowledge that these sorts of judgment are necessary if the legal scientist is to make sense of the complex

[22] D Katz, *Animals and Men* (London, Longmans, 1937) ch 6.

[23] P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413. See also W Grewe, *The Epochs of International Law* (M Byers (trans), Berlin, Walter de Gruter, 2000, first published in 1944) 29.

[24] See also Koskenniemi, above n 19 and B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529. He thinks that pre-Charter elements of international law of a more private law character (such as *pacta sunt servanda*) are built into the Charter but that with the advent of the Charter, the 'international community' is moving away from a state sovereignty model towards a model of 'international constitutionalism' (at 617).

[25] Popper, above n 20, at 48.

[26] M Koskenniemi, *From Apology to Utopia* (Cambridge, Cambridge University Press, 2005, first published in 1989) 221.

[27] A Carty, *The Decay of International Law* (Manchester, Manchester University Press, 1986) 95–6.

social practices of which international lawyers are a part. Once these judgments are made, the raw data 'reveals' its constitutive features and its continuity or otherwise as a practice. We should also acknowledge a fourth sort of judgment which is equally important. This is a judgment about the *practical point* or *purpose* of the social practices under consideration. For Anghie, such practices are purposively orientated towards colonialism and racism regardless of that which those who engage in such practices subjectively intend. Liberals, feminists or positivists take a different view about the practical point of international law.

From this analysis, it appears illogical to consider any conception as being better or worse at explaining the raw data, because each is based upon a different set of judgments made by the legal scientist about the relevance, significance, continuity or purpose about the various social practices under consideration. Therefore, it is equally illogical to think of the social practices which comprise the raw data being employed as a neutral arbiter of our theoretical controversies. This seems to place a heavy justificatory burden on those wanting to defend a concept of international law which Anghie does not attempt to meet. Therefore, we are rightly justified in being sceptical about his conclusions even if it is possible to find assorted evidence which backs up his claims.

This is not a problem which only arises in Anghie's analysis. It is true of any putative induction of that which is constitutive of international law from the various social practices which comprise the raw data. Rather than the essential characteristics being somehow natural, or there to be uncovered, the implication of this argument is that some way must be found of selecting what is essentially important about empirical reality, and to conceptualise international law from this viewpoint. Such a judgment, a priori, determines which charateristics, from the varied social practices under consideration, are central, and which are peripheral to international law. If such a judgment must be subjective, then legal science must be subjective and scepticism about the possibility of legal science conceptualising its subject matter is appropriate.[28] Any concept of international law, or, indeed, law, is not theoretically defensible and is rendered a mere perspective taken about the raw data. How is legal science then possible?

[28] This critique, however, is valid to the extent that Finnis is right: that the raw data reflects a wide variety of different subjective conceptions of the meaning, purpose, function, etc of international law. It cannot be ruled out that the raw data is not like this, and that the legal scientist can merely report its constitutive features in a clear and systematic way. See H Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Oxford University Press, 1983) 90–1. Various attempts to defend the latter view are considered in the last section of this chapter and in Chapter 3.

The Ontological Problem

This question is also implied by the ontological problem. The problem emerges from Thomas Franck's argument that 'international law has entered its post-ontological era. Its lawyers need no longer defend the very existence of international law'.[29] Instead, '[t]he questions to which the international lawyer must now be prepared to respond, in this post-ontological era, are different from the traditional inquiry: whether international law is law. Instead, we are now asked: is international law effective? It is enforceable? Is it understood? And, the most important question: Is international law fair?'.[30] Franck's discussion of this problem implies an analysis of the second facet of the methodological problem: that is, how concepts like law and international law are connected to one another. It is my view that the ontological problem begins from a concept of law which, in turn, implies a concept of international law to which paradigm cases of international law approximate. Put another way, any answer to the ontological problem rests upon a solution to the first facet of the methodological problem: how it is possible to derive concepts of legal phenomena.

Franck does not cite any authors who consider the ontological problem, but surely John Austin is the most obvious philosopher who considered it. Austin holds that all usages of the word 'law' either conform to the definition of law (laws properly so-called) or are either related to the definition of law analogically or metaphorically. International law has an analogical relationship to the central case of law in the same way as morality does: both are *similar* to law.[31]

In making these claims, Austin employs a strict taxonomical approach to word usage which has been called 'criterial semantics'.[32] This means that it is possible to determine the truth conditions for the correct usage of words. Therefore, his view is that international law is described with

[29] T Franck, *Fairness in International Law and Institutions* (Oxford, Oxford University Press, 1995) 6. On the ontological problem see Austin, above n 12, at 181–3 *et seq*. JL Brierly, *The Law of Nations* (6th edn, Oxford, Oxford University Press, 1963) 54–5, 100–2; L Henkin, *How Nations Behave* (2nd edn, London, Pall Mall Press, 1979) 31–44, 84–94; A D'Amato, 'Is International Law Really Law' (1984–85) 79 *Northwestern University Law Review* 1293; I Brownlie, 'The Reality and Efficacy of International Law' (1981) 52 *British Yearbook of International Law* 1; G Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement' (1956) 19 *Modern Law Review* 1; R Falk, 'The Adequacy of Contemporary Theories of International Law: Gaps in Legal Thinking' (1964) 50 *Virginia Law Review* 231; and G Williams, 'International Law and the Controversy Concerning the Word "Law"' (1945) *British Yearbook of International Law* 146.

[30] Franck, above n 29, at 6.

[31] Austin, above n 12, at 112.

[32] T Endicott, 'Herbert Hart and the Semantic Sting' in J Coleman (ed), *Hart's Postscript* (Oxford, Oxford University Press, 2001) 40 and R Dworkin, *Law's Empire* (Oxford, Hart Publishing, 2004, first published in 1986) 31–5.

'perfect precision' as '*positive* international *morality*'.[33] To refer to international law as law has *no meaning in an essential sense*, and is a linguistic error, even though there is an analogous relationship between various sorts of positive norms, be they moral or legal.[34] Franck seems to want to get beyond this sort of semantic quibbling and instead to consider the content, and institutional application, of international legal norms. But does he really move beyond the ontological problem?

Straightforwardly, if international law *is* law, then there must be some essential characteristics which are common to Franck's conception of both, which allows his ontological problem to be solved. But what Franck's answer to the ontological problem might be is not clear. There are at least two ways in which we can view his claims about the ontological status of international law. First, it can be said that Franck seems to want to hold that features like effectiveness and fairness are *not* constitutive characteristics of either law or international law. They are values which might or might not be characteristic of international law, but their absence does not entail that international law does not exist. But in doing this, he seems to beg the methodological problem of what the constitutive features of forms of law (of which international law is but one form) are. Secondly, it is not obvious why questions concerning whether international law is, or is not, effective, enforceable, understood or fair are necessarily post-ontological: that is, questions to be asked once the ontological problem has been solved. This is because considerations like effectiveness and fairness are often considered as constitutive characteristics of a legal order. To return to Austin, international law is better classified as international morality because it has no effective and centralised systems of enforcement. Similarly, many international lawyers would hold that rules which are unfairly promulgated (for example, the *unilateral* promulgation of a norm of pre-emptive self-defence which is inconsistent with state practice)[35] are not *correctly* called international law despite what some might say. On the basis of these examples, it is not odd to argue that those institutionalised social norms which govern international relations that are ineffective or unfair, might be more appropriately characterised as not really law or as a peripheral example of law.

Both of these options, however, appear to fall into the trap which Franck wants to avoid: that we are back to taxonomical discussion of the necessary and sufficient conditions by which a normative practice can be

[33] Austin, above n 12, at 112.

[34] *Ibid*.

[35] G Simpson, 'The War in Iraq and International Law' (2005) 6 *Melbourne Journal of International Law* 171. For other views see M Reisman and A Armstrong, 'Past and Future of the Claim of Preemptive Self-Defence' (2006) 100 *American Journal of International Law* 525 and C Greenwood 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida and Iraq' (2003) 4 *San Diego International Law Journal* 7.

correctly called a form of law. Franck's position is more subtle than this. He is calling for a discussion of how we might improve the structures of international law with which we are familiar. This seems to imply a gap between the everyday examples of international legal phenomena and an idealised form of international law to which they can be compared. Improvement means that the everyday examples are brought closer to the ideal of law (which is effective, fair, and so on). However, rather than moving beyond the ontological problem, I will argue that it is, in fact, the correct way to view the ontological problem itself.

These various considerations belie a relatively complex set of conceptual distinctions which need to be unpacked in order to be clear about the various claims about international law, and its relationship to the concept of law, which have just been set out. It is useful to distinguish initially between five ways of thinking about legal phenomena.

A The everyday examples of legal phenomena just described can be called *paradigm cases of law*. These describe those practices, rules, etc, which are normally referred to as law.[36] So, for example, an Act of Parliament might be considered a paradigm case of the law of the United Kingdom.

B Against paradigm cases there are *irregular cases of law*. These cases are not normally called a case of law by most people. An example of this is administrative circulars made by the Department of Health which restrict access to potentially life-saving medicine.

C The *concept of law* offers an account of the intensional attributes of law. It is often called the central case of law in the literature.

D A *peripheral case of law* contains some of the characteristics or attributes of the concept of law. For Austin, international law is either positive law *or* positive morality. However, the idea of a peripheral case reflects a more subtle approach whereby cases can have *some*, but not all, of the characteristics of law.

E A *false case of law* contains none of the characteristics or attributes of the concept of law but is often described as law. It is difficult to think of a clear example of this, as most examples which spring to mind (such as etiquette or the laws of cricket or tennis) actually resemble our familiar legal practices in many ways. Perhaps the best example would be scientific laws.

Therefore, at the level of our everyday practices, intuitions and language usage there are paradigm (A) and irregular (B) cases of law. Whether a practice is a paradigm case of law or an irregular case of law is based upon the loose understanding each of us has of what we and the people round us tend to call law. At the level of concept formation in legal science, there

[36] Dworkin, above n 32, at 90–3.

is the concept of law (C), peripheral cases of law (D) or a false case of law (E). If the intension of the concept of law is attributes or characteristics C_1, C_2, and C_3, a peripheral case of law has, for example, only attributes C_1 and C_2. A false case of law (E) does not have any of the attributes C_1, C_2, or C_3. There are then two sets of meta-theoretical distinctions:

Paradigm Case (A) *OR* Irregular Case (B)
Concept of Law (C) *OR* Peripheral Case (D) *OR* False Case (E)

Those engaged in the philosophical analysis of law make a judgment about the extent to which our paradigm and irregular cases of law fall within the extension of the central case (that is, have C_1, C_2, or C_3). The concept of law (C) would presumably include most, but *not necessarily any* paradigm cases of law (A).[37] It could also include some, all, but not necessarily any, irregular cases of law (B). Furthermore, paradigm cases and irregular cases may sometimes be better classified as a peripheral case of law because they exhibit certain features of the concept of law. Our paradigm and irregular cases are defeasible examples of law and are not necessarily, in themselves, an example of either the concept of law or peripheral cases of law.

Clearly, it is the concept of law which governs how we should view all the other cases of law. The concept of law might be narrower or wider than our paradigm cases, and so may exclude, or include, certain paradigm and irregular cases. This is not theoretically problematic, because, as has been argued, it is not obviously the case that paradigm cases stand up as arbiters of our theoretical controversies, and of course, those who give paradigm cases as examples of law might be, at a philosophical level, wrong.[38] But, this said, to hold that paradigm cases are not forms of law does indicate where further explanation is often required.[39]

Finnis clearly adopts this sort of approach. He explains that '[t]here are central cases of constitutional government, and there are peripheral cases (such as Hitler's Germany, Stalin's Russia, or even Amin's Uganda) . . . Indeed, the study of them is illuminated by thinking of them as watered-down versions of the central case'.[40] Applying this line of reasoning to law; there is a concept of law (a central case) against which our familiar practices can be judged *as an example of*, as a *peripheral case of*, or, indeed, a *false case of* law.

With this analysis in place it is possible to reconsider the ontological problem. It is my view that when the question 'Is international law really law?' is asked, the starting point is our paradigm cases of international law:

[37] *Ibid* at 87–96.

[38] See, eg, M Murphy, 'Natural Law Jurisprudence' (2003) 9 *Legal Theory* 241.

[39] Dworkin, above n 32, at 92. Dworkin writes that paradigm cases might 'embarrass an interpretation by confronting it with a paradigm it cannot explain'.

[40] Finnis, above n 5, at 11.

F A *paradigm case of international law* is a familiar practice, norm, etc which is normally referred to as international law. Both a Security Council Resolution and a multilateral treaty provision can be said to be paradigm cases of international law.

The ontological problem concerns whether a paradigm case of international law falls within the extension of the concept of law (C). While the paradigm case of law which is the state legal order is normally understood as falling within the extension of (C), there is often scepticism as to whether this is also the case for paradigm cases of international law (F).

This is Austin's and Hart's approach. Austin characterises international law as positive morality, while Hart considers international law a peripheral case of law. Austin considers paradigm cases of international law against the concept of law. The concept of law is not reflected in paradigm cases of international law. Rather, they are best called international morality. Hart argues much the same because the paradigm cases of international law he considers do not exhibit a secondary rule of recognition.

The reason why Austin and Hart are correctly understood as comparing paradigm cases of international law to the concept of law is because it is possible to conceive of a type of law, consistent with the concept of law, which regulates the relationship between states, which is called international law. For Austin, the concept of international law is a system of commands which are issued from a global sovereign will and which are habitually obeyed by states. Hart clearly accepts something similar. He is fully prepared to conceive of a system of international governance which has a clearly defined rule of recognition applied by a group of legal officials[41]

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

However, while he can conceive of a concept of international law, he does not think that this concept is reflected in paradigm cases of international law. Therefore, it is possible to claim that:

G The *concept of international law* is a type of law which is drawn from the general concept of law (C). If a paradigm case of international law falls within the extension of the concept of international law, then it also falls within the extension of the general concept of law.

[41] See chapter 3 and HLA Hart, *The Concept of Law* (2nd edn, Oxford, Clarendon Press, 1994, 1st published 1961), at 236 [231].

Some legal philosophers are up front in making this sort of distinction. Kant's philosophy of international law provides a good example. The concept of law (C) is employed to conceptualise the international legal order (G) as a type of law.[42] To refer to certain paradigm cases of international law (F), which do not reflect the concept of law, as law constitutes a linguistic error. So, in response to those, like Grotius, who consider that states can unilaterally determine whether a wrong has been committed in violation of international law and enforce this determination, Kant claims '[t]he concept of the right of nations as a right to go to war is meaningless'.[43]

The final sort of legal phenomena which can be distinguished are irregular cases of international law:

H There are also *irregular cases of international law* which are those cases which are not normally referred to as cases of international law. An example of these could be a General Assembly Resolution which calls for a fundamental reorganisation of the global economic order.

The concept of international law (G) or the general concept of law (C) is employed to determine whether such irregular cases are, indeed, examples of legal phenomena. For example, a very narrow concept of law might exclude all paradigm and irregular cases of international law. A very wide concept of law might include both. An intermediate position might want to include most paradigm cases of law, but exclude irregular cases of law. Some sort of intermediate position is taken, in my view, by most international lawyers, who are often prepared to accept the legality of multilateral treaties and Security Council Resolutions but are not prepared to accept that General Assembly Resolutions are straightforwardly legal phenomena.

This typology shows that the ontological problem presupposes a range of ways of thinking about the relationship between law and international law. In summary, we can say that the concept of law implies a concept of international law. Both are used to characterise paradigm and irregular cases of international law as clear cases of, peripheral cases of, or false cases of law. Those who aim to explore the ontological problem are probably engaged in this sort of analysis.

Is Franck making a claim which reflects this typology? Possibly: we have seen that for Franck, the task of the international lawyer is to transform the familiar content and institutions of international law so as to render them fairer and more effective. So, instead of simply side-stepping the ontological problem, he could be read as arguing that those norms, practices, etc, which are paradigm cases of international law are defective against the

[42] I Kant, 'To Perpetual Peace: a Philosophical Sketch' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992, first published 1795) 111–12 [8:348]. This claim presupposes a complex debate which is considered in Chapter 8.

[43] *Ibid* at 117 [8:356–7].

concept of international law which is, presumably, drawn from a more general concept of law. The project of the international lawyer is to ensure that the defective aspects of paradigm cases or irregular cases are removed or altered so that they more closely reflect the concept of international law. In this sense, Franck is actually dealing with a version of the question of whether international law is really law. But it is rendered an attempt to reform the paradigm cases of international law with which we are familiar. It is not, then, built upon the Austinian definitional squabble about whether to define international law under one concept rather than another. The concept of law, for Franck, becomes a critical device rather than a classificatory tool.[44]

In conclusion, a good example of the second facet of the methodological problem, which concerns how practical concepts are related to each other, is the international lawyer's ontological problem. However, this second facet of the methodological problem has at its heart a general concept of law. Thus, any answer to it rests upon the first facet of the methodological problem. Some legal philosophers use the general concept as a classificatory tool, but it can also usefully be employed as a critical standard against which our paradigm cases can be judged and reformed. So, whether we can understand paradigm cases of international law as cases of law, peripheral cases of law, false cases of law, or whether they are best understood as something else (eg positive morality), depends upon it being possible to conceive of a general concept of law.

CONCEPTUAL ANALYSIS AND FOCAL ANALYSIS

The first two sections of this chapter come to the same conclusion: it is necessary to establish a general concept of law to solve the methodological problem. In this section, I want to set out two ways of solving this problem and explore the viability of both. Both solutions find their origins in Aristotelian scholarship but are familiar to modern analytical legal philosophy and, to a lesser extent, international lawyers. These two solutions are normally referred to as conceptual analysis and focal analysis. Conceptual analysis describes a long tradition which holds that it is possible to draw concepts from language-use as well as the conventional conceptual

[44] In the previous discussion the concept of law is employed to consider the legality of paradigm and irregular cases of law and international law. However, for Hart, this relationship is much more complex. He considers that the concept of law is *drawn from* paradigm cases like the French or English legal orders (see T Endicott, 'Herbert Hart and the Semantic Sting' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford, Oxford University Press, 2001) 41–8). But Hart is also prepared to hold, in more orthodox fashion, that irregular cases of law are judged as similar or dissimilar to the central case to the extent that they share the characteristics of the central case. This is discussed in Ch 3, below 59–61.

distinctions which are embodied in our social practices. Focal analysis, on the other hand, describes the tradition by which various social practices are conceived of as purposive phenomena. Both of these approaches normally attempt to draw general concepts from the social practices which comprise the raw data. The difficulty of doing this in light of the methodological problem is considered at the end of this section.

The recent attention given to conceptual and focal analysis by legal philosophers finds its origin in the work of John Finnis. Through the use of Aristotelian analysis of the concept of friendship, Finnis argues that legal science is possible through the identification of 'central cases and focal meaning'.[45] This is confusing. Finnis seem to want to employ both forms of analysis, which suggests there is no clear conflict or division between the two. To explain, 'central case' analysis is often understood to refer to a sort of conceptual analysis, while 'focal meaning' points towards focal analysis. They are attempts to defend the concept of law as having certain necessary attributes and features from two different methodological perspectives.[46] Finnis, therefore, seems to conflate the two. By carefully considering Aristotle's analysis of the concept of friendship, it can be shown how these two forms of analysis are distinctive and lead to different sorts of answers to the methodological problem. Aristotle's discussion of friendship might seem to the reader some way from the concerns of this book, but his work explores the different ways it might be possible to conceive of practical phenomena. His discussion also shows how there are central and peripheral examples of practical phenomena, which in law is reflected in debates over the legal status of various forms of law including, of course, international law.

Conceptual Analysis

In the *Nicomachean Ethics*, Aristotle identifies three types of friendship. There are friendships directed towards pleasure, friendships towards utility and friendships towards moral goodness.[47] The problem which Aristotle examines is that while each of these forms of friendship is directed towards different ends, all are considered forms of the same practical phenomenon. Fortenbaugh shows that for Aristotle, the solution to this problem involves a discussion of both focal *and* conceptual analysis.

[45] Finnis, above n 5, at 9. The edited collection by R Brooks and J Murphy entitled *Aristotle and Modern Law* (Aldershot, Ashgate, 2003) is not concerned with this aspect of Aristotle's work, and is mainly concerned with his substantive legal theory.

[46] A term which is often used—the central case of law—is, in this sense, the same as the concept of law. In order to avoid confusion, the central case of law is to be understood as a way of characterising the concept of law from the perspective of conceptual analysis.

[47] Aristotle, *The Nicomachean Ethics* (D Ross (trans), Oxford, Oxford University Press, 1990) books 8 and 9, 192–247.

But contrary to what Finnis appears to be holding, Fortenbaugh argues that both reflect fundamentally different methodological approaches.

Fortenbaugh distinguishes three ways in which *conceptual* analysis might proceed. The first is *analogical*. This means that it is the case that various forms of friendship have a 'quasi-common' nature.[48] So, ordinary language users can identify various practical phenomena as forms of friendship because they are similar in various ways. This, however, is very loose and unsystematic. A second, more robust, form of conceptual analysis has it that forms of friendship are related through *necessary resemblance*. So, Aristotle 'recognizes common features which are logically necessary for the occurrence of friendship and therefore determine in part at least whether something is to be called friendship. These features are reciprocal affection, wishing well and awareness [of each other]'.[49] Endicott describes this form of analysis well when he writes 'no intelligible account of affairs is possible until the theorist stabilizes the terminology to some extent'.[50] In this sense, the idea of necessary resemblance sets out the limits beyond which language becomes unintelligible. The third form of conceptual analysis takes the central case as a *mediator concept* through which other concepts can be analysed. The central case of friendship, which is the friendship between morally good people, contains all the necessary features of friendship. Aristotle thinks that the friendship between morally good men constitutes a perfect friendship and this 'becomes a kind of focus of resemblance. It has the priority of mediator'.[51] Other forms of friendship lack some of these features and are related to each other through, and thus mediated by, the central case.

These three approaches are unified by the idea that ordinary language-use—the signs we use to describe social practices in the external world—hold the key to concept formation. The intensional meaning of a word can be discerned in this way. When our practices fall within the extension of a word, it can be said that this constitutes correct usage. However, for each form of conceptual analysis, how this plays out is slightly different. So, by taking the analogical approach, when we refer to different forms of friendship, we pick out the similarities between various paradigm cases of friendship. For the necessary resemblance approach, the correct usage of the term friendship refers to those practical phenomena which are characterised by mutual well-wishing, reciprocal affection and awareness of each other.

[48] W Fortenbaugh, 'Aristotle's Analysis of Friendship: Function and Analogy, Resemblance, and Focal Meaning' (1975) 20 *Phronesis* 51, 54.

[49] *Ibid* at 55.

[50] Endicott, above n 6, at 236.

[51] Fortenbaugh, above n 48, at 56. See also; J Cooper, 'Aristotle on Forms of Friendship' (1976–77) 30 *The Review of Metaphysics* 619 at 623–4. Cooper thinks that Aristotle's central case ought to be drawn wider to include 'friendships of character'. Whether this is the case or not is not relevant for my discussion: my focus is on Aristotle's technique of concept formation and not what his concept of friendship actually is. See *ibid* at 629.

Mere 'liking' would not be a characteristic of friendship because, as Aristotle remarks, you can like wine, but it cannot like you back: that is, the relationship is not reciprocal.[52] Finally, for the 'central case as mediator' approach (hereafter, mediator approach), the friendship between morally good people unites a number of peripheral forms of friendship.

We are now in a position to think about how conceptual analysis may help solve the methodological problem in legal science. Legal philosophers have adopted all of these forms of conceptual analysis and here are some examples. Hart argues that the central case of law corresponds to the modern municipal legal order and that international law is a peripheral form of law because it shares some features (eg primary rules) with the central case (which has all the features of law).[53] This form of conceptual analysis reflects both the mediator approach and the analogical approach in various interesting ways.[54]

Finnis, as has already been discussed, seems to advocate (although not unequivocally) the mediator approach in his discussion of constitutional government. He argues that Amin's Uganda (as an irregular form of constitutional governance) is correctly identified as a peripheral case of constitutional governance. In the same way, we might think that there is a central case of law which contains all the attributes or characteristics of law. Returning to the analysis of various cases of law set out in the previous section, our paradigm and irregular cases of law can be classified as either central or peripheral by comparison to the central case. The normative practices which are described by the words international law or Nazi law, which we might consider irregular cases of law, might be then rightly considered peripheral examples of law as they have some features of the central case.

Gardner seems to hold that forms of law necessarily resemble each other in the way described by legal positivism. He argues that the positivist sources thesis does not describe the central case of law, but is rather something that the central case as well as peripheral cases must all have in common to be correctly described as law.[55] Presumably, international law falls

[52] Fortenbaugh, above n 48, at 623.

[53] See Hart, above n 28, at 89.

[54] This is discussed in Chapter 3.

[55] See J Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199, 227. The summary of Gardner's position set out in the text is an interpretation of his distinction between *lex* and *ius*. He writes '[l]egal positivism naturally supplies only part of the answer. To be exact, legal positivism explains what it takes for a law to be legally valid in the thin *lex* sense, such that the question arises of whether it is also legally valid in the thicker sense, i.e. morally binding *qua* law. In doing so legal positivism admittedly does not distinguish law from a game, which is also made up posited norms. To distinguish law from a game one must add, among other things, that law, unlike a game, purports to bind us morally. That has implications, no doubt, for what counts as successful law, and hence for what one might think of as law's central case. But this does not detract from the truth or the importance of [the thesis that law is valid by virtue of its sources not merits], which is not a thesis about law's central case but about the validity-conditions for all legal norms, be they central (morally successful) or peripheral (morally failed) examples'.

within these widely-drawn boundaries and can be correctly called valid law.

Focal Analysis

Fortenbaugh tells us that focal analysis centres on the idea that the 'being of any functional thing consists in its capacity to perform its function' where 'its essential nature is determined by its function and is expressed by the *logos* which states its purpose'.[56] Therefore, it is a mode of inquiry in which concepts of practical phenomena can only arise from understanding them as practical, end-orientated, activities. With regard to his analysis of friendship, 'Aristotle does not apply focal analysis to relate several different kinds of human association, each of which is defined by its own goal'.[57] Aristotle thinks that forms of friendship (directed towards utility, pleasure and moral goodness) *do not* have an overall purpose, and that they can only be linked through forms of conceptual analysis. Fortenbaugh writes: 'each friendship is defined by and logically dependent upon its goal which is the focus of an independent focal series. The only possible way to relate focally these series would seem to be by relating focally the goals which generate the independent series'.[58] Each form of friendship, then, has its own purpose which *defines* the activity and, for this reason, is *other* to forms of friendship with different purposes: they are *essentially* different practical phenomena. Therefore, for the focal analysis of friendship to succeed, it would need to be the case that all forms of friendship must be associated with a singular goal. But if different forms of friendship have different goals, focal analysis cannot be employed in an attempt to conceptualise friendship as a general concept. However, it can be used to conceptualise *particular forms* of friendship where each is differentiated by its orientation towards a distinctive goal.

If this is the case, what unifies these focally differentiated social practices as forms of friendship? Aristotle's answer is that they are related by having certain features in common, such as mutual well-wishing. A range of forms of friendship are related to each other because they share this characteristic. This observation seems, prima facie, to indicate that some form of conceptual analysis is preferable for thinking about abstract and

[56] Fortenbaugh, above n 48, at 52.

[57] *Ibid* at 58.

[58] *Ibid* at 60 and Cooper, above n 51, at 644. The idea of a 'focal series' is those characteristics which are part of the extension of the concept and which must logically be the case given the goal of the form of friendship under consideration. They are good in the sense of being logically necessary to achieve the purpose of the particular form of friendship and are to be defined in terms of its purpose. So, eg, the friendship between morally good people has part of its focal series 'wishing someone well'.

general concepts such as, for example, friendship, the state or law. This is because it could be said that each example of these practical phenomena does not share a focal purpose but all resemble each other in various ways described by conceptual analysis. Certainly this is a plausible interpretation of the methodology advanced by recent positivist writings which favour conceptual analysis as a way of conceptualising law.[59] A familiar view found in these writings is that various legal orders have different or multiple purposes, but a feature common to all forms of law is that each has a social source, and this is what allows all of these disparate practical phenomena to be classified as law. This view, however, is only an assertion about the purposive nature of law and can be questioned in two ways.

First, it has been suggested that examples of legal order have different focal purposes and each has an associated focal series (ie the institutional structures, norms and so on) which are logically dependent upon the focal purpose. This means, in the same way as in Aristotle's analysis of friendship, that law does not have one overall purpose, and therefore, focal analysis cannot be used to conceptualise law as a general concept. Therefore, tracing the similarities between these forms of law through conceptual analysis would seem preferable. However, the failure of focal analysis does not mean that conceptual analysis is in any way vindicated, for the following reason. Fortenbaugh tells us that one form of friendship is *other* to another but has similar characteristics which can be charted through conceptual analysis. However, forms of friendship are 'described, but not defined' by their various resemblances to each other. So, by analogy, the French and Chinese legal orders are *other* to each other because they have different purposes, even though they may have certain characteristics in common (like courts or legislatures). However, conceptual analysis only allows both to be *described* as legal phenomena. Put another way, forms of law can be homonymous (which means that we use the same word to refer to various examples of law),[60] but this homonymy does not define the essential or constitutive nature of each form of law. This indicates that if focal analysis is an appropriate methodological approach, we should be sceptical about the possibility of generating general concepts: there is no concept of law. Instead, there is just a set of similarities between social phenomena normally called law. Conceptual analysis, then, can be said to track the similarities between *essentially different* practical phenomena.

So, while Aristotle and some recent positivists are sceptical about the use of focal analysis to generate general concepts, their scepticism is

[59] See J Raz, 'Postema on Law's Autonomy and Public Practical Reasons: a Critical Comment' (1998) 4 *Legal Theory* 1; Dickson, above n 8, at 89; V Rodriguez-Blanco, 'Is Finnis Wrong?' (2007) 13 *Legal Theory* 257, 264–8.

[60] See Endicott, above n 6, at 233. He says: 'Two things are homonymous if we use the same word for them, but in different senses'.

plainly not vindicated by stating that forms of law have many purposes. Nor does it point towards a form of conceptual analysis as the only viable way in which the methodological problem might be solved.[61] It could equally indicate that it is impossible to generate a general concept of law. All we can do is conceptualise various distinctive and unique social practices called law, and hence the features which often are found in each social practice.

Secondly, it could be that all forms of law have an essential purpose which underlies or is presupposed by any occurrent or superficial purposes each may *appear* to have. There is a long tradition in legal philosophy, which unites Hobbes, Locke, Rousseau, Kant and Bentham with Fuller and Finnis, which argues this to be the case. International lawyers like Oppenheim, McDougal, Lauterpacht and Weil also take this position. If a form of focal analysis can be appropriately employed to define a general concept of law, then it can be said that all forms of law must, in an essential sense, have a set of characteristics (a focal series) which is consistent with, or instrumentally necessary to, the end, purpose or goal of law. We might then say that there are various types, or sub-categories, of law which are consistent with this general concept such as, for example, state legal orders or public international law.

Conceptual Analysis, Focal Analysis and the Raw Data

It seems that there are two distinct methodological approaches which find their origins in Aristotelian scholarship and which are familiar to legal theory. How do these arguments fare in light of Finnis' general point about the nature of the raw data which gave rise to the methodological problem?

General concepts drawn from conceptual and focal analysis are often seen as justified to the extent that they *fit*, and are a true reflection of, the raw data. For example, the positivist claim that all forms of law have a social source (such as enactment by a legislature) refers to something that is true of the raw data. Dickson, who is more up-front about methodology than most in the positivist tradition, holds that the legal scientist 'seeks to elucidate a concept which people already know about and make use of in characterising the society in which they live, and their own behaviour and attitudes within it'.[62] Elucidation means that 'in evaluating which of law's features are the most important and significant to explain, [the legal scientist must] be sufficiently sensitive to, or take adequate account of, what is regarded as important or significant, good or bad about the law, by those whose beliefs, attitudes, behaviour, etc. are under consideration'.[63]

[61] This argument is developed in more detail in Chapter 4. See below 93–102.
[62] Dickson, above n 8, at 43.
[63] *Ibid*.

By doing this, it is an attempt, to 'tell us truths' about the social practices under consideration.[64] Theories which are based upon conceptual or focal analysis can be said to be valid to the extent that they are truthful in this way. How is this possible if the raw data exhibits the bewildering complexity which Finnis associates with it and which lies at the centre of the methodological problem?

A way around this problem is to argue against Finnis' claim: that is, to show that the raw data does not exhibit this amorphous and disparate nature. There are a number of possibilities by which a case can be made for this claim. One is that the raw data might reveal certain practices, or conceptual distinctions reflected in word usage, which are widely or normally accepted by lawyers or international lawyers and can be articulated by the legal scientist. It is not immediately clear whether anything conclusive or interesting could be said about law or international law by adopting this method,[65] but it could be that a concept of law can be drawn from ordinary language-use or the conceptual distinctions made by those in legal practice. Hart, as will be seen in Chapter 3, argues that there may be shared-criteria about law which are accepted by all legal officials which can form the basis for his concept of law. This is then used to show that paradigm cases of international law are peripheral forms of law. Another possibility is to adopt a form of focal analysis in order to argue that forms of law exhibit a purpose, end or goal which is explicitly or implicitly held by lawyers. So, it could be argued that law and international law must be focally directed towards an implicit or explicit purpose such as the protection of human dignity. This attribution of purpose can be used as a basis for concept formation.

These two ways of overcoming the methodological problem, held against Finnis' claim about the raw data, reveal paradoxical intuitions. It seems plausible to think that there is both considerable *divergence* and *convergence* in the raw data. Philip Allott spots this paradox. He remarks that it is 'not merely a pious assumption, that a society must have a shared substratum of values broad enough to permit that society to continue to cohere' and we might say the same thing about international law.[66] But he then continues: '[s]harp debates and conflicts on such matters as law and order, the role of dissent, the outer limits of state authority, should reflect conflicts of judgment as to the application of shared values, if they are not to be radically destructive of the society in which they occur'.[67] The crucial question is, then, to what extent is the lawyer's or international lawyer's perspective one of convergence or divergence.

[64] *Ibid* at 25.
[65] See Dworkin, above n 32, at 91.
[66] Allott, above n 17, at 96.
[67] *Ibid*.

The Legal Scientist

This point can be expanded further by considering the role of the legal scientist who is attempting draw concepts from the raw data. It is my view that our view of the raw data alters our view of the role of the legal scientist. To explain, the raw data, or the international lawyer's perspective, is sometimes more specifically described as the participant or the internal viewpoint. The legal scientist, on the other hand, takes an external perspective when generating general concepts, but attempts to take account of the participant viewpoint.

The legal scientist's role in concept formation depends on the nature of the raw data. Two possibilities were just described. One is that the legal scientist is merely reporting in a passive (or, more controversially, objective) manner various convergent social practices which competent language-users call international law. His role is one of clarification and systematisation of what is readily and non-controversially cognisable and conventionally the case. A second possibility is that the legal scientist must take an active role and make a choice about what is really important and significant about the raw data under consideration: that is, he must explain why certain participant's viewpoints are central and why some are peripheral. For example, it may be that the viewpoint of some participants which hold that international law is fundamentally concerned with the protection of liberal values should be prioritised and those participants who disagree should be disregarded as, possibly, irrational or deluded viewpoints. It would seem that if there is convergence between international lawyers about the social practice called international law, then the legal scientist could perform a passive role. If the raw data does not exhibit this convergence, then it would appear that an active role is necessary.

The methodological problem revealed that the legal scientist must make a series of judgments of relevance, importance, continuity and purpose in order to generate general concepts. The argument just made implies that there are two ways in which these judgments can be viewed. They are either (i) judgments which are expressed in the raw data which are *reported*, *systematised* or *clarified* by the legal scientist, or (ii) judgments made *by the* legal scientist. (i) presupposes a stability and convergence in the raw data which the legal scientist can set out in a relatively neutral and passive way. For (ii), the legal scientist has to discern from the disparate and multi-significant practices which are held at various points through time and space those that are important, relevant etc. If Finnis is right, (ii) describes the role of the legal scientist. But if this is the case, how can the judgments made by the legal scientist be anything other than one point of view among many? If there is convergence in the raw data then (i) is correct. However, this assumption seems difficult to sustain and certainly

cannot simply be presupposed. Both approaches seem to lead us to scepticism about the possibility of legal science.

Before we rush to this conclusion, there are those that consider that (i) need not be presupposed. Hart, and some recent commentators on, and defenders of, his work, defend this approach. They attempt to show that the participant viewpoint is relatively stable and, more strongly, rooted in various conventional practices adopted by ordinary language users and legal officials which the legal scientist can readily discern and tidy up into general concepts through conceptual analysis. Whether Hart can demonstrate, rather than merely presuppose, that the raw data has this character, is considered in detail in Chapter 3.

On the other hand, there are those that argue that the law is best understood as a purposive phenomenon with a specific value orientation. This may arise through various structural constraints which exist within various legal practices. Versions of this argument, which are expressed most plausibly by Weber, hold that the raw data exhibits a coherent purposive orientation, are considered in Chapter 4.

Both of these arguments, I will show, are implausible and question-begging if they rely upon convergence in the raw data. Therefore, I argue that Finnis is right about the raw data and that the legal scientist has to impose order on the disparate raw data and thus take an active role in concept formation. This is achieved by the legal scientist adopting the practically reasonable perspective. This argument will be reconsidered at the end of Chapter 4.[68]

[68] We are now in a position to reconsider Finnis' phrase 'central cases and focal analysis' which he employs in his discussion of methodology in legal science. On the one hand, and as was discussed above, he wants to discuss central and peripheral cases, which does seem to point towards the use of the central case of law as a morally idealised concept of law—as a mediator concept against which the legal orders with which we are familiar more or less approximate. On the other hand, he also thinks that the determination of the concept of law requires a determination of its practical purpose, which seems to point directly towards focal analysis. Toddington argues that Finnis confuses the central case (which Toddington defines in terms of the form of conceptual analysis which identifies the outer limits of meaningful word usage called 'necessary resemblance') with the identification of the focal purpose of law. This point needs some clarification in light of the foregoing discussion. Finnis seems to suggest that the central case is determined by the mediator approach and is not overly concerned with necessary resemblance. Toddington's view is problematic in this sense. But Toddington's point holds true more generally. Finnis may confuse, or, at least, is unclear as to, the methodological approach he adopts once we distinguish conceptual analysis from focal analysis. Recently, Rodriguez-Blanco has considered this aspect of Finnis' work. She argues that Finnis is best interpreted as offering a methodology which closely corresponds to the form of conceptual analysis which employs the morally idealised central case of law as a mediator concept. But this seems to underplay, and indeed, dismisses, the strong Weberian emphasis in Finnis' discussion of the practical purpose of law. See S Toddington, *Rationality, Social Action and Moral Judgment* (Edinburgh, Edinburgh University Press, 1993) ch 4 and Rodriguez-Blanco, above n 59. See also J Finnis, 'Grounds of Law and Legal Theory: A Response' (2007) 13 *Legal Theory* 315 which responds to Rodriguez-Blanco.

CONCLUSION

The methodological problem asks how it is possible to have concepts of practical phenomena like law and international law. The foregoing discussion has both highlighted the difficulties in solving this problem and revealed two approaches by which it might be solved. These are conceptual analysis and focal analysis. Conceptual analysis attempts to unpack the conceptual distinctions that are ordinarily accepted about law or legal phenomena. Focal analysis, on the other hand, attempts to conceptualise law as a social practice which has an essential purpose. Scepticism as to the viability of both approaches seems appropriate because both seem to presuppose that stable meanings or value orientations emerge from the raw data. That is, they contend that lawyers or international lawyers have a stable set of conceptual distinctions they are prepared to make, or consider that international law has a singular purpose.

While it is right to be wary about these claims, if it can be shown that there is stability in the raw data, then the concepts derived from conceptual analysis or focal analysis could be right or justified to the extent that they track lawyers' or international lawyers' consistently-held conceptual distinctions or conceptions of purpose. In Chapters 3 and 4, two of the strongest forms of conceptual analysis and focal analysis, adopted by Hart and Weber respectively, are discussed. If either of these approaches is convincing, it provides a method by which we can answer questions about the concept of law and, in turn, develop a concept of international law.

3

The Conceptual Analysis of International Law

HART'S LEGAL POSITIVISM, which is mainly set out in his book *The Concept of Law*, is currently the most popular and influential approach to legal philosophy in the Anglo-American tradition.[1] In recent years, his work has been interpreted in a number of different ways, which often reflect both of the methodological approaches set out in the previous chapter. Some have suggested that this is because Hart elides a number of different methodological approaches in his work, which are then given more or less prominence by his interpreters.[2] So, for example, it has been argued that Hart is correctly understood as proposing that his concept of law, as the union of primary and secondary rules, is as a rule-system which *solves* the defects of 'primitive' rule-systems.[3] This seems to reflect a purposive approach to method and some form of focal analysis. I am not convinced that this is the most accurate way of reconstructing Hart's work, even though there is plenty to suggest that Hart did think that some form of purposive approach to concept formation was appropriate.[4] Instead, I think that Hart's work is best understood as a form of conceptual analysis. This is for at least two reasons. First, there is no question that Hart's 'fresh start' to legal philosophy is 'to philosophize about

[1] HLA Hart, *The Concept of Law* (2nd edn, Oxford, Clarendon Press, 1994, first published in 1961). Page references correspond to the second edition. Page numbers in square brackets correspond to the first edition.

[2] See D Beyleveld and R Brownsword, 'Normative Positivism: the Mirage of the Middle-Way' (1989) 9 *Oxford Journal of Legal Studies* 463; S Perry, 'Hart's Methodological Positivism' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford, Oxford University Press, 2001) ch 9; B Simpson, 'Herbert Hart Elucidated' (2006) 104 *Michigan Law Review* 1437.

[3] See J Waldron, 'Normative (or Ethical) Positivism' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford, Oxford University Press, 2001) ch 12; G Postema, 'Law's Autonomy and Public Practical Reason' in R George (ed), *The Autonomy of Law* (Oxford, Oxford University Press, 1996) ch 4; T. Campbell, *The Legal Theory of Ethical Positivism* (Aldershot, Dartmouth, 1996).

[4] See Hart, above n 1. See J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980) 7–9 and see above n 3.

legal phenomena in a language-focused and analytical style'[5] despite deviations from this starting point later in his book. Secondly, Hart's lengthy discussion of international law in *The Concept of Law* makes no real sense unless his work is understood as a form of conceptual analysis.

This chapter begins by detailing both Hart's positivism and his methodology before moving onto his discussion of international law. I show that Hart's answer to the methodological problem involves a particular form of conceptual analysis and from this claims that international law is properly conceived of as a peripheral form of law. These claims are valid to the extent that legal officials share a set of criteria about what is to count as law. I then want to show why Hart's conceptual analysis begs the question in that it *assumes* the existence of this set of stable social practices within a legal community which can be uncontroversially described by the word law, or term, legal system. While there are arguments which attempt to demonstrate how such social practices arise within a community, they are not convincing. Obviously, I do not argue that all forms of conceptual analysis must fail on the basis of this analysis, but only that Hart's does without anything more. Therefore, his claim that international law is a peripheral case of law should be treated with scepticism.

HART'S *THE CONCEPT OF LAW* AS A FORM OF CONCEPTUAL ANALYSIS

The various interpretations of Hart's work reflect certain fundamental divisions within the jurisprudential tradition of which he is an important contributor. This tradition is legal positivism. This phrase has already been used in Chapter 2. For example, it has been used to refer to the commonly-held view that international law arises from the consent of states, or that law emanates from a social source. This usage, however, did not carry any theoretical weight. From here on in it does, and so it is necessary to be clear about what positivism means, and, more specifically, to distinguish between two versions of it. These versions reflect the distinction set out in the previous chapter between focal and conceptual analysis. The discussion then moves to consider why Hart's legal philosophy, read in light of the clarifications of his methodology in the *Postscript* to the second edition of *The Concept of Law*, is best understood as an innovative form of conceptual analysis.[6]

[5] See F Schauer, '(Re)taking Hart' (2006) 119 *Harvard Law Review* 852, 856. The central influence of Weber on Hart's work is suggested by Lacey in *A Life of HLA Hart: the Nightmare and the Noble Dream* (Oxford, Oxford University Press, 2004) 230–1. The purposive approach more apparent in Hart's earlier essay 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

[6] MacCormick has recently argued that the *Postscript* is considerably more positivistic than *The Concept of Law* itself, which he interprets as a sort of normative positivism. See N MacCormick, 'Legal Positivism: Hart's Last Word' in M Kramer, C Grant, B Colburn and A Hatzistavrou (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford, Oxford University Press, 2008) ch 3.

Legal Positivism

Stephen Perry argues that legal philosophy has to provide both a description of the most important or essential features of a legal system and an account of law's normativity.[7] The first task is simply a restatement of the methodological problem which concerns how it is possible to discern the 'legal' from the 'non-legal' and the 'legally valid' from the 'legally invalid'. In this sense, it is to discover the intensional connotation of the word 'law'. So, a rule which is legally valid can be said to have those attributes or characteristics which belong to all those things to which the term law is correctly applied. But by the same token, a satisfactory concept of law requires an explanation of its normativity. This is because it is widely accepted and probably logically necessary that law is a social institution which in some way affects the practical reasoning of agents. Furthermore, considerations of law's normativity (why it is binding qua law) flow both to and from questions of description (what is valid law qua law). Kelsen takes a strong view on this connection between validity and bindingness whereby the validity of a norm is dependent upon it having binding force (validity qua bindingness).[8] Most other positivists take a slightly weaker view, which is that a necessary condition of a valid law is that it offers reasons that make a practical difference to the reasoning of those subject to it. But it is the case that all legal positivists accept two familiar theses:

Sources Thesis: What is and what is not law is a matter of social fact. Therefore, what is and what is not legally valid can be ascertained by reference to social sources rather than, for instance, moral evaluation.

Separation Thesis: Law is not necessarily obligatory because it is morally valid. A legal obligation is something different from, for instance, a moral obligation.

There are plenty of difficulties when attributing these two theses to positivism. One is that Kelsen thinks that the ultimate norm which gives validity to an entire system of law is hypothetical and presupposed by the legal scientist to make cognition of legal phenomena possible.[9] This said, it is clear that this is presupposed in order to make sense of a bundle of norms created via social sources (ie human enactment) as one unified legal order. Also, Gardner has recently written that the separation thesis 'is

[7] S Perry, 'Interpretation and Methodology in Legal Theory' in A Marmor (ed), *Law and Interpretation* (Oxford, Clarendon Press, 1997) 97.

[8] See H Kelsen, *Introduction to the Problems of Legal Theory* (S Paulson and B Litschewski-Paulson (trans), Oxford, Clarendon Press, 1992, first published in 1934) 59–61 (para 30). For a discussion see P Capps, 'Sovereignty and the Identity of Legal Orders' in S Tierney and C Warbrick (eds), *Sovereignty of States or the Sovereignty of International Law* (London, British Institute of International and Comparative Law, 2006) 53–63.

[9] *Ibid*.

absurd and no legal philosopher of note has ever endorsed it as it stands. After all, there is a necessary connection between law and morality if law and morality are necessarily *alike* in any way. And of course they are. If nothing else, they are necessarily alike in both necessarily comprising some valid norms'.[10] So, for Gardner, presumably, morality, etiquette, and so on, are necessarily connected to law because they share common features. The misunderstanding which Gardner makes here is that the separation thesis, as is generally used in legal philosophy, understands the phrase 'necessary connection' in terms of an implication. It is necessary in the same way as a spark-plug might be thought of as necessary to a combustion engine, rather than a bear and a dog being necessarily similar in the sense that they are both warm-blooded mammals. In the former sense, a positivist would, indeed, think that it is not a necessary condition for the implication to be made that if a rule is a law, that the rule must be morally valid. A legal idealist or natural lawyer would disagree. The separation thesis, for present purposes, is taken to mean that there is no contradiction involved by arguing that a rule is a valid law even though it is morally wrong. There is no need to dwell on this further. My only point is that the above two theses do do justice to the way legal positivism has been described in the history of ideas.

While all positivists accept variants of both the sources and the separation thesis, it is the case that legal positivism exists in two main forms. These forms have been described in a number of different ways, but in what follows, they will be described as normative and methodological legal positivism.[11] Normative positivism refers to an intellectual tradition which was advanced by both Hobbes and Bentham.[12] Furthermore, some modern positivists have taken a position (or have been interpreted as taking a position) which is characteristic of this variant of positivism.[13] I think

[10] J Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199, 223. On Gardner's positivism, see J Finnis, 'On Hart's Ways: Law as Reason and as Fact' in M Kramer, C Grant, B Colburn and A Hatzistavrou (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford, Oxford University Press, 2008) 17–18.

[11] Normative positivism has been described as ethical positivism by T Campbell in *The Legal Theory of Ethical Positivism* (Aldershot, Ashgate, 1996). I have elsewhere referred to this position as substantive positivism so as not to confuse it with the way in which Beyleveld and Brownsword have used the expression. See Beyleveld and Brownsword, above n 2. As it seems the most popular terminology, in this book I revert to the term normative positivism. See P Capps, 'Methodological Legal Positivism in Law and International Law' in K Himma (ed), *Law, Morality, and Legal Positivism* (Stuttgart, F Steiner, 2004) 9–19.

[12] See G Postema, *Bentham and the Common Law Tradition* (Oxford, Clarendon Press, 1986) ch 9 and Postema, 'Law's Autonomy and Public Practical Reason' in R George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford, Clarendon Press, 1996) 79–118.

[13] See above n 3. Postema ascribes this view to Raz in *ibid* at 80. See Raz's express eschewal of this ascription in J Raz, 'Postema on Law's Autonomy and Public Practical Reasons: a Critical Comment' (1998) 4 *Legal Theory* 1. Also see J Dickson, *Evaluation and Legal Theory* (Oxford, Hart Publishing, 2001) 112–13. However, it is the case that most methodological legal positivists contend that their accounts of law contain substantive and normative elements. Raz, Hart, Kramer, Coleman and Dickson do include in their accounts of law the

that this is the strongest variant of positivism, and it is considered in detail in Chapter 6. At this point I merely want to set out its central claims. According to Waldron, the essence of normative positivism, as set out by Bentham and Hobbes, afforded: 'great prominence . . . to the evils that might be expected to afflict societies whose members were unable to disentangle their judgments about what was required or permitted by the law of their society from their individual judgments about justice and morality'.[14] As such, 'Hobbes and Bentham showed no particular interest in the analysis of purely conceptual differences between law and morality. Instead, they were interested in the conditions necessary for coordination, for conflict resolution, and for the general stability of expectations in people's dealings with one another. Those were normative interests that informed and shaped their positivist account of the nature and function of law'.[15] So, for these positivists, to live in a society in which each of us can predict how others will act requires the establishment of the means to generate general legal norms to govern our conduct. Our natural moral reasoning is not stable or specific enough to produce these general norms in large and complex societies. For this reason, the conflicting unilateral moral judgments must be replaced by a form of artificial, generalised and omnilateral practical reasons which apply to all members of a community. This form of practical reasoning arises from a series of legal norms, generated from a social source, which is often described by, or embodied in, the concept of sovereignty.[16] This normatively overrides and pre-empts the subjective and conflicting moral judgments of those subject to these legal norms. Somewhat paradoxically, it is immoral (for Bentham, against each agent's utility) or imprudent (for Hobbes, against each agent's long-term self-interest) not to separate legal reasons for action from moral reasons for action. Law, in this tradition, does not serve to more perfectly realise underlying moral values. Rather, it is an attempt to overcome the problems associated with unilateral moral reasoning.

theses that law (i) is normative and (ii) has a purposive orientation in that it solves co-ordination problems. However, such theorists consider it a mistake to create too strong an analogue between the purposive aspects of their theories and normative legal positivism. This is because methodological legal positivists often appeal to the co-ordinatory role of law as an attempt to *explain* a very common or indeed necessary function of legal systems. But, for such positivists, it is a mistake to conceptualise law as a practical activity with a specific purposive goal. Dickson and Raz, for example, both state that while law generally has an important co-ordinatory role in society, such a role is neither necessary nor sufficient to the concept of law. There is no need to conceptualise law as if it has a primary task or 'umbrella' purpose. Furthermore, other social institutions may play an important part in co-ordination and stabilisation of expectations. So, there is a difference between normative legal positivism and methodological legal positivism which endorses a concept of legality with normative, substantive or purposive elements.

[14] Waldron, above n 3, at 412–13.

[15] *Ibid* at 413.

[16] See Capps, above n 8.

This general approach has been adopted by positivist international lawyers like Oppenheim and Weil. They argue that the consent-based model of international law, in which all legal obligations arise from state consent, is the only way to ensure stable co-ordination and promote co-operation between states. However, they do not argue for an omnilateral social source of legal norms, like a global sovereign, but rather they argue that the same ends can be achieved by a plurilateral and decentralised version of the sources thesis.[17]

This is an extremely important argument which both is positivist and reflects focal analysis in that it proposes that law must be conceptualised with reference to its essential and singular purpose. It is clearly not, however, an attempt to draw out the conceptual distinctions which underpin ordinary language usage. Those who take this linguistic or conceptual approach, and who will be collectively referred to as methodological legal positivists, come to similar conclusions about the essential nature of law, but they do not consider that law can be conceptualised as a purposive activity. Rather, methodological legal positivism is an attempt to clarify 'the conceptual framework that we apply to certain aspects of our own social behaviour'[18] and is a form of conceptual analysis. It refers to an attempt by the legal philosopher to take the ways in which we use language to describe our social behaviour and to clarify and elucidate the underlying and immanent concepts embedded within this usage. Hart is best understood as a methodological legal positivist who is engaged in conceptual analysis.

Hart's Concept of Law

By using a version of the methodology just described, Hart seeks to set out the constitutive features of any legal order. He claims that in any legal order there is a rule of recognition which operates as the criterion of legal validity within that order. Any other rule (like primary rules or secondary rules of change and adjudication) is a legal rule if it is created in accordance with the rule of recognition. What 'accordance' means is determined by the content of the rule of recognition. But conformity with the rule of recognition is a 'conclusive affirmative indication'[19] that any other rule is legally valid for the social group or community it is a rule for. The rule of recognition is accepted as a critical standard by legal officials and subsequently provides a reason to officials to apply other legal rules. In this sense, the rule of recognition makes a significant difference to legal

[17] See Chapters 6 and 9. See H Thirlway, 'The Sources of International Law' in M Evans (ed), *International Law* (Oxford, Oxford University Press, 2006) ch 4.

[18] Perry, above n 2, at 322.

[19] Hart, above n 1, at 94 [92].

officials' deliberations about what rules they ought to apply. The rule of recognition need not be treated in this way by those subject to legal rules.[20] But this does not mean that legal officials have a moral obligation to follow the rule of recognition. For this reason, Hart is a legal positivist because he thinks that legal validity comes from a social source—that is, the rule of recognition—rather than from the moral merits of the rule.

From this brief description of Hart's concept of law, it does not seem obvious why this is a form of conceptual analysis and here I attempt to clarify this claim. However, to offer an interpretation of the methodological basis of Hart's concept of law is fraught with difficulties. Since the publication of *The Concept of Law* a tremendous amount of work has been undertaken attempting to set out Hart's claims, even if less attention has been paid to his methodology. I think that it is impossible to be neutral between the various interpretations and many will find what is offered here problematic, not least because the interpretation I argue for is then employed to show why Hart's approach fails. My analysis focuses on how Hart might have responded to the methodological question: that is, how Hart considered that legal science was possible. As mentioned, I think that he can fairly be interpreted as adopting a form of conceptual analysis when responding to this question.

Hart's Non-ambitious Concept of Law

Early in *The Concept of Law*, Hart claims that ordinary language-use is the methodological starting point for his claims about law.[21] The conceptual distinctions which are embedded in ordinary language-use form the raw data upon which his claims are built. Hart's project is an attempt to rationalise this raw data with a view to identifying these conceptual

[20] Hart says: 'On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens *need* satisfy: they may obey each "for his part only" and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution. The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses'. Hart, above n 1, at 116–17 [113–14].

[21] See, eg, *Ibid*, at 240. Here Hart states: 'The starting-point for this clarificatory task is the widespread common knowledge of the salient features of a modern municipal legal system which . . . I attribute to any educated man'. See also J Raz, *Ethics in the Public Domain* (Oxford, Oxford University Press, 1994) 221; *Practical Reasoning and Norms* (Oxford, Oxford University Press, 1975) 170–7 and *The Authority of Law* (Oxford, Oxford University Press, 1979) 142–3 and 153–7. See also Dickson, above n 13, at 42–3; M Kramer, M, *In Defense of Legal Positivism* (Oxford, Oxford University Press, 1999) 180–81.

distinctions and his claims are justified to the extent that they reflect the raw data. For this reason, the resulting concept of law 'cannot transcend actual usage'[22] but it is an attempt to discover the 'rationale behind a word's extension'.[23] It is clear that this is in the spirit of traditional conceptual analysis.

This attention to ordinary language-use works in two ways. First, his conclusions about the concept of law are both *derived* and *clarified* by considering the similarities and differences between law and other closely related concepts, such as morality.[24] Secondly, Hart's concept of law is drawn from paradigm cases of law as understood by ordinary language users.[25] This is not, then, a definition of law in a strict sense but is rather an attempt to conceive of the central case of law in terms of the rationalisation of a series of paradigm cases of law which are normally described as law by ordinary language users. Endicott explains this well. He writes that Hart's concept of law purports to be drawn from 'indisputable paradigms, and that is all there is to his semantic claims'[26] and '*those* features of law are . . . simply the least controversial sorts of statement that can be made about paradigm legal systems'.[27] Paradigm cases, therefore, *give rise* to the central case. For Hart, there are 'central clear instances to which the expressions "law" and "legal system" have undisputed application, there are also cases, such as international law and primitive law, which have certain features of the central case but lack others'.[28]

We might wonder how the central case of law can be drawn from paradigm cases, but then employed to determine that various irregular forms of law (more or less those which are not state legal orders like international law) are not straightforwardly forms of law. But before we think we have detected something fishy going on, it should be recognised that Hart's central case, as just described, is to be understood as being looser and more malleable than a strict definition like that found in the 'criterial semantics' which has been attributed to Austin.[29] Thus, 'the diverse range of cases of

[22] N Stavropoulos, 'Hart's Semantics' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford, Oxford University Press, 2001) 80.

[23] *Ibid* at 81.

[24] He accepts that '[w]ith both of these law has certainly many affinities and connections; yet, as we have seen, there is a perennial danger of exaggerating these and of obscuring the special features which distinguish law from other means of social control'. Hart, above n 1, at 213 [208].

[25] T Endicott, 'Herbert Hart and the Semantic Sting' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford, Oxford University Press, 2001) 41–7.

[26] *Ibid* at 45. See Hart, above n 1, at 3 [2]; MacCormick, above n 6. He argues that Hart's concept of law expresses general features of law which an 'ordinary, reasonably well-informed but non-expert person might suppose to be significant about law'.

[27] Endicott, above n 25, at 47.

[28] H Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Oxford University Press, 1983) 89.

[29] The influence of L Wittgenstein's *Philosophical Investigations* (3rd edn, GEM Anscombe (trans), Oxford, Blackwell, 1967) is most clear in this part of his work. See above, 40–43.

which the word "law" is used are not linked by . . . simple uniformity, but by less direct relations—often of analogy of either form or content—to a central case'.[30]

When Hart refers to the union of primary and secondary rules as the *necessary* and *sufficient* conditions for the existence of a legal order, this is a clarification, simplification or rationalisation of the conceptual distinctions that are implied by, and underpin, ordinary language usage. Stavropoulos points out that the words necessary and sufficient are employed to attribute epistemic significance to Hart's concept of law. But for Hart, 'there is no conjunction or finite disjunction of conditions'.[31] Understood correctly, this somewhat confusing statement is best interpreted as entailing that Hart's claims are both *drawn from* and are *defeasible* against ordinary language-use and the conceptual distinctions found within it. Therefore, his concept of law is not secure due to the malleability of language, the existence of peripheral cases of law and the 'complex and multiple relations among instances of law'.[32] This explains why it might be said that Hart's work is a novel form of *non-ambitious* conceptual analysis.[33]

How this approach to conceptual analysis maps onto the three forms of it which are advanced in Chapter 2 is not straightforward. On the one hand, Hart wants to use the central case of law to analyse various other cases of law. This does suggest a mediator approach to conceptual analysis. However, the looseness of Hart's non-ambitious methodology seems to reflect an analogical approach. Perhaps we should not assume that Hart's approach should map onto any of the approaches set out above despite the apparent similarities. This said, it is my view that the loose analogical approach at least captures the spirit of Hart's *non-ambitious* method, whereas the central case of law is used by Hart in an *ambitious* sense when considering irregular cases of law which rather reflects the mediator approach to conceptual analysis. It is in this ambitious sense that he claims that international law is correctly classified as a peripheral, rather than central, case of law. This is because paradigm cases of international law do not have a clear rule of recognition. How can it be said that Hart's claims are ambitious?

Hart's Ambitious Concept of Law

An initial query which can be made about Hart's non-ambitious conceptual analysis, which highlights the ambitious nature of his claims, is to

[30] Hart, above n 1, at 81 [79].
[31] Stavropoulos, above n 22, at 66.
[32] *Ibid*.
[33] *Ibid*.

consider how Hart might deal with linguistic errors. A linguistic error is where the word 'law' is used to refer to social practices which do not fall within the central case of law. Hart does accept that such errors can arise, as has been seen with regard to his views on international law. The problem for Hart is that if we take him to be engaged in non-ambitious conceptual analysis, which is defeasible against ordinary usage, then surely it is *as appropriate* to modify the central case of law as much as declare unorthodox usage as linguistic error.

Stavropoulos expands on this argument. Specifically, he argues that Hart's conceptual analysis reveals itself as being more ambitious than has just been described with respect to the epistemic significance of his central case. Non-controversially, Stavropoulos claims that, for Hart, there are a set of judgments and claims about law 'on which most agree' and that these are 'the applications [of the word law] most are disposed to make'.[34] However, instead of giving rise to a non-ambitious claim which is defeasible, the claims about law which arise from these usages are 'secure from discounting'.[35] Linguistic and conceptual error is established by reference to the central case. Therefore, it seems that there are some *indisputable* or *paradigm* cases of law which are reflected in ordinary language, which are then afforded epistemic priority by Hart. These are articulated by the legal scientist through a process of rationalisation which involves a 'minimal sifting to eliminate inconsistencies'.[36] Through this process he arrives at the central case of law as a union of primary and secondary rules.

The central case of law rests upon the identification, by various communities, of indisputable cases of law which are reflected in their linguistic practices. This is why Stavropoulos calls Hart's legal philosophy a 'folk theory' of law. This, crucially, presupposes that there is 'a unique determinate theory [which] underlies ordinary use, rather than many conflicting theories'.[37] It is from this theory that Hart's claims about international law are substantiated, and against which indeterminate cases of law are judged. This is why the central case does the same methodological work as, for example, criterial semantics or the 'mediator' views of conceptual analysis.[38] It is in this sense that Hart's conceptual analysis is ambitious.

When describing forms of law against the central case, Hart distinguishes between central cases, indisputable cases and indeterminate cases. The central case, as we have seen, is the union of primary and secondary rules. An example of an indisputable case is the modern municipal legal

[34] *Ibid* at 75.
[35] *Ibid*.
[36] *Ibid* at 78.
[37] *Ibid* at 77.
[38] See V Rodriguez-Blanco, 'A Defense of Hart's Semantics as Non-ambitious Conceptual Analysis' (2003) 9 *Legal Theory* 99, 104.

order and it is the same as the paradigm case which was considered in Chapter 2. However, as has just been seen, for Hart it can be said that the paradigm case *gives rise* to the central case: ordinary usage correctly identifies the modern municipal legal order as a paradigm case of law and it from this that the central case is drawn. The central case is correct to the extent that it corresponds to the paradigm case. International law is an indeterminate case of law for Hart. This much is clear. But what, specifically, is the indeterminate case? This is not that easy to explain. First, I do not think that it is synonymous with the irregular case which was described in Chapter 2.[39] It works differently: the indeterminate case of law is a social practice which may be either a paradigm case or an irregular case of law but, crucially, it is indeterminate in the sense that it is *unclear* whether it falls within the extension of the central case.

One might think that if an indeterminate case of law has a set of primary and secondary rules then it is a form of law; if it is lacking, it is a peripheral or false case of law. If it is a false case of law, it might be better subsumed under another concept like morality. But the point about the indeterminate case is that this judgment *cannot be clearly made*. So, while the French legal order falls within the extension of the central case of law, 'there are cases where the criteria fail to provide unequivocal support, in which, as Hart says, there are reasons both for and against application. In such cases, he does not infer that we have the wrong criteria, that the criteria are not in fact the conditions of correct application; rather, he infers that we *choose* to apply or withhold application, based not on criteria but on *arguments* of similarity to' paradigm cases of law.[40] Whether an indeterminate case is legal or not depends upon arguments of similarity to the central case, and whether one accepts those arguments. An argument is acceptable if it serves 'any practical or theoretical aim'[41] for the legal scientist taking a professional and external orientation. This approach is made most explicit in Hart's discussion of international law.

INTERNATIONAL LAW AS AN INDETERMINATE FORM OF LAW

Hart can be said to argue that there are paradigm cases of international law (most obviously, a treaty) and there are paradigm cases of law (ie such as the English legal order). The central case of law is drawn from the latter. It is indeterminate whether the paradigm cases of international law

[39] See above 35–39. Irregular cases are those cases which are not normally referred to as a form of law.

[40] Stavropoulos, above n 22, at 95. Stavropoulos employs the term 'exemplars' of law. This is an accurate word to describe Hart's approach. I have reverted to the phrase 'paradigm cases' so as to not overcomplicate the text.

[41] Hart, above n 1, at 214 [210].

fall within the extension of the central case. This, for Hart, is to be determined by arguments of similarity to both paradigm cases of law *and* the central case. So, he compares the features of paradigm examples of international law to both the 'modern municipal legal system', which is a paradigm case, and the union of primary and secondary rules, which is the central case. There is nothing odd here: the central case is, after all, drawn from paradigm cases of law.

Regarding international law, which is an indeterminate case, Hart argues 'the only question to be settled is whether we should observe the existing convention [that is, describing international law as a form of law] or depart from it; and this is a matter for each person to settle for himself'.[42] Hart, himself, concludes that paradigm cases of international law do not fall within the extension of the central case. They are close to the central case, but not close enough.

Hart's conclusion is justified to the extent that it serves 'any practical or theoretical aim' to describe international law as a form of law.[43] A theoretical aim is one that increases the clarity, simplicity or explanatory power of our conceptual distinctions.[44] I am not sure what Hart means by practical aim, but presumably it is because it helps us, in some way, determine the nature of the obligations of which international law comprises and, hence, what states ought to do. In this way, it might serve a practical aim to characterise treaties as primary legal rules rather than moral rules but not to hold that, for example, Article 38(1) of the Statute of the International Court of Justice constitutes part of the rule of recognition of the international legal system.

To set out these claims in more detail, Hart begins with the paradigm case (the 'clear, standard example of what law is')[45] which is the modern municipal legal order. It is from this case, as we have seen, that the central case as the union of primary and secondary rules is drawn. He then compares this paradigm case as well as the central case to paradigm cases of international law. This discussion centres on two questions which have often been asked about the nature of international law. The first concerns whether international law is legally binding on states. The second concerns whether international law is more similar to morality than law.

Hart's first question is whether international law is legally binding. This is split into two sets of considerations. The first concerns the lack of sanctions in the international legal order. His answer, not unsurprisingly, given his famous distinction between legal obligations and being obliged to comply with the orders of a highwayman,[46] is that sanctions are not necessary

[42] Hart, above n 1, at 215 [210].
[43] *Ibid* at 214 [209].
[44] *Ibid* at 239.
[45] *Ibid* at 216 [210].
[46] *Ibid* at 20–5 [20–5].

for a legal rule to be binding. Rather, it might be said in the spirit of Hart's claims about theoretical clarity that the lack of sanctions in cases of international law and their presence in the central case of law does not give clear answers to questions of whether the latter is binding and the former is not. Hart argues, 'there seems no good reason for limiting the normative idea of obligation to rules supported by organized sanctions'.[47] Rather, the differences between the aggressive behaviour of a state and that of a human being renders sanctions in public international law less important than between individuals in a state. Therefore, the general social pressure to conform, as well as self-help mechanisms like countermeasures, renders international law sufficiently close to the central case of law.

Another way in which he compares international law to the central case is to consider whether international law can genuinely obligate sovereign states. He argues that we should not a priori assume that states have absolute sovereignty, which would entail that international law is not binding, and one must look at the actual rules which regulate state sovereignty in international law. He then says that if one looks as state practice, it can be concluded that sovereignty is genuinely limited by international law.[48]

His second inquiry traces the similarities between cases of international law and morality. He offers three arguments to suggest that to focus on the similarities between international law and morality, rather than between international law and the central case of law, is theoretically confusing. The first is that the rules of international law are more like a regime of primary legal rules found in a 'primitive society' rather than a system of moral rules.[49] This is because many of the techniques and methods of the international legal process are closer to law than morality. His second argument is that state practice reflects a distinction between international law and morality. He says 'the [moral] appraisal of states' conduct in terms of morality is recognizably different from the formulation of claims, demands, and the acknowledgements of rights and obligations under the rules of international law'.[50] Thirdly, he argues that states comply with international laws for many reasons which might or might not be moral.

[47] *Ibid* at 218 [213].
[48] *Ibid* at 226 [221].
[49] *Ibid* at 227 [222].
[50] *Ibid* at 228 [222]. He continues: 'What predominate in the arguments, often technical, which states address to each other over disputed matter of international law, are references to precedents, treaties, and juristic writings; often no mention is made of moral right or wrong, good or bad'. He also argues that 'one of the typical functions of law, unlike morality, is to introduce just these elements in order to maximize certainty and predictability and to facilitate the proof or assessments of claims . . . It is for this reason that just as we expect a municipal legal system, but not morality, to tell us how many witnesses a validly executed will must have, so we expect international law, but not morality, to tell us such things as the number of days a belligerent vessel may stay for refuelling or repairs in a neutral port; the width of the territorial waters; the methods to be used in their measurement . . . The point is only that legal rules *can* and moral rules *cannot* be of this kind'.

At this juncture, Hart sets out a number of counter-arguments which distinguish international law from the central case. He claims that international lawyers have tended to play down these dissimilarities in order to defend their subject against the sceptic. However, Hart's view is that these dissimilarities are theoretically significant. He thinks that international law is a form of primitive law, and to reject this claim is 'as if we were to insist that a naked savage *must* really be dressed in some invisible variety of modern dress'.[51] His main argument in support of this claim is that international law is not like 'a system with a basic rule of recognition'.[52] Instead, international legal order governs a 'simpler form of society' in which 'we must wait and see whether a rule gets accepted as a rule or not'.[53] He argues that there are no general criteria which establish the validity of rules in international law. To insist that there are, or to presuppose that there are,[54] is only another source of theoretical confusion.

In conclusion, then, the analogies between paradigm cases of international law and the central case of law are 'thin and even delusive'. However, these analogies are:[55]

> those of function and content, not of form . . . The analogies of content consist in the range of principles, concepts, and methods which are common to both municipal and international law, and make the lawyers' technique freely transferable from one to the other. Bentham, the inventor of the expression "international law", defended it simply by saying that it was "sufficiently analogous" to municipal law . . . [In] this analogy of content, no other social rules are so close to municipal law as those of international law.

We might argue whether his conclusions about international law are correct: it may be that since he was writing, a convention has arisen in the conduct of state officials and international lawyers which can be considered a rule of recognition. Furthermore, while Hart was sceptical as to whether Article 38(1) of the Statute of the International Court of Justice (ICJ) constituted a statement of the sources of public international law, there is certainly room for disagreement here.[56] But either way, his methodology is as follows: paradigm cases of law establish the central case of law; paradigm cases of international law are held against the central case and found to be deficient as a case of law. This is why it would be theoretically obscuring to bring international law under the extension of the central case of law.

[51] Hart, above n 1, at 236 [230].

[52] *Ibid*.

[53] *Ibid* at 235 [229].

[54] This is the view of Kelsen and Anzilloti. For a discussion of their views, see H Lauterpacht, 'The Nature of International Law and General Jurisprudence' in E Lauterpacht (ed), *International Law, Being the Collected Papers of Hersch Lauterpacht*, vol 2, *The Law of Peace, Pt 1* (Cambridge, Cambridge University Press, 1975) 14–19.

[55] Hart, above n 1, at 237 [231].

[56] Hart cites T Gihl, *International Legislation: an Essay on Changes in International Law and in International Situations* (S Charleston (trans), Oxford, Oxford University Press, 1937). See JL Brierly's review of Gihl's book in (1938) 17 *International Affairs* 550.

As we have seen, Hart can be considered to hold a set of non-ambitious claims about the central case. Concepts are fuzzy: there are paradigm and indisputable cases which are secure from discounting, but they shade into indeterminate cases. Language is malleable and there are complex and intricate conceptual connections and distinctions between forms of law and other norm-systems. The central case is therefore defeasible against ordinary language. But, as has been argued, Hart employs conceptual analysis ambitiously to hold that the central case of law contains all the characteristics of law which are equally contained in all paradigm cases. Indeterminate cases either fall within the central case or do not. In other words, rather than it being fuzzy, Hart can ambitiously claim that international law does not contain a rule of recognition, and therefore contains some, but not all, features of law. International law is judged against the central case and found to be lacking. Therefore, it can be said that rather than international law being an indeterminate case, it is more accurately described as a peripheral case of law because it has some features of the central case but not all. It is for this reason that he considers that it is theoretically inaccurate and practically not useful to describe international law as a form of law. It seems that the central case is not defeasible and indeterminate cases are judged against this central case. Hart's concept of law is employed ambitiously.

USAGES AND CONVENTIONS

The form of conceptual analysis adopted by Hart, which allows him to support a variety of claims about the essential nature of law, is question-begging. This is because it rests upon a claim that his concept of law is a theory which is true for legal officials, or participants within a legal order. I will argue that this claim remains presupposed rather than justified in his writings. Hart, and some Hartians, turn to non-moral and theoretical values to justify this claim. This approach is not successful. In conclusion, it is argued that his conceptual analysis of law is built upon an assumption that there is conformity in the raw data and this is question-begging.

The Legal Scientist, the Ordinary Language User and the Legal Official

For Hart, indisputable or paradigm cases of law are sifted by the legal scientist to yield the central case of law as the union of primary and secondary rules. Therefore, the union of primary and secondary rules is a rationalisation of what most people would consider to be paradigm cases of law and what they share in common. However, it is also the case that for Hart, legal officials, within a legal order, act in accordance with the rule

of recognition and this is a sociological fact. The identity of the legal order, for legal officials, is the rule of recognition along with all the other primary and secondary rules validated by it. Raz is right when he argues that for Hart '[a] legal system consists of its rule of recognition and all the rules identified by it'.[57] Therefore, for both the legal official and the ordinary language user, the union of primary and secondary rules is (at least immanently) the central case of law. Furthermore, for Hart, the correct-thinking legal scientist must also adopt this central case of law.

Even though each of these groups identifies the same central case of law, each thinks about it differently. The ordinary language user correctly describes a practice, norm, etc, as a case of law when it falls within the extension of the central case. So, for example, language users are correct when they describe a norm validated by the rule of recognition, or official act authorised by the rule of recognition, as a legal norm or act. For the legal official, the rule of recognition is employed to determine the contents of the legal order. The rule of recognition determines what ought (legally) to be the case. For the legal scientist, the rule of recognition is determined to be a feature of the central case of law by rationalising the conceptual distinctions that underpin ordinary language-use. But this concept of law is employed to determine whether some practice which is being studied is a legal order.

These three groups also deal with the issue of indeterminacy differently. Within a linguistic community, there are a range of ways of conceiving of the analogies between the central case of law and indeterminate cases like international law. There are some who hold that (paradigm cases of) international law are close to the central case of law; some may consider that there are no important analogies between the central case and paradigm cases of international law, and for others it is entirely plausible to see (paradigm cases of) international law as an example of the central case. This final group may well be prepared, for example, to view Article 38(1) of the Statute of the ICJ as at least part of the rule of recognition of the international legal order. But if Hart's conclusion is explicable with reference to ordinary usage, there must be a dominant folk theory or set of shared criteria about law which is reflected in this ordinary usage which allows us to distinguish between those usages which are correct and incorrect. Those that consider international law to be a form of law are incorrect in their use of language, as we have seen. Without this claim being true, all usages would be indeterminate relative to all other usages and none of the ways of conceiving of international law as law would be preferable to any other. In fact, there would be no way of holding that his central case of law was preferable to any other.

[57] J Raz, *Practical Reasoning and Norms* (Oxford, Oxford University Press, 1975) 146.

This same indeterminacy is viewed quite differently by the legal official. It emerges in two circumstances. First, with regard to judicial interpretation, legal rules underspecify what is to be the case in a particular factual circumstance. Hart uses the example of whether roller skates are vehicles, but it emerges in many other circumstances. One familiar to international or public lawyers would be the way in which various state-owned or state-controlled enterprises have, or do not have, immunity under various well established rules of English law.[58] The second example, which is of more importance for present purposes, concerns the identification of each individuated norm which is part of the legal order. While the rule of recognition determines the sum of norms which comprise the legal order in which it exists, this is sometimes indeterminate.[59] So, for example, if an international law is an indeterminate case of law for legal officials then it is questionable whether it is part of a domestic legal order and therefore enforceable. After all, English courts have quite often disagreed as to whether different sorts of international legal norm are part of the legal order, whether they can be used to interpret statutes, and so on.[60]

For legal officials, determining whether a putative law is part of a legal order or is even a law at all is not a matter of theoretical usefulness or the correct usage of language. This is because when a legal official determines whether a putative law ought to be applied and obeyed in a legal order, it will have an important effect on legal subjects' lives. For the legal official a decision has to made whether the rule of recognition allows an international law to be a valid legal norm for that domestic legal order and hence can be enforced against, or on behalf of, a litigant.

Hart thinks that the legal scientist, who is investigating a putative legal order, must make a judgment about whether to classify indeterminate cases as legal phenomena or otherwise on the basis of whether it serves any practical or theoretical aim. If Hart thinks this is ultimately subjective (that is, what he thinks), this must be disingenuous. To draw a conclusion one way rather than another is justified because if it serves a theoretical or practical aim. Therefore, some conclusions drawn are preferable to others in a non-subjective sense

In each case, the legal scientist, legal official or ordinary language user employs Hart's concept of law to determine whether indeterminate cases are law or not. However, the ways in which these groups use the concept of law is different. The ordinary language user employs it as a folk

[58] *Kuwait Airways Corp v Iraqi Airways and Iraq (No 2)* [2001] Lloyds Rep 485. See M Evans, 'When the State Taketh and the State Giveth' (1996) 45 *International and Comparative Law Quarterly* 401.

[59] Hart, above n 1, at 258 and 266–7.

[60] *R v Jones and Milling and others* [2006] UKHL 16, [2006] 2 WLR 772. Some positivists, like Jules Coleman, have seriously questioned whether there is indeterminacy with regard to the rule of recognition and the contents of a legal order. I will return to this below at 70–74.

theory against which indeterminate cases are judged in terms of correct language-use. The legal official uses it as the basis for determining what rules ought to be applied and obeyed. The legal scientist uses it to determine the existence and content of legal orders as part of a theoretical inquiry.

Law as a Social Practice

A problem arises for Hart when we consider the relationship between the theoretical perspective of the legal scientist, the conceptual distinctions embedded in ordinary language-use, and the viewpoint of the legal official. First, Hart's central claim is that the legal scientist's claims about the concept of law are justified to the extent that they reflect ordinary language-use, and that there are shared criteria accepted by language users which can be articulated. Stavropoulos comes to this conclusion when he says that Hart's 'attempt to distil metaphysical wisdom out of ordinary use, makes no sense without the assumption that ordinary use is founded on shared, common ground that *defines or individuates* the concepts that figure in use. So the method presupposes the shared criteria thesis'.[61] But secondly, ordinary language usage describes a social practice which is undertaken by legal officials. These usages are correct to the extent that they accurately map onto this social practice. To consider otherwise would be to admit that the legal scientist is tracking language-use of language users who might be fundamentally mistaken about the nature of the social practices undertaken by legal officials. So, Hart cannot simply take the role of the legal scientist in reporting language-use and detach it from analysis of the internal point of view of the social practice of legal officials. Neither, I think, would he want to and this might be the reason Hart attempts to explicate the perspective of the legal official after his discussion of linguistic concepts. But it is the case, then, that the central case of law rests upon another shared criteria thesis. This is not shared views about the correct usage of words. Rather it is about the conditions by which a norm can be said to be legally valid for legal officials engaged in the social practice of law.

These two sets of shared criteria (linguistic and practical) come together in the following way: the rule of recognition is an articulation of the shared criteria accepted or adopted by legal officials in their collective social practice as to what norms are to count as legally valid. These shared criteria must, in a sociological sense, be accepted and employed by the legal official when determining the normative content of a legal order. Ordinary language users then have shared criteria about correct language use about

[61] Stavropoulos, above n 22, at 88. See N Simmonds, *Law as a Moral Idea* (Oxford, Oxford University Press, 2007) 20–21.

the word law. Substantively, the word 'law' is used correctly by ordinary language users (at least immanently) when they use it to describe the central case of law. This must, if it is to be a correct use of language, respect the social practice and shared criteria accepted by legal officials. Law is, then, for Hart, a practical phenomenon and not simply a free-floating theory about the ordinary language-use: it rests on shared criteria accepted by legal officials about the social practice of which they are a part.

Theoretical Values

The legal scientist's account of law is bound, given Hart's approach to method, by the nature of the raw data he attempts to make sense of. Therefore, if Hart is right, the legal scientist describes the shared criteria about law which are accepted by legal officials and concludes that law is the union of primary and secondary rules. A number of legal philosophers, especially Dworkin and Finnis, have questioned this claim on the grounds that these shared criteria do not exist either in language-use or in practical deliberations of legal officials. If they do not, then the legal scientist cannot describe them and therefore Hart must be wrong. The process of rationalisation cannot extract a simple, clear, central case of law if it is not there to be extracted.

To explain further, let us assume that legal officials can think about law in different ways and there are no clear shared criteria about law which are accepted by legal officials. If this is the case, Hart's adherence to the central case, in the face of any recalcitrant viewpoints held by legal officials, cannot be supported by the raw data. This is obvious: if the raw data admits of a variety of views about law which contradict Hart's view, then he cannot claim the central case is justified by the content of the raw data. Once this break is made, '[t]he reliance on and derivation of wisdom from ordinary use would become empty rhetoric . . . [and] [h]is theory would be one among many tolerated by the practice, and would have to include appeal to some independent political, moral, or methodological principle'[62] to be justified.

Rather than appeal to some independent political or moral principle, Hart, in the *Postscript* to *The Concept of Law*, attempts to defend his approach by appealing to a methodological principle. Specifically, he claims that theoretical values, like accuracy, clarity, elegance, explanatory power, and so on, allow him to justify his central case of law over others.[63] But this solution cannot resolve the problem just described. If the shared

[62] Stavropoulos, above n 22, at 87.

[63] Hart, above n 1, at 239–40 of the *Postscript*; Raz, above n 57; Dickson, above n 13 and J Dickson, 'Methodology in Jurisprudence: a Critical Survey' (2004) 10 *Legal Theory* 117, 125.

criteria thesis holds, then it is possible to argue for a concept of law which corresponds and describes these shared criteria. Theoretical values reflect how well (in a technical sense) these shared criteria have been explicated. But the validity of the central case derived this way is fundamentally rooted on the shared criteria thesis being true. If the shared criteria thesis is false, then theoretical values justify the selection of those criteria (which are not shared) as important or unimportant. But surely, theoretical values like accuracy, clarity, and so on, are ones which emphasise a general fidelity to the raw data. If the raw data do not contain shared-criteria, then neither can the conceptual distinctions exposed by the astute legal scientist. Therefore, while theoretical values can effectively 'streamline' various conceptual distinctions, a central case of law, and so on, they cannot be used to pick and choose the important from the unimportant unless that judgment is reflected in the raw data, and this, in turn, implies the existence of shared-criteria.

Law as a Conventional Practice

The plausibility of Hart's central case of law depends on two conditions being the case: (i) that there are shared criteria about what constitutes legally valid phenomena; and (ii) these are reflected in the social practices of legal officials. So the shared criteria thesis is not a linguistic but a practical claim about the validity conditions of legal norms. This point is not lost on Hart. He says in the *Postscript* that 'the theory remains as a faithful account of conventional social rules which include . . . the rule of recognition, which is in effect a norm of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts'.[64] But what if the shared criteria thesis was false? It cannot be assumed that it is true. For example, Dworkin has argued that the social practices of legal officials are characterised by fundamental disagreement about the point or purpose of law.[65] Dworkin thinks that such disagreement is a central feature of any legal order and reveals the moral, and contestable, underpinnings of law which must be interpreted in their best light. Shared criteria, or conventions, which allow the identification of legal phenomena, for Dworkin, are inherently unstable and the rule of

[64] See Hart, above n 1, at 255–6 of the *Postscript*; A Marmor, *Positive Law and Objective Values* (Oxford, Oxford University Press, 2001) chs 1–4. See A Marmor, 'Legal Conventionalism' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford, Oxford University Press, 2001) 197.

[65] See R Dworkin, *Law's Empire* (Oxford, Hart Publishing, 2004, first published in 1986) 3–6. Perry summarises Dworkin's point: 'Hart is undoubtedly correct that an important task of legal theory is making clear our implicit conceptual commitments and presuppositions. But the need for clarification only exists if there is confusion, uncertainty, or disagreement of some kind within the internal conceptualization of the practice'. See Perry, above n 2, at 339.

recognition cannot exist in the way that it must for Hart's claims to be sustainable.

It is not appropriate to haul through the conceptual finery which characterises positivist responses to Dworkin's critique of Hart here. However, my central methodological point, to which I do not think that Hart and Hartians can easily respond, can be considered through an examination of an important argument advanced by Jules Coleman in an essay from 1980.[66] I will leave consideration of other Hartian positions to others.[67]

Coleman's response to Dworkin's charge is that he fails to distinguish between two types of disagreement about the law. The first is a disagreement about the rules of the convention itself. The second is a disagreement about the convention's application. Coleman concedes that if there is disagreement about the convention itself, then Dworkin is right.[68] However, he then argues that such disagreements do not occur in law, and in fact Dworkin mistakes disagreements concerning the application of conventions for disagreements concerning the convention itself. Simply, legal officials do not disagree about the conventions which establish criteria of legal validity. Thus, there is no real disagreement, shared criteria exist in law as a social practice, and any disagreement is only apparent rather than real. Evidence of disagreement does not undermine the centrality of shared criteria in the practice of legal officials. As a result, Coleman states that the conventionality thesis[69] (which describes Hart's rule of recognition and is his version of the shared criteria thesis) is an existence condition for legal order which remains untouched by Dworkin's critique.

[66] Coleman, J, 'Negative and Positive Positivism' in *Markets, Morals and the Law* (Cambridge, Cambridge University Press, 1988). See also Hart, above n 1, at 258. Coleman remains committed to the view his view in his recent work. See, eg, *The Practice of Principle* (Oxford, Oxford University Press, 2001) 105 and lecture 5 and 7.

[67] Arguments which do need further consideration are Coleman's reversion to Bratman's conception of 'shared co-operative activities' and Marmor's reversion to Lewis' work to provide an epistemological grounding to their accounts of law being rooted on conventions. See M Bratman, 'Shared Cooperative Activity' (1992) 101 *Philosophical Review* 327 and 'Shared Intention' (1993) 104 *Ethics* 97; D Lewis, *Convention* (Oxford, Blackwell Publishing, 2002, first published by Harvard University Press, 1969). Of course, the heart of these approaches to legal theory is conceptual pragmatism. See W Quine, 'Two Dogmas of Empiricism' in *From a Logical Point of View: Nine Logico-Philosophical Essays* (Cambridge, Mass, Harvard University Press, 1961) 20–46. It seems to me that reversion to the epistemological position which is conceptual pragmatism, which shows how truth-claims emerge and are valid within communities but not universally, cannot be automatically translated into a theory of how stable practices emerge within the law. For example, judges could agree on the meaning of the word 'rule', but not the social practices by which certain rules are considered valid or otherwise. The reversion to Bratman's work may fare better to establish the epistemic basis of conventionalism. On this see R Dworkin, 'Thirty Years On' (2002) 115 *Harvard Law Review* 1655, 1662.

[68] J Coleman, *The Practice of Principle* (Oxford, Oxford University Press, 2001) 117.

[69] See J Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford, Oxford University Press, 2001) 99.

But how would Coleman respond to a case, for example, like *Trendtex*?[70] This case concerned a claim brought by the Trendtex Trading Corporation against the Central Bank of Nigeria for payments due in respect of the Bank's breach and repudiation of a letter of credit. In its defence, the Bank claimed that as it was a department of the Federal Republic of Nigeria it was immune from suit. It was held, on appeal, that the Bank could not plead immunity as it was created by the Government of Nigeria as a separate legal entity. If the Bank was considered a Government department on further appeal, the court decided that the doctrine of sovereign immunity had changed from its absolute to restrictive variant in customary international law and the latter could be directly applied by English courts. The majority of the court considered that it could apply the doctrine of restrictive immunity notwithstanding older decisions of the House of Lords which, via the doctrine of *stare decisis*, bound the lower court.[71]

Disagreement over the *content of the law* would certainly describe the judges' discussion *obiter dicta* as to whether the restrictive or absolute immunity rule was customary international law, or whether there was any consensus at all on either rule in state practice. However, disagreement as to whether customary international law could apply even in the face of a House of Lords judgment may reflect a more profound sort of disagreement. We might say that it is a disagreement as to the nature of the convention of *stare decisis* as applied by English judges. The majority of the court (Denning LJ and Shaw LJ) held that the decision of the House of Lords which applied customary international law need not be followed if the customary international law which was applied had changed.[72] The minority (Stephenson LJ) disagreed.[73]

That there is a dispute as to whether the court should show deference to earlier decisions of higher courts or should employ the logic of the majority, appears to be an example of a disagreement over the conventions which guide the court's decision-making processes when determining which rules are legally valid and ought to be applied. This appears to undermine Coleman's response to Dworkin. But Coleman would disagree with this diagnosis. He argues that this is merely another example of a disagreement about the application of a convention, rather than a disagree-

[70] *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529.

[71] In this case, *Compania Naviera Vascongada v Steamship Cristina* [1938] AC 485.

[72] Lord Denning MR concluded: 'Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court—as to what was the ruling of international law 50 or 60 years ago—is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change—and apply the change in our English law—without waiting for the House of Lords to do it' (at 554).

[73] *Ibid* at 571–2.

ment about the nature of the convention itself. Coleman employs, according to Dworkin, an 'abstraction strategy'. This is where the convention is re-described so that the disagreement is rendered one of application rather than one of content. So, instead of claiming that *stare decisis* is a convention which is accepted by judges and which guides their conduct when deciding cases, the norm becomes something like: 'judges must follow the decisions of higher courts, unless it is unreasonable to do so'. As such, the judge's disagreement is concerned with what counts as unreasonable rather than the substance of the convention itself. We can then interpret the decision of the majority as that they thought that the application of the old decision of the House of Lords was unreasonable in the circumstances, while Stephenson LJ, in the minority, did not.[74] Alternatively, the abstracted convention could be understood simply as entailing that a decision of a higher court is binding unless that previous decision is applying superceded customary international law. Disagreement, then, concerns the content of customary international law rather than the content of the convention. It needs to be stated that neither of these arguments match the tenor of the decision. Stephenson LJ, for example, says: 'this court is bound by previous decisions as to what international law is to hold [and] that it is the same until altered by the House of Lords or the legislature; and that this court is bound by previous decisions to hold that absolute sovereign immunity is a rule of international law until the House of Lords or the legislature declares that it is so no longer'.[75] But, of course, Stephenson LJ or the majority might have misunderstood the nature of the convention which applied. This being the case, however, an error theory is needed to distinguish sound from unsound applications of the convention, which in turn, *presupposes* that there is a stable convention which is being applied. Finally, the judicial practice in this case may be adopting an 'extension strategy'. They are, in fact, extending the rule of recognition in this decision. However, this presupposes either disagreement about the convention which is being settled by the judges or presupposes a stable convention which is being extended. In the first circumstance, this supports Dworkin's view about the nature of judicial practice. In the second circumstance, the extension strategy presupposes rather than demonstrates the existence of a stable convention. Abstraction or extension strategies and error theories appear to be required in order to save the conventionalism thesis from Dworkin's critique.

Why should we accept the abstraction strategy, extension strategy or an error theory in order to save the conventionality thesis? First, it should be noted it is not intrinsically worth saving. Secondly, Dworkin is undoubtedly

[74] *Ibid* at 561.

[75] *Ibid* at 571–2. See also C Warbrick, 'The Application of International Law in the English Legal System' in A Carty and G Danilenko (eds), *Perestroika and International Law* (Edinburgh, Edinburgh University Press, 1990) 76–8.

right to argue that every judicial dispute could be described as a dispute over application of the rule of recognition if Coleman wanted to do so.[76] But as Shapiro contends, neither of these observations entail that the abstraction strategy nor the conventionalism thesis is logically wrongheaded. It is, however, the case that Coleman's approach is non-falsifiable in that '[p]ositivism could never be refuted if positivists had free rein to characterize any alleged unconventional behavior as involving innocuous disputes about application'.[77] This is correct, and could equally be applied to the error theory. It could also be applied to Dworkin's critique of conventions. Shapiro's answer is to call for evidence to ascertain the validity of either account. The existence or absence of disagreement in the internal point of view concerning certain crucial aspects of the legal order would seem to provide the crucible for testing both Coleman's and Dworkin's views. But, while it appears to me that judges adopt more naturally a Dworkinian approach in their decision-making and hence his is a better account of what legal officials tend to do, Shapiro appears to have missed that, as with more radical theoretical approaches,[78] the reason non-falsifiable theories are non-falsifiable is because they cannot be undermined by recalcitrant evidence. If, however, we *assume*, a priori, that there are stable conventions within the order, through the abstraction strategy, extension strategy and the error theory, any empirical evidence can be made to fit with the raw data. Therefore, that there are shared criteria appears to be an unjustified assumption about the nature of the raw data. The shared criteria thesis only survives if we interpret disagreement in a way so that the latter does not touch the former.

Paradigm Cases and the Internal Point of View

I have argued in this chapter that paradigm cases of law are the source of Hart's central case and it is against this central case that indeterminate cases of law are to be judged. These paradigm cases arise from ordinary usage. Against the central case, international law lacks a rule of recognition and therefore can be seen as a peripheral case of law. To complete this chapter, I want to return to this claim in light of the argument just made.

Hart's argument relies upon a chain of validity which runs from the social practices which legal officials describe as legal practice, through ordinary language-use, to the conclusions about law made by the legal scientist. This being the case, Hart's conclusions about law and international

[76] R Dworkin, 'A Reply by Ronald Dworkin' in M Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (London, Duckworth, 1986) 252.

[77] See S Shapiro, 'On Hart's Way Out' in J Coleman (ed), *Hart's Postscript*: *Essays on the Postscript to The Concept of Law* 168.

[78] Such as, eg, Anghie's approach which is described in Chapter 2.

law are dependent upon the rule of recognition being a characteristic of the social practices undertaken by legal officials.

It is possible to hold that the social practices of legal officials do exhibit a rule of recognition. But to do so requires that the legal scientist invoke various strategies, such as the abstraction or extension strategies or error theories, in order to sustain this conclusion. How should we view these theories? As was shown in Chapter 2, Finnis argues that the legal scientist must make various judgments (of importance, relevance, continuity and practical purpose) about the raw data when generating a concept of law. Seen in this light, the various strategies and theories which could be invoked by the Hartian to sustain the rule of recognition are ways by which recalcitrant raw data can be rendered irrelevant and unimportant. The point is that the selection of importance and relevance has been made a priori and, once made, the Hartian legal scientist picks that from the raw data which supports his conclusion that the essential nature of legal practice is shaped by a rule of recognition. Dworkin, to his credit, realises this, when he claims that the raw data can be interpreted in a number of different ways and the point of legal science is to determine why we should view it one way rather than another. This takes the analysis back to the conclusion which was reached at the end of the last chapter. Attempts to conceptualise a general concept of law require the legal scientist to make judgments of significance and importance about the raw data under consideration. Hart's theory relies upon the existence of shared criteria and a rule of recognition existing among legal officials, but this is presumed to be the case. This, then, allows raw data which does not fit his view to be disregarded as unimportant, mistakes, not-law or irrelevant. The raw data can be equally reinterpreted so as to be consistent with his claims. However, why should we make this presupposition and see the raw data through this lens? Hart, I submit, does not offer any conclusive reasons for choosing his view over others.

CONCLUSION

As one gets further into Hart's concept of law and his methodology, the famed clarity and simplicity of his approach quickly becomes murky and highly complex. In sum, though, Hart advances a positivist conception of law which claims to be non-ambitious. This means that he attempts to draw, in a straightforward way, the analogies, commonalities and conceptual distinctions which are found in paradigm cases of law. However, Hart's claims about the central case of law quickly become more ambitious. He wants to claim that his central case of law can be used to determine the legality of indeterminate cases of law, like international law. International law is best viewed, against the central case, as an example of

a social practice which is not really law. Thus, rather than being a defeasible concept, his central case is *that against which other cases of law are to be judged*. Furthermore, its validity relies not on ordinary language-use, nor on the theoretical values employed by the legal scientist, but rather on the existence of the rule of recognition as a set of shared criteria about the legal validity of norms which form the content of a legal order in which the official has a role.

While it is possible to hold that such conventions exist, it requires the legal scientist to discount data which undermines the central claim about shared criteria. This goes straight back to the point made in Chapter 2, that the legal scientist has to distinguish the important from the unimportant or the relevant from the irrelevant. It seems that the Hartian legal scientist, who wants to sustain his idea of shared criteria at all costs, does this through various approaches (such as an error theory or an abstraction or extension strategy) which allow the shared criteria thesis to remain untouched. Fidelity to the raw data cannot be resorted to, to defend this approach, but rather it is the legal scientist who is imposing his own judgments on the raw data and sustaining them through these various strategies and theories. Equally, the resort to theoretical values cannot solve this problem, as one cannot use such values to defend the shared criteria thesis if those shared criteria do not necessarily exist in the raw data. By implication, such strategies, values and theories also sustain Hart's conclusions about international law and are problematic for the same reasons.

This is a more general problem which is faced by all attempts to induct various strong conclusions about the nature of law from the raw data. We return to Finnis' original point which forms the heart of the methodological problem: participants within a social practice adopt different understandings of its meaning, significance, point or purpose, and the raw data can be interpreted differently according to the judgments of relevance and importance made by the legal scientist. This is why Hart's approach to conceptual analysis is question-begging. We are no closer to solving the methodological problem.

4

Focal Analysis and Ideal-Types

HAVING SEEN THE shortfalls of Hart's form of conceptual analysis, it is now necessary to consider if its alternative, focal analysis, fares any better. This alternative view is used to describe an approach to concept formation (accepted by a diverse group that contains, amongst others, Weber, Finnis, McDougal, Oppenheim, Lauterpacht and Weil) which has it that the essence of any practical phenomena lies in an analysis of its function, purpose or end. This analysis of purpose, function or end can then be employed to establish, strongly, a general concept of law, or, weakly, the concept of international law. It is used to explain why any particular features of law or international law (such as, for example, a monopoly on coercion) are important for it as a *practice*. In this chapter, I will show how the methodological problems concerning concept formation in legal science and international law can, in principle, be solved through attention to the practical point of legal phenomena qua normative practice. In doing so, I defend a form of focal analysis. I further expand upon, and otherwise reinforce, this claim in the remaining chapters of this book. Before examining various theories which are best viewed as forms of focal analysis, it is necessary to distinguish two ways of thinking about practical phenomena, as both form an important distinction at the centre of the argument which follows. The first concerns how this attention to the point or purpose of a practical activity may be useful when conceiving of the international legal order as an individuated normative practice, and the second how it may be employed to conceive of the general concept of law.

How can the international legal order be said to be a normative practice? To explain, in Chapter 2, I described paradigm cases of law. These are the familiar practices, norms, institutions, and so on, which we normally refer to as law. Now, I think that it is possible to be more specific about to what such paradigm cases refer. They refer to elements or features of various *normative practices*. Such normative practices can be said to be forms of social practice with some specific features. First, a practice can be understood as a form of action and is purposive: it is an attempt to achieve an end or to achieve a state of affairs which did not previously pertain. A *social practice* is an activity which is undertaken by a group of individuals in a relatively organised way. Secondly, social practices are *concrete* in the sense that they, in an ontological sense, exist. Thirdly, they

are *normative* in the sense that they are forms of co-ordinated and institutionalised group activity. Thus, those engaged in a social practice offer reasons for acting and undertake particular roles against a backdrop of norms and conceptions of the ways of properly doing and saying things. The viability of any reason is judged, at least in part, against this normative backdrop by which the social practice is defined. This normative backdrop can be highly contested by participants. Furthermore, the character of these normative practices can be understood as a manifestation of its historical development. The rationality, psychology and ideology of the individuals which comprise the practice drive its development, as does the sociological and physical environment within which it exists. Such a normative practice is a paradigm case of law to the extent that it is usually called a legal order by those engaged in these forms of social action (or legal officials), those subject to legal norms (legal subjects) and others studying these forms of action from an external perspective (external observers or legal scientists).

These rich and complex normative practices could well be considered the subject of focal analysis. This methodological focus could be employed to understand the international legal order as an individuated normative practice and, in this way, could help conceive of the concept of international law. This seems appropriate for a number of reasons. One is that by conceiving of the international legal order as a normative and purposively driven practice, we can provide an explanation of the meanings and reasons which justify its institutional structures and normative outcomes. So, for example, if the purpose of the international legal order is to establish the conditions by which states can co-operate and co-exist, then we can explain why, prima facie, the consent-based theory of international law—which makes the obligations states are under clear—is important and plays a vital role in the success of the international legal order as a practice. A second reason is that this sort of analysis seems more incisive than those forms of conceptual analysis which focus on ordinary language-use, or the conceptual distinctions which are common to international lawyers. This is because the meaning of the various linguistic acts and conceptual distinctions drawn by international lawyers can be regarded as a self-characterisation through language of something international lawyers *do*, or such linguistic practices and conceptual distinctions themselves are purposive acts; they are ways of doing international law. Specifically, modes of language usage are often fundamental to the achievement of social activities and collective enterprises, but these are parasitic upon a conception of the normative practice qua purposive activity. Although I will expand on this point towards the end of this chapter, this is one reason why an attempt to conceptualise international law as a normative practice—that is, as a meaningful collective activity—stands a better chance of capturing its essence. It is this normative practice which is

more or less captured through, and reflected in, the linguistic practices of participants.

Some have employed a form of focal analysis to make the much stronger claim that all forms of a particular normative practice are unified by a purpose or set of purposes. It is this ascription of purpose which unifies all forms of law and is the basis of the general concept of law. A version of this approach is advocated by the policy science school. One of its chief proponents, Myres McDougal, argues that the general concept of law is a set of authoritative institutions which are focally orientated towards establishing the conditions whereby all human beings can have human dignity. Our various normative practices which we normally call international law can be said to be *legal practices* to the extent that they are authoritative institutions which reflect this purposive orientation. This general concept of law tells us whether the general linguistic practices by which we attribute the sign 'legal order' or 'law' to a particular normative practice are correct and tells us exactly what is 'legal' about the normative practices associated with paradigm cases. So, one of the functions of the general concept, which is accepted by most legal philosophers, is to show to us when we make mistakes when characterising various normative social practices as legal phenomena. As has been shown in the discussions of Austin and Hart in the previous chapters, it can, then, be used to determine whether the normative practice which we call international law is really a form of law or, less strongly, where its institutional structures or value orientations are pathological or otherwise problematic.

The weak claim, that international law is a normative practice with a purposive orientation, is relatively uncontroversial. However, the strong claim that the general concept of law should be understood as having an overall purpose and that various normative practices, including that which we call international law, should be evaluated qua legal practices against it, is far more so. However, it is my view that the strong claim can be vindicated. The first section of this chapter considers two forms of focal analysis, which are normative positivism and the policy science school. Both accept the strong and weak claims just set out. It is, however, the work of Max Weber which provides the most acute analysis of the methodological claims upon which various forms of focal analysis rest. Through an analysis of his concept of the ideal-type, it is possible to discern why a purposive orientation is to be preferred to other methodologies. Weber, however, can be clearly seen to accept the weak claim associated with purposive analysis, but he rejects the strong claim. In rejecting the strong claim, he reverts to a form of conceptual analysis which, I argue, is unsustainable. In fact, I argue that there are conclusive reasons for accepting the strong claim. However, this is only possible if the problem of competing claims about the purpose of law and international law can be resolved. This, in turn, requires a conception of the

practically reasonable point of view in order to resolve the methodological problem.

PURPOSIVITY AND INTERNATIONAL LAW

As just mentioned, both the policy science school and normative positivism adopt a methodology which centrally focuses on the purpose or purposes of international law. While these approaches accept both the strong and the weak claims just set out, they differ in positing different conceptions of the ends or purposes of international law.

Human Dignity and the Purpose of International Law

The first approach is adopted by McDougal, and his associates such as Lasswell, who form the policy science school. This is a difficult, almost arcane, approach to international law, jurisprudence and social philosophy and their approach is not now taken particularly seriously in the latter two disciplines. This said, its substantive conclusions remain influential for international lawyers and its spirit is at the heart of an influential strand in US legal and political science. It is also, it should be noted, similar to the approach taken in this book. For present purposes, it is only necessary to show how the school adopts a form of focal analysis.

McDougal considers legal science a value-laden form of inquiry orientated towards a fundamental respect for human dignity. This claim takes it cue from his intellectual forebears writing in the tradition of legal realism. For legal realists, adjudication is a form of authoritative decision-making in which judges are entrusted to make policy decisions based upon the values of the community in which they act. From this follows the more general claim that law, like any social practice, is to be conceptualised through inquiry into the attitudes, values, etc of those engaged participants. He then claims that the values adopted by the legal scientist (or 'scholarly observer') and the legal official ('decision-maker') are similar. It is not immediately apparent how the detached legal scientist is to share the same values as those involved in the practice he observes. The answer given by policy science is that, in part, the 'scholarly observer is . . . inextricably a part of community process; he, like other community members, is incurably affected by preferences about value distribution'.[1] It might also be because the scientist is attempting to retain some fidelity in his explanations of legal phenomena to those meanings, values, and so on, of

[1] H Lasswell and M McDougal, 'Criteria for a Theory about Law' (1970–71) 44 *Southern California Law Review* 362, 373.

those who participate in it. But McDougal's claims about the attitudes of the scientist and participant—the observer and subject—are more specific and subtle than this. Duxbury explains with reference to McDougal and Lasswell's discussion of the relationship between the legal official's and scientist's point of view:[2]

> the Lasswell and McDougal version of policy science implies a distinction between institutional and ideological commitment: while the legal [scientist] . . . is supposedly able to view the mechanics of the legal process in a wholly dispassionate light—such detachment being the key to constructive legal critique—he or she cannot assume detachment from, and therefore cannot regard objectively, the social culture and values upon which the legal process is founded.

Duxbury is right when he argues, '[p]recisely how Lasswell and McDougal's scholarly observer is supposed to achieve this strange state of semi-detachment is not clear'.[3] The best answer is that their methodological approach is that both officials' and scientists' viewpoints *should* cohere around a conception of substantively rational ends. That is, there are certain substantive ends which must be accepted by the legal scientist and against which actual normative practices can be criticised. After all, if legal science is a value-laden activity, then one should be up front about this, and it is these values which are the basis for the criticism of actual normative practices.

For McDougal and Lasswell, the normative practice of law should be orientated towards ends which coalesce around the concept of human dignity. These are '"basic values of human dignity" and, as such, their worth is a matter beyond political or moral debate—they exist, as it were, "beyond ethics"'.[4] Furthermore, deviations from these values in normative practices can be subject to criticism by the legal scientist and the legal official's actions are justified to the extent that she practices these values in public decision-making.[5] This is what McDougal and Lasswell are claiming in their ostensibly uncritical idea of the semi-detached legal scientist. Lasswell makes this point explicit in his description of McDougal and Feliciano's work, *Law and Minimum Public Order*:[6]

> They are explicitly cognizant of the fact that they occupy an observational vantage point. True what is said in a treatise of this kind flows into the stream of knowledge, prediction, and proposal reaching the decision-makers of many

[2] N Duxbury, *Patterns of American Jurisprudence* (Oxford, Oxford University Press, 1995) 174.

[3] *Ibid*.

[4] *Ibid* at 178 and, more generally, H Lasswell's introduction to M McDougal and F Feliciano, *Law and Minimum World Public Order: the Legal Regulation of International Coercion* (New Haven, Yale University Press, 1961) xix. It should be noted that this sort of argument is also made by Hersch Lauterpacht. I consider his work in detail in Chapter 8, 210–12.

[5] McDougal and Feliciano, above n 4, at xxii.

[6] *Ibid* at xx.

> nations and associations. In the end, however, the decision-makers are the ones who must expect to be better off—in terms of all their values—by following the lines of policy put forward in this book than by continuing to rely upon strategies that keep mankind at the brink.

Law, on this approach, is part of a more general attempt to create public order which is consistent with human dignity within a community. Specifically, they claim that '[f]rom this man-centered, universalist and equalitarian perspective, the challenge is not merely to seek to resolve issues connected with law by "definition", but rather to relate authoritative decision to preferred public order'.[7] Furthermore, '[i]n any community, the legal system is but a part of a more inclusive system, the system of public order, which includes a preferred pattern for the distribution of values and a preferred pattern of basic institutions'.[8] So law is a process of authoritative decision-making which aims to achieve certain substantive ends as an element of this wider conception of public order. This is why policy science reflects the strong claim made by versions of focal analysis: that all forms of law share a common practical purpose and actual normative practices called law can be criticised against this general concept.

Public international law is to be understood in exactly the same way: as a system of authoritative decision-making within a broader conception of *world public order*. Therefore, international law is a normative practice which is a form of authoritative decision-making that is orientated towards establishing the conditions by which each has human dignity. Their concept of international law is part of a universal 'world public order of human dignity'[9] and they aim to develop 'a jurisprudential framework in accordance with which the entire world might be transformed into a rationally organized, democratically governed "free society" encompassing all peoples and offering the greatest enjoyment of human values for the largest number of individuals'.[10] In turn, various doctrines, claims, reasons, institutions and systems which comprise normative practices normally called international law can be appraised against this concept of international law.[11] So, in summary, their concept of international law is to be understood as a type of law as described by their general concept. It is a specific type of authoritative decision-making which attempts to attain a world public order in which all individuals have human dignity.[12]

[7] Lasswell and McDougal, above n 1, at 374.
[8] *Ibid* at 374–5.
[9] Duxbury, above n 2, at 195.
[10] *Ibid* at 195–6.
[11] M McDougal and H Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 *American Journal of International Law* 1, 28.
[12] As will be seen in the later chapters in this book, there is much to commend in the policy science approach from the methodological perspective. But there are some immediate problems with it that ought to be flagged up. One problem with this approach is that it

Normative Positivism and International Law

Another, very important, form of focal analysis has come to be known as normative, substantive or ethical positivism. While this has been mentioned in Chapter 2, and is considered in detail in Chapter 6, its central claims should be noted here as they adopt a purposive approach to concept formation in international law. Normative positivists like Hobbes, Bentham, and probably Kant, set out a general concept of law and thus make a case for the strong claim associated with focal analysis. For these philosophers, the purpose of legal order, it might be said, is to establish the conditions by which each person can safely predict how others will act, as well as to facilitate co-operation and to resolve social conflict. This is achieved by constituting an artificial system of norms which are created by and authoritatively interpreted by a sovereign will. Norms become legally valid because they have been enacted (therefore, they have a social source) rather than because they are morally just.

Normative positivists who have written in detail on international law, such as Oppenheim and Weil, adopt this same view about the international legal order as an individuated normative practice. Furthermore, Oppenheim places his comments in the context of a strong claim about law in general.[13] Like other normative positivists, these international lawyers consider that the international legal order is an authoritative institution whose purpose is to provide a normative framework that constitutes the conditions by which states can co-operate and co-exist in international relations. In order to achieve this end, international law must be institutionally designed so as to further this end: so, sovereign independence, equality and the consent-based theory of obligation are all justified institutional features of international legal order insofar as they further the achievement of this end. For example, the consent-based theory of legal obligation is another way of putting the idea that law is created by a sovereign will which, in turn, allows the content of legal norms can be readily identified. This feature of the international legal order helps establish

affords scant attention to questions of why human dignity must be accepted as a universal value. Another is how human dignity might be protected through international law in an institutional sense. Without these two explanations, the approach is open to a charge offered by Duxbury who says: '[i]t is perhaps not utterly cynical to suggest that policy science is intended as an exercise in teaching potential future policy-makers how to use the rhetoric of value-clarification in order to embellish even the most questionable official activities with the gloss of democratic accountability and rectitude'. Duxbury, above n 2, at 187.

[13] L Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *American Journal of International Law* 313, 331, where he writes 'What I maintain is that municipal, constitutional law, ecclesiastical law, and international law are all branches of the same tree of law in general as a body of rules for the conduct of the members of a community, which rules shall by common consent of the community be eventually enforced by external power'. See also P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413.

the conditions by which states can co-operate and co-exist successfully. Furthemore, for Weil, the introduction of *jus cogens* and obligations *erga omnes* is considered pathological because it destabilises the international legal order and prevents it successfully achieving its purposes.

The central difference between normative positivism and policy science is the selection of the focal purpose of international law. How should we view these claims about focal purpose? One way to consider it is as a weak claim adopted by all those who engage in international law as a normative practice; ie all international lawyers. That is, those engaged in the normative practice which is called the international legal order accept, at least immanently, an attribution of purpose. The stronger claim is that all forms of law share the same purposive orientation and it is this insight which forms the basis for the general concept of law. International law on the basis of the strong claim is a form of law because it adopts the same normative orientation which is associated with the general concept of law. Policy science can be said to make the strong claim, even though it is clear that actual normative practices deviate from the immanent ideal to which legal phenomena are orientated. International lawyers who adopt a normative positivist approach do not always argue for the stronger claim. But as has just been set out, the claims about the purposive nature of international law are consistent with a broader general concept of law. For this reason, I will take normative positivism as making the strong claim about the general concept of law of which international law is a type and against which normative practices called international law can be evaluated.

How plausible are the weak and strong claims associated with focal analysis? To begin with, I want to consider the viability of the weak claim: that the individuated normative practice called international law coheres around an explicit or immanent purposive orientation. One way of supporting this weak claim is to show how a normative practice can be understood as structurally orientated around shared conceptions of purposes. This view is considered in detail by Weber and his work forms the focus of the following section. The stronger claim—that forms of law are unified by a shared purposive orientation—is rejected by Weber. I will show why, and then, in the final section, explain why Weber (and others) are wrong to reject the strong claim about law. In fact, it is the vindication of the strong claim which will allow the methodological problem, which concerns how we can have knowledge of the concept of international law, to be answered.

FOCAL ANALYSIS AND IDEAL-TYPES

Weber thinks that concept formation in social sciences can proceed on the basis of an analysis of the purpose, function or end of practical phenomena.

However, the importance of Weber's method for present purposes is two-fold: first, he outlines an argument to support the weak claim by showing how actual normative practices cohere around shared-understandings of purpose. This may then be employed to defend the sorts of claims about the value-orientation of international law just considered. Secondly, Weber, in a way that is similar to the arguments ascribed to Aristotle in Chapter 2,[14] argues that this purposive approach to concept formation cannot be applied to conceive of general concepts. Therefore, while he may accept that international law, as an individuated normative practice, has an overall purpose which defines it, the general concept of law cannot be defined in terms of an overall purpose which unifies all forms of law. His approach to general concepts (which adopts a form of conceptual analysis) denies legal validity to international law. International law can be defined as a distinctive normative practice, but is not a form of law against his view of the general concept. In this section, this argument is briefly set out.

Action and Axiology

Weber's general approach is to conceive of purposive action, which is the subject matter of the human sciences, in terms of the subjective meaning any action has for the individual human agent engaged in it. The meaning of any act is to be understood in terms of its motive, intention or purpose. So, 'we understand the motive of a person aiming a gun if we know that he has been commanded to shoot as a member of a firing squad, that he is fighting against an enemy, or that he is doing it for revenge'.[15] Thus, what is observed as the same action can be differentiated with reference to the purpose of the action according to the subjective view of the agent. This cashes out into two components of action. The first is the purpose or end of an action, which may or may not be *substantively* rational. The second is the means which are selected to achieve that end, which may or may not be technically or *instrumentally* rational.[16] Weber, with some equivocation, is generally understood as considering that substantive rationality is not part of sociological analysis and accepts a non-cognitivist position with

[14] See above 39–45.

[15] M Weber, *Economy and Society* (New York, Free Press, 1964) 95.

[16] Weber often refers to this sort of rational calculation of effective means as formal rationality. However, he also uses it to apply to the fact that in modern society, with the rise of capitalism and bureaucratic forms of social action, formal rationality is of increasing importance in justifying various courses of action and is sometimes raised to the status of an end-in-itself. I use the phrase instrumental rationality to refer simply to the idea of effective means to subjectively determined ends and to distinguish it from his more general sociological claim. See R Brubaker, *The Limits of Rationality: an Essay on the Social and Moral Thought of Max Weber* (London, Allen & Unwin, 1984) 35–43.

regard to ends.[17] Instead, he thinks that the end of an action is subjectively set by the acting agent, and it is this subjective meaning which provides the basis for sociological analysis. Sociological analysis is oriented towards the ends subjectively held by the subject of inquiry and so he does not impose his own conception of moral rightness when considering motives. This is why Weber considers that his methodology is objective.[18] Questions of substantive rationality, for Weber, are more the concern of 'dogmatic sciences' like jurisprudence or theology.[19] Instrumental rationality, on the other hand, is concerned with efficient means (given the nature of the physical and social context within with action takes place) to achieve the agent's ends. Weber thinks that efficient means can be cognised and are crucial to his critical sociology.

Ideal-Types

Weber then argues that action and institutions (which are understood in terms of collective and co-ordinated normative practices) should be conceptualised as ideal-types. An ideal-type is built on his basic concept of action, and is understandable insofar as 'the typically observed course of action can be understood in terms of the purely rational pursuit of an end'.[20] To explain: an ideal-type is a rationalisation of the instrumental aspect (ie 'the pursuit') of a given end (which is selected by the agent). It is crucially important to understand why Weber thinks that we might understand action this way. Talcott Parsons explains:[21]

> it is inherent in the frame of reference of 'action' which is basic to Weber's whole methodology, that it is 'normatively oriented'. The actor is treated not merely as responding to stimuli, but as making an 'effort' to conform with certain 'ideal', rather than actual, patterns of conduct with the probability that his efforts will be only partially successful, and there will be elements of deviation. The ideal type, then, is not merely an abstraction, but a particular kind of abstraction. It states the case where a normative or ideal pattern is perfectly complied with.

Thus, the end or purpose of action conceived of by the agent (albeit sometimes in a partial or inchoate sense) and the selection of efficient or

[17] There are a number of grounds for equivocation: (i) that the balancing of competing ends can be rationally oriented by comparing the costs of achieving each against each other; (ii) ends which are purely based upon impulses, motives, and so on, are irrational (this is why he thinks that shooting a gun in revenge is irrational). This last point, perhaps, reveals the Kantianism in Weber's theory of action. More generally on this point, see S Toddington, *Rationality, Social Action and Moral Judgment* (Edinburgh, Edinburgh University Press, 1993) ch 3 and Brubaker, above n 16, ch 4.

[18] A Schutz, 'Concept and Theory Formation in the Social Sciences' (1954) 51 *Journal of Philosophy* 257 at 271.

[19] See above n 15. See also Brubaker, above n 16.

[20] Weber, above n 15, at 108.

[21] *Ibid* at 12.

instrumentally rational means to that end comprise the two components of the ideal-type. As such, it is a rationalisation of the actual normative processes undertaken by the acting agent. We might say that the 'ideal type as Weber used it is both abstract and general. It does not describe a concrete course of action, but a normatively ideal course, assuming certain ends and modes of normative orientation as "binding" on the actors'.[22] Its validity, according to Schutz, comes from two postulates. The first is the 'postulate of logical consistency' which conforms to the idea of instrumental rationality. The second is the 'postulate of adequacy' which conforms to the idea that the ideal-type must reconstruct the ends of human action 'in such a way that a human act performed within the real world by an individual actor as indicated by the typical construct would be understandable to the actor himself'.[23]

The function of the ideal-type is to allow the social scientist to be objective as well as critical. But Weber's critical sociology, then, can only operate at the level of instrumental rationality and through an appraisal of whether the agent has chosen the most efficient means to achieve his ends.[24] When the actual course of events deviates from the ideal-type, it cannot be explained with reference to the agent's intention. This alerts the social scientist to other reasons (which might be social or physical as well as irrational or emotive) which might explain the action. Weber gives a good example which summarises his approach:[25]

> a panic on the stock exchange can be most conveniently analysed by attempting to determine first what the course of action would have been if it had not been influenced by irrational affects; it is then possible to introduce the irrational components as account for the observed deviations from this hypothetical course . . . Only in this way is it possible to assess the causal significance of irrational factors as accounting for the deviations of this type. The construction of a purely rational course of action in such cases serves the sociologist as a type ('ideal type') which has the merit of clear understandability and lack of ambiguity. By comparison with this it is possible to understand the ways in which actual action is influenced by irrational factors of all sorts, such as affects and errors, in that they account for the deviation from the line of conduct which would be expected on the hypothesis that the action were purely rational.

[22] *Ibid* at 13.

[23] Schutz, above n 18, at 271.

[24] On this point see Toddington, above n 17.

[25] Weber, above n 15, at 92. For Parsons, to treat deviations from the ideal-type as irrational is to render certain normal aspects of action as also irrational. He offers three examples of normal aspects of action: (i) 'The empirical facts of the external non-social situation'; (ii) 'the outline of the structure of the individual personality as it is relevant to ordering the actor's orientation, not only to other actors, but to himself'; (iii) 'the basic value-orientations which individuals have and which are institutionalized in the society of which they are a part'. These elements are 'not "rational", but neither does it make sense to speak of them as "irrational"'. See Parsons in Weber, above n 15, at 17.

If we now turn to ideal-types of collective social practices, the problem arises that while it may be possible to conceive of individuated acts ideal-typically but collective social practices comprise of a range of individuated acts, each of which may be directed towards different ends. Thus, two international lawyers may have very different conceptions of the end, purpose or function of the collective activity they are engaged in or those associated with the particular individuated acts they undertake. This is another version of the problem of multi-significance which lies at the heart of the methodological problem.

If this is correct, the intentions or motives which individuals subjectively attach to their purposive activities vary considerably within a particular social practice. Therefore, while it is plausible to understand individuated acts ideal-typically, it is not obvious how the same sort of method can be rolled out to highly complex normative practices like international law and thus support the weak claim associated with focal analysis. Nor it is obvious how this method can give support to the strong claim to defend a general concept of law. Weber thinks that it is possible to defend the weak claim, and to extend his method to particular normative practices, but it cannot be extended to general concepts and hence the strong claim is considered implausible.

The Ideal-Type and Collective and Institutionalised Social Practices

To explain, any social practice is made up of all the actions of all the individuals who participate in it (leaving to one side how agents participate). But it is not obvious how all those who participate in a social practice share a common end. This is the problem Weber has to overcome if the weak claim is to be vindicated. Weber presents a number of answers. The first introduces the concept of social action: '[a]ction is social in so far as, by virtue of the subjective meaning attached to it by the acting individual (or individuals), it takes account of the behaviour of others and is thereby oriented in its course'.[26] This means that individual acts are oriented—are *altered*—by the actions of others and this gives a sense of the collective social context which structurally influences individual acts.

This point is plausible: an attempt to understand any action requires an explanation of the social as well as physical context within which it takes place. Weber does, however, explore a number of more sophisticated options to explain how acts are normatively structured by such social practices. One route he considers, but rejects, is that collective action can be understood in terms of collective or institutional ends. While this may allow us to understand collective entities in a juristic sense as having

[26] Weber, above n 15, at 88.

a singular purposive nature[27] (ie 'BP buys', 'the UK ratifies'), it does not, as Weber recognises, answer any questions about the sociological relationship between individual motives and collective or institutional action: 'in sociological work these collectivities must be treated *solely* as the resultants and modes of organization of the particular acts of individual persons, since these alone can be treated as agents in course of subjective understandable action'.[28] A better explanation is provided in his characterisation of legal phenomena:[29]

> [t]hese concepts of collective entities . . . have a meaning in the minds of individual persons, partly as of something actually existing, partly as something with normative authority. This is true not only of judges and officials, but of ordinary private individuals as well. Actors thus in part orient their action to them, and in this role such ideas have a powerful, often a decisive, causal influence on the course of action of real individuals . . . Thus, for instance, one of the important aspects of the 'existence' of the modern state, precisely as a complex of social interaction of individual persons, consists in the fact that the actions of various individuals is oriented to the belief that it exists or should exist, thus that its acts and laws are valid in the legal sense.

Reading this in line with his definition of social action, it would seem that each agent's actions are structurally constrained by the normative practice in which they act: that is, by reasons which structure and define that practice. These normative constraints have a causal effect on the action of each individual and produce collective action which coheres around certain meanings about the value of the collective activity as a whole.

Weber explains that we can observe, sociologically, these forms of social action. That a social practice empirically exists depends upon the probability that each member of the group will adhere to a particular pattern of conduct. Therefore, 'as a defining criterion, it is essential that there should be at least a minimum of mutual orientation of the action of each to that of the others'.[30] The problem with this claim is that individual action may appear to conform to the purpose of the institution, but, as was seen in his example of aiming a gun, conformity in observable action may simply be coincidental and each member may have a different motive for action. Weber acknowledges this. He says '[t]he subjective meaning need not necessarily be the same for all the parties who are mutually oriented in a given social relationship'.[31] For Weber, though, these subjective meanings, motives or intentions are not relevant if individual actions *do appear* to conform to patterns of mutual normative expectations which are embodied in

[27] *Ibid*.
[28] *Ibid* at 101.
[29] *Ibid* at 102.
[30] *Ibid* at 118.
[31] *Ibid* at 119.

the social practice and its overall purposive orientation.[32] Weber wants to hold 'that a "friendship" or a "state" exists or has existed means this and only this: that we, the observers, judge that there is or has been a probability that on the basis of certain kinds of known subjective attitude of certain individuals there will result in the average sense a certain specific type of action'.[33]

Weber's argument, then, is that the existence of a social practice qua normative practice relies upon some sort of convergence in the normative attitudes of the individuals of which it comprises. However, for Weber, this only needs to appear, from an external perspective, to be the case. This move is problematic. Weber's approach is built upon the presupposition that the purposive orientation of the normative practice shapes, stabilises, structures and provides meaning for the immensely complex and densely interwoven flux of individual acts. His argument now seems to suggest that we can *presuppose* a purposive orientation for a normative practice and then *presume* that the action of its members is consistent with it because it externally appears to be in conformity with it. To make this move disregards the essential place in his method for the structural orientation of the normative practice as a whole which shapes the internal motives and reasons of individual agents. The problem is, then, how to explain the way in which the normative practice gives rise to actual normative expectations which structure individual actions, rather simply logging apparent conformities found in observable acts.

There are at least two solutions to this problem. The first is advanced by Weber himself. He treats the motivation of the individual as functionally connected to the 'motivation' or 'purpose' of the whole institution. However, he does not explain how this is possible or whether it is simply an a priori assumption.[34] It is also a boot-straps argument which replicates rather than solves the criticism just made. The second argument is advanced by Schutz who holds that 'the socially distributed constructs of patterns of typical motives, goals, attitudes, personalities, which are supposed to be invariant . . . are then interpreted as the function or structure of the social system itself'.[35] I take this to mean that it is possible to cognise sets of commonly held individual motives which can be taken as the purposive orientation of the practice itself. But this merely operates as a rule of thumb about what sort of motives might characterise the normative practice, but does not show how a normative practice can structure the reasons and actions of those acting as part of it.

[32] This does not imply that any meaning, motive or intention is valid; of course, some actions towards certain purposes will frustrate the purposes of the social institution. This might, after Vogelin, be called the limits of 'socially possible disagreement' about motives. E Voegelin, 'The Theory of Legal Science: a Review' (1941) 4 *Louisiana Law Review* 554, 562.

[33] Weber, above n 15, at 119.

[34] Parsons in *ibid* at 25.

[35] Schutz, above n 18, at 269.

The application of Weber's theory of action to normative practices seems highly problematic for these reasons. But returning to our central focus, if these problems are overcome, we can show how international law can be understood as a normative practice which does cohere around a particular collective end. Thus, normative positivism and policy science, understood as making weak claims about the international legal order, can be judged plausible to the extent that they do actually reflect these collectively held motives. However, without an explanation of how individual motives are normatively structured by the collective ends of the institution as a whole this weak claim seems difficult to vindicate. These collective ends could be assumed, and individual motives often read consistently with them, but this presupposes that we must devalue or disregard errant individual motives and actions on the basis of an assumption. Furthermore, it does not explain why we should accept one view of the purpose of international law over another. So, if the validity of either normative positivism or policy science is presupposed, then we can find examples which fit. The selection of either purposive orientation has the effect of making certain aspects of our paradigm cases centrally important, and others peripheral and unimportant. Also many paradigm cases of international law, such as the Charter of the United Nations or the Vienna Convention on the Law of Treaties, seem to reflect both points of view.

General Concepts

Weber recognises that this methodology fails when applied to general concepts. His argument is as follows. From his characterisation of normative practices, Weber develops the idea of a corporate group, which is a particular kind of social institution. It is a closed social relationship (not everyone can become part of it), and it normally has an administrative division of labour. He says:[36]

> [e]xamples of corporate action would be participation in any capacity in a war fought by a state, or a contribution paid in accordance with a levy authorized by the executive committee of an association, or a contract entered into by the person in authority, the validity of which is recognized by the members and its consequences carried out by them.

The empirical existence of such a group depends upon the probability 'that rules imposed by the governing authority will be acceded to'.[37] Therefore, '"Power" . . . is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless

[36] Weber, above n 15, at 147.
[37] *Ibid* at 149.

of the basis on which this probability rests'.[38] A political corporate group exists:[39]

> in so far as the enforcement of its order is carried out continually within a given *territorial* area by the application and threat of physical force on the part of the administrative staff. A compulsory political association with continuous organization . . . will be called a 'state' if and in so far as its administrative staff successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order.

Crucially, though, the *general concept* of a political corporate group cannot be defined through the end to which it is oriented, simply because there is no end which is common to all social practices of that type. Therefore, 'it is possible to define the "political" character of a corporate group only in terms of the *means* peculiar to it, the use of force. This means is, however, in the above sense specific, and is indispensable to its character. It is even, under certain circumstances, elevated into an end in itself'.[40] This is why 'the concept "law" will be made to turn on the presence of a group of men engaged in enforcement',[41] rather than through the attribution of a specific end, function or purpose to law.

For Weber the purposive orientation has dropped out of his view of general concepts such as a legal order or political group, even if it possibly can be employed to describe a particular individuated normative practice like the London Stock Exchange or the international legal order. Instead, Weber's *general* concepts of normative practices, such as law or the state, arise through the identification of common features which all forms of the phenomena have. It is these commonalities which unify various diverse normative practices and represent the general concept of the practical phenomenon under consideration. Weber's concept of law is not, then, an ideal-type in the sense that there might be an ideal-type of tactics during warfare, the French legal order or a religious cult.

To this must be added that the existence of a legal order depends upon the probability that people will act in accordance with its maxims. If a legal order is defined according to the monopoly it holds on the use of force within a given territory, its existence conditions are stable patterns of expectation engendered through either enforcement or the subjective belief in the legitimacy of the state. If either of these reasons, generate the empirical probability of conformity to the mutual expectations set out in legal norms, the legal order can be said to be valid.[42] Therefore, law can come about in a variety of ways which may rest upon voluntary agreement, tradition, charisma or straightforward coercion.

[38] Weber, above n 15, at 152.
[39] *Ibid* at 154.
[40] *Ibid* at 155.
[41] *Ibid* at 128.
[42] *Ibid* at 124.

Weber's claim is that beyond ideal-types of *particular* (that is individuated examples of) *legal orders*, his purposive methodology should not be applied. Instead, the general concept of law is defined by identifying certain common features which all legal orders exhibit. This is why he claims that all examples of legal order have a monopoly on coercion. It will be noted that this mirrors Aristotle's analysis of friendship: each form of friendship is essentially characterised with reference to fundamental purpose, but conceptual analysis is employed to link all forms of friendship to each other through commonalities they share, such as, for example, reciprocal well-wishing. Equally, for Weber, attention to purposivity is central to conceptualising examples of legal order qua normative practice, but attention to commonalities between all forms of law is the basis for determining the general concept of law. He is prepared to support the weak claim associated with focal analysis, but refuses to support the strong claim.

Weber on International Law

Weber then argues that the normative practice which is called international law is not a form of law because it does not have a monopoly on coercion. He writes:[43]

> [a]s is well known it has often been denied that international law could be called law, precisely because there is no legal authority above the state capable of enforcing it. In terms of the present terminology this would be correct, for a system of order the sanctions of which consisted wholly in expectations of disapproval and of the reprisals of injured parties, which is thus guaranteed entirely by convention and self-interest without the help of a specialized enforcement agency, is not a case of legal order.

So, against law as a general concept, the normative practice called international law falls short. This is the case, even though those engaged in it as a normative practice consider it a form of law and even if it can, in principle, be ideal-typically modelled in the same way as the French legal order or the London Stock Exchange.[44] How are we to make sense of this?

IDEAL-TYPES AND PRACTICAL REASONABLENESS

Weber's approach can be described as embodying a methodological dualism. His dualism is that international law can be ideal-typically modelled

[43] *Ibid* at 128.

[44] But see the report of the International Law Commission, *Difficulties arising from the Diversification and Expansion of International Law* (6th edn, 2004) vol I.

as a normative practice using purposive analysis, but the general concept of law can only be conceptualised by tracing the commonalities between various normative practices normally called law. Analysis of this dualism reveals a number of significant problems with his methodological claims about law and related phenomena. These problems arise from the observation that international lawyers probably consider the normative practice of which they are a part is a form of law, but Weber refuses to draw this conclusion on the basis of his general concept of law. My argument is that these problems can only be solved by vindicating the strong claim associated with focal analysis, and thereby rejecting his claim that general concepts can only be conceptualised via a form of conceptual analysis. Therefore, an analysis of purpose or function is appropriate to the generation of the general concept of law.

This is a relatively complex argument which progresses in three stages. The first step is to show how the concept of international law relies upon a general concept of law even if it is possible to conceive of an ideal-type of a normative practice which its participants refer to as international law. The second step is to show why the general concept of law is best conceived of as a purposive phenomena in support of the strong claim. The third step is to show that a judgment about why law is valuable as a normative practice, and towards what ends it should be put, is essential to defending a general concept of law.

The Concept of International Law Relies upon the General Concept of Law

Weber makes two claims which are relevant for the present purposes. First, as we have seen, he thinks that it is possible to generate concepts of both individuated action (eg firing a gun) and individuated normative practices (eg the international legal order). Using such a method, it may be possible to conceive of international law as an individuated normative practice and support the weak claim associated with focal analysis. Thus, an ideal-type rationalises the reasoning, meanings and intentions of those acting as international lawyers and which are normatively structured through the international legal order qua normative practice. Policy science and normative positivism could be justified in that they are plausible descriptions of the concept of international law. This is to the extent that the normative practice we call international law is, indeed, directed towards the fundamental purposes which they ascribe to it.

The second claim is that the general concept of law is derived from the common features of various forms of law. What, then, is a *form of law*? To avoid this simply being a tautology, a form of law must refer to a normative practice which its participants normally describe as a legal practice.

The general concept, then, traces the commonalities between these sets of normative practices called law. For Weber, the intensional meaning of the general concept of law refers, in part, to the existence of a monopoly on coercion. This must be a commonality which exists in all normative practices called law.

His general concept of law is then employed to deny legal validity to the normative practice called international law. This is because international law is a normative practice which does not have a monopoly on coercion. The problem with this claim is that it detaches Weber's general concept of law from is justificatory basis. To explain, the general concept of law is justified to the extent that it picks out the common features of the set of normative practices referred to as a form of law by their participants. Weber's general concept is *restrictive* in its characterisation of these features because it denies at least one normative practice—international law—the character of law in variance to the self-characterisation of that practice by those involved in it. It is, in Stavropoulos' language,[45] an ambitious general concept of law because it denies legal validity to certain normative practices which their participants consider forms of law. By doing this, Weber's general concept is undermined because it is in itself justified to the extent that it describes a commonality between forms of law as described by their participants.[46]

This argument undermines Weber's substantive claim about the general concept of law being connected to enforcement, but does not necessarily undermine his general approach. It could be possible to make very general statements of common features which exist between various forms of law. However, this is likely to be very thin gruel. Also, it precludes the general

[45] See N Stavropoulos, 'Hart's Semantics' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford, Oxford University Press, 2001) 81 and above 56–61.

[46] It should be noted that Fassbender takes a Weberian approach like this when arguing that the UN Charter is a constitutional document of the international legal order (see B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529). He begins his argument with the uncontroversial statement that the concept of a constitution is contested. In response to this disagreement, he develops an ideal-type of a constitution which he claims is consistent with Weber's method. This is achieved by 'intensifying and combining one or more of its individual features to form a consistent theoretical construct' (at 570). By doing this, he conceives of an ideal-type of a constitution which leaves out its traditional state-centred focus 'because we do not regard it as an essential characteristic of a constitution' (at 570–1). Some features which are essential are a system of governance, a definition of membership of the community governed by the constitution, a hierarchy of norms, rules for amending the constitution and ensuring its continuity over time, a charter or constitutional document, and so on. He thinks that the UN Charter, and the historical processes which led to its creation and its implementation, reflects these features. The most plausible interpretation of his Weberian claims is that he adopts an approach to concept formation which is similar to the way in which Weber viewed general concepts like law: he attempts to discover common or important features in all forms of constitutions. His work might then be read as meaning that there are some forms of constitution which are not associated with the state, and therefore a sovereign state is not an essential feature of a constitution, whereas a system of governance and the existence of rules of membership are.

concept being employed in an ambitious sense. If normative practices described by their participants as forms of law contradict the concept of law, then it is the concept of law which must be rejected rather than the concept being used to describe a normative practice called law as 'not-law'. This is because our concepts are valid to the extent that they describe the commonalities which exist in those normative practices which their participants normally call law. Therefore, the general concept of law cannot be ambitious in the sense of being restrictive.

No legal philosopher, including Weber, accepts this very loose and non-ambitious approach to generating the general concept of law. All general concepts are in some senses ambitious and restrictive with regard to their assessment of various normative practices which are referred to by the participants as law. We have already seen a variety of examples: Weber's, Hart's and Austin's views on international law are three. So are Hart's views on forms of customary and primitive law which do not have a clear rule of recognition. Similarly, most natural lawyers will deny legal validity to the normative practices described as law in Apartheid South Africa and in 1930s Germany. The reason why a restrictive and ambitious approach is taken is given by Finnis. Our general concept of law should not simply be the set of lowest common features which are associated with a miscellaneous set of practices over history and geography. Rather, it is an attempt to isolate the relevant from the irrelevant or the significant from the insignificant.[47] By making this sort of judgment, the general concept is, *by necessity*, restrictive.

This point indicates that the general concept of law, in being ambitious and restrictive, can also be said to be critical. This can be explained by returning to Weber's methodological dualism which is critical about various forms of law in two ways. The first is on the basis of an ideal-typical rationalisation of an individuated normative practice referred to by participants as a legal order. A good illustration of this approach is Weil's argument that the purpose of international law is to constitute the conditions by which states can co-operate and co-exist. As the normative practice under consideration develops a normative hierarchy associated with *jus cogens* and so on, it fundamentally undermines, or is pathological towards, the attempt to achieve this purpose. In this sense, Weil's approach is consistent with Weber's own view of the role of ideal-types. Secondly, forms of law (like the international legal order) may be considered critically against the general concept of law. For Weber, a monopoly on coercion is an essential feature of the general concept of law. Various normative practices are legal to the extent that they have this characteristic: international law is, for this reason, not law.

[47] J Finnis, *Natural Law and Natural Rights* (Oxford, Oxford University Press, 1980) ch 1 and above 25–7.

Furthermore, within Weber's methodological dualism, there is another possibility which links back to the discussion of the various cases of law in Chapter 2.[48] If we accept Weber's view that the normative practice we call international law is not a form of law because it lacks a monopoly on coercion, it is easy to imagine what a system of international law which is consistent with his general concept of law would look like. For Weber, it would be a normative practice that has a monopoly on coercive force which governs the relations between states. This is the case even though the normative practice which is ideal-typically modelled as international law does not have such a monopoly. Thus, at one level we have an ideal-type of international law drawn from the normative practice which its participants call international law. At another, we have a concept of international law, which may only be partially reflected in any normative practices, which is drawn from the general concept of law. Furthermore, the normative practice called international law is (i) a type of law to the extent that it reflects the general concept, and (ii) a form of international law to the extent that it reflects the concept of international law which is drawn from the general concept.

There are, then, a range of ways of thinking about international law in relation to the general concept of law and familiar normative practices which can be clarified in the following way:

> (a) the normative practice called international law → *judged against* → (b) an ideal type of international law drawn from those normative practices described by participants as international law → *judged against* → (c) the general concept of law → *which can be used to generate* → (d) a concept of international law as a form of law in that it is consistent with the general concept of law.

The ideal-type of international law (b) simply refers to a rationalisation of how a particular group of participants in a normative practice view that practice at a particular time and how their reasons for action are structured by that normative practice. This does not tell us, however, anything about what is distinctly legal, or otherwise, about this practice. This is why we need a general concept of law (c) from which can be drawn the concept of international law (d). It is on the basis of this argument this we can say that various normative practices (a) are indeed a form of international law. This is, in my view, the true basis upon which the question 'Is international law really law?' is asked.

On this line of argument, whether (a), a normative practice, or (b), the ideal-type, is correctly described as international law depends upon whether it corresponds to the concept of international law (d). This, I think, is what is going on when Weber claims that international law is not

[48] See above 33–9.

really a form of law because it lacks a monopoly on coercion. It is also how we should understand the critical perspective taken by both policy science (ie authoritative normative practices not orientated towards a respect for human dignity) and normative positivism (ie the pathological nature of *jus cogens*).[49]

It could be that all of the ideal-types and concepts which comprise (a) to (d) form a relatively harmonious whole: the ideal-type of international law both reflects the normative practice and falls within the extension of the concept of international law which is drawn from the general concept of law. Normative positivism can be understood as making a claim like this. So, the general concept of law, (c), is an authoritative system of dispute settlement which establishes the conditions by which those subject to it can co-operate and co-exist. The positivistic concept of international law, (d), is consistent with this general concept of law. The normative practices (a) and (b) described as international law by participants, more or less reflect this concept. Deviations from this in normative practices associated with the development of relative normativity associated with, for example, *jus cogens* can be judged against (d) and argued to be pathological. However, we should note that an international lawyer influenced by policy science, like Michael Reisman,[50] may well have it that slavish attention to state sovereignty is equally problematic and that the development of *jus cogens* and relative normativity renders the normative practice closer to the concept of international law, (d).

Purpose and Meaning

This analysis falls squarely back on one's general concept of law. Once the problem of how to generate such a general concept is solved it can be employed to conceptualise international law as a type of law which can then, in turn, be employed as the basis for a critical analysis of various normative practices often referred to as international law. How then should we begin to think about the general concept of law?

Weber's solution is to adopt a form of conceptual analysis. In doing so, he traces the commonalities between various normative practices nor-

[49] Hart makes exactly the same sort of point: '[i]t is true that, on many important matters, the relations between states are regulated by multilateral treaties, and it is sometimes argued that these may bind states that are not parties. If this were generally recognized, such treaties would be in fact legislative enactments and international law would have distinct criteria of validity for its rules. 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'. See HLA Hart, *The Concept of Law* (2nd edn, Oxford, Clarendon Press, 1994, first published in 1961) 236 [231].

[50] M Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866.

mally referred to by participants as law. The substantive conclusions he comes up with, and the plausibility of this sort of catch-all approach to concept formation, has already been criticised above. It is clear from this criticism that the general concept of law rests upon a judgment being made concerning what the relevant and important features of the complex and multifaceted forms of normative practices under consideration are. While our various normative practices may set the outer-boundaries beyond which we can make little or no sense, our general concepts must isolate the essential features of these normative practices.

One solution is to argue that law as a general concept should be understood in terms of a general or focal purpose. This is the view, for instance, taken by policy science and normative positivism. But surely we should be sceptical about any claim that all forms of law share a common purpose? This argument is made by Weber, as has been seen, and has been made more recently by Raz and Dickson. These two positivists both claim that a central feature of law is that it claims legitimate authority over legal subjects by providing reasons for action which pre-empt and preclude action on the basis of other (eg moral) norms and this identifies an important (or essential) feature of all legal orders. But crucially, they do 'not hold that law can be characterised in terms of having any one overall function'.[51] Put in the language used here, they argue that legal orders have all kinds of purposes and do not have a focal purpose. While they may accept the weak claim associated with focal analysis, they would not accept the strong claim.

I think that this problem is even more acute than they consider. This is because even if some sort of argument can be constructed whereby we can say that an individuated legal order has an overall purpose or function (ie on the basis of an internal normative structure), it is difficult to see how this can give rise to a general concept. This is because the purpose or function is one that is specific to the normative practice under consideration and its members. These members attach value to features of a system of law qua normative practice of which they are a part and play a role. They do not obviously attach any value to a general concept of law at an abstract level. If a legal scientist is to claim that law has an overall focal purpose, she would be imposing her own judgment of practical purpose which can never be vindicated by the raw data. But this same criticism can equally be directed at Raz and Dickson's argument. They argue that an important feature of law for those who participate in it is that it makes a claim to legitimate authority over legal subjects. This is then rendered an essential feature of all legal orders. This claim is valid to the extent that it is consistent with the raw data. But surely their claims about what participants

[51] J Dickson, *Evaluation and Legal Theory* (Oxford, Hart Publishing, 2001) 117.

consider important, or the conceptual distinctions which are exhibited by ordinary language usage, must rest upon a judgment of significance and importance that is also only partially reflected by the raw data.

Furthermore, if Weber is right, and an understanding of normative practices has to come from an understanding of its meaning for participants, then surely the importance of any features of law have to be understood with reference to the meaning the individuated legal order has for its participants: that is, why it is valuable as a normative practice, which in turn implies an understanding of its purpose. To explain this point clearly, it is necessary to return to Fortenbaugh's discussion of Aristotle's analysis of the concept of friendship. This revealed that while forms of friendship may share certain common features, they are fundamentally *other* to each because they have different purposes. While such common features may exist, each feature only has meaning with reference to those engaged in the purposive enterprise under consideration. By the same token, in order to understand the meaning of any particular feature of law identified by conceptual analysis, one has to consider why that feature is valuable to those engaged in the legal order under consideration. So, for example, for law to exhibit a stable and clear source is valuable for participants because it enables a legal system to effectively co-ordinate the behaviour of those subject to it. This is why normative positivism is an explanation of why a positivist concept of law is valuable to those involved in its practice. Without an explanation like this I cannot see how Raz and Dickson are able to claim that a sources thesis is meaningful to those involved in the practice of law. Similarly, if the purpose of the international legal order is to constitute the conditions by which states can co-operate and co-exist, as Weil suggests it is, it is this purposive orientation which explains why sovereign equality is an important feature of it for those who participate in it. So, to understand why particular common features of forms of law have meaning for participants, it is necessary to understand why they are valuable to law as a normative practice.

In and between forms of law, participants' views of the meaning, end, purpose or function of it as a normative practice varies. The value they attach to apparent commonalities between forms of law varies for the same reason. How is the legal scientist to isolate what is important or significant about these forms of law and generate a general concept of law? Given that an appeal to the variable raw data cannot resolve our theoretical controversies, what can? Does it mean that all our theoretical controversies about the nature of international law resolve down to a question of viewpoint or arbitrary selection? My answer is that our controversies are solved by selecting a non-arbitrary viewpoint. Before expressing my view, it should be noted that this exact claim is adopted by both policy science and normative positivism. Both can be said to hold that their particular view on the focal purpose of international law is justified for various

reasons. So, policy science considers human dignity as a value-orientation as being 'beyond debate'.[52] Normative positivism considers that co-operation and co-existence are 'higher normative goals'.[53] These, I think, can be said to be characterisations of the purpose of international law which are *reasonable* compared to others. Such a characterisation allows us to understand why the common features of various normative practices called law or international law are, indeed, valuable to the practice. Given that one always must prioritise certain viewpoints as being more significant than others, it seems that attempting to discern such a viewpoint, which every agent, to the extent that they are rational, must agree with, is a way in which the selection of viewpoint can take place in a non-arbitrary or non-ideological way.

Practical Reasonableness and Ideal-Types

John Finnis makes the same argument. Although with some equivocation, which was discussed in Chapter 2, I think that he claims that law must be understood as a normative practice with a practical point. The legal scientist must select a viewpoint from which to determine what is significant or important about the disparate mass of material under consideration, and that this viewpoint must be a particular kind of rational viewpoint. The legal scientist must take the *practically reasonable viewpoint* as focal and the basis for determining the general concept of law. So, the general concept of law (as well as all other practical phenomena) is a practically reasonable case of law. Specifically, he claims:[54]

> the central case viewpoint itself is the viewpoint of those who not only appeal to practical reasonableness but also *are* practically reasonable, that is to say: consistent; attentive to all aspects of human opportunity and flourishing, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction. What reason could the descriptive theorist have for rejecting the conceptual choices and discriminations of these persons, when he is selecting the concepts with which he will construct his description of the central case and then of all the other instances of law as a specific social institution?

Thus, the question which is to be answered by the normative positivist or the policy scientist (as well as anyone else making general claims about the nature of law or international law) is why international law is valuable

[52] Duxbury, above n 2, at 178 .

[53] B Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13 *European Journal of International Law* 401, 403.

[54] Finnis, above n 47, at 15.

from a practically reasonable viewpoint. For the present, I do not attempt to defend one view over another. My point is that international lawyers must delineate the reasonable from the unreasonable in order to discern the general concept of law and, in turn, the concept of international law.[55]

COMPONENTS OF THE CONCEPT OF INTERNATIONAL LAW

It seems that the methodological problem in legal science can only be solved by adopting the viewpoint of the reasonable person which may, or may not, reflect actual participants' point of view. This approach is well-known to international lawyers and international relations theorists. It is, for example, at the heart of realist explanations of rational state action, game theory, as well as in the concepts of law and international law set out by normative positivists and policy science. The problem with this approach is that it begs a determination of what might constitute reasonable motives or ends and this is the subject of the next chapter.

Legal science can only proceed on the basis of a judgment being made about what is focally important about law. Without this, the meaning or importance of any feature of various normative practices as legal orders cannot be grasped. Furthermore, this is the only way to cut through the flux of competing interpretations exhibited by participants in its practice. This argument for focal analysis rests upon an argument about practical reasonableness from which a general concept of law might be constructed. International law, as a type of law, can be conceptualised in just the same way. The components of the concept of international law are, then, as follows: (i) a conception of practical reasonableness; (ii) a general concept of law; (iii) a concept of international law derived from the general concept. This can then give rise to a critique of the normative practice we call international law, as well as those described as law in general. (i) is considered in the following chapter; (ii) is considered in Chapters 6 and 7; (iii) is considered in Chapters 8, 9 and 10.

[55] The tenor of this view is, at the methodological level, similar to Kant's argument that in order to have a general concept of law we must leave behind what is legally rightful in any particular place and instead 'seek . . . the sources of such judgments [of right and wrong] in reason alone, so as to establish the basis for any giving of positive laws'. I Kant, *The Metaphysics of Morals* (M Gregor (trans), Cambridge, Cambridge University Press, 1996, first published in 1797) 23 [6:229].

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Practical Reasonableness and Human Dignity

WE NOW KNOW what is required to solve the methodological problem. It requires an explanation of how it is possible to have cognition of the international legal order in a way that neither relies upon the assumption that there is some conformity in the practices and attitudes of international lawyers nor on an unjustified or stipulated claim about the common features or purposes which are exhibited by the international legal order. The answer is that the legal scientist must adopt a viewpoint from which to determine what is important, significant, etc about the raw data qua legal phenomena. The solution, I have already argued, implies three steps. The first is to adopt the practically reasonable point of view which is a non-arbitrary perspective from which to interpret the meaning of various normative practices. Like policy science and some versions of natural law or legal idealism, I argue that the normative practices must be focally orientated towards a fundamental respect for human dignity. Secondly, it needs to be shown how this viewpoint can be used to explain the nature of law as a normative practice. Law, I argue, is crucial in *constituting* the conditions by which members of a community are able to have dignity and this point is essential to understanding why law is important and significant from a practically reasonable point of view. Thirdly, it needs to be shown how international law is a form or type of law. I argue that international law is a type of law that attempts to constitute the conditions by which human agents can have dignity in a particular field of human conduct: the relations between states. If this argument can be vindicated, it can be employed to determine if and why the normative practices described by our paradigm cases of international law can be said to be examples of international law.

This is a long argument which fills the rest of this book. This chapter is an attempt to set out the practically reasonable viewpoint. This is vital, it will be recalled, because legal science can only progress if there is a non-arbitrary viewpoint from which to conceptualise legal phenomena. Without this, our concepts are based upon subjective judgments of significance or importance about the raw data from which concepts are drawn. My claim is that the practically reasonable viewpoint is one that accepts

that the concept of human dignity operates as a moral constraint upon action.

How can this moral viewpoint be said to be a practically reasonable viewpoint? To explain, the term practical reasonableness can be used in a number of different ways. A familiar way of thinking about it, though, is as an evaluative term which describes rationally justified practical action. A practically reasonable action could be, then, one which is an efficient (or instrumentally rational) means to a subjectively chosen end. But this is not what we are looking for given the argument in Chapter 4. Specifically, the problem is not whether efficient means are chosen to particular ends, but is rather the problem of diverging views about the purpose or function of law adopted by participants or legal scientists: that is, why law is a meaningful activity for those engaged in it or subject to it. Thus, the problem which our concept of practical reasonableness must solve concerns the rationality of the various ends a human agent may seek.

Finnis considers practical reasonableness in this way. He contends that it encompasses a moral point of view (eg 'attentive to all aspects of human opportunity and flourishing' and 'concerned to remedy deficiencies and breakdowns') which also takes into account the conditions in which human beings find themselves and their psychological disposition (eg the roots of human breakdowns lie in 'various aspects of human personality and in the economic and other material conditions of social interaction').[1] He then adopts a moral point of view which is rooted in a Thomist conception of basic goods; that is, a series of goods (such as knowledge, life, etc) pursuance of which are reasonable ends of human striving.[2] As will be clear from the discussion in Chapter 4, policy science takes the same sort of methodological approach. But instead, this school claims that respect for human dignity is a practically reasonable viewpoint. The concepts of law and international law are institutionalised authoritative decision-making processes which are consistent with this value-orientation. They are valuable practices for practically reasonable agents because they have this value-orientation. Furthermore, the view of public international law taken by policy science is conceived of in the context of a detailed appraisal of the social, political, psychological and ideological conditions which are to be found in international relations.[3]

While these two positions may be reconcilable with each other, they do seem to offer diverging accounts of what practical reasonableness entails. What reasons can there be for selecting one approach instead of the other? Furthermore, both *presuppose* that a moral point of view is the practically

[1] These quotes are from J Finnis, *Natural Law and Natural Rights* (Oxford, Oxford University Press, 1980) 15.

[2] *Ibid* chs 3–5.

[3] See, eg, M McDougal and F Feliciano, *Law and Minimum World Public Order: the Legal Regulation of International Coercion* (New Haven, Yale University Press, 1961) ch 1.

reasonable point of view. As Beyleveld and Brownsword have argued, this is exactly what needs to be demonstrated.[4] By not showing this, both accounts are open to the charge that they are elevating a particular, and perhaps parochial, ideological position to the level of a general statement about the practically reasonable point of view.

Through a discussion of the work of Hobbes, Kant and Gewirth, this chapter demonstrates how the practically reasonable viewpoint is indeed a moral point of view, and is one that requires a respect for human dignity. Specifically, I attempt to show why any human agent must accept that she has a categorical moral obligation to respect the dignity (which is protected by a set of human rights) of other agents who, because they are affected by her action, can be said to be her recipients. My argument, then, is an attempt to solve the brief criticism just made of the conception of practical reasonableness associated with Finnis and policy science. This is because it demonstrates, rather than presupposes, why we should take a moral point of view. Setting out this argument is the first step towards solving the methodological problem and establishing and defending a concept of international law.

In the first section of this chapter, I introduce the idea of human dignity through a discussion of its centrality within paradigm cases of international law and show how the idea of human dignity contained in such paradigm cases implies the ideas of autonomy and human rights. The rest of the chapter is concerned with how the idea of human dignity contained in such paradigm cases can be justified as embodying a practically reasonable perspective. With this aim in mind, in the second section, I explore the idea that there are a set of objective conditions by which individuals can be said to have dignity. In the third section, I show how all human agents must necessarily accept that they are committed to respecting the dignity of others and that this is a practically reasonable point of view. The fourth section sketches, via a brief discussion of Kant's philosophy of law, how this argument can be employed to establish a concept of law from which the concept of international law can be outlined.

Before moving on to the substance of this argument, it is necessary to explain why I need to engage in this sort of foundational argument. Some might say that this is a book on the philosophy of international law, and an inquiry into the broader questions of moral philosophy is out of place, unnecessary, or best left to others. While I have a degree of sympathy with this view, I offer three reasons why this inquiry should be included. First, the methodological approach defended in this book relies upon a conception of practical reasonableness. Without a clear idea of what this

[4] D Beyleveld and R Brownsword, *Law as a Moral Judgment* (Sheffield, Sheffield University Academic Press, 1994, first published in 1986) 98–117. On Finnis' moral theory, see S Toddington, *Rationality, Social Action and Moral Judgment* (Edinburgh, Edinburgh University Press, 1993) ch 6.

conception might be, and how it might be vindicated, any further claims I want to make are fundamentally built on sand. Secondly, this is an exposition of the work of others which I agree with rather than a wholesale defence of their positions. My only innovations are to show that the sort of claims found in paradigm cases of international law reflect some similar ideas about human dignity, and that the arguments set out here have a long history in moral philosophy. Thirdly, my approach is to develop a philosophy of international law which is rooted on human dignity as a foundational value orientation. This is something that many international lawyers, who are not well versed in moral philosophy, would agree with and which is reflected in many paradigm cases of international law. Thus, this chapter aims to explain how this sort of value-orientation adopted by some international lawyers towards paradigm cases can be justified. On this same point, later in this book it is argued that this value orientation is employed to argue that those paradigm cases of international law which have human dignity at their core (eg the UN Charter) can be considered constitutional and that these cases should be interpreted by adopting this value-orientation. Without discussion of how human dignity can be justified in this chapter, it would be difficult to persuade readers why this value-orientation, which is at the centre of the arguments that comprise the rest of this book, is plausible.

THE IDEA OF HUMAN DIGNITY

Human dignity is a concept that is articulated in a number of paradigm cases of international law. For instance, in the Universal Declaration of Human Rights, the United Nations General Assembly pronounced that '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.[5] Furthermore, this is:

> a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for

[5] It is fair to say that General Assembly Resolutions are, in the language of Chapter 2, irregular cases of international law (above 33–9). However, it is widely recognised that the Universal Declaration of Human Rights is either (i) part of customary international law or (ii) an articulation of the human rights obligations set out in Article 1 of the Charter of the United Nations. On this, see M Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866; J Morsink, 'The Philosophy of the Universal Declaration' (1984) 3 *Human Rights Quarterly* 309; G Alfredsson and A Eide (eds), *The Universal Declaration on Human Rights: a Common Standard of Achievement* (The Hague, Martinus Nijhoff, 1999); and 'Symposium' (2008) 19 *European Journal of International Law* 647; J Griffin, *On Human Rights* (Oxford, Oxford University Press, 2008) ch 11. However, nothing turns on whether one considers the Universal Declaration as a paradigm or irregular case of international law.

> these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Members States themselves and among the peoples of territories under their jurisdiction.

Acceptance of the Declaration clearly commits states (in some sense) to the idea that human dignity and human rights are core values which should be respected when pursuing any policy. Furthermore, it establishes that human dignity and rights are afforded to all human beings qua human beings and that all human action ('every individual and every organ of society') must act in accordance with human dignity. Dignity, in this sense, is a universal principle of practical reasonableness because the Declaration requires that it governs *all* practical action. The Declaration then sets out a number of familiar human rights which must be respected by those required to apply them to ensure that each human being has dignity.

A second example is set out in the Covenant on Civil and Political Rights[6] which is understood as establishing the primary human rights regime in the international legal order and is a paradigm case of international law.[7] In the Preamble to this document, it is stated that the states which have ratified the Covenant shall recognise 'the inherent dignity and inalienable rights of all members of the human family' and that this recognition is 'the foundation of freedom, justice and peace in the world'. Furthermore, it states that human 'rights derive from the inherent dignity of the human person'. This again indicates a connection between human dignity and human rights as well as setting out their universal nature: that both are possessed by all human beings. Furthermore, it asserts a connection between dignity, human rights and freedom.

Thirdly, the United Nations Charter sets out that each state must 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. The 'rights of nations' is a very different concept to that of human rights or human dignity, but leaving this to one side, the idea of human dignity is once again connected to the idea of human rights in this foundational document upon which it is usually considered the international legal order is based.[8] Thus, the idea that practically reasonable and rationally justified action finds its basis in a respect for human dignity

[6] The ICCPR was opened for ratification in 1966 and came into force in 1976.

[7] See S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (2nd edn, Oxford, Oxford University Press, 2004) 4; D McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford, Clarendon Press, 1991) 20; and M Novak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, NP Engel, 1993) xvii–xix.

[8] See B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529 and T Giegerich, '"A Fork in the Road": Constitutional Challenges, Chances and Lacunae of UN Reform' (2005) 48 *German Yearbook of International Law* 29.

and human rights is embodied in these paradigm cases of international law. This claim is uncontroversial and close to the intuitions of many international lawyers. Attention can now be turned to explain in more detail what human dignity means in this context and to justify why respect for it constitutes a categorical moral constraint on action.

Human Dignity as Empowerment

In these paradigm cases of international law, human dignity has two characteristics: (i) human beings have dignity when they can exercise freedom or, more specifically, autonomy;[9] and (ii) autonomy is protected by a series of rights which every human being has because they are a human being.[10] For Beyleveld and Brownsword, this view of dignity is described in the following way: human being are 'recognized not only as having the capacity to make their own choices, but also as being entitled to enjoy the conditions in which they can flourish as self-determining authors of their own destinies'.[11] This conception of human dignity, then, is as a form of *empowerment*: human rights empower individuals so that they can exercise autonomy. To have dignity is to have the entitlements or conditions by which they can be autonomous agents. This concept of human dignity can be distinguished from archaic or traditional accounts of dignity.[12] Here, dignity operates as a *constraint* on behaviour. Thus, individuals have dignity to the extent that they do not morally demean themselves.[13] An example of this form of dignity is found in Kant's moral philosophy. Although often understood as reflecting a contemporary account of dignity as empowerment, it is clear that Kant understands dignity primarily as a constraint.[14] Thus, human agents must not demean themselves by acting towards others in violation of the moral law.

While it may be possible to reconcile these two accounts, I want to defend the argument that practical reasonableness is primarily concerned with human dignity as empowerment which, as has been shown, is reflected in paradigm cases of international law. Specifically, in the paradigm cases of

[9] Although freedom and autonomy are often used as synonyms, in this chapter freedom is defined in terms of an absence of unjustified coercion on constraint by the actions of others. This lies alongside substantive rights to well-being. Jointly, freedom and well-being constitute the conditions by which human beings can have dignity. Having dignity means that agents have autonomy to achieve their self-chosen purposes.

[10] D Beyleveld and R Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford, Oxford University Press, 2001) chs 3–6 and also see *Consent and the Law* (Oxford, Hart Publishing, 2007) ch 2.

[11] See Beyleveld and Brownsword, *Human Dignity in Bioethics and Biolaw*, above n 10, at 64.

[12] See O Sensen, 'Kant's Conception of Human Dignity' (paper Presented at North American Kant Society, Pacific Division of the American Philosophical Division, 2007).

[13] Beyleveld and Brownsword, above n 11, at 52–63 and Sensen, above n 12.

[14] *Ibid*.

international law just discussed, human dignity consists of a set of human rights which must be afforded to all human beings qua human beings by all other human beings, as well as human social institutions, and it establishes the conditions by which they can exercise their autonomy. This claim, however, requires further substantiation. While it is possible to write out a list of human rights this does not adequately explain how the content of such norms is ascertained. It is clear that human rights constitute a set of substantive conditions by which human agents can *exercise autonomy* and hence have dignity. But what, specifically, are these conditions? Also, an explanation of what it is about human beings in distinction to other (sentient and non-sentient) beings which makes them worthy of dignity is required. Finally, an explanation of why each of us must, when acting, afford human rights to others. After Gewirth, these calls for explanation imply three sorts of distinct question which are common to all attempts to show that there are moral constraints upon action. These are:

(1) *The substantive question*: if dignity is to be understood in terms of affording human beings the conditions by which they are able to exercise their autonomy, what are these conditions?
(2) *The distributive question*: who or what has dignity? Is it all human beings, all purposive agents, or some narrower category?
(3) *The authoritative question*: why is it rationally required that each of us should act in accordance with the dignity of all others identified by the distributive question?

In the following two sections I set out an answer to these three questions. To begin with, I set out, through a discussion of the arguments made by Hobbes, Kant and Gewirth, the specific conditions which are necessarily implied by any attempt to achieve one's purposes and thus have autonomy.

THE SUBSTANTIVE QUESTION

In *Leviathan,* Hobbes sets out a conception of practical reasonableness rooted in a conception of prudential rationality. By this, he means that each of us must value self-preservation and liberty[15] because these are necessary conditions to attain any end an individual chooses. This argument in defence of his conception of practical reasonableness provides the outline of an answer to the substantive question and is worth explaining in some detail.

[15] By liberty Hobbes means 'the absence of externall Impediments: which Impediments, may oft take away part of a mans power to do what hee would'. T Hobbes, *Leviathan* (Cambridge, Cambridge University Press, 1992, first published in 1651) 91 [64].

Hobbes thought that prudential reason could be used to take the place of the traditional role played by natural law in practical philosophy. But, as Harrison shows, prudential reason is to be understood in *a negative sense* for Hobbes. Hence, it is 'not against reason' to seek one's own preservation.[16] Harrison continues:[17]

> [i]n the *Elements*, he says 'it is not against reason that a man doth all he can to preserve body and limbs, both from death and pain' . . . He notes that what 'is not against reason, men call RIGHT, or *jus*'. So from the fact that people seek to preserve themselves, that they do not find it unreasonable, we are into rights, into justice, into natural law. Our conclusions are the conclusions of 'right reason' . . . Hobbes's content is more obviously prudential than moral; it is preservation of the self rather than respect for others.

When human beings pursue their own interests, it must be the case that there are certain rational interests they also accept such as 'the avoidance of death and physical pain'.[18] So it could be thought that an action which is conducive to these ends constitutes a good reason for action and, in the language used here, is practically reasonable. This is not straightforwardly the case. The logical relationship between such reasonable courses of action and ends can be understood in two ways for Hobbes. First, it is as a motivating interest in itself, and, secondly, as a precondition for the fulfilment of any other end. Hobbes thinks both are important. He 'does not . . . have interest-maximisation as a reason but merely its condition, self-preservation. So however variable and contested other elements of people's interests may be, they all have a clear interest in survival, since without survival they would not have any of these other interests'.[19] This is why the laws of nature (which follows his analysis of prudential reason in *Leviathan*) are 'hypothetical imperatives (indeed, true ones), dictating certain actions when certain conditions are satisfied for those who accept the goal of self-preservation'.[20] Taken together, Hobbes can be said to argue that we must rationally will

[16] See R Harrison, *Hobbes, Locke and Confusion's Masterpiece* (Cambridge, Cambridge University Press, 2003) 64.

[17] *Ibid* at 64–5.

[18] *Ibid* at 65.

[19] *Ibid* at 65–6. Harrison argues that for Hobbes this is also an account of how human beings *actually do* behave. Therefore, while there is a rational justification for valuing self-preservation as a necessary means to any end, it is also the case that people naturally, in a psychological and biological sense, think about practical reason in this way. Harrison claims: 'the struggle for survival is natural for Hobbes in a double manner. First, as rational animals, we naturally think it to be rational, both in a prudential and also in a moral sense. Second, it is natural in that it is what we most basically strive to do. It is the way in which the species naturally, instinctively, behaves'. (*Ibid* at 67.)

[20] J Hampton, *Hobbes and the Social Contract Tradition* (Cambridge, Cambridge University Press, 1986) 99 and also 47. In *Behemoth*, Hobbes comes to a different conclusion. He claims that actual human emotions are often irrational, passionate, and sometimes honour or religious values are valued over life. This is why, perhaps, Harrison is right to say that it is not against reason to value prudence—there has to be some basis in practical reason which we would not disagree with. T Hobbes, *Behemoth* (Chicago, Chicago University Press, 1990, first published in 1682).

that certain conditions are the case if we will self-preservation as an end, but also that the selection of self-preservation itself is an end which is necessarily presupposed by any other contingent end.

This is some way from the idea of human dignity previously discussed. But what Hobbes offers in his analysis of prudential reason is the idea that the capacity to act to achieve purposes—that an agent is to be able to self-consciously pursue one's ends—necessarily implies certain conditions and willing certain ends. However, his argument is purely prudential in nature. These are the conditions that I must rationally claim if I am to achieve my purposes. But Hobbes does not show that I must respect others' autonomy or the conditions by which they might exercise it.

Before moving to consider this issue, it should be noted that Kant hints at a similar solution to the substantive question but from a moral rather than prudential perspective. While the categorical imperative, which is Kant's supreme principle of morality and practical reason, is often characterised as an entirely formal principle which is devoid of substantive content, some of his arguments for its application seem to be driven by a conception of necessary human needs. For example, in *The Doctrine of Virtue*, Kant's writes about 'living in excess of one's true needs'[21] and that our duties to others are limited to 'each person's true needs'.[22] While none of these suggestions conclusively demonstrate a Kantian conception of necessary goods or needs, they are sufficient for Rawls to read them in exactly this way. He argues 'I understand Kant to say that we have certain true human needs, certain requisite conditions, the fulfilment of which is necessary if human beings are to enjoy their lives'.[23] Furthermore, he contends that 'Kant holds, I think, that we have "true human needs" (or basic needs) not only for food, drink, and rest, but also for education and culture, as well as for various conditions essential for the development and exercise of our moral sensibility and conscience, and for the powers of reason, thought, and judgment'.[24] On Rawls' view of Kant, a just state of affairs can only be achieved if the moral obligations we owe to each other are substantively orientated towards respect for these basic goods in others.[25] The idea that there are certain goods or general conditions which

[21] *The Doctrine of Virtue* is the second part of Kant's *Metaphysics of Morals*. (M Gregor (trans), Cambridge, Cambridge University Press, 1996, first published in 1797) 184 [6:432].

[22] *Ibid* at 155–156 [6:393].

[23] J Rawls, *Lectures on the History of Moral Philosophy* (Cambridge, Mass, Harvard University Press, 2000) 174.

[24] *Ibid* at 174–5.

[25] Rawls' argument for primary goods reflects his interpretation of Kant presented here. He argues that 'though men's rational plans do have different final ends, they nevertheless all require for their execution certain primary goods, natural and social. Plans differ since individual abilities, circumstances, and wants differ; rational plans are adjusted to these contingencies. But whatever one's system of ends, primary goods are the necessary means'. (J Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1972) 92.) It can even be said that Habermas makes the same sort of claim in his recent book on communicative action and

are required for human beings to achieve their purposes develops Hobbes' conception of prudential reason.

Generic Features of Agency

The ideas just discussed are set out systematically by Gewirth. His view is that agency, which is a capacity of all normal human beings (ie human agents), implies a commitment to a set of necessary conditions. For him, to act is to 'envisag[e] more or less clearly some preferred outcome, some objective or goal . . . [an agent] wants to achieve'[26] where wanting 'constitutes a valuing on the part of the agent; he regards the object of his action as having sufficient value to merit his acting to attain it'.[27] For Gewirth, to value something is to consider it good in a broad sense and need not entail that the agent considers it morally good. So, it is sufficient that the agent is motivated by the proactive attitude he has towards its goal so that he actually acts with the intention of attaining it. There are obviously lots of conditions that must the case in order for an agent to achieve any specific goal. For example, one necessarily must have a tennis racket in order to play tennis. But Gewirth argues that there are certain 'generic features of agency' which are necessary for such an agent to achieve any purpose. He then claims that the general features of agency can be categorised as freedom and well-being. Freedom means the ability of an agent to 'control their behavior by their unforced choice while having knowledge of relevant circumstances'[28] and is necessary in order to achieve any purpose at all.[29] Freedom can be understood both positively (so that the agent can act as they choose) and negatively (that others should not interfere with the agent acting as he chooses) and describes the procedural requirements for individuals to be able to act.[30] Well-being 'consists in having the various substantive conditions and abilities that are proximately required either for acting at all or for having general chances of success in achieving one's purposes through one's action'.[31] It divides into three categories. First,

law. Habermas takes communicative action rather than purposive agency as a starting point, but thinks that certain goods are necessary for any agent to participate in society as a communicative agent. J Habermas, *Between Facts and Norms* (Cambridge, Mass, MIT Press, 1998) 127–31.

[26] A Gewirth, *Reason and Morality* (Chicago, University of Chicago Press, 1978) 49.

[27] *Ibid*.

[28] A Gewirth, *The Community of Rights* (Chicago, University of Chicago Press, 1996) 13.

[29] D Beyleveld, *The Dialectical Necessity of Morality* (Chicago, University of Chicago Press, 1991) 19.

[30] Gewirth, *The Community of Rights*, above n 28, at 15. Freedom is procedural in the sense of it being the efficient cause of an act; that is, how it happens. Freedom to achieve one's purposes free from coercion by others is a distinctive good and is not simply a description of the achievement of those purposes once such agents have the conditions associated with well-being. One, after all, can have well-being, but not freedom. In this chapter, I will define the word autonomy to describe the capacity to achieve one's purposes which, in turn, requires freedom and well-being.

[31] *Ibid* at 14.

basic well-being refers to the necessary preconditions for action, such as life, physical integrity, food, shelter, clothing and mental equilibrium. Secondly, non-subtractive well-being 'consists in having the general abilities and conditions needed for maintaining undiminished one's general level of purpose-fulfilment and one's capabilities for particular actions; examples are not being lied to or stolen from'.[32] Thirdly, additive well-being concerns the requirements which an agent needs to increase his level of purpose-fulfilment. Examples Gewirth gives are education and opportunities to gain income.[33]

These basic goods are hierarchical according to the 'degree of their indispensability for purposive action'.[34] So, without basic well-being, an agent would not be able to achieve any purposes at all and this form of well-being does not alter in substantive content from society to society. The other forms of well-being are the necessary preconditions for an agent to *successfully* achieve his purposes. The specific contents of these goods may vary both historically and socially and are more variable than basic goods. So, education might be a non-subtractive good in some societies with near universal education, but would be an additive good in others with low-levels of educational provision. Furthermore, while the contents of various aspects of well-being may change, each category, and its relation to the other categories, does not. They are generic in the sense that in society X at Y time, an agent needs Z good in order to have, or increase, his level of well-being. Therefore, the agent can rightfully claim that 'Z is a non-subtractive good relative at the time (Y) and place (X) in which I live', but it does not mean that Z cannot be an additive good in other societies at other times. Nor does this variability mean that a good it is not necessary for successful action.[35]

Freedom and well-being are required for the possibility of action in both an occurrent and dispositional sense. Occurrently, if a human agent was lied to concerning an important aspect of a transaction, she would have very little chance of achieving what she set out to achieve in the transaction.[36] Dispositionally, an agent requires a generic feature of agency over a long period if she is to achieve her purposes. For example, an access to adequate standards of education is required so that agents have the ability to achieve their given purposes over their lifetime. Often, human agents may be able to achieve a few purposes without non-subtractive and additive well-being in an occurrent sense, but in a dispositional sense, these goods are required permanently.[37] But for an agent to claim that

[32] *Ibid* at 14.
[33] *Ibid*, and Gewirth, *Reason and Morality*, above n 26, at 256.
[34] *Ibid* at 62–3.
[35] *The Community of Rights*, above n 28, at 14; *Reason and Morality*, above n 26, at 59, 230–49.
[36] *Ibid* at 58–61.
[37] See E Bond, 'Gewirth on Reason and Morality' (1980) 11 *Metaphilosophy* 26 and Beyleveld, above n 29, at 78–90.

additive and non-subtractive well-being are not necessary to action for this reason means that she can only value her occurrent purposes. If she must value all her purposes, whether occurrent or dispositional, she must also value well-being in all of its forms.

Gewirth's description of freedom and well-being clarifies the long-held idea (which finds its origins in Hobbes and possibly Kant) that there are certain necessary conditions which are required for human agents to achieve their purposes. Autonomy can be said to refer to being able to achieve one's purposes, and therefore, the generic features of agency can be said to be an articulation of what is required in order to have autonomy. This argument shows that it is reasonable for each of us to will, prudentially or subjectively, that we have these goods. But no argument has been made for the moral claim that each of us must respect such interests in others. Furthermore, while this sort of argument forms the basis for determining the substantive content of, and arguably the rationale behind, paradigm cases of international law,[38] it does not show how such goods can be said to give rise to rights claims against others. It is to these points that I now turn.

DISTRIBUTIVE AND AUTHORITATIVE QUESTIONS

In paradigm cases of international law like the Charter of the United Nations, human dignity is connected to a set of human rights that must be afforded to all human beings and human rights are universal in this sense. The structure of this claim, I will assume, is as follows: agent X has human rights against Y because X is a human being and Y has correlative duties to X.[39] If X and Y are both human beings, they can be interchanged with each other in this formulation. Humanness, therefore, is the justificatory criterion by which X and Y can both claim that they have the human rights which afford them human dignity and allow them to act autonomously.

While the claim that human rights must be universal to all human beings is at the centre of these paradigm cases, it is somewhat problematic. Gewirth puts the problem in the following way: 'To say that all that is needed to have moral or human rights is that one be human raises the question of just how "A is human" serves to ground "A has rights". The connection between these is not analytic; one can, without contradiction, affirm the antecedent and deny the consequent'.[40] In fact, racists and other

[38] This is how Held uses Gewirth's claim that there are generic goods. See D Held, *Democracy and the Global Order* (Cambridge, Polity Press, 1995) 194.

[39] Gewirth, *Reason and Morality*, above n 26, at 65. See also W Hohfeld, *Fundamental Legal Conceptions as applied in Judicial Reasoning* (New Haven, Yale University Press, 1964). See also M Kramer, H Steiner and N Simmonds, *A Debate about Rights* (Oxford, Oxford University Press, 1998).

[40] *The Community of Rights*, above n 28, at 11.

sorts of bigot often claim that rights are either not universally, or not exclusively, held by human beings and anti-vivisectionists argue that all animals (whether human or otherwise) have rights. In order to solve this problem, it is necessary to show how human dignity can be vindicated as a moral claim and, in turn, to answer the authoritative question.

The Authoritative Question

Article 1 of the Universal Declaration of Human Rights says 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. Although this connection is not explicitly made in the Declaration, 'reason' and 'conscience' are often employed to justify human rights and human dignity, and can be said to be the basis of rationalist and intuitivist justifications for human dignity, respectively. Put simply, the problem with an intuitivist account is that our intuitions vary; and, as a matter of fact, there is no moral consensus in favour of human rights as a set of basic moral values even though such rights have an extremely important place in paradigm cases of international law. So, therefore, it is preferable to consider that there are *necessary reasons* why any human agent must be committed to respect the human rights of their recipients. The origins of this sort of argument are found in Kant's moral philosophy, but as with the substantive question, they are convincingly developed by the Kantian philosophy of Alan Gewirth.

Kant's argument for the categorical imperative purports to offer us categorical reasons why we have specific moral duties to respect others. Such moral duties require that we must respect the autonomy of our recipients. What arguments are offered to support this claim? Kant offers two possibilities. The first argument is the most familiar and is found in the first two chapters of the *Groundwork on the Metaphysics of Morals*. This argument attempts to show how the categorical imperative can be analytically derived from our common understanding of morality. This, however, cannot answer the authoritative question simply because it may be that our common understanding of morality might be false.[41] Kant acknowledges this when he says that the moral obligations we feel we have towards each other might be 'a chimerical Idea' or a 'mere phantom of the brain'.[42] His second line of argument, which is a transcendental deduction set out in the third chapter of the *Groundwork* as well as in the *Critique of Practical Reason*,[43] is

[41] It is problematic, then, for the same reasons as policy science and Finnis' moral theory. See above, 104–5.

[42] H Paton, *The Moral Law* (London, Hutchinson, 1948; translation of Kant's *Groundwork of the Metaphysics of Morals*, first published in 1785) 106 (4:445).

[43] I Kant, *Critique of Practical Reason* (M Gregor (trans), Cambridge, Cambridge University Press, 2003, first published in 1788).

that all beings with a will, like human beings, must adopt the categorical imperative on pain of contradicting that they are capable of exercising that will.[44] Thus, to reject the categorical imperative as a moral constraint upon one's action is to reject that one is a being with a will, which one cannot do without contradiction. Kant's second, stronger, argument gives the outline of an answer to the authoritative question. It shows why all 'beings with a will' must respect the autonomy of all others.

This stronger argument rests upon the validity of Kant's transcendental deduction of the categorical imperative from the concept of a being with a will. To discuss this requires an analysis of a complex interpretative and reconstructive debate on Kant's various works on moral philosophy. Instead, I want to offer Gewirth's answer to the authoritative question. Gewirth's argument is that each agent is categorically required to respect the rights to freedom and well-being of all his recipients. This may seen an odd step to make, but it is made for the following reason. Gewirth's answer to the authoritative question, as Beyleveld has shown, is structurally similar to Kant's stronger argument.[45] So, Gewirth claims, in the same way as Kant, that all purposive agents (where the concept of a purposive agent is equivalent to the concept of a 'being with a will')[46] must categorically accept moral constraints upon action if they are not to contradict that they are an agent.[47] In addition, the categorical imperative (also according to Beyleveld) is *analytically connected* to Gewirth's supreme principle of morality, the Principle of Generic Consistency (or PGC). More straightforwardly, the same point can be put in a different way: both arguments seem to be unified by the idea that there are certain categorical moral obligations to respect the fundamental interests of others which arise from our capacity to will and act.

Kant and Gewirth's argument are, then, structurally similar and come to the same conclusion. But why take Gewirth's argumentative route? There are two further reasons. First, Kant, in *The Critique of Practical Reason*, is sceptical as to whether he can establish an analytical link between the concept of a 'being with a will' and the categorical imperative. This is not

[44] An excellent analysis of this aspect of Kant's work is H Allison, *Kant's Theory of Freedom* (Cambridge, Cambridge University Press, 1990) ch 9.

[45] *Ibid*.

[46] Kant claims that a 'rational being with a will' has 'practical freedom' which as such 'involves a genuine, albeit limited, spontaneity or capacity for self-determination and therefore the capacity to act upon imperatives, even though the incentives for obeying these imperatives might ultimately be traceable to our sensuous nature'. See Allison, above n 44, 207. If we consider that the ability to act upon imperatives can be broadly construed as the ability to act purposively then it corresponds to Gewirth's concept of agency. This does not imply transcendental free will, as Puolimatka appears to suggest, but merely 'behaviour done voluntarily in order to achieve a chosen purpose (goal or end), as voluntary intentional behaviour'. See Beyleveld, above n 29, at 13 and 68–70 and T Puolimatka, *Moral Realism and Justification* (Helsinki, Suomalaninen Tiedeakatemia, 1989).

[47] See Beyleveld, above n 29 at 13 and 68–70.

the place to go into detail on this matter.[48] But we might offer a reconstruction of Kant's transcendental deduction (along the lines of that plausibly suggested by, for example, Henry Allison) or we can reach the same conclusions by employing Gewirth's argument. Either route may vindicate the conclusions which both advance, but I think that Gewirth's is more straightforward and does not obviously suffer from the same logical complexities and difficulties which are associated with Kant's argument. Secondly, Gewirth's argument to the PGC is easier to apply practically because its determinate substantive content arises from the generic features of agency. For these reasons I will set out Gewirth's argument to the PGC in the remainder of this section. In the next, I will in turn show how Gewirth's argument for human dignity can be employed as a practically reasonable viewpoint from which to establish a concept of international law.

Action and the Generic Features of Agency

Practical reasonableness concerns the good reasons we have for acting in particular ways. Put the other way round, appeals to practical reasonableness can only be a concern for those who are either able to act, or who would be able to act if they were not physically or psychologically constrained in various ways. This is why Kant and Gewirth both argue that recognition of, and reflection on, the capacity to act by any normal human beings is the starting point for a consideration of how there might be moral constraints on action.[49] Specifically, however, Gewirth argues that it is the positive instrumental evaluation that agents must make about the necessary means by which they are able to successfully act, or, indeed, act at all, which gives rise to a moral claim that they must respect the rights of others. It is a move from technical evaluation of what *I* require to do certain things to a deontological claim about how *I* should act towards others. This deontological claim takes the form of the PGC which requires that each agent must respect the rights to freedom and well-being of their recipients when acting. Thus, any agent must accept that there are moral constraints upon their action simply because they recognise that they are an agent.[50] This is

[48] I appreciate that I have not considered the problem with Kant's strong argument. On this point, I consider Beyleveld's critique to be correct. See D Beyleveld, 'Gewirth and Kant on Justifying the Supreme Principal of Morality' in M Boylan (ed), *Gewirth: Critical Essays on Action, Rationality, and Community* (New York, Rowman and Littlefield, 1999) 102 and ch 9.

[49] Strong arguments for the rights of beings who come close in various senses to possessing agency have been offered by S Pattinson and D Beyleveld, 'Precautionary Reasoning as a Link to Moral Action' in M Boylan (ed), *Medical Ethics* (Upper Saddle River, New Jersey, Prentice-Hall, 2000) 39–53.

[50] All of what follows is a description of Gewirth's argument to the PGC which is based upon *The Dialectical Necessity of Morality*, *Reason and Morality* and *The Community of Rights*. I will not reference this section in detail.

a highly ambitious move about which many will be sceptical. I think, however, that Gewirth is successful.

Gewirth's argument runs as follows. For Gewirth, all agents are capable of action, which is defined as 'behavior done voluntarily in order to achieve a freely chosen purpose (goal or end), as voluntarily intentional behaviour'.[51] *Human* agents are human beings who are capable of agency. For an agent to accept the PGC entails that he must accept, from his internal (dialectical)[52] viewpoint, that every other human agent has rights to freedom and well-being. Gewirth argues that any agent who rejects the PGC as a constraint upon their action also must logically deny that he is an agent.

From the internal standpoint of an agent, any action can be articulated in this way:

(1) 'I do (or intend to do) X voluntarily for (my freely chosen) purpose E'.

Here is not only the acknowledgement of the relationship between means and ends, but also a commitment by the agent to its purpose E. This entails that the agent holds that:

(2) 'E is good'.

What Gewirth attempts to capture by (2) is that the agent is making a proactive (and not necessarily moral)[53] evaluation of E. This is in the sense that that if he did not value E in a minimal sense, then he would have no motivation to attempt to achieve E in comparison to other ends, or to stir himself from acquiescence.[54] If the agent is coerced in any way without his consent then he cannot be said to be acting in the sense of (1), even though the agent would be *prospectively* capable of action in circumstances where he was not coerced.[55]

According to Gewirth, agents must accept two assumptions about their agency. The first is that they are capable of acting voluntarily or freely and hence controlling their own action. The second is that they have the capacity to determine a goal and to move towards achieving it. The requirements which are necessary in the case of all action are freedom and well-being and are the generic features of agency. As the generic features of agency are necessary for the possibility of an agent achieving his purposes, or achieving his purposes with any chance of success, an agent must acknowledge that:

[51] Beyleveld, above n 29, at 13 citing Gewirth, *Reason and Morality*, above n 26, at 22, 26–7, 36.

[52] *Reason and Morality*, above n 26, at 44. 'Dialectical' refers, for Gewirth, 'to a method of argument that begins from assumptions, opinions, statements, or claims made by protagonists or interlocutors and then proceeds to examine what these logically imply'.

[53] *Ibid* at 51.

[54] *Ibid* at 51–2; Beyleveld, above n 29, at 22.

[55] Furthermore, E can include dispositional life-plans or mere whims or selling oneself into slavery or committing suicide.

(3) 'The generic features of agency are the necessary preconditions of my agency'.

So, the agent must recognise that by not having the generic features of agency it is highly unlikely or impossible that he can achieve his given purpose E. In this sense, the agent must recognise that freedom and well-being have a generic instrumental value for the agent to achieve E, and therefore the agent must assert:

(4) 'The generic features of agency are necessary goods'.

The Universalisation of Generic Rights

The next stage of Gewirth's argument is to show that a human agent must claim, from its internal viewpoint, that it has a right to the generic features of agency from the acknowledgement of (4). Gewirth argues that:

(5) 'I at least have a prima facie claim right to the generic features of agency'

follows from (4). How can 'needs' (in (4)) be considered correlative with 'rights' (in (5))? In brief, Gewirth's argument is as follows. He argues that an agent must strictly value having the generic features of agency. This is because he must necessarily value his purposes and thus must defend having the generic features of agency which are, therefore, *prudentially valuable*. For the same reason, the agent must claim other agents have a strict-duty to not interfere with him having freedom and well-being against his will. This does not introduce an other-regarding component: rather, an agent must accept that others have a strict-duty because of the positive evaluation he makes about his own purposes. Plausibly, Gewirth thinks that 'from Y's point of view, X has a strict-duty not to interfere with Y having Z' correlates to 'from Y's point of view, Y has a right to Z'. Therefore, an agent must accept (5) on pain of contradicting that he is an agent.[56]

Thus, the agent must adopt a viewpoint from which, at least prudentially, they have to claim a right to the generic features of agency. A self-loving agent may adopt (5) as an end-in-itself, and a sado-masochist may constantly waive their right to the generic features of agency. At this stage of the argument, there is no reason offered to any other agent to respect those rights, although others may well choose to do so in some circumstances.

The final stage of the argument to the PGC is a universalisation of (5) which means that an agent must accept that 'I am an agent, and as such I

[56] See Beyleveld, above n 29, at 24–42; Gewirth, *Reason and Morality*, above n 26, at 63–103.

must acknowledge *that all other agents have a right to freedom and well-being*'. To demonstrate this, from (5), Gewirth claims that:

(6) 'From my internal viewpoint as an agent, I am logically required to treat (I am a human agent → I must consider that I have prima facie generic rights) as a valid inference'

To universalise (6) entails:

(7) 'From my internal viewpoint as an agent, I am logically required to treat the statement (Any other agent is an agent → I must consider that any other agent *has prima facie* generic rights) as a valid inference'.

The key move is from (5) to (6). (5), once universalised, establishes only that an agent must acknowledge that other agents must also consider that they have generic rights. The move from (5) to (6) moves from 'the premise that my being . . . [an agent] is a sufficient ground *for my being required to consider that I have a right to my freedom and well-being* to the conclusion that I am required to consider that my being . . . [an agent] is the sufficient ground *for my having a right to my freedom and well-being*'.[57] From (6), the universalisation can proceed to (7). Put another way, it is because of my necessary recognition that 'agent-ness' is the sufficient reason that I have the generic rights that I can also recognise that this is something that must be logically afforded to all other agents. Gewirth's argument to justify the move from (5) to (6) is called the argument from the sufficiency of agency:[58]

> The agent's description of himself as . . . [an agent] is both a necessary and a sufficient condition of the justifying reason he must adduce for his claim to have the generic rights . . . If the agent were to maintain that his reason must add some qualifying restriction to this description, and must hence be less general than his simply being . . . [an agent], then he could be shown to contradict himself. Let us designate by the letter D such a more restrictive description . . . Now let us ask the agent whether, while being an agent, he would still hold that he has the rights of freedom and well-being even if he were not D. If he answers yes, then he contradicts his assertion that he has these rights only insofar as he is D. He would hence have to admit that he is mistaken in restricting his justificatory description to D. But if he answers no, that is, if he says that while being an agent he would not hold that he has these rights if he were not D, then he can be shown to contradict himself with regard to the generic features of action. For, as we have seen, it is necessarily true of every agent . . . that he . . . implicitly claims the right to have freedom and well-being. For an agent not to claim these rights, at least implicitly, would mean that he does not act for purposes he regards as good at all . . . But this in turn would mean that he is not an agent, which contradicts the initial assumption. Thus, to avoid contradicting himself, the agent must admit that he would hold that he has the rights of freedom and well-being

[57] Beyleveld, above n 29, at 43.
[58] Gewirth, *Reason and Morality*, above n 26, at 109–10.

> even if he were not D, and hence that the description or sufficient reason for which he claims these rights is not anything less general or more restrictive than that he is . . . [an agent] who has purposes he wants to fulfil.

And this means that the agent must accept (6) 'From my internal viewpoint as an agent, I am logically required to treat (I am an agent ? I must consider that I have generic rights) as a valid inference'. From here the universalisation (in (7)), from which the PGC is derived, can progress unimpeded.

From (7), it follows from the agent's internal (dialectical)[59] viewpoint for the agent to acknowledge:

(8) 'I am an agent → other agents have prima facie generic rights'

as being a valid inference. This is equivalent to saying that the agent must acknowledge that all those who have the property of being an agent must have generic rights. Understood assertorically,[60] all agents must acknowledge (8) as being correct, and therefore:

(9) all agents must act in accordance with the generic rights of their recipients (ie those affected by their action),

which is the PGC. For an agent to deny (9) is for him to contradict that he values his purposes. The argument to the PGC shows how all agents must, from their internal viewpoint, necessarily accept that they are morally obligated to respect the generic rights of all other agents on pain of contradicting that they are an agent.

The Distributive Question

Generally, as the agents we are aware of are all human beings, we can say that Gewirth shows why human beings should respect the human rights of other human beings. But it is their agency which is the relevant factor by which such rights must be afforded, rather than their humanness. Thus, the answer to the distributive question must be that all agents have generic rights, and that all human beings have human rights because they are agents (even though this overlooks important arguments about the extent to which non-human beings, or human beings who do not have agency, have generic rights).[61] If human dignity, as a form of empowerment, is

[59] See above n 52.

[60] *Reason and Morality*, above n 26, at 45. Assertoric method, for Gewirth, is defined in distinction to a dialectical method. See above n 52. Gewirth writes: 'it is one thing to say assertorically that X is good; it is another thing to say dialectically that X is good from the standpoint of some person, or that some person thinks or says 'X is good'. Where the assertoric statement is about X, the dialectical statement is about some person's judgment or statement about X'.

[61] S Pattinson and D Beyleveld, above n 49, at 39.

understood as being the capacity of each human being to have autonomy (that is, to be the self-determining authors of their own life), then it would seem that rights to freedom and well-being are essential for human beings to have this capacity.[62] Thus, Gewirth's argument to the PGC demonstrates why each of us must respect the dignity of our recipients by respecting their human rights. If they have dignity they are, in their moral relations with other agents, able to act autonomously.[63] It also shows why Kant's claim that each of us is required to respect the autonomy of others is a valid claim.

THE CONCEPT OF INTERNATIONAL LAW

The argument to the PGC can be said to establishe the practically reasonable viewpoint: it is the basis upon which actions can be said to be rationally justified. Thus, it avoids the *presumption* that there are moral constraints upon behaviour which was found to be the problem with Finnis' moral theory, as well as with policy science. To conclude this chapter, I want to show briefly how it is possible to conceive of a concept of international law from this understanding of human dignity. Here I focus on Kant's argument for legal order, but reconsider it through the PGC.

Dignity in the Kingdom of Ends

Kant's conception of dignity arises in his discussion of the kingdom of ends and the latter is an important concept in what follows. The kingdom of ends is a hypothetical community in which each human being complies with the dictates of the categorical imperative and, as such, is a community of moral harmony. In this community each human agent, because they do not suffer moral harms at the hands of others, has autonomy: they are able to pursue their self-chosen and morally valid maxims without harming any other agent. For Kant, '[*a*]*utonomy* is . . . the ground of the dignity of human nature and of every rational nature'.[64]

Paton argues that the kingdom of ends 'shows that we are dealing, not with isolated laws or isolated ends, but with a system of laws and a system of ends. It . . . renders explicit the freedom with which the morally good man makes his own laws through his maxims'.[65] Therefore, 'the

[62] See Beyleveld and Brownsword, *Human Dignity in Bioethics and Biolaw*, above n 10, at 64.

[63] That human rights constitute the conditions by which agents have autonomy from the will of others is a central theme developed in Chapter 7. See below 179–83.

[64] Paton, above n 42, at 97 [4:436].

[65] H Paton, *The Categorical Imperative* (New York, Harper and Row Publishers, 1967, first published in 1947) 185.

concept of a kingdom . . . that is, a self-governing society, a connected system of rational agents under common self-imposed, and yet objective, laws. It leads to the concept of a kingdom of ends, because . . . the laws enjoin that every member should treat himself and all others, never merely as a means, but at the same time as an end'.[66] So:[67]

> [a]lthough the members . . . of the kingdom of ends are subject to the law, they are nevertheless subject to laws imposed by their own rational will. The kingdom of ends is possible only through the autonomy, or the freedom of will, of its members. This autonomy is the ground of their absolute value, their 'dignity' or 'prerogative', their inner value or worth or worthiness.

In the kingdom of ends, all agents have autonomy, and they rationally exercise that autonomy by following the moral law. I understand Paton's interpretation of the kingdom of ends as introducing a kind of reciprocal moral relationship between its members: each acts autonomously and with dignity when each respects the autonomy, or 'value', of others. All have dignity as a result of *acting* in a way that respects the autonomy of others (thus implying dignity as a form of moral constraint). But each also has dignity, and is able to act autonomously, because of the respect *afforded* to them by others (dignity as a form of empowerment).[68] It seems that Kant's concept of the kingdom of ends is a state of affairs in which an agent has the capacity to act, and does indeed act, in accordance with the dignity of others. This capacity to act, as well as the conditions by which others have autonomy, both rest, if Gewirth is right, on each respecting the human rights of their recipients. Therefore, to have dignity is to have the conditions by which one is to be able to act autonomously and this implies a set of human rights. In the kingdom of ends, dignified conduct is that which respects the dignity of others.

From the Kingdom of Ends to Positive Law

The normatively ideal kingdom of ends is a long way from any community we know of empirically. This is explicit in Kant's moral philosophy when he argues that it is 'pure [and] . . . completely cleansed of everything that can only be empirical and appropriate to anthropology'.[69] Thus, it is

[66] *Ibid* at 186–7.

[67] *Ibid* at 188–9.

[68] This view of what dignity might mean within the kingdom of ends is slightly controversial. Dignity in Kant is often considered to be a conception similar to that offered by Gewirth: as empowerment. However, Sensen (see above n 12) has convincingly shown that dignity operates as a constraint for Kant. Therefore, rational agents should act in a dignified manner by acting in according with the autonomy of their recipients' rights. My view is that human agents have dignity in both senses as members of a moral community where each reciprocally respects the dignity of its recipients.

[69] Kant in Paton, above n 42, at 55 [4:389].

completely divorced from the empirical, or anthropological, conditions in which we find ourselves. In our communities, human beings often do not have dignity because the actions of others are often immoral and irrational. But more generally, their autonomy is often constrained because the actions of others limit their capacity to achieve their objectives. Given the social conditions in our real, human, communities, Kant thinks that we need law to externally coerce human agents to respect the autonomy of others. His argument forms the basis of the argument for international law in the rest of this book, but I will set it out briefly here to conclude this chapter.

His argument runs as follows. Kant argues that laws are 'constituted not by a set of wholly pure moral principles, but instead by the system of duties that results when the pure principle is applied to the empirical nature of human beings in general'.[70] But given 'the empirical nature of human beings', there is a need for external coercion to achieve this end. This means that a system of external laws must be established which creates the conditions whereby each human agent can enjoy a degree of autonomy given the various motives and actions of others. This is expressed in the principle of right: '[a]ny action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law'.[71] So an action is juridically right (or not wrong) if 'the scope of the duties it imposes is restricted to what may be externally coerced in the name of protecting external freedom'.[72]

In the first two sections of this chapter, it was discussed how autonomy is constituted by a set of human rights. This being the case, law is a system of external coercion which guarantees that each agent has human rights. International law, as a type of law, must do the same and as such provide a system of external coercive norms, which governs the relations between states, which are consistent with human rights.

This brief argument, which explains how Kant may move from his moral philosophy to international law, is controversial for reasons which will be explored in the rest of this book. However, it should be noted that from a methodological point of view, it is unproblematic that the kingdom of ends is empirically unrealisable, and can only be approximated to by law. In Chapter 4, Weber's claim, that all action is to be understood as an attempt to attain an end-state which may or may not be realised, was set out.[73] It is the value-orientation of the action, rather than its outcome,

[70] Kant in Paton, above n 42, at 4.

[71] Kant, above n 21, at 24 [6:230].

[72] A Wood, 'The Final Form of Kant's Practical Philosophy' in M Timmons (ed), *Kant's Metaphysics of Morals* (Oxford, Oxford University Press, 2002) 7.

[73] See above 86–8.

which gives it meaning. It is in this sense that the rational aim of any action is to bring about a state of affairs which is consistent with the dignity of all human beings: that is, to bring the social relations which comprise our communities closer to the kingdom of ends. From the perspective of our own communities, actions can be said to be practically reasonable to the extent that they are consistent with recipients' human dignity. Our systems of public governance and our other organised activities are reasonable for the same reason. As much is true for normative practices such as law or international law and is the basis upon which they should be conceptualised.

CONCLUSION

The solution to the methodological problem in legal science depends, I have argued, on the establishment of a non-arbitrary practically reasonable viewpoint. Gewirth's argument for human dignity, by which each agent is able to exercise his autonomy through the protection of a set of human rights, establishes this viewpoint. Normative practices, like law and international law, can be said to be practically reasonable to the extent that they are focally orientated toward this viewpoint. This can then be employed to explain what is legal or otherwise about our paradigm cases of international law. The paradigm cases considered earlier in this chapter, which afford centrality to human dignity, would seem, then, to be cases of international law. This conclusion is close to the position adopted by policy science. But in this chapter, considerable effort has been made to explain why this value-orientation is one that should be adopted in legal science, rather than it being presumed to be 'beyond ethics'.[74]

This conclusion, while ultimately supported in this book, is premature. One reasons for this is that the claims just made about Kant's philosophy of law are controversial. There are some, like Jeremy Waldron or Thomas Pogge, who have argued that law is not simply an external, coercive, expression of moral principles. On their reading of Kant, law is a system of norms which are *distinct* from any moral obligations agents are under. Thus, the role of law is to provide for, and enforce, an artificial system of norms which establishes a zone of freedom that protects a set of legal rights for each agent. However, such norms do not necessarily attempt to adhere to any objective moral standards, like human rights. In distinction to the claim just made, the proximate aim of law is to establish a community by which human beings can peacefully co-exist and co-operate rather than one which aspires to an ideal conception of autonomy. The argument is that in real communities, law has to mediate between competing moral

[74] See Chapter 4 at 81.

perspectives and ensure social stability rather than adhere to and impose one particular moral perspective. It is in this sense that law is functionally differentiated from morality. This view is also reflected in parts of Kant's philosophy of international law in which he states that its functional aim is to ensure the conditions for peaceful co-existence of states, rather than to ensure that each individual has dignity.[75]

This sort of argument about law is not unusual. For instance, Locke, Pufendorf and Grotius all claim that practical reasonableness operates as a series of strong moral rights which each of us have and which constrain our acts with regard to others, but they also argue, in a similar way to Kant, that law has a specific functional role in pre-empting and resolving the social conflict which arises from each individual's attempt to interpret, apply and enforce those rights against others. While there may be complex relationships between law and morality, law is distinguished by having a specific function. Returning to the theme of Chapter 4, it may be that this sort of co-ordinatory role or function for law is one which is specific to it. Law can be conceptualised as a distinctive practical phenomena which is not straightforwardly, or at all, embedded in wider concerns of moral right. The point to be taken forward from this consideration is that forms of law have a specific functional orientation which is peculiar to them. They do not seek to attain, for example, the kingdom of ends or anything like it. Instead, they provide an autonomous system of external coercive norms which allow us to get on in diverse and complex communities. This point, which is normally ascribed to normative positivists in both legal philosophy and international law, is one that could undermine the claims made in this chapter.

This idea of legal autonomy, and the implications of the functional differentiation of law as a normative practice and its separateness from morality, will be considered in the next chapter. Contrary to those who argue for legal autonomy, I will argue that law cannot be distinguished from underlying concerns of practical reasonableness if it is to be able to resolve social conflict and to allow us to co-operate. However, through an examination of law's autonomy, it is possible to show how forms of law, like international law, are distinctive to, if not totally isolated from, morality.

[75] Lack of attention to this idea of legal autonomy is perhaps the central reason why 'Kantians' like Fernando Teson go wrong. See F Teson, *A Kantian Philosophy of International Law* (Oxford, Westview Press, 1998). In response, see G Cavallar, 'Kantian Perspectives on Democratic Peace: Alternatives to Doyle' (2001) 27 *Review of International Studies* 229 and P Capps, 'The Kantian Project in Modern International Legal Theory' (2001) 12 *European Journal of International Law* 100.

6

The Logic of the Autonomy Thesis

In an essay called 'The Case Against Freedom', Lon Fuller writes:[1]

> if we are to live with our fellows, our actions—whether they be selfish or altruistic—cannot be effective unless they take place within some framework that brings them into meaningful relation with the actions of others. So, we need restraints not merely because we need the products of an organization which rests on restraints, but because we ourselves can act effectively as members of society only within a framework of restraints—though these restraints are often so taken for granted that we do not feel them as such.

His characterisation of law as a framework of mutual restraints is part of his broader view that law is a purposive enterprise which provides an institutional framework for unifying our community's judgments and stabilising and structuring our social relations. This view of law is one that is familiar and uncontroversial in legal and political philosophy and is usually subsumed under the idea of the autonomy of law. Furthermore, this idea is central to the consent theory of international legal obligation whereby state consent turns moral aspirations or bare promises into concrete legal norms which govern state conduct. The idea of legal autonomy is at the centre of the argument in this chapter.

Controversy arises because there are different ways of characterising this autonomy. Three examples illustrate this point. First, Fuller thinks that law's function, which was just set out, implies that it must adopt a necessary procedural moral form.[2] Secondly, the argument in the last chapter points towards a view of legal autonomy that is built upon, or rooted in, a conception of human dignity. For both of these positions, law is autonomous in the sense of being a set of general norms which establish the conditions by which a community can co-operate and co-exist, but both also accept that law is integrated with underlying criteria of practical reasonableness. Thirdly, some positivists, while accepting Fuller's claim that the function of law is to guarantee the conditions by which we can co-exist and co-operate, disagree that law must take a form rooted in either procedural morality or thick substantive values associated with human

[1] L Fuller, 'The Case Against Freedom' in K Winston (ed), *The Principles of Social Order: Selected Essays of Lon Fuller* (Oxford, Hart Publishing, 2001, first published in 1981) 320–1.

[2] L Fuller, *The Morality of Law* (London, Yale University Press, 1969, first published in 1964).

dignity. Instead, they reject the idea that law is necessarily related to *any* underlying considerations of practical reasonableness. They instead adhere to a general concept of law which takes the form of a *genuinely* autonomous framework of practical reasoning in which authoritative legal norms, reasons or judgments normatively override other reasons individuals might have for acting. On this account, it is only by being autonomous from other (eg moral) reasons that law can fulfil its function. Law, in order words, must be separated from any moral considerations if it is to perform the functional role expressed in the idea of legal autonomy.

This central idea—that law must be autonomous from moral reasoning, or, more generally, practical reasonableness—will be called the Autonomy Thesis (or AT). The AT lies at the core of a normatively driven version of legal positivism[3] in that it holds that it is only by separating law from other (including moral) reasons that it can stabilise social relations. The AT, then, throws into question any straightforward connection between the concept of human dignity set out in the last chapter and our characterisation of the function or purpose of legal norms and institutions which, as was seen in Chapter 4, is the basis for the formulation of a general concept of law. One example of this sort of argument is that while it may be agreed that human dignity is a constraint that governs our social relations, it is disagreement and conflict over how such rights should be cashed out in socially complex situations and in circumstances of resource scarcity that drives the need for legal institutions to be developed which establish a set of general or *omnilateral* norms to govern our conduct. While an end-state like Kant's kingdom of ends is something to which each of us, as rational agents, should aspire, the day-to-day complexities of human action means that law must be *focally* orientated towards a more mundane aspiration. This aspiration can be put in the following way: the purpose of law is to solve the moral conflict which emerges in a situation in which each of us makes unilateral judgments about our moral entitlements, through the establishment of a system which provides a general or omnilateral judgment about what we all are to do, and thus provides a stable framework in which each of us can act. It is this which provides an explanation of the function of law as a normative practice; not that it is somehow connected to the higher aspiration of achieving the conditions by which agents can have dignity and hence act autonomously. The AT, then, poses a serious threat to the arguments made in this book.

The main features of the AT can most plausibly be attributed to Hobbes, Bentham and, sometimes, Kant. It also has been attributed to Hart and Raz, even though these philosophers are better described as adopting different sorts of methodological approach and sets of substantive claims.[4]

[3] Normative positivism is described in Ch 5.
[4] See above 54–5.

This said, this attribution of function to law explains why the positivists' sources thesis, conventionality thesis or the rule of recognition is valuable to those engaged in law qua normative practice. It also describes the accounts of international law developed by Oppenheim and Weil which have already been set out in brief.[5] These international lawyers argue that the international legal order is rooted in institutional minimalism and a consent-based conception of the sources of international law which is alleged to be functionally orientated to providing the conditions for co-operation and co-existence in international relations. So, this sort of theory can also plausibly be described as a form of the AT. All of these philosophers and lawyers are unified by the idea that law establishes the conditions by which an ordered society can be established, but this, in turn, requires moral and legal judgment to be kept separate from each other.

In the first part of this chapter, the core aspects of the AT are described alongside some versions of it found in legal and political philosophy and the philosophy of international law. Following the arguments advanced by Postema and Simmonds, the second part of this chapter attempts to show that the strategy of isolating legal norms and reasons from other norms and reasons which lies at the heart of the AT cannot be sustained if law is to secure social stability. The alternative argument—that law must be integrated into the moral fabric of society if it is to fulfil its function—can then be shown to be implied by the AT. As such, I present a *reductio ad absurdum* of the possibility of the concept of law described by the AT being functionally appropriate to achieve the purpose by which it is defined: stabilising social relations and avoiding social conflict. If this argument follows, international lawyers must, for the same reasons, reject the AT and accept a version of international law which is, at its root, based upon an integration of, rather than isolation of, international legal norms and practical reasonableness, morality and human dignity. Thus, law is autonomous in the sense of it being a set of distinctive general norms which are established to stabilise social relationships within a community, but it is not autonomous in the sense that it must be isolated from broader concerns of practical reasonableness if it is to fulfil this function. After Postema, I call this model of law the integrated-Autonomy Thesis. In the following chapters, I reverse this argument, and demonstrate how any human agent, who is rationally committed to respect the human dignity of his or her recipients, must necessarily accept that law, as well as international law, must be modelled on the integrated-AT.

[5] See above 83–4.

THE AUTONOMY THESIS

In Chapter 3, I distinguished two types of positivism. The first was methodological legal positivism, which is argued to be the approach taken by Hart when conceptualising law and international law. The second was normative positivism which can plausibly be brought under the methodological umbrella of focal analysis. Focal analysis is the position that law is best conceptualised with reference to its function or purpose. For the normative positivist, the purpose of law is to solve the moral conflict which emerges in (mainly complex, modern, morally heteronomous) communities. The AT, therefore, forms the central pillar of normative positivism even though many methodological legal positivists might argue that the AT does, indeed, reflect a popular and important feature of many forms of social phenomena called law.[6] In what follows, and given my arguments in Chapters 3 and 4 in favour of focal analysis, I will restrict my comments to the idea that law as a normative practice can be conceptualised through the AT as a functional or purposive phenomenon.

Normative positivism is the position which holds that there are good reasons for separating moral from legal reasoning. Although previously cited, Waldron's description of the normative positivism of Hobbes and Bentham sums up the purposive and practical orientation of normative positivism. Such theories afford 'great prominence . . . to the evils that might be expected to afflict societies whose members were unable to disentangle their judgments about what was required or permitted by the law of their society from their individual judgments about justice and morality'.[7] As such, it is a position which is 'interested in the conditions necessary for coordination, for conflict resolution, and for the general stability of expectations in people's dealings with one another'.[8] This similarly describes the general approach taken by the AT. This section proceeds by describing the central features of the AT according to Postema. It then proceeds to show that Hobbes, Kant, Oppenheim and Weil can all be interpreted as offering versions of the AT.[9]

[6] It should be noted that natural lawyers would also adopt a version of the AT. See J Finnis, 'On Hart's Ways: Law as Reason and as Fact' in M Kramer, C Grant, B Colburn and A Hatzistavrou (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford, Oxford University Press, 2008).

[7] J Waldron, 'Normative (or Ethical) Positivism' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford, Oxford University Press, 2001) 412–13.

[8] *Ibid* at 413.

[9] See G Postema, *Bentham and the Common Law Tradition* (Oxford, Oxford University Press, 1986) chs 5–9 for a clear discussion of how Bentham adopts a normative positivist position.

Structure of the Autonomy Thesis

Gerald Postema, in his paper 'Law's Autonomy and Public Practical Reason', attempts to describe the main features of the AT. The AT draws a distinction between the unilateral moral judgments that each of us (as human agents) makes concerning how we ought to act and the legal norms which establish general standards for our conduct as members of a community. The AT, then, describes a discrete body of norms which are distinctly legal. The core of the AT is the idea that it is only by being *isolated* from other forms of practical reasoning that law can achieve 'its proximate aim and defining task [which] is to supply a framework of practical reasoning designed to unify public political judgment and co-ordinate social interaction'.[10] In doing so it achieves its focal purpose which is 'to help us solve problems of social co-operation'.[11] By '[s]implifying and focusing our practical reasoning, law mediates between our conflicting interests and our ultimate, often contested, values and principles, on the one hand, and our concrete decisions and actions, on the other'.[12] Instrumentally, this is achieved by '*displacing* or focussing practical reasoning onto a limited domain of publicly accessible norms, and *isolating* that reasoning from the conflicting interests, principles, and values that stand as obstacles to social co-operation'.[13] Here, then, is the isolation strategy which lies at the heart of the AT which requires a *separation* of legal norms from the unilateral moral (and other) judgments each of us makes about how we are to act. By doing so, law allows us to co-operate effectively.

For Postema, there are three interlocking and essential features which describe aspects of the Autonomy Thesis. The first is the *limited domain thesis*. For the AT, law 'defines a limited domain of practical reasons or norms for use by officials and citizens alike'.[14] He introduces here the idea that there are a set of norms or reasons which are distinctively legal in comparison to other sorts of reasons or norms. The second is the *pre-emption thesis*. This thesis 'offers an account of how the introduction of law into the practical reasoning of individual agents *alters* it'.[15] By claiming that law is pre-emptive, Postema means the following: '[l]egal norms not only provide rational agents with positive (first-order) reasons to act in certain ways, but they also provide them with second-order reasons for *not acting* on certain *other* reasons',[16] where these other reasons are ones which fall

[10] G Postema, 'Law's Autonomy and Public Practical Reason' in R George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford, Clarendon Press, 1996) 79–118 at 80.
[11] *Ibid* at 91.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid* at 82.
[15] *Ibid* at 83.
[16] *Ibid* at 85.

outside the limited domain of law. These second-order reasons do not outweigh those reasons outside the limited domain. Rather they 'preclude acting for other reasons'.[17] The pre-emptive reasons offered by law, then, 'provide grounds for vindication or legitimation (to some degree) of actions taken in accord with them . . . it *alters* our framework of practical reasoning in a material way'.[18] The third is the *sources thesis*. This means that the norms which are located within law's limited domain are ascertainable only with reference to social fact—primarily, enactment by a legal official—and not with regard to moral argument. So, the boundaries of the limited domain are not 'defined substantively—that is, in terms of the content or importance or soundness of norms or reasons—but rather by "content independent" criteria'.[19] It is fairly clear that various positivist theories substantively correspond to these theories. However, the AT explains why such features are valuable or necessary given law's purposive orientation and why law is valuable as a normative practice for officials and subjects alike.

For the AT, law must be modelled on these three theses if it is to be able to achieve its function, which is variously understood in terms of conflict resolution, the stabilisation of social relations or expectations and the achievement of social order. This means/ends relationship follows for a number of reasons. One is that if the austerity of the limited domain thesis or sources thesis is violated, the content of law would become ambiguous. It is not a clear standard against which individuals can guide their actions. Similarly, if law did not attain a pre-emptive status, individuals might act on their subjective reasons rather than specifically legal reasons. As a result, those regarding the law as pre-emptive could not predict how others would act. It would not serve its purpose of stabilising people's expectations as to how others will probably act. Therefore, it is plausible to hold that if these three features of the AT were not adopted, the end to which a legal order is committed would be frustrated. The central features of the AT are found in the accounts of law offered by Hobbes and Kant, as well as the international legal theory of Oppenheim and Weil.

Hobbes' Version of the Autonomy Thesis

The 'Hobbist' interpretation of Hobbes can easily be interpreted as developing a version of the AT. This familiar interpretation starts from Hobbes' central claim that our prudential self-interest compels us to recognise the legitimacy of *any* legal order because the alternative is an irrational state of

[17] G Postema, 'Law's Autonomy and Public Practical Reason' in R George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford, Clarendon Press, 1996) 79–118 at 82.
[18] *Ibid* at 83.
[19] *Ibid*.

nature.[20] It focuses on his claim that all norms are legally valid because they have, either directly or indirectly, been willed by a sovereign. Positive laws are wholly conventional and independent of norms which might be found in custom or morality.

To explain in more detail, the exercise of will by the sovereign to create legal rules coupled to their entirely conventional nature establishes Hobbes' version of the limited domain thesis. Hobbes says: 'These Rules of Propriety (or *Meum* and *Tuum*) and of *Good*, *Evill*, *Lawfull*, and *Unlawfull* in the actions of Subjects, are the Civill Lawes; that is to say, the Lawes of each Common-wealth in particular'.[21] Elsewhere he says: 'It belongeth therefore to the Soveraigne to bee *Judge*, and to praescribe the Rules of *discerning Good* and *Evill*: which Rules are Lawes; and therefore in him is the Legislative Power'.[22] All public standards, then, can be traced back to an act of the will of the sovereign. Customary law is not binding 'by virtue of their being received and approved here' as common lawyers, like Matthew Hale, who were contemporaries of Hobbes, might suppose.[23] Rather, custom is binding because (i) it is reasonable against natural rights[24] and (ii) it is authorised by the 'Will of the Soveraign signified by his silence'.[25] On this reading, if the will of the sovereign was contrary to natural rights it would still bind. Hobbes says 'the Right of Nature, that is, the naturall Liberty of man, may by the Civill Law be abridged, and restrained'.[26]

Civil laws, for Hobbes, pre-empt other norms or reasons for action. This can be explained with reference to Hobbes' distinction between command and counsel. He says: 'Command is, where a man saith, *Doe this*, or *Doe not this*, without expecting other reason than the Will of him that sayes it'.[27] Counsel 'is where a man saith, *Doe*, or *Doe not this*, and deduceth his reasons from the benefit that arriveth by it to him to whom he saith it'.[28] So, 'a man may be obliged to do what he is Commanded; as when he hath covenanted to obey: But he cannot be obliged to do as he is Counselled'.[29]

[20] D Dyzenhaus, 'Hobbes and the Legitimacy of Law' (2001) 20 *Law and Philosophy* 461, 463.

[21] T Hobbes, *Leviathan* (Cambridge, Cambridge University Press, 1992, first published in 1651) 125 [91].

[22] *Ibid* at 143 [105–6].

[23] G Postema, 'The Philosophy of the Common Law' in J Coleman, S Shapiro and K Einar Himma (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, Oxford University Press, 2004) 591; M Hale, *A History of the Common Law of England* (C Gray (ed), Chicago, Chicago University Press, 1971, first published in 1713).

[24] These are essentially natural rights derived from prudence. See the discussion of Hobbes in Ch 5 as well as R Harrison, *Hobbes, Locke and Confusion's Masterpiece* (Cambridge, Cambridge University Press, 2003) 65–9.

[25] Hobbes, above n 21, at 184 [138].

[26] *Ibid* at 185 [138].

[27] *Ibid* at 176–7 [131–2].

[28] *Ibid*.

[29] *Ibid*. See also Dyzenhaus, above n 20, at 466 on 'Hobbes's rather odd claim that the commander has only his own benefit in mind'.

Therefore, counsel is followed if it accords with the balance of reasons of the individual to whom it is addressed, whereas commands are followed simply because they are commanded.[30] Commands, therefore, can be said to be opaque to background reasons.

All civil laws are commands in this sense. To explain, Hobbes holds that 'Civill law, *Is to every Subject, those Rules, which the Common-wealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will*'.[31] Civil laws are created by 'an Artificiall Man, which we call a Common-wealth' which legal subjects 'have fastned at one end, to the lips of that Man, or Assembly to whom they have given the Soveraigne Power; and at the other end to their own Ears'.[32] That Hobbes' commands give second-order reasons for not acting on reasons outside the limited domain of law is explained by Dyzenhaus: '[f]rom the internal perspective of sovereign or subject in civil society the law has a very different character. Even if it is important, as Hobbes supposes, to justify on the basis of self-interest establishing a society in which the laws can be effective, once effective they oblige in a way that transcends self-interested judgements'.[33]

One example of commands providing second-order reasons not to follow norms outside the limited domain is found in Hobbes' discussion of hereditary succession. It has already been shown that customs only apply in the absence of a sovereign command.[34] The will of the sovereign provides a sufficient reason for not following the customary rule. James I uniting England and Scotland, is an example of a sovereign command overriding the normal customary rules on succession of monarchs in both commonwealths.[35] The sovereign can dispose of the custom through his will. As well as being a command to act, the sovereign will also provides a second-order reason for *not following* customary norms.

A second example concerns the relationship between civil laws and natural law (which he thinks emerge from prudential self-concern in both a normative and socio-psychological sense).[36] The Hobbist interpretation of the laws of nature has it that natural laws are binding *in foro interno* but 'are not properly Lawes, but qualities that dispose men to peace'.[37] So, 'When a Common-wealth is once settled, then they are actually Lawes . . . For it is Soveraign Power that obliges men to obey them'.[38] But as has

[30] See Harrison's discussion of the relationship between counsel and command. Above n 24, at 81–8.
[31] Hobbes, above n 21, at 183 [137].
[32] *Ibid* at 147 [108–9].
[33] Dyzenhaus, above n 20, at 464.
[34] Hobbes, above n 21, at 137 [100]. Hobbes argues: '[f]or whatsoever Custome a man may by a word controule, and does not, it is a naturall signe he would have that Custome stand'.
[35] *Ibid* at 138 [101].
[36] Harrison, above n 24, at 66.
[37] Hobbes, above n 21, at 185 [138].
[38] *Ibid*.

already been seen, 'the Right of Nature, that is, the naturall Liberty of man, may by the Civill Law be abridged, and restrained'.[39] Therefore, civil laws give second-order reasons for not following non-positive natural law.

The distinction between command and counsel would also seem to bear out Hobbes' version of the sources thesis. Considerations of reasonableness do not have a bearing on the validity of command: that they are commanded is sufficient for a rule to be a law. So, 'though . . . [natural law] be naturally reasonable . . . it is by the Soveraigne Power that it is Law'.[40]

For Hobbes these are necessary features of a legal order if that order is to secure the end which all rational human agents must seek: that is, peaceful co-existence. Consistently through *Leviathan* these structural features of law are justified with reference to this end. A good example of this is where Hobbes tells us that:[41]

> [t]he only way to erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and the injuries of one another, and thereby to secure them in such sort, as that by their owne industrie, and by the fruites of the Earth, they may nourish themselves and live contentedly; is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much to say, to appoint one Man, or Assembly of men, to beare their Person.

Therefore, Hobbes' legal philosophy contains all the features of the AT, and can be read as a version of it.[42]

[39] *Ibid*.

[40] *Ibid* at 191 [143].

[41] *Ibid* at 120 [87].

[42] This interpretation of Hobbes as advocating the AT is familiar but not entirely convincing. Hobbes can be interpreted in a non-Hobbist way whereby considerations of prudence operate to constrain both the sovereign will and judicial decision-making. There are a range of arguments which can be made here. The most important is his claim that the violation of the laws of nature 'can never be made lawfull. For it can never be that Warre shall preserve life, and Peace destroy it'. (Hobbes, above n 21, at 110 [79].) This appears to indicate that Hobbes thinks that there are some broad substantive limits on the sovereign's competence to legislate beyond which its commands cease to have pre-emptive force. In *Behemoth*, what this might mean is discussed in more detail (see T Hobbes, *Behemoth* (Chicago, Chicago University Press, 1990, first published in 1682) 51). One view is that it is preferable for the sovereign to attempt to persuade and co-opt its subjects so that they believe its commands are in their self-interest. So, eg, Charles I should have submitted to parliamentary limitations on his power to tax to ensure parliamentary co-operation in the exercise of sovereign powers (*ibid* at xli–xlii). Holmes comments that for Hobbes: 'authority is excessive when it is self-defeating, when it undermines itself by alienating potential cooperators' (*ibid*). Hobbes also suggests that those norms which fail against procedural values like generality, a prohibition on retroactivity, promulgation before enforcement, and so on, cannot be considered laws of the sovereign. He argues: '[f]or by disobeying Kings, we mean the disobeying of his laws, those his laws that were made before they were applied to any particular person; for the King, though as a father of children, and a master of domestic servants yet he command the people in general never but by a precedent law, and as a politic, not a natural person' (*ibid* at 51).

Kant's Version of the Autonomy Thesis

Chapter 7 considers Kant's legal theory in detail but, as some leading commentators on Kant characterise his work as a form of normative positivism, some of his central claims will be introduced here. At the end of the last chapter, I suggested that one way in which Kant's legal philosophy might be interpreted is that it is an attempt to provide a system of enforceable norms which ensure that each human agent has moral autonomy. However, Waldron, Wood and Pogge all argue that this is incorrect and that Kant advocates a form of positivism.[43] In turn, this can be considered as a version of the AT; that is, spheres of freedom which are established and protected by law are to be understood as being entirely conventional. While it is not controversial to ascribe to Kant the AT's general description of the function of law, controversy arises as to whether Kant accepts a more specific version of the AT which is connected to various criteria of procedural or substantive justice.

For Kant, law is understood as an expression of the *omnilateral* will of a community of moral agents. An omnilateral judgment is one which Kant describes as being one of 'all the wills of a community together'.[44] Like Hobbes, Kant defends this claim about law through a contractarian argument.[45] His argument begins with the premise that, in a system of unilateral willing, or state of nature, the capacity of any agent to act on its judgment is constrained by the judgments of others; or, if that agent achieves its purposes it constrains others against their will. Thus, in a system of unilateral willing, each agent's ability to achieve their purposes, or conclusively claim property, is contingent upon the actions of others and it is not-rightful for this reason. The solution to this problem is to establish a general or omnilateral will which expresses public right. Waldron explains Kant's view when he writes that '[*a*]*ny* obligation that a person bears must be presented as part of a *system* of mutual respect among all persons, not merely as an artefact of one person's demands'.[46] Law is systemic in the sense of being a system of omnilateral willing which issues a set of general norms which structures the conduct of all and guarantees mutual respect. It also provides an assurance to each of us as to how others

[43] J Waldron, 'Kant's Legal Positivism' (1996) 109 *Harvard Law Review* 153; A Wood, 'The Final Form of Kant's Practical Philosophy' in M Timmons (ed), *Kant's Metaphysics of Morals* (Oxford, Oxford University Press, 2002) ch 1; and T Pogge, 'Is Kant's *Rechtslehre* a "Comprehensive Liberalism"' in M Timmons (ed), *Kant's Metaphysics of Morals* (Oxford, Oxford University Press, 2002) 133.

[44] I Kant, *The Metaphysics of Morals* (M Gregor (trans), Cambridge, Cambridge University Press, 1996, first published in 1797) 48 [6:259]. For an alternative translation see I Kant, *The Philosophy of Law: an Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (W Hastie (trans), Edinburgh, Clark, 1887) 84.

[45] See below 164–75 for further discussion.

[46] Waldron, above n 43, at 1557.

will act and that what we have rightfully claimed is conclusively ours. As such, it represents 'a collective general (*common*) and powerful will, that can provide everyone this assurance. But the condition of being under a general external (i.e., public) lawgiving accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours'.[47] This conception of the omnilateral will is considered in Kant's description of a court. He says '[t]he moral person that administers justice is a *court* (*forum*) and its administration of justice is a *judgment* . . . So the question here is not merely what is *right in itself*, that is, how every human being has to judge about it on his own, but what is right before a court, that is, what is laid down as right'.[48]

This can be plausibly considered a version of the AT. The idea just mentioned that law unifies political judgment by establishing a public standard of right is described by the limited domain thesis. This domain is defined by the sum of the public standards. The sources thesis is reflected when Kant claims, in the foregoing quotation, that such laws are identified by what is 'laid down as right' rather than relying upon consistency with some underlying principle of morality. Allen Wood argues that, for Kant, there is no moral or prudential incentive for complying with laws.[49] Rather: '[i]t requires only a system of external legislation, backed by coercive sanctions sufficient to guarantee that [legal] rights will not be infringed'.[50] The moral obligations we owe each other get us into law, but law itself is autonomous from moral reasoning.

That the law is pre-emptive is expressed in Kant's infamous claim that there is no right to resist the sovereign. Kant says: '[t]he reason a people has a duty to put up with even what is held to be an unbearable abuse of supreme authority is that its resistance to the highest legislation can never be regarded as other than contrary to law, and indeed as abolishing the entire legal constitution'.[51] This implies that unilateral judgments as to the quality of law-making cannot undermine the binding nature of the law. As with Hobbes, such unilateral judgments undermine the whole reason for having the state in the first place. Waldron says: '[f]or even assuming that the objector's dissent is conscientious and is based on the most impeccable argumentation, it is still tantamount to turning his back on the idea of our *sharing* a view about right or justice and implementing it in the name of the community'.[52] It would seem, therefore, that subjective or unilateral

[47] Kant, *The Metaphysics of Morals*, above n 44, at 45 [6:256].

[48] *Ibid* at 78 [6:297].

[49] A Wood, 'The Final Form of Kant's Practical Philosophy' in M Timmons (ed), *Kant's Metaphysics of Morals* (Oxford, Oxford University Press, 2002) ch 1. For an opposing view, see O Höffe, *Kant's Cosmopolitan Theory of Law and Peace* (A Newton (trans), Cambridge, Cambridge University Press, 2006, first published in 2001) at 11.

[50] Wood, above n 49, at 8.

[51] Kant, *The Metaphysics of Morals*, above n 44, at 96–7 [6:320].

[52] Waldron, above n 43, at 1564.

arguments can never trump the omnilateral judgment of the sovereign and it is in this sense that Kant's legal theory reflects the pre-emptive thesis. Waldron puts it this way: 'law must be such that its content and validity can be determined without reproducing the disagreements about rights and justice that it is law's function to supersede';[53] or '[t]he task of the legislator is to put to an end to this conflict by replacing individual judgments with the authoritative determinations of positive law'.[54]

It should be noted that a very similar argument to the one just presented is employed by Kant to ground his conception of international law. The key differences are that (i) the state of nature in international relations is often characterised by *violent conflict* arising from unilateral judgments by states; and (ii) Kant is equivocal as to whether a system of international public right is required to solve this problem. Regarding (i) he argues that '[i]t is *redundant* . . . to speak of an unjust enemy in a state of nature; for a state of nature is itself a condition of injustice'.[55] The state of nature is unjust because '[i]n the state of nature among states, the *right to go to war* (engage in hostilities) is the way in which a state is permitted to prosecute its right against another state, namely by its own *force*, when it believes it has been wronged by the other state; for this cannot be done in the state of nature by a lawsuit (the only means by which disputes are settled in a rightful condition)'.[56] Kant makes a similar point in *Perpetual Peace*: 'The concept of the right of nations as a right to go to war is meaningless (for it would then be the right to determine the right not by independent, universally valid laws that restrict the freedom of everyone, but by one-sided maxims backed by force)'.[57] In Chapter 7, I argue that this difference should not be overstated but it is the case that actual physical conflict is emphasised more in his work on international law.

With regard to (ii), he runs a similar argument to that just offered for the law and the state, with one important qualification that there should be no universal or global state. He is highly equivocal on what might govern international relations other than a global state, but one example he gives is of a federation of states.[58] Kant writes:[59]

> (1) states, considered in external relation to one another, are (like lawless savages) by nature in a non-rightful condition. (2) This non-rightful condition is a *condition* of war (of the right of the stronger), even if it is not a condition of actual war and actual attacks being constantly made (hostilities). Although no state is

[53] Waldron, above n 43, at 1540.
[54] *Ibid* at 1545.
[55] Kant, *The Metaphysics of Morals*, above n 44, at 119 [6:350].
[56] *Ibid* at 116 [6:346].
[57] I Kant, 'To Perpetual Peace: a Philosophical Sketch' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992, first published 1795) 117 [8:356–7].
[58] See below 237–39.
[59] Kant, *The Metaphysics of Morals*, above n 44, at 114 [6:344].

> wronged by another in this condition . . . this condition is in itself still wrong in the highest degree, and states neighboring upon one another are under obligation to leave it. (3) A league of nations in accordance with the idea of an original social contract is necessary . . . (4) This alliance must, however, involve no sovereign authority (as in a civil constitution), but only an *association* (federation).

Kant also claims that the function of 'the right of nations', or international law, must be analogous to 'a universal nation'[60] or 'a universal cosmopolitan state'.[61] Even though Kant's view is highly equivocal on this point (as will be seen in Chapter 8) it is plausible to infer that the international legal order must adopt the features of the AT, even though institutionally it need not resemble state legal orders in every way.

Oppenheim's Version of the Autonomy Thesis

Oppenheim is a positivist international lawyer who adopts a version of the AT. Positivist international lawyers describe international law as having three features: consent as the source of international legal obligations, state sovereignty, and political and ethical neutrality. The characteristics of sovereign equality and consent as a source of international legal obligation do not automatically or obviously square with the more general conception of legal positivism considered in this section. For instance, the idea of sovereign equality implies a thin conception of procedural justice which moves it some distance from legal positivism.[62] It is, however, the idea that states are bound by their consent, as a non-evaluative fact and social source, and not because the rule is reasonable or otherwise just, which connects this view with the central claims of legal positivism.

Carty thinks that Oppenheim 'was not a theoretician but merely the humblest scribbler of student manuals'.[63] However, the view that Oppenheim is best seen as a normative positivist has been discussed in a recent article by Benedict Kingsbury. From this, it can be shown that Oppenheim's substantive conclusions are consistent with the AT. This re-interpretation might, as Kingsbury freely admits, be 'attributing too much' theoretical weight to Oppenheim's writings, simply because of the

[60] Kant, above n 57, at 133 [8:379].

[61] I Kant, 'Idea for a Universal History with a Cosmopolitan Intent' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992, first published 1784) 38 [8:28].

[62] L Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *American Journal of International Law* 313, 347.

[63] A Carty, 'Why Theory? The Implications for International Law Teaching' in *Theory and International Law: an Introduction* (London, British Institute of International and Comparative Law, 1991) 80.

genuine scarcity of theoretical discussion in the latter's work.[64] But it is fairly clear that Oppenheim's conception of international law is a (or is at least a proto-) normative positivist position.[65]

Kingsbury tells us that Oppenheim's 'legal positivism was normatively justified as being the best conception of law for the realization of higher normative goals relating to peace, order, certain forms of justice, and the legal control of violence'.[66] So, to serve these 'certain ends outside itself'[67] international law must adopt certain positivist institutional characteristics. These characteristics constitute 'a minimal architecture necessary to an international order'[68] which fleshes out into (i) the principle of sovereign equality, and (ii) consent as the source of international legal obligation. Oppenheim considers that international law must adopt positivism in order to achieve the ends of global order. As such, this is a 'first-order dispute as to which concept of international law should be accepted'.[69]

The specific features of the AT can be found in Oppenheim's position. The limited domain thesis is reflected in Kingsbury's claim that, for Oppenheim, the 'need for authoritative articulation of international legal rules necessitated building institutions capable of determining a legal rule even where there existed disagreement about the relevant principles of justice'.[70] This requires a prototype pre-emptive thesis; Kingsbury argues that for Oppenheim 'judges must decide according to the law, not on extraneous moral or political grounds'.[71] This is well put by Oppenheim when he writes 'our science will not succeed . . . unless all authors . . . make an effort to keep in the background their individual ideas concerning politics, morality, humanity and justice'.[72] It also requires the sources thesis:

[64] B Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13 *European Journal of International Law* 401, 423.

[65] For interpretations of Oppenheim which focus on different aspects of his approach to international law see A Perreau-Saussine, 'Three Ways of Writing a Treatise on Public International Law: Textbooks and the Nature of Customary International Law' in A Perreau-Saussine and JB Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge, Cambridge University Press, 2007) 228, 244–52; M Reisman, 'Lassa Oppenheim's Nine Lives' (1994) 19 *Yale Journal of International Law* 255; M Janis, 'The New *Oppenheim* and its Theory of International Law' (1996) 16 *Oxford Journal of Legal Studies* 330; and M Schmoeckel, 'The Internationalist as a Scientist and Herald: Lassa Oppenheim' (2000) 11 *European Journal of International Law* 699.

[66] Kingsbury, above n 64, at 403.

[67] Oppenheim, above n 62, at 314.

[68] Kingsbury, above n 64, at 407.

[69] Kingsbury, above n 64, at 422. This uses the word first-order in the same way Dworkin uses it: that is, as a normative position accepted as justified by those engaged in the practice of international law—that is, from the internal perspective. See R Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1 at 1–3. See also R Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy and Public Affairs* 87.

[70] Kingsbury, above n 64, at 424.

[71] *Ibid* at 426.

[72] *Ibid* at 427; Oppenheim, above n 62, at 355.

'if Rule X met a relatively stringent sources test—it satisfied the requirements for custom binding the states concerned, or was embodied in a binding and applicable treaty—it was a rule of international law, and if it did not meet these requirements, it was not'.[73] Without this separation the function of international law will be frustrated: 'How is it impossible to offer a body of firm, distinct, and clear-cut rules of law, if rules of morality and of religion, if political aspirations and chimerical schemes for a better future, are constantly mixed up with what is really law?'.[74] While this presupposes a plurilateral rather than omnilateral conception of the sources of international law, the attention to factual and non-evaluative criteria for determining legal validity is clear and reinforces the claim that Oppenheim is best interpreted as advocating a form of normative positivism. Therefore, international law is not law because it passes a test of reasonableness or rationality: it is law because it has a social source which is found in the consent of states.

Weil's Version of the Autonomy Thesis

A final example of the AT is given in Prosper Weil's widely discussed paper on the function of international law.[75] He claims that international law is a system of norms which is functionally orientated towards the twin ends of co-operation and co-existence. As such, Weil, according to Tasioulas, 'may be viewed as an international analogue to the kind of normative positivism advocated by philosophers such as Hobbes, Hume and Bentham in the municipal sphere'.[76]

This is clearly the case. To explain, Weil's positivistic conception of international law centres on three features: voluntarism or consent, moral and political neutrality, and positivism which means *lex lata* rather than *lex ferenda*. By adopting these features, it is able to achieve the ends or function of international law. These three features reflect the AT. So, it can be said that international law should be based upon a limited domain of legal rules which are generated via state consent. This is a non-evaluative and social source of law. It also requires the exclusion of substantive moral tests and *lex ferenda*. Moreover, the advent of *jus cogens* and obligations

[73] Kingsbury, above n 64, at 433 and Oppenheim, above n 62, at 334.

[74] *Ibid* at 327.

[75] P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413; J Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *Oxford Journal of Legal Studies* 85; U Fastenrath, 'Relative Normativity in International Law' (1993) 4 *European Journal of International Law* 305; J Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 *European Journal of International law* 627. The argument set out in this chapter bears some resemblance to that offered by Tasioulas.

[76] Tasioulas, above n 75, at 89.

erga omnes undermines the efficiency of international law because it blurs the 'normativity threshold'.[77] This means that it introduces a substantive moral test of legal validity which can 'destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose'.[78] This implies that states should not act upon such norms when they conflict with those legal obligations which are generated by state consent. This can be interpreted as a version of the pre-emptive thesis. By adopting this concept of international law, state X is not able to claim that a norm that it had consented to is not binding on it because it considers it (or it is widely considered to be) substantively unjust. State Y, then, can have an expectation that state X will comply with its obligations, thus rendering international relations relatively stable. For these reasons, it is plausible to suggest that Weil adopts a version of the AT as his concept of international law. It is a version of normative positivism because this theory rests on the claim that there must be a separation of international law and morality to facilitate social co-operation in international relations.

FAILURE OF THE AUTONOMY THESIS

I will advance two criticisms of the AT which rest upon the arguments made by Postema in his paper referred to at the beginning of the previous section and Simmonds in a paper entitled 'Between Positivism and Idealism'. In Simmonds' paper, he attacks a version of positivism, which is consistent with the AT, 'which emphasised the need for a body of posited, ascertainable rules by which conduct might be co-ordinated and regulated'. He continues: '[w]hether by coercion or otherwise, such rules were to be made binding on individuals, and in this way a shared basis for social order might be provided even in a world racked by disagreement'.[79] Both papers come to similar conclusions as to the viability of the separation of law from considerations of practical reasonableness which lies at the heart of the positivist version of the AT. Postema's view is that the AT fails because it is incapable of achieving its purpose if it adopts the isolation strategy which is at its heart. Rather, this purpose can only be achieved by law rejecting the isolation strategy. His argument, then, is a *reductio ad absurdum* of the claim that law is only able to co-ordinate social

[77] Weil, above n 75, at 415.

[78] *Ibid* at 423.

[79] N Simmonds, 'Between Positivism and Idealism' (1991) 50 *Cambridge Law Journal* 308, 309. It should be noted that Simmonds has recently published a book-length defence of a version of legal idealism entitled *Law as a Moral Idea* (Oxford, Oxford University Press, 2007). I do not think that there is anything in his book which undermines the central argument presented here.

action if it is isolated from considerations of practical reasonableness. Similarly, Simmonds thinks that the isolation of law from considerations of practical reasonableness, which are held generally in the community it governs, entails that it cannot fulfil its function. These arguments, in my view, can be equally extended to normative positivist accounts of international law.

Adjudication and Function

It has been shown that the structural elements of the AT are justified to the extent that they can resolve disputes, stabilise social action, achieve peace, and so on. But it is obvious that within a society regulated by law there is likely to be conflict as to the content of norms found in the limited domain for the same reasons as there is over moral norms. This is because, in all cases, norms, whether legal or moral, underspecify what is to be done in a particular circumstance.[80] Neither sort of norm can be true algorithms of how we ought to act in all circumstances.

If there is more than one possible meaning of a legal norm in a particular circumstance, an interpretation must be made which will specify what we ought to do, and therefore alter (narrow or expand) the meaning of the legal norm under consideration. Without an institutionalised system of interpretation being part of the legal order that which is required of those subject to the norm will remain unclear and therefore the ability of law to fulfil the function ascribed to it by the AT will be undermined. The same problem arises where two or more norms require the subject to undertake different actions in the same circumstances. Canonical formulations of the norm cannot solve these norm collisions unless a normative hierarchy is specifically written into its formulation. Without this stated normative hierarchy, an authoritative interpretation must be made about which norm is to apply. The same problem equally arises when there is no source-based norm to determine what is the case. Here, there is a need to fill-in gaps in the law and this must be done by someone. Each of these circumstances is one where decisions must be made about what the law requires and such a decision must be made if law is to fulfil its function according to the AT. Normally, this decision falls to adjudicative institutions. This is as equally true, but is a significantly more radical proposal, for versions of the AT which are used to provide a normative rationale for the international legal order. It is more radical simply because adjudicative institutions are

[80] See A Perreau-Saussine and J Murphy, 'The Character of Customary Law: an Introduction' in A Perreau-Saussine and J Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge, Cambridge University Press, 2007) 5 (discussing an unpublished paper by Onora O'Neill).

generally understood as being ad hoc and consensual by international lawyers.

Postema's point is that '[s]ince, in such cases, by hypothesis, the existing legal considerations are silent, indeterminate, or in conflict, the courts' setting of them is determined not by appeal to the law, but by appeal to considerations outside its limited domain'.[81] Simmonds says much the same. He argues that judges must apply legal norms because of 'the need for predictability and the requirement that judges should be bound by rules published and ascertainable in advance'.[82] But this indicates that 'the judge's apparent freedom to tinker with the rules on each occasion that they are applied' is a problem.[83] Therefore:[84]

> the positivist is forced to treat much that would ordinarily be seen as interpretation and application of rules as being an instance of rule-modification. The attempt to identify rules with black-letter texts thus makes the rules seem increasingly loosely related to the occasions when we might seek to rely upon them.

Judges, then, have a simple choice: they must remain silent when legal norms are silent or they must engage in rule-modification and rule-creation through the process of interpretation, gap-filling and balancing the normative requirements of conflicting norms. To do the former means that disputes over controversial matters will not be able to be resolved. This merely replicates the problems which law, for the AT, is functionally designed to solve. To do the latter means that judges must resort to reasons outside of the limited domain of law when making judgments as to what the law requires. The problem then arises that the content of legal norms is not wholly determining what is the case, and consequently, law becomes less predictable as soon as it is applied.[85]

This causes two problems for an attempt to fulfil the function ascribed to law by the AT. First, once the interpretative function of a legal order is acknowledged, it must be non-legal norms which are determining what is legally the case in any particular circumstance. These norms are, by definition, not pre-emptive *in a legal sense* from the perspective of the AT. If they are not pre-emptive in this sense, we might wonder how they are able to make a practical difference to legal subjects and hence co-ordinate

[81] Postema, above n 10, at 93.
[82] Simmonds, above n 79, at 310.
[83] *Ibid*.
[84] *Ibid* at 318–19.
[85] Postema argues 'it rests on the recognition that we seek both to *settle* matters that are in dispute and threaten to disable necessary social co-operation and to *settle them justly*, and on the recognition that these aspirations cannot be radically separated' (above n 10, at 112). Simmonds says: 'My object is simply to suggest that, in a chaos of subjectivity, a shared body of rules . . . require shared interpretations, but shared interpretations could not emerge in a chaos of subjectivity. When the legal positivist solution to the problem of co-existence in a world of disagreement seems most *necessary*, it turns out to be *impossible*' (above n 79, at 314).

behaviour in accordance with the law. Secondly, the whole point of having a limited domain of law is so that individuals know what the law requires of them. If reasons outside the limited domain are being employed, individuals cannot have recourse to the limited domain to ascertain what they are required to do, or the standards of conduct that they might expect from others. The problem is one of '*uncertainty* of mutual identification of the practical rules that are supposed to govern our social interaction'.[86]

Legitimacy as a General Condition for the Success of the Autonomy Thesis

The AT also fails if legal norms are not legitimate. Postema tells us that '[t]he isolation strategy seeks to overcome obstacles to social co-operation by influencing *the practical reasoning* and deliberation of people through issuing authoritative directives with pre-emptive force'.[87] But crucially '[t]hose directives give pre-emptive practical guidance only when people to whom they are addressed *regard* them as pre-emptive and so *accord* them that force in their practical reasoning'.[88] Therefore, in order for law to work, it is not simply enough for the law to purport, or for legal officials to claim, that it is authoritative. Rather, it must actually be considered authoritative from the point of view of legal subjects if it is to regulate their behaviour. Therefore, 'the isolation strategy can work only if legal directives are *widely regarded* as pre-emptive'.[89]

What reasons might rational agents have for considering the law pre-emptive? One is that 'it is clear to most people that it is more important that they co-ordinate their interaction around a common scheme . . . even if people are not indifferent among the available arrangements'.[90] So, whatever their subjective view might be about the particular institutional arrangements offered by a legal order, legal subjects realise that it is rationally preferable to have law, and to follow it, than otherwise. This is exactly the reason for compliance offered by all the versions of the AT considered in the previous section.

But the problem here is that 'it is not clear that according law pre-emptive status is *necessary* in such cases'.[91] This is crucial. Law understood in terms of the AT purports to *offer* good reasons for compliance with the

[86] Postema, above n 10, at 97. This is similar to Dworkin's argument against positivism when applied to judicial reasoning. See R Dworkin, *Law's Empire* (Oxford, Hart Publishing, 2004, first published in 1986) ch 4.

[87] Postema, above n 10, at 104.

[88] *Ibid*.

[89] *Ibid*.

[90] *Ibid* at 105.

[91] *Ibid*.

law, but do these reasons necessarily follow for every individual subject to it? Postema thinks that they do not *necessarily* secure the pre-emptive force of law. This is because the reasons offered by the AT, which are ultimately based upon the value to all of a stable system of co-ordination, are 'hostages to contingent fortune'.[92] This is because if the law is to work, it must be pre-emptive vis-à-vis other reasons for acting. Therefore, the reasons for compliance offered by the AT must, in principle, require that in some circumstances legal subjects follow what, in a subjective, societal or transcendental sense, might be considered immoral or imprudent rules. This places a serious burden on legal officials offering reasons for compliance. After all, it certainly is prima facie reasonable for a legal subject to do what is morally required or prudentially rational rather than comply with bigoted, partial or unjust laws. But the AT holds that, however much an individual suffers because of bigoted norms, the need to co-ordinate is a sufficient reason to comply with their immoral or imprudent dictates.

Postema asks us to imagine a situation where there are losers who suffer systematic prejudice by the legal order. He then asks whether the value attached to a system of stable co-operation provided by law is sufficient to ground the pre-emptive thesis in all circumstances. He thinks that it does not, and says for these losers, 'the implementation and enforcement of the law's solutions may appear worse than having no solution at all'.[93] This might or might not be the case, but it cannot be ruled out as being a rational response by the losers in an unjust legal order to which they are subjected. Furthermore, for such losers, it becomes increasingly difficult to realise that reasons of co-ordination are pre-emptive reasons for either themselves or for others: '[t]he moral or political conflict may blind them to opportunities for co-operation still open to them'.[94] Finally, others who see the injustice will presume that the law will not be pre-emptive for those who suffer it and may suspect that they will not follow unjust norms. If others think that the losers will not treat the law as pre-emptive, the reasons for others to follow the law are weakened as they cannot rationally suppose that others will do the same. The AT, then, may well fail simply because its norms are illegitimate.

The Autonomy Thesis and International Law

On the basis of the first argument concerning the isolation of law, those who advocate the AT in international law face a serious and preliminary problem. Neither Weil or Oppenheim think that compulsory authoritative

[92] Postema, above n 10, at 105.
[93] *Ibid* at 106.
[94] *Ibid*.

dispute settlement is a *necessary* feature of an international legal order modelled on the AT. Instead they argue that ad hoc arrangements such as diplomacy, arbitration and, occasionally, authoritative dispute settlement, are generally sufficient to establish international legal order.[95] It is straightforwardly the case that these adjudicative arrangements are problematic for the AT simply because there is no guarantee that disputes will be solved at all. Furthermore, in order to resolve a dispute, when a court must interpret a norm, balance competing norms, or deal with a *non-liquet*, it must use, for the reasons given by Postema and Simmonds, reasons outside the limited domain of legal norms.[96] Seen this way, to simply claim that a dispute which contains a *non liquet* is a political issue is tantamount to a failure of law according to the AT. It is difficult to see how, for this reason, such an approach to dispute settlement, with nothing else, fulfils the requirements of the AT.

Turning to the argument against the AT concerning legitimacy in the context of international legal order, it is necessary to focus on the role of consent in the formation of international legal norms. To consent to be bound to a norm is normally a sufficient condition for it to be considered legally obligatory and to fall within the limited domain of the international legal order. To see how the argument concerning legitimacy works, it is useful to look at two paradigm examples of international law. First, it is well-known that foreign investment and trade between poor but resource rich states and foreign companies has been conducted on the basis of very unfair agreements. This is primarily because these agreements do not serve the interests of the local population and do not fairly reflect the worth of the resources on the open market. The reason for this is often due to the high levels of corruption of the government which claims to be competent to deal with foreign companies and enter into agreements with them governed by international law. Foreign companies are often complicit in committing this injustice. International law regarding foreign investment has traditionally been stacked in favour of the foreign company in that when a less corrupt government follows the corrupt government, the extant, and often unfair and onerous, contractual obligations remain binding on the state.[97] Now, from the perspective of the developing state, it might be

[95] See, eg, Oppenheim, above n 62, at 322–3, 341-–4, 349–535. This said, Oppenheim developed a clear approach as to how stronger adjudicative mechanisms, with clear procedures and interpretative canons, should arise. He also claimed that international law would only develop to the extent that the 'juristic school' prevails over the 'diplomatic school'. See Kingsbury, above n 64, at 407.

[96] On the concept of a *non liquet* in international law see R Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 *International and Comparative Law Quarterly* 58 and N Tsagourias, 'The Constitutional Role of General Principles of Law in International and European Jurisprudence' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (Cambridge, Cambridge University Press, 2007) 71–106.

[97] *Tinoco Arbitration (Costa Rica v Great Britain)* (1923) 1 RIAA 369.

considered that such international laws are extremely unfair, and that the risk of dealing with corrupt regimes should be borne more fully by the investing foreign company. But in this circumstance, while the developing state may, for all kinds of reasons, continue to comply with the law, it sometimes may not. In fact, recent history with regard to changes of government in the Middle East and Africa tells us that developing states may well act on other, non-legal, reasons, simply because the international law that governs them is perceived to be unjust.[98] Postema's view that 'the implementation and enforcement of the law's solutions may appear worse than having no solution at all' seems an appropriate description of the attitudes of newly formed governments attempting to use the natural resources they control for the benefit of the people they govern. But also, these laws may be considered by other, unaffected, states to be unjust and they might consider it unlikely that states affected by such laws will comply with them. This undermines the functionality of international law according to the AT.

A more controversial example is that, in light of the perceived threat of attack by terrorists and 'rogue states', states such as the United States and Israel have gone outside of the traditional confines of international laws regulating self-defence as they perceive that to follow such rules is contrary to their vital state interests. Thus, we see, in these cases an attempt to justify military action on the basis of a doctrine of pre-emptive self-defence. The implications of their failure to act on legal rules which do not extend self-defence this far, and the resort by such states to reasons outside the limited domain of law, means that other states will not be able to predict how these states will act in international relations, thus undermining the capacity of law to fulfill its function as set out by the AT.

Notwithstanding the development of the complex network of bilateral investment treaties and specialised tribunals such as the United States-Iran Claims Tribunal, or the recent attempts to reconstitute the Security Council so that it is better able to maintain international peace and security, it is clear that the illegitimacy of legal norms threatens the capacity of the international legal order to achieve its purpose of maintaining the conditions by which states can co-operate and co-exist peacefully. On the basis of the arguments concerning function and legitimacy, the version of the AT as proposed by Weil and Oppenheim does not seem able to fulfil the functions which they associate with international legal order.[99]

To return to the central theme of this book, it has already been argued that, according to the AT, consent, sovereign equality and neutrality are elements of the international legal order to the extent that they are instru-

[98] See, eg, *Amoco International Finance Corp v Iran (US v Iran)* (1987) 15 Iran-USCTR 189.

[99] Le Fur argued for this point with regard to international law in the 1930s. See M Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge, Cambridge University Press, 2002) 321.

mentally necessary features of it as a purposive normative practice. If this is correct, then when we observe in paradigm cases these features we can genuinely say that they are features of the international legal order. This explains, for instance, why any particular treaty is an international legal norm, why the Permanent Court of International Justice was right in the *'Lotus' Case*[100] to consider that consent is the basis upon which norms can be legally valid. It can also be employed, as it is by Weil, to dismiss claims that international law is based upon a normative hierarchy or fundamental and universal norms like *jus cogens*. However, the foregoing argument shows that criteria of legitimacy, as well as a general system of norm interpretation (ie arbitration or judicial tribunals), are necessary if international law modelled on the AT is to succeed. This is why arguments like Weil's, as well as other forms of the AT, fail. The problem then arises concerning what might be meant by legitimacy in this context. An exploration of this issue can be used to explain how an interpretation of norms which relies on sources outside of the limited domain of legal norms might be justified.

Public Practical Reasons

To begin with, it is useful initially to consider Postema's own view. He asks whether the law would work better if it was integrated into a background of relatively stable public practical reasons which constitute a general normative framework of widely held reasons for action. He thinks that it would. To explain, public practical reasons are a relatively stable set of important moral and political values or concerns, held within a community, against which social action can be deemed to be to be justified. With regard to the first argument concerning adjudication, if judges, when venturing beyond the limited domain of law, were able to justify their actions against such standards it may serve not only to legitimise their decisions but also to ensure that legal subjects know what kinds of reasons the judge will apply. The predictability of the law is thus sustained simply because judicial reasons are integrated into a general interpretative framework of *justified* and *public* reasons: legal subjects can predict what kind of reasons are to be employed and can adjust their behaviour accordingly. With regard to the second argument concerning the legitimacy of law, if norms in the limited domain were justified against these public standards, law would, at least roughly, track justice.[101] This is more likely to engender compliance and, at least, the presumption that subjects will comply with legal norms. For both of these reasons, then, a legal order that treats people fairly and justly is more likely to stabilise expectations than one that does not.

[100] *'Lotus' Case*, Judgment no 9 (1927) PCIJ Series C.
[101] Postema, above n 10, at 109.

Simmonds' solution to the sorts of problems just outlined is very similar to Postema's. He thinks that to solve the problems associated with the AT we need to invert the top-down model of law which is at its heart. He thinks that the problem associated with the interpretation of legal norms can be solved if subjects are likely to come to the same conclusion as judges about how legal rules might be interpreted. He says, though, that such '[s]hared interpretations would only be arrived at where people began with a measure of convergence in judgment, and regularity in desire. Shared rules can only be the product of a deeper background of shared understanding'.[102] Furthermore, '[i]t seems hard to deny that a great deal of social life is structured by informal rules and shared normative expectations. A great deal of law is an attempt to stabilise such rules and to resolve ambiguities within them'.[103] He sees, then, a symbiotic relationship between legal norms and the broader normative framework held by the community governed by it. He writes:[104]

> [o]rder is valuable in so far as it enables us to form reliable expectations about the conduct of others, and thereby enables us to pursue the medium and long term projects in which we invest our hopes and our labour. The best way for the law to encourage a stable system of expectations is by seeking to confirm and enforce those informal rules and understandings that characterise social life apart from law. In the absence of law, such rules and understandings would be considerably less reliable, partly because of problems of enforcement, and partly because of the scope for conflict created by ambivalence and ambiguity in informal rules and relations. Law embodies an authoritative interpretation of social relationships and in that way enters into our understanding of social life. Yet, at the same time, our understanding of social life makes a vital contribution to the stability and ascertainability of law.

Therefore, both Postema and Simmonds think that law must be integrated into the shared or public practical reasons for action found in the community governed by it. It is not controversial to claim that such reasons are associated with the community's sense of justice. A stable order is achieved by this strategy of integration with wider considerations of justice rather than a strategy of isolation.

On the basis of this argument, the success of the international legal order described by the AT requires that disputes over the interpretation of legal norms must be resolved by authoritative institutions in a way that is consistent with the underlying public practical reasons. These are bound up with the most important interests of states and those whom such states govern both of which can be said to be an expression of the international community's sense of justice.[105] While the AT need not imply some kind

[102] Simmonds, above n 79, at 318.
[103] *Ibid* at 319.
[104] *Ibid* at 321–2.
[105] See Tasioulas, above n 75.

of global state, it does seem to imply some form of compulsory dispute settlement.[106] Furthermore, disputes must be settled in a way that is consistent with the international community's sense of justice if law is to achieve its function according to the AT. More generally, it would also appear that the international legal order modelled on the AT can only work if the content of legal norms themselves is consistent with justice. Without this, legal reasons for compliance are potentially diminished.

Practical Reasonableness and the Law

This argument points towards a version of the AT that reflects all its features except for the isolation strategy which is at its heart. Therefore, law should adopt the sources thesis, pre-emptive thesis and limited domain thesis which establish a set of distinctively legal norms but the content of such norms must track generally-held standards of justice, rightness or fairness. Such standards of fairness and justice are also employed by legal officials when considering those disputes where the limited domain of legal norms affords no clear answer. This can be called an *integrated* version of the AT (or integrated-AT) and law must be modelled on this thesis if social stability is to be achieved.

The public practical reasons or shared understandings which have been alluded to both seem to presuppose a relatively stable set of important moral and political values which are commonly held within a community. If there is no such consensus of values a serious problem arises. Postema writes:[107]

> as modern Western societies have become increasingly pluralistic, these problems of principle may have become more serious and more difficult to solve. Our societies embrace a number of different communities whose histories and practices yield fundamentally different and potentially deeply conflicting moral points of view. While any one such moral point of view might provide a sufficiently rich and stable set of principles for social interaction within a portion of the society, no single one of them is widely accepted enough to structure interaction in society as a whole.

And we should note that it is to this exact problem of moral and political pluralism that the AT, in both its general form and as a model for the international legal order, is designed to respond to according to its proponents.

Postema says: 'It may not be possible to construct a framework for common deliberation and public justification in societies deeply divided about

[106] This argument is developed in Chapter 9.

[107] Postema, above n 10, at 91; see P Capps and H P Olsen, 'Legal Autonomy and Reflexive Rationality in Complex Societies' (2002) 11 *Social and Legal Studies* 547. See also, L. Fuller, 'The Case Against Freedom' in K Winston (ed), *The Principles of Social Order: Selected Essays of Lon Fuller* (Oxford, Hart Publishing, 2001, first published in 1981).

matters of fundamental value and principle.'[108] If this deep-seated value-pluralism is the case, it would seem that law must be, to all intents and purposes, inert. But rather than accept this sceptical view, he tentatively suggests that Dworkin's attempt to ground adjudication in moral principles of profound moral import and which are deeply embedded in the legal order might be a solution. But he writes that 'the jury is still out regarding the adequacy of this approach'.[109]

Simmonds rejects Dworkin's approach because he thinks that 'a firm recognition that any search for the single moral vision, value, or rationale that underpins the law is itself an objectionable form of legal idealism'.[110] Rather, he sees as foundational 'the constitutive role of shared understandings, expectations, and concerns' which are deeply embedded within social systems and that claims about the extent of moral pluralism are overstated. At one point he describes his view of the symbiosis of law and community values as follows: the 'community is the matrix of interpretation, not its result; and if social life did not already exhibit some stable expectations and shared understandings, law could not provide them'.[111] So, the fact that we have legal orders means that the charge of moral pluralism is limited. However, he then goes on to say that once law attempts to go beyond, rather than merely stabilise and reflect, such shared-understandings, laws 'lose . . . [their] meaning' or become 'empty'. This is reflected in the 'final triumph of law over informal social relations [and] is the ironic metamorphosis of law into bureaucracy'.[112]

The problem with Simmonds' claim is that his idea of shared-understandings might entail a legal order which is systemically unjust. A statute might, for instance, deprive women of being considered persons who can hold public office and this might be justified according to widely held public practical reasons about the status of women. In this circumstance, so long as some people think this interpretation unjust, the legal order is thrown back to the problems of legitimacy and stability identified by Postema. Therefore, it would seem that 'shared understandings' must take on a stronger meaning. It is at this point that Simmonds' charge against Dworkin seems somewhat unfair: Dworkin's principles can plausibly be characterised as fundamental and deeply embedded principles of civil association rather than being abstract and disconnected from the legal enterprise.[113] More radically, it might be exactly what 'shared understandings' are for a community in which each has freedom from the

[108] Postema, above n 10, at 112.
[109] *Ibid*.
[110] Simmonds, above n 79, at 329.
[111] *Ibid* at 326.
[112] *Ibid* at 320.
[113] See R Dworkin, 'Hart's Postscript and the Character of Political Philosophy', above n 69.

physical and ideological domination of powerful groups. It should be noted that in later works, Simmonds does indeed move much closer to an idealist position which is consistent with this more radical idea.[114] However, to press this point found in his earlier work does indicate that there could be strong substantive limits to what could constitute 'shared understandings' within a community.

The success of a legal order in stabilising expectations relies upon some conception of public practical reasons upon which law and legal institutions can rest in light of moral pluralism. Without this, law, instrumentally, cannot regulate social interaction and, as such, becomes inert. But what are these public practical reasons? Postema refers to Dworkin's idea of principles but other than this, he is not forthcoming with ideas. To speculate, we might say that such reasons are justified to the extent that they reflect fundamental principles of public or civil association, and these, we might presume, cash out into a series of civil rights. Equally, the idea that such reasons are public, rather than private, suggests that they should stand a test of publicity. Such reasons are those that all members of a community can accept as reasonable. Private reasons are ones which cannot survive this test because they are reasonable to the individual holding them in a subjective sense only.

Three strategies outlined in the last chapter can be employed to develop this solution. First, Hobbes, who dealt directly with this problem, argued for a conception of prudential reason which all agents can rationally accept regardless of their subjective purposes and which could be employed to justify legal norms. That is, law protects the long-term prudential interests of members of the community governed by it. Secondly, Kant, at least in part, attempted to show that the categorical imperative is binding because a rational agent *can will*, not because he or she wills a *particular end*. This indicates that the idea of public practical reasons could come from our nature as rational agents and not because we have particular subjective (or private) interests. Thirdly, Gewirth combines these approaches in defending the existence of human rights. Each of these accounts of practical reasonableness are intended to provide apodictic reasons why rational agents must accept certain principles as binding on them. This is not, then, some 'objectionable form of legal idealism'. Rather, it is an attempt to provide principles of practical reasonableness which *transcend* moral pluralism within communities. These are principles which every agent must accept regardless of their subjective viewpoints and interests. Laws and judicial decisions which are competent attempts in good faith to apply such reasons cannot, rationally, be rejected as unreasonable simply because they are based upon principles which require respect for our freedom from domination at the hands of

[114] Simmonds, *Law as a Moral Idea*, above n 80.

others.[115] In conclusion, then, it would seem that the AT needs an argument for practical reasonableness to succeed. While law can be considered an autonomous legal order in the sense of being a set of norms which exist within a limited domain, it cannot be fundamentally disconnected from underlying considerations of practical reasonableness if it is to succeed in its task of providing the conditions for co-existence and co-operation. By building on the arguments advanced by Hobbes and Kant, Gewirth's argument for human dignity fulfils this exact role. Therefore, the integrated Autonomy Thesis, I suggest, must be rooted in a broad concern for human dignity.

For the same reasons, it follows that international legal order cannot establish the conditions by which states can co-operate and co-exist if it is disconnected from practical reasonableness. More strongly, the idea of the integrated-AT, where law is described by the sources thesis, pre-emption thesis and the limited domain thesis, but which is integrated with human dignity, tells us something about the institutional features, as well as the substantive orientation, of international law. Putting flesh on the bare bones of this claim is considered in the rest of this book.

CONCLUSION

The AT is a theory about law which characterises it as a purposive normative practice which solves the problems of moral conflict by establishing the conditions by which members of a community can co-operate. However, the argument developed in this chapter has shown that this cannot imply that the content of legal norms is disconnected from a broader conception of practical reasonableness. Instead, the austere AT must be recast as a theory of law which recognises the need for a limited domain of legal rules with which to stabilise social relations, but that this body of norms must be integrated with general moral values associated with human dignity. This is the integrated-AT model of law and is, I argue, the general concept of law. The integrated-AT describes why law is a distinctive form of normative practice, with a specific functional orientation, which is embedded in morality.

Oppenheim and Weil both accept the need for a version of the AT in order to provide a minimum normative architecture which ensures stability in international relations. Weil goes even further and argues that peremptory norms undermine the potential for the AT to operate. The argument presented in this chapter suggests that exactly the reverse must be the case. Norm creation in international law is, on the basis of the

[115] This conclusion, which is close to Rousseau's view of law, will be considered in detail in Chapter 7.

integrated-AT, an attempt to create law which is consistent with basic substantive principles connected to human dignity. *Jus cogens* are norms which have this character and should be interpreted as a positive development in paradigm cases, rather than a source of concern.[116]

The approach set out in Article 53 of the Vienna Convention on the Law of Treaties is a clear example of the concept of international law I want to defend. This is because it demands that norm creation and norm interpretation must take place within a context of fundamental norms. The identification of peremptory norms in Article 53 of this Convention should not then be interpreted as 'super-custom'—which suggests that they are binding merely through very long-standing practice. Rather, they should be seen as foundational to, and necessary for, the aspiration of institutionalising an international legal order which is able to secure a system of stable co-operation in the relations between states. Therefore, in order to achieve co-operation and co-existence in international relations it is necessary to integrate fundamental principles of practical reasonableness within the limited domain of international law instead of rejecting them via a reification of the concept of political and ethical neutrality which lies at the heart of positivist theories of international law.

[116] See Tasioulas, above n 76.

7

Law as a General Concept

THE AUTONOMY THESIS, or AT, purports to be an analysis of law's necessary purpose or function which, in turn, gives rise to an account of its essential features. For the proponents of the AT, law is a purposive enterprise which provides 'a framework of practical reasoning designed to unify public political judgment and co-ordinate social interaction'.[1] It establishes a limited domain of 'publicly accessible norms' which are isolated, or autonomous from, the mass of conflicting principles, interests and values that would otherwise govern our social relations. This is the best way, I think, of capturing the positivist notion of a separation of law from morality: that law is an artificial and autonomous set of norms which pre-empt other forms of practical reasoning, thus establishing the conditions by which social life is possible in complex and pluralistic communities like our own. Therefore, the AT, by identifying the general purpose of law, as well as the instrumentally rational characteristics by which that purpose can be achieved, purports to describe the general concept of law. Whether one is convinced by this account or not, the AT can be thought about in three ways which relate to the various arguments which have been developed in previous chapters of this book.

First, in the context of debates on concept formation in the social sciences in general, the AT is a way of solving the problem identified in the analysis of Weber's method in Chapter 4. Here, it was argued that while Weber is right to prefer an interpretative approach to concept formation, his break from this approach as well as his resort to a form of conceptual analysis when considering general concepts (such as, for example, law or politics) is highly problematic. The AT, because it holds that law has a general or overall purpose or function, provides a way of conceiving of law as a general concept in a way that is consistent with the Weberian interpretative approach. The AT, then, represents an attempt to ground a general concept of law.

Secondly, and more specifically, the AT provides a way of conceiving of law and international law as purposive enterprises, where each attempts to give rise to the conditions by which subjects can co-operate and co-exist, be they individuals or states. The institutional form by which this end

[1] G Postema, 'Law's Autonomy and Public Practical Reason' in R George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford, Clarendon Press, 1996) 79–118 at 80.

can be achieved can vary from legal order to legal order. Thus, the international legal order is argued to have a different, more horizontal, institutional structure when compared to the state legal orders with which we are familiar. More generally, though, our paradigm cases of law (such as state legal orders or the international legal order) are forms of law *because* they are concerned with establishing the conditions by which those subject to the law can co-operate and co-exist and because they exhibit those characteristics which are instrumentally rational in achieving these ends. That our paradigm cases do not reflect this indicates where our normative practices are not-law, are pathological or are irrational.

Thirdly, understood from the perspective of the history of legal philosophy, the AT bears close connection, and unifies, some old and familiar ways of demonstrating why law should take a particular form and why it is obligatory for those subject to it. To give three examples, Hobbes' sovereign, Kant's omnilateral will and Rousseau's general will all express the idea found in the AT that law is an artificial system of autonomous norms which establishes the conditions by which social life can take place. Each explains how our natural moral relationships can and must be replaced or concretised through a system of law. They tell us that in a natural moral community (often called a state of nature) *I* can will and act upon *my* own unilateral judgments about how *I* ought to act and what *I* owe to others. The not-rightfulness of a community in which these forms of judgments exist can only be avoided by establishing an artificial set of legal norms which establish how *we* ought to act and what *each of us* ought to expect from each other. By establishing that a pre-legal community is not-rightful, governance by law can be justified to the extent that it avoids this state of affairs.[2] Furthermore, this sort of argument gives rise to an explanation as to why legal norms normatively pre-empt other forms of practical reasoning and gives the basis for a theory of authority within the framework of the AT. From the methodological perspective set out in the earlier chapters of this book, these sorts of accounts offer to conceptualise law as a practically reasonable normative practice in that they purport to explain why law is significant or meaningful for each of us as rational agents and, in this sense, each advances a general concept of law.

In the previous chapter, the AT was presupposed as a concept of law. In this chapter, I explore the idea just set out; to show how the AT appropriately models law from the viewpoint of practical reasonableness. It aims to ask the question why a practically reasonable person would select the AT to describe the general concept of law. The sort of argument just described,

[2] I deliberately use the term 'not-rightful' in contrast to 'wrongful'. This is because it is not always the case that an individuated action in the state of nature is always morally wrongful in substance. My point is to show that a system of unilateral willing is not-rightful compared to a system of law. See I Kant, *Religion within the Boundaries of Mere Reason* (A Wood (trans), Cambridge, Cambridge University Press, 1998, first published in 1793) 106–7 [6:95–6].

and which can be attributed to Hobbes, Kant and Rousseau (amongst others), demonstrates why any human agent, regardless of their subjective purposes, must will a system of law consistent with the AT. Each contains a justification as to how the transition from a system of natural morality to law is rationally required. It is my argument that if individual human agents are committed to the objective moral standards embodied in the idea of human dignity, they must will a specific version of the AT that is consistent with these standards, which was called the integrated-AT in Chapter 6. This, I argue, constitutes the general concept of law.

I admit that this argument takes us some way from discussion of the concept of international law which is the central focus of this book. It is the case, however, that the argument made in this book so far is that the concept of international law is explicable as a form of law against a general concept of law. Therefore, I beg the reader's indulgence in this chapter with the reassurance that in the remainder of the book I will show exactly how the general concept of law set out here provides a justification for a concept of international law.

THE BARE-AUTONOMY THESIS AND THE INTEGRATED-AUTONOMY THESIS

The AT, as a general concept of law, sets out what specific and concrete examples of legal order all have in common. So it explains that each example of law has a purposive orientation towards establishing the conditions by which individuals or states can co-operate and co-exist and, to this end, must (i) adopt an isolation strategy, and (ii) adopt the features of law described by the limited domain thesis, pre-emption thesis and the sources thesis.[3] From (i), the AT implies that the substantive or procedural values embedded in each example of law can vary. So long as a set of general norms are instantiated (as in (ii)) which solve the community's co-ordination problems, the functional aspiration of law as a normative social practice is satisfied. Issues concerning reasonableness of the content of law, or the way it is made, are matters for each particular community governed by law to determine for themselves or for other branches of practical philosophy to work out. Furthermore, for individual agents to determine their legal obligations against criteria of reasonableness threatens the capacity of law to achieve its function (and this is why (i) is justified).

[3] For a description of these features of law see Ch 6, above 131–32. Briefly, the isolation strategy is that law must be separate from wider moral considerations. Without this isolation, the content of the body of legal norms would often be unclear. The limited domain thesis is that law consists of a distinctive set of general norms. The sources thesis describes the factual criteria by which a norm can be described as a legal norm. The pre-emption thesis is that that law offers reasons for action to legal subjects which purport to override morality.

It is my view that the AT can be interpreted in two ways. The first is to maintain a version of the AT which is characterised by (i) and (ii) and is disconnected from considerations of practical reasonableness. On this argument, not to adopt the isolation strategy undermines the capacity of law to achieve its function. Because this view of the AT lacks any integration with wider concerns of practical reasonableness it will be called the bare-AT. The bare-AT can be distinguished from the integrated-AT which was sketched in Chapter 6. The integrated-AT is a narrower version of the AT in which law is integrated with, and hence responsive to, the community's standards of reasonableness, which I will understand in terms of a respect for human dignity and autonomy. Specifically, the integrated-AT accepts a description of law as in (ii), but rejects (i), the isolation strategy. Furthermore, although this has not been specifically argued for as yet, the idea of responsiveness presumably implies certain procedural guarantees (eg democratic decision-making) to ensure that the legal decision-making tracks these community standards. Those who might advocate either of these two versions of the AT disagree about whether the function of law described by the AT is best maintained by isolation from, or integration with, the community's standards of practical reasonableness.

The normative philosophies of Hobbes, Rousseau and Kant, amongst others,[4] can be seen as defending versions of either the bare or integrated-AT. As was seen in Chapter 6, Hobbes argues that the commands of a sovereign will constitute the civil law and form a distinctive body of norms which solves a community's co-ordination problems. He is normally read as demonstrating that law need not be consistent with the moral rights each individual subject to law may claim and in this sense his approach defends the bare-AT.[5] Both Rousseau and Kant accept a version of the AT, but there is controversy concerning the form it takes. Rousseau, in distinction to Hobbes, is probably best considered as arguing that legal norms are an expression of the general will of those governed by them and must be consistent with most important interests that they hold. For this reason, it can be said that he defends a version of the integrated-AT. Kant's, often obscure, legal philosophy is normally interpreted as reflecting that of Hobbes but it often veers close to Rousseau's argument.[6]

[4] I have not included a discussion of Locke's philosophy in this chapter. This is because Locke's view is that the people only entrust the power to make laws to government. Therefore, law is not, in a strict sense, pre-emptive because it does not offer secondary reasons for non-compliance with moral reasons. It is questionable, then, whether Locke offers a version of the AT. For further discussion, see R Harrison, *Hobbes, Locke and Confusion's Masterpiece* (Cambridge, Cambridge University Press, 2003) chs 6–8.

[5] See above at 132–35 for a discussion. Also see T Hobbes, *Leviathan* (Cambridge, Cambridge University Press, 1992, first published in 1651) 185 [138].

[6] See T Pogge, 'Is Kant's *Rechtslehre* a "Comprehensive Liberalism"' in M Timmons (ed), *Kant's Metaphysics of Morals* (Oxford, Oxford University Press, 2002) 133, 136; J Waldron, 'Kant's Legal Positivism' (1996) 109 *Harvard Law Review* 1535; and A Wood, 'The Final Form of Kant's Practical Philosophy' in M Timmons (ed), *Kant's Metaphysics of Morals* (Oxford, Oxford University Press, 2002).

Moral Reasoning and Law

It is the case that all of the foregoing brief summaries of the versions of the AT supported by Hobbes, Kant and Rousseau are controversial. However, each offers a solution to a similar problem which is familiar to legal philosophers. It can be put this way. In Chapter 5, Gewirth's argument for moral rightness was set out. He explained how each human agent was categorically required to respect the human dignity of his recipients. Equally, while perhaps lacking the substantive content of Gewirth's analysis, Kant's argument for the categorical imperative requires agents to respect the moral autonomy of other agents. The point is that for both Kant and Gewirth, moral reasoning is *explicable*: it is able to guide our conduct and we can offer strong reasons why we should act in particular ways with regard to those who are affected by our actions. Practically speaking, however, this requires that we do our best to act in accordance with morality, given our knowledge of the outcome of potential courses of action when we exercise our moral judgment. Furthermore, we can identify when others commit wrongs against us. In both of these ways, moral reason is able to determine how we should act towards our recipients and how they should act towards us.

Kant, as was briefly discussed in Chapter 6, is normally interpreted as holding that these moral reasons need not govern the content of legal norms. Kant argues that as a community we must, as a matter of moral obligation, establish legal institutions which apply one, *omnilateral*, voice about how each of us should act. This is because if a community is governed by the unilateral moral judgments of each of its members, it is chaotic and prone to conflict. This is the case even if it consists solely of benign human agents, each of which is attempting to act morally. However, the omnilateral judgment of the community, which is expressed through law, need not reflect our vital moral interests and merely establishes a set of legal norms which determine our respective zones of freedom which are guaranteed through coercive institutions. It is for this reason that Kant's legal philosophy is often said to reflect the bare-AT.

There is a problem with this sort of argument for the bare-AT if one accepts that there are categorically binding moral obligations which each human agent owes to one another. If moral reason enables us to evaluate the rightfulness of actions, then it is equally the case that legal norms can be judged to violate our autonomy or dignity in the same way as the actions of any other agent. Therefore, we are caught in a bind: Kant tells us that we have an obligation both to follow moral reason and to follow positive law. If they conflict, how can we have an obligation to follow both? Kant's answer is that we have a *moral* obligation to follow positive law instead of our morality. This is odd: Kant seems to hold that human agents have a moral obligation *not to follow* their considered moral judgments

when such judgments conflict with legal norms. However, this reveals a more general problem concerning the relationship between law and morality. Legal norms can be distinguished from moral norms, and a society governed by law is one in which we are able to achieve certain (collective) purposes which we could not achieve in a world solely governed by morality. But does this mean that law is obligatory even if it conflicts with our moral obligations? The problem can be stated as three qustions. First, why it is rational to be governed by law? Secondly, must legal, or omnilateral, judgments which are made by the community be consistent with our explicable but unilateral moral judgments? Thirdly, if they should be, how can they be?

One answer to these questions is simply to regard moral reason as too indeterminate, especially regarding community decisions which may involve the complex balancing of a large number of competing claims. Law sorts out this mass of conflicting judgments by expressing our general or omnilateral will which may or may not reflect individual unilateral moral judgments about what is the correct thing to do for the community. This is, in fact, what makes the AT itself so plausible. Another answer is that moral reason does require us to act in certain ways with regard to our recipients and we can identify violations of the moral obligations others owe us. Thus, legal norms can be subject to critical censure, and human agents should rationally insist that such norms are consistent with their fundamental moral interests. On this second view, laws are an expression of a community's morally valid but omnilateral judgment. In this chapter, I defend this view against claims that law need only reflect the bare-AT.

Ideal and Non-ideal Theory

Before setting out this argument, a final introductory comment needs to be made. A distinction employed in this chapter is one that is suggested by Kant and made explicit by Rawls. To explain, according to Pogge, Kant's argument for law is considered to be 'freestanding' from the rest of his practical philosophy.[7] By this he means that he wants to justify his version of the AT both for members of a community who are committed to acting upon the categorical imperative and those that are not. The key passage in which Kant outlines his argument for legal order runs as follows:[8]

> It is not experience from which we learn of human beings' maxim of violence and of their malevolent tendency to attack one another before external legisla-

[7] Pogge, above n 6, at 134.

[8] I Kant, *The Metaphysics of Morals* (M Gregor (trans), Cambridge, Cambridge University Press, 1996, first published in 1797) 89 [6:312].

> tion endowed with powers appears. It is therefore not some fact that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding men might be, it still lies *a priori* in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples, and states can never be secure against violence from another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this. So, unless it wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate *power* (not its own but an external power).

So, for Kant, law arises because a state of nature is a non-rightful condition for all agents. This applies equally to what might be called, after Rawls, a community described by ideal theory, that consists of morally benign human agents, as much as to a community of devils, which is a form of non-ideal theory. Kant wants to argue that in either community, or ones like our own (which are also non-ideal but perhaps not consisting entirely of devils) it is rational for each member of any community to choose to give up their natural freedom to unilaterally determine what is right and to establish a system of law which creates and enforces a system of omnilateral willing. This implies two sorts of argument, both of which are essential to his philosophy of law. In the first, ideal theory presents an argument which shows why all morally benign human agents must accept a system of omnilateral willing. In the second, non-ideal theory shows how this system of omnilateral willing plays out in communities like ours which are morally heterogeneous. A number of questions arise in non-ideal theory. A question faced by Kant is why morally *irrational* agents (like devils) must will legal order. Rousseau, when considering the same sort of distinction, focuses on how coercing those who refuse to comply with the general will is justified. Hobbes focuses on the problems which arise from civil disobedience. Rawls employs the same distinction to show how a community of liberal states described by ideal theory accepts certain sorts of moral, political and legal constraints in their international relations, as well as showing why members of a community described by non-ideal theory will accept his conclusions about international law in some circumstances and how others (such as outlaw states) can be coerced so that they comply with principles of political morality which he thinks must govern international relations. In each example, however, the justification of legal order (and concepts like obligation, enforcement, and so on, which are its corollaries) are considered in light of the irrational proclivities of human agents rather than being concerned with an idealised community. In the rest of this book, I will use the terms an ideal community to refer to a community of

individuals or states which respect the autonomy and dignity of all their recipients[9] and non-ideal to refer to a morally diverse community.

JUSTIFICATION OF THE AUTONOMY THESIS

Kant's project in the *Doctrine of Right* (which comprises the first part of *The Metaphysics of Morals*) is to show how members of a community must rationally will that their social relations are governed by law. His argument can be reconstructed to show that he can justify *at least* a form of law modelled on the bare-AT for an ideal community of rational human agents. Therefore, law establishes and guarantees a zone of freedom for each legal subject. However, as mentioned, for most of Kant's commentators, this zone of freedom is entirely conventional, rather than being integrated with moral reason. If Kant is successful in his attempt to show why rational human agents have a moral obligation to accept a general concept of law modelled on the AT, which I think that he is, he shows why law is meaningful and significant for such agents as a normative practice. It is, in Kant's own language, an attempt to 'establish the basis for any possible giving of positive laws' on the basis of practical reason alone.[10] But in making this argument, Kant 'reconciles' any conflict between legal and moral obligations by arguing that the former must pre-empt the latter in human agents' practical reasoning. I will show why this aspect of his legal theory is problematic.

Immorality of the State of Nature

Kant's first step is to show how morally benign human agents must will a system of law. Elements of Kant's argument are spread across a range of his works, and what follows is a reconstruction. To begin with, for Kant, a pre-legal community in a state of nature is characterised as a not-rightful situation because it 'is a continual violation of the rights of all others'.[11] This is caused by 'the presumption of being the judge in one's own affairs and of not allowing any security to other human beings in theirs save one's own power of choice'.[12] There is much in Kant's legal philosophy which suggests that he thinks that such a situation, empirically, would be one of violence in a similar way to that described by Hobbes' account of the state of nature. To make this connection is tempting, but it does not genuinely capture Kant's argument. I contend that it is not the fear of violence that

[9] The argument whereby a state can be said to have moral rights is made in Chapter 8.
[10] Kant, above n 8, at 23 [6:229–30].
[11] *Ibid* at 108 [6:97n].
[12] *Ibid*.

drives his argument for legal order. Rather, the problem is that of unilateral judgments made by members of a community who 'cannot help but mutually influence one another'.[13] I read this as meaning that by acting in particular ways, agents limit the scope of others to act. In this specific sense, unilateral acts can be said to be *coercive* because if the action is successful it overbears the scope of the other's freedom to act. Kant makes this point when he argues that 'every limitation of freedom by the will of another is called coercion'.[14] Systemically, then, the state of nature is one in which each person's 'rights' are 'continually infringed' by action of others on the basis of their unilateral judgments.

It is easy to see how this sort of argument might play out in a morally diverse and non-ideal community, and how, empirically, violence may arise. But it is not obvious why this argument follows in an ideal community consisting of 'well disposed and law-abiding men'. After all, it is not unreasonable to suppose that if all members of a community respect each others' moral rights then no conflicts of unilateral judgments will arise. So, for Kant, how do the rights infringements just described arise in an ideal community?

One clue to answer this question is to be found in Kant's discussion of the distinction between the kingdom of ends and real human communities. In the kingdom of ends, morality does arise as an imperative to which human agents must comply, but it does not describe a real human community. Rather, it is a community in which there is 'a systematic unity of purposes or ends' where 'we . . . conceive all actions of rational beings . . . *as if* they sprang from one supreme will'[15] where that supreme will 'must be all-powerful, all-knowing, omnipresent, and eternal'.[16] Because of this assumption, the kingdom of ends describes a situation in which each human being acts in a way that is in complete conformity with the moral obligations she owes her recipients.

In real human communities, it is rational (for reasons set out in Chapter 5)[17] to attempt to create, through one's action, this sort of systematic unity of wills in conformity to the moral law. However, we cannot presume that our real human communities can get close to this ideal.[18] This is because, while in such communities each agent can internally legislate in the sense that he attempts to act in accordance with moral reason, they cannot comprehend all the possible moral consequences of their actions. Furthermore, whether or not individuals are able to fulfil their moral obligations is

[13] I Kant, 'On the Proverb: That May Be True in Theory, But Is of No Practical Use' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992, first published 1784–95) 71 [8:289].

[14] *Ibid* at 72 [8:290].

[15] H Paton, *The Categorical Imperative* (New York, Harper and Row, 1967) 193.

[16] *Ibid*. Also see Kant, above n 8, at 107 [6:96].

[17] See above 122–25.

[18] On this point, I agree with Waldron's view of Kant. See Waldron above n 6, at 1550 n 61.

dependent upon the social framework (which comprises the actions of others) in which they act. These sorts of arguments are summarised in Kant's claim that in real human communities 'we are dealing with freely acting beings to whom one can *dictate* in advance what they *ought* to do, but of whom one cannot *predict* what they actually *will* do'.[19] For Kant, this gives rise to the problem in the state of nature that each member of a community will systemically infringe the rights of others simply by acting on their unilateral judgments. This is the case even in ideal communities. To explain further, we must turn to how it is the case that when human agents make moral judgments, it may give rise, in a systemic[20] sense, to rights infringements.

When we make moral judgments two sorts of claims seem to be intuitively correct. On the one hand, human agents are not divine beings and make moral judgments in light of available information and awareness of consequences.[21] But on the other, attempts to apply the morality are not simply a free-for-all. For Rawls, Kant's view is that human agents are able to, and must, make a sincere and rational attempt to think through what morality requires prior to action. This involves an attempt to envisage 'adjusted social worlds' that arise as expected outcomes of various judgments. We must, then, consider such 'adjusted social worlds' against our moral convictions as well as considerations such as whether particular actions to achieve various outcomes are likely to succeed.[22] Furthermore, if Kant, as Rawls suggests, thinks that the application of the categorical imperative requires a consideration of 'true human needs',[23] judgments which enhance such needs when acted upon are morally to be preferred. This would be equally true of Gewirth's concept of generic rights. But if moral judgment is *determinate* in this sense why do we need law? Why does a community of benign moral agents systematically infringe the rights of each other?

The answer must be tied up with the problem of moral fallibility.[24] This problem comes in at least three related forms. The first is that moral reasoning, as just seen, involves an assessment of the outcome of various acts. This involves imagining the world as it might be as a result of undertaking a particular course of action. As we are not omniscient, we cannot

[19] I Kant, 'The Contest of Faculties' in H Reiss (ed), *Kant's Political Writings* (2nd edn, H Nisbet (trans), Cambridge, Cambridge University Press, 1991) 180.

[20] See above 136–37 for a definition of 'systemic'.

[21] For an analysis, see HP Olsen and S Toddington, *Architectures of Justice* (Aldershot, Ashgate, 2007) 38–65.

[22] See J Rawls, *Lectures on the History of Moral Philosophy* (Cambridge, Mass, Harvard University Press, 2000) 167–9 and 220. Also see O Höffe, *Kant's Cosmopolitan Theory of Law and Peace* (A Newton (trans), Cambridge, Cambridge University Press, 2006, first published in 2001) ch 3 and D Beyleveld and R Brownsword, *Law as a Moral Judgment* (Sheffield, Sheffield Academic Press, 1994, first published in 1986) 280–87.

[23] *Ibid* at 221.

[24] See O Höffe, above n 22 at 102, 104 and 111.

guarantee that our course of action has properly weighed up all the potential rights-infringements of our actions. The best we can do is try to make a judgment, based upon available knowledge within the timeframe in which we must decide, about which course of action is most consistent with our moral obligations. If asked about why we acted, we can offer strong reasons for our actions based upon our moral reasons. We cannot, however, guarantee that our judgment is correct because we simply cannot have knowledge of all the ramifications of our actions prior to acting. Our judgment is further complicated by the varying probability that we are able to achieve particular outcomes. For example, should I act towards an outcome if there is only a small chance that I will be able to achieve it instead of undertaking one which has a lower moral pay-off but which is more likely to succeed?

Secondly, by acting on the basis of what is morally right for me, I will often inhibit the capacity of others to act. So, for example, given that we exist in a world of finite resources, each of us may plausibly claim a right to some external object because it will increase some aspect of our well-being. Now, it may be that one of us has the stronger claim; for example, I have a stronger moral claim to some food because I am starving, over someone who has already eaten today. But the point is that each of us has a solid moral claim—both of us need food—but when making each claim we have to balance it against the moral claims of others and this is often extremely difficult. We tend, it is submitted, to reason in a self-orientated way; that is, we are more fully able to appreciate the moral outcomes of our actions for ourselves and, perhaps, those near by us, and not for others further away, or for the community as whole. It is equally difficult to foresee the long-term consequences of our actions.

Thirdly, in complex social situations there are often a number of judgments each of which might be consistent with the moral rights of their recipients. However, if human agents adopt a particular configuration of options within the community, this may cause infringements of morality. The obvious example employed by legal philosophers is that of driving on the right or left hand side of the road. Kant's concern with claims to property is another good example of this idea. But these are both examples of the hugely complex co-ordination problems which face all large communities and which cannot be solved simply by each of us acting upon our unilateral moral judgments.

This idea of fallibility helps explain why Kant's idea of 'violence' in a state of nature is not Hobbesian. Rather, his idea is that 'violence' is to do with a conception of subjective wrongs which arise from the fallible unilateral judgments made by each member of a community. If this is incorrect as an interpretation of Kant, I do not see that we can understand either Kant's claim that a state of nature between 'well disposed' individuals can still be one of violence, or that violence is connected to each having 'its

own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this'.[25] Moral obligations are determinable for Kant, but the systemic infringement of rights occurs because of human fallibility which gives rise to co-ordination problems which arise from each of us acting unilaterally.[26]

I think that this analysis fits with the tenor of Kant's argument in *The Doctrine of Right*. It is also a view that is supported by Flikschuh in her analysis of Kant's argument for property rights. She claims that, for Kant, the physical proximity each agent has to others means that the freedom of each to hold property takes place 'under conditions of unavoidable empirical constraints'.[27] To unilaterally exercise this freedom is, from the point of view of others, 'incompatible with the freedom of everyone else'.[28] This is because 'any exercise of choice by one constrains the freedom of everyone else by removing from availability to them external objects of their possible choice'.[29] On my argument, rather than being only about conclusive ownership of things external to the person, Kant's analysis of property can be seen as an exemplar of his more general point about the relationship between willing and action.[30]

Law as a Community Governed by an Omnilateral Will

It is for the reason just given that Kant holds that the state of nature is 'not rightful'. To solve this problem, we must 'unite . . . with all others' and 'subject . . . [ourselves] to a public lawful external coercion' where what is to be 'recognized as belonging to it is determined *by law*'.[31] He attempts to show that law expresses the united, general or omnilateral will of the community governed by it and by doing so it establishes the freedoms and rights each person is legally entitled to. Furthermore, it stands as an effective external power which guarantees those rights. Thus, as Pogge states, law, for Kant:[32]

[25] Kant, above n 8, at 90 [6:313].

[26] See R Dworkin on moral judgments being determinable even in cases of moral controversy. R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1994, first published in 1977) 279–90. See also A Gewirth, *Reason and Morality* (Chicago, University of Chicago Press, 1978) 272–365.

[27] K Flikschuh, 'Freedom and Constraint in Kant's Metaphysical Elements of Justice' (1999) 20 *History of Political Thought* 250, 264.

[28] *Ibid*.

[29] *Ibid*.

[30] Furthermore, this argument is hinted at in his claim that the obligation to act morally contains within it, analytically, an authorisation to coerce. See Kant, above n 8, at 157–8 [6:396] and Wood, above n 6, at 7.

[31] Kant, above n 8, at 89–90 [6:312].

[32] Pogge, above n 6, at 139.

> is instantiated when persons coexist under an effective legal order that delimits and sustains mutually secure domains of external freedom . . . All that is required for such a condition is that there be an effective body of public standing laws that constrains each person's freedom in predictable ways and thereby predictably delimits and secures each person's constrained external freedom.

Therefore:[33]

> [a] person's external freedom is *secure*, then, in so far as possible obstructing actions by others are themselves obstructed. The security of a person's external freedom thus requires that the external freedom of others (to obstruct her external freedom) be constrained. Therefore, a plurality of persons can have security of their external freedom only if and in so far as the external freedom of each is constrained so as to be consistent with the constrained external freedom of all others.

Kant's view of law, on Pogge's interpretation, is that it secures a domain of external freedom for each member of the community governed by law. However, this domain of freedom is understood by Pogge to be entirely conventional in nature. Pogge claims that law, for Kant, 'may be instantiated in many different ways, only some of which involve equality under the law'.[34] Therefore, '[a]ll that is required for such a condition is that there be an effective body of public standing laws that constrains each person's freedom in predictable ways and thereby predictably delimits and secures each person's constrained external freedom'.[35] Similarly, Allen Wood argues that, for Kant, there is no moral incentive for complying with laws.[36] Rather: '[i]t requires only a system of external legislation, backed by coercive sanctions sufficient to guarantee that [legal] rights will not be infringed'.[37] In Chapter 6, it was shown that Waldron interprets Kant in this way.[38] So, on this interpretation, legal norms must simply establish for each legal subject a domain of external freedom. Such norms set out the legal limits of both their action and that of others. For this reason, it can be said to reflect the bare-AT.

Kant's Justification for Law

We may think this argument is odd. Kant seems to argue that the categorical imperative is binding in an apodictic sense on all human agents but law pre-empts morality's strictures. This is not, as Raz would have it, a *claim* by law to authority. Rather, the idea that the state of nature is

[33] *Ibid* at 137.
[34] *Ibid* at 138.
[35] *Ibid* at 139.
[36] Wood, above n 6.
[37] *Ibid* at 8.
[38] Waldron, above n 6 and above 136–37.

not-rightful seems to indicate that agents *have a moral obligation* to comply with law even if it contradicts their unilateral assessments of what morality requires them to do. How, then, does Kant justify this step of his argument; that is, why should we obey the law even if its content contradicts the content of our moral obligations?

As just mentioned, Kant's justification relies upon a demonstration that a community in which there is unilateral willing and action is not-rightful and that a community governed by law is a rightful condition. Pogge suggests why Kant finds this community (which is a state of nature) is not-rightful:[39]

> When *Recht* is not instantiated, persons' attempts to act are likely to be obstructed in various and unpredictable ways, and they will often fail to complete the actions they want to perform on account of such obstructions and will frequently not even attempt to do what they want to do from fear of being so obstructed. When *Recht* is instantiated, the conduct or options of persons are constrained by firm restrictions on their external freedom. These constraints are, however, regular and predictable and give each person a clearly delimited space of options that are secure from the obstructing actions of others. Persons' external freedom is enhanced far more by the security that some of their options gain by being protected through an effective legal order than it is reduced by the added obstacles that legal prohibition imposes on their remaining options. Therefore persons tend to benefit, on balance, from the existence of a juridical condition.

There is no obvious textual evidence in *The Doctrine of Right* to support this argument, but it does, prima facie, make considerable sense if one takes a Hobbesian view of Kant's account of human psychology and motivation. But there is a problem with this sort of justification. For it to work it must be the case that law, which can vary in its substantive and procedural institutional form from community to community, is preferable to a state of nature when considered against each member of a community's subjective viewpoint. So, each person must judge that it is better to be subject to a morally iniquitous system of omnilateral rules than to exist in a state of nature. The problem with this argument is the introduction of the idea of *moral balancing*. This is not Kant's argument. Instead, each member is under an *obligation* to leave the state of nature because it is, a priori, not-rightful, and it is not-rightful independently of any subjective judgment made by legal subjects about the moral validity of legal norms. That he refuses a right to civil disobedience to human agents in the face of an iniquitous sovereign power reflects this exact same view.[40] Therefore, it is not permissible for human agents to balance whether legal order is in their best interests or not depending upon how it supports their subjective

[39] Pogge, above n 6, at 146–7.
[40] Kant, above n 8, at 95–8 [6:318–23].

interpretation of the moral obligations and the duties owed to them. Thus, Kant's argument cannot be as Pogge claims it is. Rather, Kant aims to show how a system of unilateral willing and action is a priori not-rightful. *The Doctrine of Right* does not furnish us with a clear account of how this is demonstrated, but it is relatively simple to construct a solution given the foregoing argument about the fallibility of human agents. It runs as follows:

(1) A human agent S makes a subjective judgment to achieve purpose *P*. S regards *P* as a purpose that is consistent with both S's interests and the moral obligations he owes to other agents, and it can therefore be said to be a subjectively legitimate purpose.
(2) When another agent, T, acts upon her subjective judgment to achieve purpose *Q*, S must consider *Q* unjust if it prevents or otherwise inhibits S achieving *P* because *P* is a subjectively legitimate purpose for S.
(3) S considers that pursuing *P* might be considered unjust from the point of view of T if *P* interferes with T achieving her legitimate purposes.
(4) S considers that a system of unilateral willing is a not-rightful state of affairs because it describes a situation where S may infringe T's subjectively legitimate purposes and vice versa even when both are sincerely attempting to act in a way that is consistent with the moral obligations they owe to each other.

So, for all members of a community (like S or T), and therefore systemically, this situation is not-rightful because it is one in which each agent's subjective conception of their own legitimate purposes may always be potentially infringed by the actions of others. Equally, each member recognises that they may subjectively infringe the purposes of other agents even when they attempt to act morally.[41] This is how I think we should read Flikschuh's claim that, for Kant, '[i]ndividuals' rights are not simply *secured* through entrance into the civil condition: it is because such claims are raised that the problem of justice arises, so that entrance into the civil condition becomes obligatory'.[42]

The final step for Kant is to show how a system of omnilateral willing or law must take the form of a system of norms described by the AT. Once again, some reconstruction is required. That the state of nature is not rightful (as set out in (4)) rationally requires that human agents must give up their competence to unilaterally will and act. Omnilateral willing must, then, imply that for S and T a determination must be made by *someone* or by *some procedure* whether *P*, *Q* or indeed *R* (which might be a compromise

[41] See Flikschuh, above n 27, at 269–70 and O Hoffe, above n 22, at 2.
[42] Flikschuh, above n 27, at 271.

position) is to be the case. This omnilateral judgment can be said to *concretise* the relationship between S and T and determine how they are to act in the occurrent circumstances of the disagreement. S and T must necessarily *assent* to this by virtue of (4) and the omnilateral judgment has *authority* over them. This should not be seen in terms of consent, if this means that they have a choice. Rather they have a moral obligation to submit themselves to an omnilateral will. This is equally true for a community of human agents where the same reasoning would apply. All social relations which give rise to subjective rights-infringements must be normatively concretised in the same way.

This can be achieved in a variety of ways. Often it can occur through ad hoc arrangements. We can, obviously, get together and work out a solution. This is what we normally, in fact, do. But the problem with ad hoc arrangements is that they do not allow members of a community to be able to predict how others will act and is purely reactive to disagreements which emerge. For this reason, ad hoc arrangements cannot *pre-empt* disagreement, but can only be reactive to the particular dispute which is solved by them. The AT, on the other hand, describes a set of enforced legal norms which establish zones in which each member of a community can have freedom to act. This is how it pre-empts disagreement and establishes the conditions by which co-ordination and co-operation can occur. This point is crucial: all human relations, to the extent that there is disagreement, must necessarily be governed by an omnilateral will, but this can take a variety of forms. For the day-to-day spats with our friends and colleagues this can often be ad hoc. But for the serious co-ordination problems which beset our society, or for certain forms of action which cause serious rights-infringements, we must have a way of pre-empting our disputes. The AT, as a regulatory strategy, does this by pre-empting disagreement by establishing a *limited domain* of general or omnilateral norms for members of the community. In doing so, it removes the *potential* for disagreement. These are artificially created and in this sense, they can be said to have a *social source*. Thus, a system of law, modelled on the AT, is rationally preferable to ad hoc judging as it is better able to solve the problems of a state of nature in a complex and large society.

This argument is, I think, consistent with Kant's idea that law is an omnilateral system of norms. However, for Kant, law has a close connection with the concept of sovereignty. The legal institutions which interpret legal norms ultimately determine what is the case for the entire community.[43] Thus, 'the united people does not merely *represent* the sovereign: it *is*

[43] See P Capps, 'Sovereignty and the Identity of Legal Orders' in C Warbrick and S Tierney (eds), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (London, British Institute of International and Comparative Law, 2006) 19–73.

the sovereign itself'.[44] Therefore, the individual gives his right to judge wholly to the community, and the community, through the omnilateral will and its associated political and legal organs, determines the domains of freedom which the individual has. Furthermore, the disputes which arise over our ad hoc agreements, or the interpretation of legal norms, must be settled, ultimately, by the omnilateral will of the community. Therefore, by constituting an omnilateral will we imply various legal institutions which are able to settle, once and for all, the community's co-ordination problems. Sovereignty describes this idea of institutions possessing this ability to ultimately determine what is the case for the community. This argument is not, in itself, authoritarian. Rather, Kant's idea is that in order to avoid the state of nature, which each of us must rationally recognise as a not-rightful condition, we must constitute ourselves as a collective unity. To allow this constitutive process to be based upon a provisional judgment implies that a community is not constituted omnilaterally and thus the problem of the state of nature is not solved.

Enforcement

Kant holds that law must guarantee zones of freedom through coercive institutions. There is a relatively straightforward explanation of how coercion through law can be justified. At the centre of Kant's legal philosophy is his view that coercion is not something that is a feature only of law. But rather it is a *structural feature of action*. Human agents constrain or, rather, channel, the behaviour of others by acting.

This can be developed by considering a claim to object *O* by two agents, S and T. If S succeeds in his act to claim a right to *O*, it channels the behaviour of T to the extent that T can only claim *O* by taking it from S. Both S and T will think that their claims to *O* are justified, that the other's act to claim *O* is a wrongful act and an infringement of their rights. However, either act can be seen as an attempt to channel the behaviour of the other agent. There is no real difference between the fact that S takes *O* from no one and T takes *O* from S: both acts are wrongful from the point of view of the other party against their considered moral judgment. As has been shown, if S and T are reasonable they accept that they have a moral obligation to submit to an omnilateral system of willing and a common judge to decide who should own *O*. But the nature of this now omnilateral judgment is crucial. Assume that the judge holds that S has a right to *O*. The implication of this is that S's claim to *O* ceases to be a subjective claim and it instead becomes *the case* in the relationship between S and T. T can no longer claim either a right to *O* or act to claim it. Extrapolating this

[44] Kant, above n 8, at 113 [6:341].

reasoning to an ideal community, the judgment (i) overrides the earlier subjective claims, and (ii) *determines what constitutes a rights-infringement for that community*.

In an ideal community, by determining that S has a right to *O*, law gives all relevant agents a sufficient reason not to infringe S's right to *O*. But the legal judgment itself cannot be said to enforce S's right, it instead vindicates S's attempt to enforce its right by acting to claim *O*. Enforcement can be said to take place simply by S acting on the basis of the legal right. So, coercion is the case in both a state of nature and under a legal order. It is simply that in the former the coercion is defined in terms of action on the basis of a unilateral judgment. Under law, enforcement takes place in pursuance of an omnilateral judgment. I suggest that this is what Kant means when he writes 'each considers himself authorized to protect the rights of the commonwealth by laws deriving from the general will, but not authorized to subject it to his own unconditioned, discretionary use'.[45]

Merely acting on an omnilateral judgment is not sufficient to channel behaviour in a non-ideal community. That S can simply enforce his right to *O* by acting on it cannot be sustained simply because unreasonable and irrational agents will attempt to prevent him exercising it. This might imply that S can use physical force to ensure that he has *O*. Alternatively, and more plausibly, it implies that coercion by legal institutions are required and must be a feature of law if it is to guarantee agent's legal rights. However, there is no qualitative difference between legal and non-legal forms of enforcement. All human social action, as we have seen, is potentially coercive. Irrational individuals may subjectively think that law should not channel their behaviour through coercive institutions. However, their complaint would be exactly the same in a state of nature. Thus, whether unilateral or omnilateral, the complaint is the same: the will of such individuals is being overborne against their will. However, once subject to a legal order it is the community's will that is being enforced, rather than the unilateral will of a stronger individual.

It is my view that Kant's argument, on the interpretation offered here, convincingly explains why morally benign individuals must consider a state of nature characterised by unilateral willing morally and systemically not-rightful. In itself, this justifies the AT as a description of the concept of law, and establishes that law is an expression of the omnilateral and sovereign will of the community governed by it. Under non-ideal conditions, the AT implies coercive institutions. While there is much which is attractive about this justification of the AT, it remains the case that Kant is often understood as defending the claim that we have a moral obligation to comply with law even if it violates what we consider we are owed

[45] Kant, above n 13, at 73 [8:291]. See Also see O Höffe, above n 22, at 83.

morally. This claim seems to be problematic. In the next section, I argue that to reconcile the moral and legal obligations that we have, we must reject Kant's view that law is conventional and that the obligation to obey law overrides our moral concerns (and thus reflects the bare-AT). Instead, we must select a version of the AT which is consistent with the moral constraints each agent is under, which I refer to as the integrated-AT.

JUSTIFICATION OF THE INTEGRATED-AUTONOMY THESIS

The foregoing reconstruction of Kant's argument explains how his version of the AT can be defended but does not show that there are any substantive constraints on the limits of possible law-making (beyond, perhaps, commanding the impossible, and so on). Instead, it establishes that the omnilateral will, expressed through legal norms and which delimit the domain of freedom for each member of a community, is isolated from morality. Law is, on this account, best described as a version of the bare-AT for this reason. The conflicts and disagreements which emerge in human communities over what morality requires and which 'stand as obstacles to social co-operation' are solved by law characterised in this way.[46]

Now it may be that for Kant, like Hobbes, our capacity to reason morally is just too loose and variable (i) to establish determinate moral rules or reasons for acting, or (ii) to determine what the proper moral content of laws ought to be for both law-makers and citizens.[47] Clearly, Kant does not accept (i). I want to show that he must reject (ii) if he rejects (i). This argument, then, implies that Kant cannot sustain the claim that the content of legal norms need only be conventional.

To explain, Kant rejects (i) because he does think that moral reason can be employed to determine which, from a variety of possible actions, is morally preferable. He also thinks that general moral norms are explicable, such as the prohibition on lying.[48] This claim is so obviously a feature of Kant's moral philosophy that it does not need further substantiation.[49] But if the moral correctness or otherwise of our actions is determinable for Kant, then so it is equally determinable when wrongs are committed against us by others. Crucially, then, such a determination would be

[46] Postema, above n 1, at 80.

[47] See M Ridge, 'Hobbesian Public Reason' (1998) 108 *Ethics* 538, 543–5 for a discussion and critique of Hobbes' views on this matter.

[48] H Paton, *The Moral Law* (London, Hutchinson, 1948; translation of Kant's Groundwork of *The Groundwork of the Metaphysic of Morals*, first published in 1785) 67–8 [4:402–3].

[49] See above 161–62, and see J Rawls, *Lectures on the History of Moral Philosophy* (Cambridge, Mass, Harvard University Press, 2000) 162–81 for a clear discussion of how the categorical imperative guides action and norm-creation. See also O Höffe, above n 22, ch 3.

equally possible when legal norms are enforced against us. Thus, we can evaluate the moral quality of legal norms and must reject (ii). Given the arguments in support of moral rationality in chapter 5, I accept this view.

It is equally plausible, as has been shown, that submission to law is morally obligatory. This must give rise to two moral obligations which can often require different actions from us: to do what is morally right, and the moral obligation to submit to law. Kant thinks that each of us must submit to law, and therefore, we do not have a right to unilaterally determine whether to follow morality or law: we must follow the law and we have a moral obligation to obey laws which require us to do that which is morally wrong.

While it is clear that rational moral evaluation will often require the balancing of moral obligations, this is not my point. Rather, by willing the bare-AT, a human agent is being asked to will a state of affairs in which a conflict between law and morality can arise. Surely, he cannot be rationally required to do this? If he is required to act in accordance with moral reason, he must be rationally required to will a state of affairs in which such a conflict would not arise. It is for this reason that a human agent cannot rationally will the bare-AT because it entails willing a state of affairs which leaves open the possibility of law being immoral. On the other hand, if a community is morally required to establish a legal order to determine right in matters where there are recurrent co-ordination problems, one which attempts to do so in a way that is consistent with morality must be preferred to the concept of law described by the bare-AT.

According to Pogge, Kant's decision to isolate law from morality is part of a deliberate strategy to disconnect it from his moral philosophy.[50] His aim is to argue for a concept of law that is ecumenical between those who accept his view of morality and those that do not and so provide a rationale for law in a non-ideal community. But if he thinks that morality is determinable, then this argument is difficult to sustain. For surely those who refuse to accept that they have categorical moral obligations to respect the autonomy of their recipients are simply irrational. To pander to their divergent views about the obligations they owe to their recipients by jettisoning a necessary connection between law and morality is equally

[50] Pogge isolates the republican and democratic elements of the *Rechtslehre* in a way that is similar to Hart's removal of the normative from descriptive elements of Bentham's legal philosophy through the familiar distinction between 'law as it is' and 'law as it ought to be'. See Pogge, above n 6, at 138 and G Postema, *Bentham and the Common Law Tradition* (Oxford, Clarendon Press, 1986) 303. I suspect that this might be a convenient, but ultimately overly straightforward, interpretation of Kant's legal philosophy. It could be said that Höffe does exactly the opposite in his interpretation of Kant as a natural lawyer or legal idealist. See Höffe, above n 22. But either way, Kant does offer a strong argument in defence of the AT, even if it is unclear as to what version of the AT he is defending.

irrational. It is, however, rational to will a system of law that is consistent with the moral obligations we each owe to others.

Kant may have ultimately agreed with this criticism and there is much in his works on legal philosophy which does suggest that morality and law should be integrated.[51] But to explain this would involve a detailed, and ultimately speculative, interpretation of his work which would require a substantial deviation from the central focus of this chapter. However, if we turn to Rousseau's argument in *The Social Contract*, which has been interpreted by some as proto-Kantian,[52] we can find an extremely powerful argument to solve this problem with Kant's legal philosophy. Rousseau argues that our natural social relationships, which are potentially or actually damaging to our fundamental interests, must be restructured through law. More strongly, *law is the way in which it is possible to have moral autonomy* in complex human societies. His argument can be employed to show how law restructures our natural social relations so that they are consistent with morality and thus offers a way of justifying a connection between moral and legal obligation and, with it, the integrated-AT.

Law Constitutes our Freedom from Dependency

The central pillar around which Rousseau's legal philosophy is built is well put by Hegel. This is that 'freedom is not something that is surrendered in the state; rather, it is first constituted therein'.[53] This seems an odd claim to make. After all, freedom (or autonomy)[54] is normally understood as being free from restraint from others and subjugation to the laws of the state is a form of restraint. How can it be that freedom is *constituted* by the state?[55]

Rousseau argues that law is an expression of the general will of the community governed by it. The general will is an expression of the common good of a community, which in turn is an expression of its collective interests. Law can be said to be authoritatively expressed by a set of well-constituted political and legal institutions embodied in the state

[51] See, eg, Kant, above n 13, at 72–6 [8:290–4]. See M Simpson, *Rousseau's Theory of Freedom* (London, Continuum, 2006) 103–8; E Cassirer, *The Question of Jean-Jacques Rousseau* (P Gay (trans), Bloomington, Indiana University Press, 1954) 104–5.

[52] See Simpson, above n 51.

[53] F Hegel, *Werke* (Frankfurt am Main, Suhrkamp, 1986) 20:307, quoted from F Neuhouser, 'Freedom, Dependence, and the General Will' (1993) 102 *Philosophical Review* 363, 364. This section will rely heavily on Neuhouser's analysis of Rousseau's concept of the general will.

[54] Rousseau's use of the word 'freedom' is to be considered coterminous with the way in which autonomy is used in Chapter 5 and is not the same a Gewirth's concept of freedom as a generic feature of agency.

[55] I discuss the relationship between the state and law below at 190–93. For present purposes I will consider that there is no substantial distinction to be made between the two concepts.

which attempt to articulate the general will. One straightforward interpretation of the claim that freedom is constituted by the state, is that it is in each member's interests to *choose* to act in accordance with the law, because it expresses his or her interests. Therefore, all act freely because all exercise a choice to act in accordance with the law. For this argument to work, however, it must be the case that (i) an individual can recognise the common good as something that is in his or her interests, and (ii) that it is a dominant will when compared to particular interests each individual may have.[56] If all individuals accept (i) and (ii), the governance of a community by a state is a state of affairs that each will freely accept because it reflects their dominant interests. As Neuhouser highlights, this line of argument cannot be squared with two claims made by Rousseau. First, Rousseau argues 'whoever refuses to obey the general will shall be constrained to do so by the entire body, which means only that he will be forced to be free'.[57] Secondly:[58]

> when the opinion [of the state] contrary to mine prevails, that proves nothing except that I was mistaken, and what I thought to be the general will was not. If my private opinion had prevailed, I would have done something other than what I wanted. It is then that I would not have been free.

Put together, these two claims imply that an act in compliance with the general will constitutes a free act *even if* it does not accord with a member's own view of their dominant interests. Therefore, Rousseau seems to imply that (i) and (ii) are not the grounds by which freedom is constituted by law. An explanation is needed which shows that the general will is an expression of the common good even if it is not coincidental with anyone's subjective or unilateral self-conception of their individual interests.

Neuhouser's solution to this difficulty is to turn to the distinction between dependence, independence and freedom in Rousseau. He begins by analysing the rest of the paragraph surrounding Rousseau's claim which was just set out. It reads:[59]

> in order for the social compact not to be an ineffectual formula, it tacitly includes the following engagement, which alone can give force to the others: that whoever refuses to obey the general will shall be constrained to do so by the entire body; which means only that he will be forced to be free. For this is the condition that, by giving each citizen to the homeland, guarantees him against all personal dependence; a condition that creates the ingenuity and functioning of the political machine, and alone gives legitimacy to civil engagements which without it would be absurd, tyrannical, and subject to the most enormous abuses.

[56] Neuhouser, above n 53, at 369.

[57] JJ Rousseau, *On the Social Contract* (JR Masters (trans), New York, St Martins Press, 1975, first published in in 1762) 55 [1.7.8].

[58] *Ibid* at 111[4.2.8].

[59] *Ibid* at 55 [1.7.8].

The pivotal idea contained in this quote is that by forcing an individual to be free, the general will '*guarantees him against all personal dependence*'.[60] Now, one might think that, against ordinary meanings, freedom is the opposite of dependency. However, it is necessary to be faithful to Rousseau's technical vocabulary. Rather than freedom and dependency being opposing concepts, dependency is opposed to independence. Independence corresponds to the idea of self-sufficiency and is the characteristic of (one description of) the state of nature.[61] Thus, man is independent when cast in a state of nature as a relatively asocial being who can obtain all the things he requires from his surroundings. All social life (even in forms of the state of nature in which there is social life) is characterised by dependency: it is a 'fundamental, ineliminable feature of human existence'.[62] It is a *constitutive feature* of any sort of socialised environment and is conceived in two ways: economic dependency (which concerns the distribution of physical goods) and psychological dependency (which concerns *amour propre*).[63] Freedom cannot, then, be the opposite of dependency. This is because within a community, Rousseau thinks that both freedom and dependency co-exist, whereas independence is logically ruled out within any social community. But while this argument clarifies Rousseau's terms, it does not answer his problem: how is freedom constituted by the general will in a community which is characterised by dependency?

Rousseau's answer hangs on his *moral* and *negative* definition of freedom. Freedom does 'not consist so much in doing one's will as in not being subjected to the will of others'.[64] So, freedom is not defined in terms of my *success* in *achieving* my will. To do so:[65]

> overlooks a central characteristic of freedom, a characteristic that makes freedom, for Rousseau, an inherently moral phenomenon, namely, that freedom (as well as its opposite) always refers to a relation between one will and another: To be unfree is to obey a foreign will, and freedom is always being free of the will of another.

[60] Emphasis added.

[61] This is called 'natural freedom' by Simpson. See Simpson, above n 51, at ch 1. Simpson argues that there are a number of different forms of the state of nature. In its purest form, it is a state of independence. In all other forms there is moderate scarcity of resources and there are various forms of social interaction. Here, social life is rationally intolerable because of our dependency upon each other and the oppression which arises as a result.

[62] Neuhouser, above n 53, at 374.

[63] See C Bertram, *Rousseau and the Social Contract* (London, Routledge, 2004) 22–33. For a recent discussion of this concept, see also F Neuhouser, *Rousseau's Theodicy of Self-Love* (Oxford, Oxford University Press, 2008).

[64] B Gagnebin and M Raymond (eds), *Oeuvres Complètes* (Paris, Gallimard, Bibliothèque de la Pléiade, 1959–69) 3:841 quoted in Neuhouser, above n 53, at 380. L Fuller makes a similar set of claims in his essay 'Freedom and the Nature of Man' in K Winston (ed), *The Principles of Social Order: Selected Essays of Lon Fuller* (Oxford, Hart Publishing, 2001, first published in 1981). See also ch 2 of Olsen and Toddington, above n 21 and S Toddington and D Beyleveld, 'Human Nature, Social Theory and the Problem of Institutional Design' (2006) 12 *Studies in Social and Political Thought* 2.

[65] Neuhouser, above n 53, at 381.

Therefore, the 'free individual is one who *obeys* only his own will, or more explicitly, one who *obeys no will* other than his own'.[66] That an agent has *moral freedom* in this sense can be explained by comparison to Kant's equivalent concept of autonomy. Simpson argues that for Rousseau, the problem of the state of nature is that '[e]ach person's actions . . . are constrained by other people's actions'.[67] Kant's view, as has been shown, is similar to this. Kant argues that each person, simply by acting on their unilateral will, inhibits the capacity of another to achieve their purposes and thus be autonomous. So, it could be said that for both Rousseau and Kant, the concept of moral freedom means being able to act upon one's *moral purposes* without unjustified inhibitions which arise from the actions of others. But Rousseau's concept of dependency is a much thicker concept than Kant's conflicting unilateral wills. For Rousseau, it is being *subject to the will* of another which makes us unfree. He thinks that human societies (both ideally and non-ideally)[68] are often tied up with strong and pernicious forms of economic and psychological dependency which inevitably inhibits freedom because each allows one individual to control the behaviour of another. In other words, dependency is the 'source of subjection' because 'it makes possible the subjection of one will to another'. Thus, 'the bonds of servitude are formed only from the mutual dependence of men and the reciprocal needs that unite them, it is impossible to enslave a man without putting him in the position of being unable to do without another'.[69]

Rousseau's concept of freedom being constituted by law can now be stated. He argues that it is possible to restructure relations of dependency so that they are compatible with freedom. His central claim is that 'inemliminable relations of dependence among individuals are preserved but mediated through a system of well-founded law and thereby made less injurious to freedom'.[70] In the same way as Kant, for Rousseau, law forms a set of norms which express the general will of a community. But, for Rousseau, such norms constitute the conditions by which freedom from dependence is possible. Law concretises our natural social relationships in such a way so as to alleviate dependency. It does this by reflecting the objective social conditions, expressed by the concept of the general will,

[66] Neuhouser, above n 53, at 381.

[67] Simpson, above n 51 at 49.

[68] This follows from the discussion above in n 61 regarding Rousseau's idea that there are different forms of the state of nature which are characterised by differing forms of dependence and independence.

[69] From Rousseau's, 'Discourse on Inequality' quoted from Neuhouser, above n 52, at 382. But see also I Kant, *Anthropology from a Pragmatic Point of View* (Cambridge, Cambridge University Press, 2006, first published in 1798) 44 [7:152–3]. See also A Perreau-Saussine, 'Immanuel Kant on International Law' in J Tasioulas and S Beson (eds), *Philosophy of International Law* (Oxford, Oxford University Press, 2009).

[70] Neuhouser, above n 53, at 386.

which must be present for individuals not to be dependent upon the will of another. This idea of 'objective social conditions' cashes out into the idea:[71]

> that the individual will, apart from whatever particular ends it may embrace, necessarily, and most fundamentally, wills its own freedom. But in willing a certain end (its freedom) it must also will the conditions that make that end attainable. A will that is required for the realization of its own freedom cannot be regarded as 'doing its own will' and therefore cannot be considered truly free. Such a will—one which in effect wills its own subjection—is a self-negating, therefore contradictory, will.

Rousseau's claim that members of a community can be 'forced to be free' now becomes clear. For Rousseau, it constitutes a contradiction in the will for individuals not to act in compliance with legal norms because the latter publicly enforces the general will and hence the conditions by which that individual can be free from dependency. To claim that such subjection to law undermines an individual's freedom makes the mistake of thinking that freedom is simply the capacity to achieve one's individual ends. Such ends, insofar as they are inconsistent with the general will, must be inconsistent with the individual's rational interests. Freedom is not concerned with freedom from restraint for Rousseau. Rather, it concerns the moral relationships between individuals and the attempt by law to restructure such relationships through law so that dependency is reduced or eliminated. Once this condition is achieved, members of a community can be said to have *civil freedom*.

For Rousseau, law establishes the conditions by which we can have civil freedom through legal norms which establish and enforce the necessary conditions by which we can have freedom. This argument is crucial for our purposes for two reasons. First, it is a small step from Rousseau's idea that there are conditions by which we can exercise our freedom from dependency to Gewirth's idea, which is supported in this book, of the necessary conditions of agency. Gewirth, as was shown in Chapter 5, plausibly builds this general idea of generic conditions for agency into a concept of moral obligation rooted in a respect for human dignity. In this sense, the conditions by which each of us can have freedom from dependency are articulated through the concept of human dignity. Secondly, it is apparent that Rousseau shows us how law is the way in which we have freedom from dependency. If we substitute this essentially prudential view of Rousseau with the similar, but moral, concept of human dignity in Gewirth, we have an outline of an argument for a version of the AT which is rooted in human dignity. Thus, it is possible to show why law must be integrated with morality and why rational human agents must will it.

[71] *Ibid* at 392.

Rousseau's Concept of Law

Rousseau explains that law is a set of coercive institutions that ensure that each of us have the objective social conditions that allow us to be freed from dependency. As such, law can be understood as an *attempt* to instantiate an idealised condition: a community free from dependency. This idealised condition, for Rousseau, is represented by the idea of the general will. We can think of the general will, in this sense, as being a similar concept to Kant's kingdom of ends. Both describe an idealised condition of *moral* rightness to which human communities must aspire. But for Rousseau, regulation through law is the only way in which the social relations in real human communities can be restructured so as to achieve this end. As we have seen, because we are fallible, we conflict, we are dependent upon each other, and so on, the general will can only be *practically* implemented through a system of general norms which restructures our chaotic and interdependent natural relations in a way which is responsive to the objective social conditions by which each of us can be free. If the content of legal norms do, or at least help to, establish the conditions by which we can have freedom from dependency, they are rationally preferable to other forms of regulation or the state of nature. They restructure our social relationships so that they better resemble our rational aspirations. This is how, I think, we should understand Rousseau's claim that the guarantee against personal dependence can only be achieved through 'the ingenuity and functioning of the political machine'. If political and legal institutions increased rather than reduced dependency, social life 'would be absurd, tyrannical, and subject to the most enormous abuses'.[72]

From here, Rousseau is able to argue that legal institutions must take a particular form if they are to reduce dependency. Centrally, this is achieved by establishing 'equality . . . among citizens'.[73] In *The Social Contract*, this implies, amongst other ways in which dependence can be reduced,[74] that law is applied equally to all, thereby protecting 'individuals from capricious wills of those on whom they depend'.[75] Thus, law limits what can be demanded from those who are dependent upon others.[76] We would understand this as cashing out to a set of civil rights or a set of substantive constitutional principles which are articulated by law.

[72] Rousseau, above n 57.

[73] Neuhouser, above n 53, at 389.

[74] *Ibid* at 385–91. For example, Rousseau thought that a reduction in economic inequality could reduce dependence. Furthermore, he argued that the well-constructed state becomes a source of esteem so that *amour propre* comes from our self-conception as citizens rather than from other people on whom we depend. This then cashes out into equality of respect as citizens and implies standing as a member of the community constituted politically.

[75] *Ibid* at 388–9.

[76] See also Simpson, above n 51, at 56.

Secondly, the state must embody the freedom of the individuals which constitute it. Laws are 'objectively liberating' and are 'consciously embraced as their own'.[77] So, law is 'imposed by, or comes from all'[78] and therefore all must have a role (as voters, for example) in deliberative political processes rather than various powerful or sectional interests having the ear of state institutions.[79]

Each of these general ideas is understood by Rousseau as constraints on legal form so that dependency is reduced. Presumably these constraints include procedural mechanisms which ensure publicity of legislation as well as the reasons for legal enactments and decisions, as such mechanisms help remove undue influence from the legislative process. It would also imply mechanisms for the review of legal decisions for procedural and substantive legitimacy. Each of these help to ensure that the law attempts to achieve freedom from dependency, as well as providing a brake which prevents a back-slide into pathological forms of governance. Such procedural constraints improve decision-making and help ensure that the process by which legal norms are formed is a genuine attempt to remove dependency. This does not, however, entail that such constraints *constitute* the general will in an idealised sense. It is, rather, an expression of the general will in a *practical* sense.[80]

The General Concept of Law

Rousseau's argument shows powerfully how law must be established so as to restructure our natural social relations so as to protect our fundamental interests. Gewirth's argument gives flesh to Rousseau's idea that there are certain necessary goods which allow us to be free from dependency. Gewirth also shows why this necessarily implies a moral obligation to respect the rights of others to these necessary goods rather than simply being self-interested values. Law can be understood, then, as the only way in which our social relations can be restructured so that each of us have these necessary goods and thus can act free from dependence on the will of others. More strongly, it is the way in which we can be assured of dignity as human agents.

[77] Neuhouser, above n 53, at 395.

[78] *Ibid* at 390.

[79] It is here that modern theories of deliberative democracy in legal regulation are of value. See, for eg, J Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597 and 'Proceduralizing Regulation: Part II' (2001) 21 *Oxford Journal of Legal Studies* 33. See also Gewirth's argument that such institutions are necessary to apply the PGC in large scale societies in *Reason and Morality* (Chicago, University of Chicago Press, 1978) 308–10 and D Beyleveld and R Brownsword, *Law as a Moral Judgment* (Sheffield, Sheffield Academic Press, 1994, first published in 1986) ch 7.

[80] Simpson, above n 51, at 81.

So, the general concept of law is described by a version of the AT which is predicated on an integration of law with objective moral interests. This is achieved by officials exercising their role in legal institutions so as to establish the conditions by which each legal subject has human dignity. This would, at least, imply a commitment to civil rights as well as the procedural mechanisms by which such rights can be maintained and protected.[81] Furthermore, as an expression of a community's collective will, legal norms must be directly or indirectly consented to by those subject to them.

This view of law can be explained another way. Our unilateral moral reasoning is a sincere attempt to make a decision in light of available information that is consistent with the moral obligations that are binding on us. Legal reasoning involves the same sort of judgment. But legal norms express judgments about how we collectively ought to act, and how we can structure the totality of social relationships in our community, so that they are consistent with the moral obligations each of us owe to our recipients. The requirement that law must be procedurally valid is merely an omnilateral version of the requirements that arise when making unilateral judgments about what morality requires: we must think carefully what we should do in light of the available information and the effect our actions may have on others.

This shows how law and morality can be rendered consistent with each other and how law is an expression of our community's will rather than our will as individual moral reasoners. It is my view that if we are bound by categorical moral constraints which require us to respect the dignity of others, law, which is the product of our collective agency, must be bound in the same way. It is for this reason that law cannot be characterised by the bare-AT. Rather, law must adopt a particular form of the AT which has been referred to as the integrated-AT. The bare-AT, in this sense, can be seen as subscribing to a concept of law which institutionalises pathological social relations because patterns of dependency are unmediated or concretised.

This conclusion is somewhat odd in that it defends a strong conception of law, but only loosely describes its substantive and procedural contours. I make no apology for this because, after all, this is a book on international law. It is hoped that these general conclusions give the reader a general sense of what sorts of constraints law of any form must be under, and this will be more fully developed with regard to the concept of international law in the rest of this book.

[81] See D Beyleveld and R Brownsword, 'Principle, Proceduralism and Precaution in a Community of Rights' (2006) 19 *Ratio Juris* 141 for a detailed discussion of the sort of procedural values that are implicit in a legal order rooted on a fundamental respect for human dignity.

CONCLUSION

The argument in this chapter defends and explores the claim that any member of a community must rationally will a general concept of law described by the integrated-AT. Law, then, is a system of artificial, omnilateral and institutionalised judgment which attempts to restructure our natural social relations by removing sources of dependency. It does this by enforcing a system of norms which has, not least, a fundamental respect of human dignity.

In the earlier sections of this book, it was shown why a concept of law must explain why law is valuable, important or significant from the practically reasonable viewpoint which is one that respects human dignity as a fundamental value. Law is valuable, important or significant because it is consistent with this fundamental value-orientation. Thus, this inquiry into the justifications for law offered by Kant and Rousseau is not some sort of normative inquiry about what law ought to be. It is not based upon the subjective meanings which have been variously attached to normative practices through time which have carried the title law. Nor is it a summary of what these various normative practices have in common. Rather, the argument for the integrated-AT is an articulation of why law is valuable, significant or important from a practically reasonable viewpoint. It explains why law has meaning for us as rational agents.

Parsons recognises that the 'ideal type as Weber used it is both abstract and general. It does not describe a concrete course of action, but a normatively ideal course, assuming certain ends and modes of normative orientation as "binding" on the actors'.[82] The general concept of law offered here advances a view of law as a social practice which adopts a practically reasonable normative orientation. Either implicitly or explicitly, the normative practices of which we are a part and which we call law are often consistent with this general concept.[83]

The general concept of law also allows analysis of those examples of various normative practices often called law as being potentially pathological. Weber was only concerned with instrumental pathologies,[84] but the argument offered here allows a more substantial moral critique of law as an example of a social phenomena in two ways. First, it is often the case that the forms of law which govern our lives will accord with the general concept of law and other times they will not. Kant claims that deviations from his concept of law indicate where there is a need to reform or, in

[82] See T Parsons, 'Introduction' in M Weber, *Economy and Society* (New York, Free Press, 1964) 13.

[83] This argument is well-developed by N Simmonds in *Law as a Moral Idea* (Oxford, Oxford University Press, 2007).

[84] See above 85–86.

extreme circumstances, to reconstitute legal order.[85] Sreenisvasan, writing on Rousseau's concept of the general will, considers that the failure of our normative practices to be consistent with the general will is an opportunity to multiply constraints on governance or to forge newer and better ways of ensuring the responsiveness of law to our fundamental interests, rather than the interests of powerful groups.[86] In this way, the general concept of law provides us with a critical standard against which our paradigm cases of law can be judged and developed.

Secondly, if a normative practice called law is focally orientated to a goal which systematically does not exhibit a fundamental respect for human dignity, then it cannot properly be called a form of law. These forms of practices often called law are related to the general concept of law in some sense, but, *essentially*, they describe normative practices which cannot be forms of law from the practically reasonable viewpoint. Some might think it counter-intuitive to claim that, for example, the coercive normative practice which existed in Apartheid South Africa is not a form of law, or perhaps only resembles law. But in response to this, it is only necessary to be reminded that the critical analysis of paradigm cases of law against a general concept is one that is familiar to all attempts to conceptualise law. Positivists, after all, frequently deny that paradigm cases of international or primitive law fall within the extension of their general concept of law. The role of the concept of law is to be critical of, and explain the truth in, our intuitions. I think that this is best done by taking the practically reasonable viewpoint.

A concept of international law uses this general concept of law in two ways. First, as a sub-category of the general concept, international law can be conceptualised by reference to it. It should also, then, be possible to explain how various paradigm cases of international law are forms of law or are pathological. But secondly, international law regulates the conduct of states with regard to the way they treat other states and their own subjects. Thus, the general concept of law has something important to tell us about the standards which states must comply with under international law. In the remainder of this book, I will develop these two points.

[85] Kant, n 8 above, at 98 [6:321–2].
[86] G Sreenivasan, 'What is the General Will' (2000) 109 *Philosophical Review* 545, 576.

8

The Foundations of the International Legal Order

HERSCH LAUTERPACHT WRITES that a central problem for international lawyers is 'the determination of the legal nature of international law'.[1] He continues '[t]he answer to this question obviously depends upon the conception of law which we adopt as the basis of the investigation'.[2] Later in the same essay he writes: '[t]he notion of law with the help of which the international lawyer gauges and determines the nature of the rules which form the subject-matter of his science is necessarily an *a priori* one'.[3] One can say that Lauterpacht wants to employs a general concept of law, derived from reason, which gives rise to a concept of international law. This is then used to interpret paradigm cases of international law as forms of law. I will return to Lauterpacht's contribution, and why it supports the substantive and methodological claims developed in this book, towards the end of this chapter. But at present it is sufficient to highlight that this is the same methodological approach to that which is taken here.

Specifically, the methodological approach set out in this book rests upon the determination of a general concept of law. This was set out in the previous chapter. This general concept of law has several functions. First, it explains why law is a normative practice that is valuable for practically reasonable human agents. Secondly, this general concept of law can also be employed to establish a concept of international law as a *form of* law. Thirdly, it can be employed to interpret normative practices which are normally called law, and to isolate that which is significant about such practices qua forms of law. This is as much the case for normative practices normally called international law as for those practices normally called state legal orders.

My primary task in this chapter is to articulate how the general concept of law can be employed to conceptualise international law as a form of

[1] H Lauterpacht, 'The Nature of International Law and General Jurisprudence' in *International Law, Being the Collected Papers of Hersch Lauterpacht*, vol II, *The Law of Peace, Pt 1* (E Lauterpacht (ed), Cambridge, Cambridge University Press, 1975) 7.

[2] *Ibid*.

[3] *Ibid* at 21.

law. A secondary task is to consider how we *go about* interpreting normative practices which are usually called international law. This argument is then built upon in Chapters 9 and 10 to set out in detail the concept of international law as well as explore its institutional character. To begin with, it is useful to set out briefly the overall argument which spans these three chapters.

A JUSTIFICATION FOR INTERNATIONAL LAW

The general concept of law described in the last chapter can be summarised in the following way. Natural human relations can often be harmful to the vital moral interests of human agents (which are defined by the concept of human dignity) in that they prevent each human agent achieving his purposes (thus he does not have autonomy (or (for Rousseau) moral freedom). Law, which describes a set of authoritative and general or omnilateral norms applied by a set of legal officials, concretises and restructures those natural human relations so as to ensure they are conducive rather than damaging to these vital interests. The application of these norms by legal officials implies the development of various institutionalised practices, constrained both substantively and procedurally, which create, interpret and enforce such norms. This general concept of law is described by the integrated-Autonomy Thesis (or integrated-AT). This general concept of law unifies all forms of law including international law.

How is the move made from the general concept of law to international law as a specific form of law? Kant's injunction that '[a]ll men who can mutually influence one another must accept some civil constitution',[4] that is government through law, is a promising starting point, if not least because his argument for law was broadly supported in Chapter 7. Kant explains how his justification for law, whereby each of us are morally compelled to submit to the authority of an omnilateral will, equally applies to the interrelations between communities governed by state legal orders. This is because it is another example of where individuals 'mutually influence each other' and therefore must be governed by law. Kant makes this point and explains how this gives rise to a justification for international law:[5]

> finally, after much devastation, upheaval, and even complete exhaustion of their inner powers, [states] . . . are driven to take the step that reason could have

[4] I Kant, 'Towards Perpetual Peace: a Philosophical Sketch' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992, first published in 1795) 112 [8:348 footnote].

[5] I Kant, 'Idea for a Universal History with a Cosmopolitan Intent' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992, first published in 1784) at 34–5 [8:24].

> suggested, even without so much sad experience, namely, to leave the lawless state of savagery and enter into a federation of peoples. In such a league, every nation, even the smallest, can expect to have security and rights, not by virtue of its own might or its own declarations regarding what is right, but from this great federation of peoples . . . alone, from a united might, and from decisions made by the united will in accordance with laws.

It is clear from this statement that Kant's argument for the general concept of law applies as much to the relations between states as between human beings within various communities which are governed by state legal orders. This is because the problem of a state of nature in pre-legal human relations and international relations is, in all important ways, the same.

In this chapter, this argument is set out in detail and comprises three parts. First, I develop a rudimentary moral concept of the sovereign state. Secondly, I run the argument for the integrated-AT set out in the last chapter for a community of such states. Thirdly, I set out how international law modelled on the integrated-AT can take either an interstate (in which the states collectively administer the international legal order) or suprastate (in which international institutions are separate and above state legal orders) institutional form.

There are a number of immediate problems with this strategy which give rise to the focus of Chapters 9 and 10. One is that the foregoing argument, which justifies international law, may not be straightforwardly applied to govern international relations. For example, Kant's 'federation of peoples' seems something quite different to the state legal orders with which we are familiar. Is Kant justified in claiming (albeit equivocally)[6] that law can be equally instantiated in a horizontal, federative and interstate institutional structure, as well as in a vertical state legal order? If it is, how are we to theorise this institutional distinctiveness? Secondly, Kant's argument rests upon a simile between natural, human agents and states. Can this simile be sustained or are human agents and states different in significant ways? Bringing these two concerns together, it might be the conception of the state itself, as a sovereign body, and as an artificial institution rather than natural being, which leads us to different conclusions about the institutional structure of international legal order. Certainly, the normative positivist's argument that international law should take a horizontal institutional form rests upon the institutional role which states can perform in the creation of international legal norms. Kant suggests something similar as has already been suggested. International law is institutionalised as 'a federation of *nations*, but it must not be a nation consisting of nations'.[7] This is because '[t]he latter would be contradictory, for in every nation there exists the relation of *ruler* (legislator) to subject (those

[6] See below 235–39 for a discussion of this equivocation in the character of Kant's concept of international law.

[7] Kant, 'Towards Perpetual Peace', above n 4, at 115 [8:354].

who obey, the people); however, many nations in a single nation would constitute only a single nation'.[8] Thus, it is something about the nature of states qua states which requires that international legal order should not resemble some sort of global or universal sovereign state.

These ideas are considered in Chapters 9 and 10. In Chapter 9, I argue that if international relations are significantly different to natural human relations, these differences are not sufficient to undermine the argument that international relations must be regulated by international law. But such arguments may demonstrate that international law need not or should not take an institutional form which is a globalised version of a state legal order. In Chapter 10, I argue that international law based upon an interstate system is sufficient to establish an international legal order in a community of states, each of which acts on the moral obligations each owes to others and to those they govern. However, in a world like ours, specific suprastate institutions are required to ensure that international legal order fulfils the requirements of the integrated-AT. Therefore, interstate institutions are plausible for ideal theory, but often implausible for non-ideal theory. This thesis is then developed with regard to issues such as law-creation, international dispute settlement, personality and enforcement.

CIVIL INCORPORATION AND THE SOVEREIGN STATE

As just mentioned, in this chapter the argument for a general concept of law will be run for a community of states. This, however, presupposes a concept of the state and this is the focus of this section. Before setting this argument out, it is necessary to make two points of clarification.

The first point is that the concept of the sovereign state, while important, is one that need not be fully explored here. This is a book about international law and not the concept of the state, so a detailed discussion here would be inappropriate. But not only this, because some reject the idea that the state, or international (or, more accurately, interstate) relations, should be the primary focus of forms of global law, we should not automatically assume that the state is the subject of global regulation.[9] These sorts of arguments are discussed in Chapters 9 and 10, and there the concept of the state, from the perspective of international legal regulation, is more fully developed. My task here, then, is to establish the rudimentary concept of the state in order to develop the concept of international law. This is then embellished upon in subsequent chapters.

[8] Kant, 'Towards Perpetual Peace', above n 4, at 115 [8:354].

[9] For a summary of this literature on 'post-sovereignty', see S Beson, 'Sovereignty in Conflict' in C Warbrick and S Tierney (eds), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (London, British Institute of International and Comparative Law, 2006).

The second point is that the concept of the state offered here is a moral conception of the state. Briefly, I argue that the concept of the sovereign state follows from the integrated-AT. Because the integrated-AT proposes that law and morality should be integrated, it will be argued that the concept of the state can be said to reflect the same moral orientation. Building on this claim, I propose, a moral concept of the state whereby it has certain moral rights and duties towards other states and those in the communities all states govern. Discussion of the moral concept of the state can be distinguished from sociological questions about various powerful institutions, which are normally called a 'state' or a 'regime', and how each attempts to justify their claims to authority.[10] It can also be distinguished from the juridical view of the state: that is, one that is constructed by state law or international law. Here, the state is conceived of as a corporate body which has agency and is responsible for exercising that agency consistently with legal norms. These three ways of viewing the state are interrelated. In this book, I will concentrate on the interrelations between the moral and juridical concepts of the state. I will argue that the moral concept of the state forms the basis for international legal standards to which juridical states are legally required to conform. The juridical concept of the state, however, is one that is based upon de facto effectiveness rather than legitimacy. The reasons for this emerge from debates amongst international lawyers about how best to conceive of the state as a juridical body, and these will be considered in detail in Chapter 10. This section proceeds, however, by considering the moral concept of the state and comprises three arguments. First, and as just mentioned, it is argued that the integrated-AT and the moral concept of the state are related concepts. Secondly, it will be shown how the state can be said to have moral rights. The third argument explains how the state can be said to have agency.

The State and Civil Incorporation

The moral concept of the state is, I will argue, described by the integrated-AT. This, in turn, implies a rejection of dualism between law and the state. To begin with, the relationship between the AT and the state can be brought out through two examples.

[10] For the reasons like those set out in this book, sociological inquiry presupposes a concept of statehood. For theorists of the state, like Weber and Dyson, this is a thin concept of the state which concerns how order is established, but not whether it has any particular substantive orientation. On the basis of arguments developed throughout this book, I consider that the concept of the state must take a substantive moral form. See K Dyson, *The State Tradition in Western Europe: a Study of an Idea and Institution* (Oxford, Martin Robertson, 1980) ch 8, for an interesting discussion of the methodology relating to the concept of the state.

The first is Hobbes' discussion of the similarities between the sovereign state and the human body in the opening to *Leviathan*. For Hobbes, the sovereign state is an 'Artificiall Man' where the sovereign is the 'Artificiall *Soul*, as giving life and motion to the whole body'.[11] This analogy captures the idea of *civil incorporation*, where a community of disparate, unilaterally judging, agents are unified as one judging agent through the creation of a sovereign state. This sovereign state, then, determines what is the case for each member of that community. But this is equally a description of law as described by the AT. Both describe the way in which a group of individuals becomes a *unified* political-legal community, through *civil incorporation*, and becomes a community governed by the state through law. Furthermore, because law, as described by the AT, *ultimately determines* what is to be the case for the community it governs, it reflects the concept of the *sovereign* state.

The second view elaborates on the institutional features of the state. Kant, whose concept of omnilateralism in many ways mirrors Hobbes' concept of sovereignty just set out, argued that '[a] state (civitas) is a union of a multitude of human beings under laws of right'.[12] This comprises of three 'persons' that correspond to the familiar executive, legislature and judicial institutions. He claims that these are held together 'in a practical syllogism: the major premise, which contains the *law* of that ['general united' or omnilateral] will; the minor premise, which contains the *command* to behave in accordance with the law, that is, principle of subsumption under the law; and the conclusion, which contains the *verdict* (sentence), what is laid down as right in the case at hand'.[13] Therefore, the state institutions which Kant describes are logically implied by the idea of the omnilateral will. The sovereign state, in this sense, describes an *institutionalised* version of the AT and is entirely captured by it.

As was argued in Chapter 7, from the practically reasonable viewpoint, one must select the narrower integrated-AT. For the reasons just set out, this viewpoint equally entails that the sovereign state should be understood as a particular institutionalised manifestation of the integrated-AT. The sovereign state describes those institutions which are necessary to enable a community to restructure its natural social relations in a way that reduces dependency and enhances human dignity and individual autonomy. It achieves this by being substantively and procedurally constrained so as to achieve this end.[14] This, I suggest, is the moral concept of the state.

[11] T Hobbes, *Leviathan* (Cambridge, Cambridge University Press, 1992, first published in 1651) 9 [1].

[12] I Kant, *The Metaphysics of Morals* (M Gregor (trans), Cambridge, Cambridge University Press, 1996, first published in 1797) 90 [6:313].

[13] *Ibid*.

[14] See above 137–38 for a discussion of these substantive and procedural constraints. It should be noted that the moral concept of the state is close to traditional understandings of the *Rechtsstaat*. See H Heller, '*Rechtsstaat* or Dictatorship' (1987) 16 *Economy and Society* 127.

For these reasons the integrated-AT, properly understood, implies a rejection of a dualism of law and state at least with regard to the community it governs. Dualism 'attributes to the state an existence independent of the legal system'.[15] Kelsen put this well when he states that dualism conceives of the state as 'essentially metalegal in character, some kind of powerful macro-anthropos or social organism'.[16] These biological metaphors obviously bear some parallel to Hobbes idea of the sovereign state being an artificial person. But the crucial difference is that for Hobbes, the artificial person, which is the sovereign state, can only be constructed *through human volition*, rather than being some kind of meta-legal entity. For Hobbes, the sovereign state is correctly understood as the product of civil incorporation in response to the human need for social order, and this is what unifies the state and law. In this sense, the coercive acts of the state cannot be disentangled from those of law: they are both ways of describing the process of determining and enforcing what is right for a community.

Sovereignty and Collateral Moral Rights

Intuitively, dualism between the state and law is probably most plausible when the state is conceived of as an agent in international relations. As has been seen, internally, the state has a specific relation to those subject to it: it refers to the omnilateral will of the community governed by law in which state officials have particular roles in the overall functioning of state institutions. Externally (that is, a state's relations to other states) it can be seen quite differently. Kant sets out this familiar idea: the state is 'a moral person . . . [which] is considered as living in relation to another state'.[17] In this external dimension, the state could be said to have a personality as a sovereign state which is distinct from the way it is internally conceived thus, prima facie, implying dualism. But dualism, in this sense, only implies that states can be said to have external agency. It does not establish that states have some sort of *inherent* dignity, that they are free from

[15] H Kelsen, *Introduction to the Problems of Legal Theory* (S Paulson and B Litschewski-Paulson (trans), Oxford, Clarendon Press, 1992, first published in 1934) 97 [para 46].

[16] *Ibid*., referring to Jellinek's 'two-sides theory'. See G Jellinek, *Allgemeine Staatslehre* (3rd edn, Berlin, O Häring, 1914). Perhaps the strongest form of dualism, which implies not only the personhood of the state, but also that it is 'the absolute power on earth', is set out by Hegel. See G Hegel, *Elements of the Philosophy of Right* (AW Wood (ed), HB Nisbet (trans), Cambridge, Cambridge University Press, 1991, first published in 1821) 366–71 [paras 330–40]. See also, J Waldron, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law and Public Policy* 15 at 20–21.

[17] Kant, *The Metaphysics of Morals*, above n 12, at 114 [6:343]. See also S Byrd, 'The State as a Moral Person' in H Robinson (ed) *Proceedings of the Eighth International Kant Conference* (Milwaukee, Marquette University Press, 1995) 171

the constraints which arise from morality, or that they cannot be bound by international law.

This said, states can be said to have a series of collateral moral rights, which flow from human dignity, and which are normally associated with sovereignty. As has just seen set out, law restructures social relations so that each human agent subject to it has those rights which are necessary for them to have dignity and this is institutionalised through the sovereign state. Having such rights would be threatened if the existence of the state was undermined by others, whether inside their community or from outside.[18] So, while a sovereign state does not have intrinsic rights (like human agents) it does, as an artificial agent, have collateral moral rights. Put simply, this is because of the central importance the state has for maintaining the human dignity of those governed by it. For the dualist, the state is often portrayed as some sort of 'social organism' which we might say has natural sovereign rights in the same way as a human agent does. This should be rejected. Instead, the moral value of the sovereign state to its subjects is the sole reason why states can be said to have rights as a sovereign state.

The content of these collateral moral rights is based upon the two ways in which law expresses the collective will of those subject to it.[19] First, the state establishes the dignity of those it governs through legally articulated and protected civil rights. Secondly, the state reflects that which the community as a whole collectively decides to do through the latter's democratic will.

If the state is valuable to protect the justified moral interests of each member of the community it governs, this corresponds to two familiar sorts of collateral moral rights against other states. The first is a right to non-interference. This imposes a duty on other states and persons not to undermine the state as a community's attempt at civil incorporation because of the fundamental role the state has in establishing the conditions by which individuals can have human dignity. A second collateral right, which can be referred to as state autonomy, is the freedom for the political-legal community to achieve its collective purposes.[20] However, it should be observed that state autonomy does not simply reflect a prudential right which is defensively asserted by states, but rather is a moral right. This is because autonomy is exercised in a social environment whereby each state's attempt to achieve its purposes potentially affects the

[18] Rousseau makes this point when he writes: 'What, then, does it mean to wage war on a sovereign? It means an attack on the public convention and all that results from it; for the essence of the state consists solely in that.' See JJ Rousseau, 'The State of War' in S Hoffmann and D Fidler (eds), *Rousseau on International Relations* (Oxford, Oxford University Press, 1991) 42

[19] See above, at 182–87.

[20] This might also be called 'external self-determination'. See A Cassese, *Self-Determination of Peoples: a Legal Reappraisal* (Cambridge, Cambridge University Press, 1995) ch 4. See also B Simma (ed), *The United Nations Charter* (2nd edn, Oxford, Oxford University Press, 2002).

capacity of other states to act.[21] A state with unfettered freedom can cause violations of the moral rights of those affected by its actions.[22] For a community of agents to will state institutions which are unconstrained in this way implies that it is willing a state of affairs where such violations may occur. This, given the argument in Chapter 5, constitutes a denial of the value members of the community must place on their purposes.[23] In this sense, the autonomy of states implies a moral, rather than unfettered, freedom to act. That is, states have collateral moral rights, but they also owe moral obligations to other states, communities and human agents when acting in international relations.

The State and Agency

As just mentioned, state action exists within a social environment that can limit or enhance the capacity of other states to achieve their purposes. Some might assume that if all states attempt to act consistently with the moral obligations they owe to their recipients, their relations would not be characterised by moral conflict or co-ordination problems. This assumes too much for reasons which are familiar. Kant explains: 'to assume that the ruler cannot ever err or that he cannot be ignorant of something would be to portray him as blessed with divine inspiration and as elevated above the rest of humanity'.[24] So, to assume that ideal theory describes a world devoid of moral conflict or co-ordination problems assumes that states are somehow morally infallible. But if a state is administered by human agents, the decisions those agents make on behalf of the state must be fallible in the same was as individuated human agency can be. This is the case even if human agents are attempting to comply with their moral obligations.

There are a variety of reasons why moral fallibility arises in state action, which correspond to the account of human fallibility in Chapter 7.[25] One reason is when a state makes a serious attempt to comply with its moral obligations, its judgment involves an appraisal of how different actions fit with these obligations. Thus, state officials have to envisage various 'adjusted social worlds' which are likely to result from acting on different judgments. State action is an attempt to restructure international relations in various ways so that the 'adjusted social world' becomes reality.

[21] See above 179–80 and F Neuhouser, 'Freedom, Dependence, and the General Will' (1993) 102 *Philosophical Review* 363, 381.

[22] In this abstract and general sense, I accept Julius' reply to Nagel. See below n 26.

[23] See above 112–14 and 117–19.

[24] I Kant, 'On the Proverb: That May Be True in Theory, But Is of No Practical Use' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992, first published in 1793) 82 [8:304].

[25] See above 164–68 and 171.

Imagining these worlds correctly is normally an extremely complex task and often action will have an impact which may not be envisaged by even the most sophisticated state decision-making procedures. All states can do is make a good-faith judgment which balances the chances of achieving a particular outcome with the benefits which arise from taking a particular course of action. To this problem can be added that a particular configuration of actions between a group of states may cause harm to each; for example, if all states claim a right to extract as much of a previously unowned resource as they need, this may well mean that such resources are overexploited and diminished.

This fallibility is aggravated because a state is responsive to the community it governs and not to those who are outside of this community and who might be affected by its activities.[26] A good example of this point are protectionist policies adopted by wealthy states with regard to their agricultural sector which can ultimately deny a large number of human beings in poorer states the conditions by which they can have basic goods. Some immigration policies would be another equally good example.[27] Also, a claim to a particular resource may be justified in abstract, but not when considered in a social context. For example, a state which claims a moral right to global resources (for example, metals found on the deep seabed) because it allows the development of a new university (thus increasing the additive well-being of the community it governs), has a prima facie moral claim to the resources. However, there may be another state which has a greater claim to the resources to ensure that its population can have shelter (which is a basic right). The university-building state can rightfully claim the resource in abstract, but this example shows that it may sometimes be wrongful to do so in a particular social setting.

In summary, the moral concept of the sovereign state has three characteristics: (i) it is an institutionalised version of the integrated-AT; (ii) it is morally obligated towards other states and other human agents and has rights itself; and (iii) it is morally fallible. A community of such states is described by ideal theory. From the viewpoint of practical reasonableness, why should a community of such states be governed by international law? To develop an answer to this question, it is useful to return to Kant's justification for law and see how it plays out in international relations.

[26] For discussion of this point see T Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113 and A Julius, 'Nagel's Atlas' (2006) 34 *Philosophy and Public Affairs* 176. See also J Madison, A Hamilton and J Jay, *The Federalist Papers* (London, Penguin, 1987, first published in 1788) 111.

[27] See Lauterpacht, above n 1, at 28. Here he makes the same sort of point: 'subjects like economic policy and migration are entirely within the so-called sphere of exclusive jurisdiction of the State—matters which are among the most fruitful sources of friction'.

INTERNATIONAL LEGAL ORDER

Any analysis of Kant's work on international law is complicated because his arguments on this subject are spread across a number of essays, and his claims do not always appear to be consistent with one another.[28] The interpretation offered here is an attempt to read Kant's international legal theory as an attempt to extend his general concept of law to international relations. Given his claim that '[a]ll men who can mutually influence one another must accept some civil constitution'[29] this would seem to make sense. While international legal order might take a different institutional form to state legal orders for Kant,[30] I will attempt to show how his general argument for law equally applies to international relations and gives rise to a plausible argument for international law.

Kant's 'State of War'

It is not hard to show that Kant's argument for international law adopts a very similar structure to his argument for law in general. A starting point is Kant's comment that 'nations . . . [and] peoples can be regarded as single individuals who injure one another through their close proximity while living in the state of nature (i.e., independently of external laws). For the sake of its own security, each nation can and should demand that the others enter into a contract resembling the civil one and guaranteeing the rights of each'.[31]

The important feature of Kant's observation is that states 'injure one another through their close proximity'.[32] When reading Kant's work on international relations, 'injury' sometimes reflects a more Hobbesian view than his general legal theory. For instance, he characterises the state of nature as a 'state of war',[33] 'barbarous freedom'[34] and 'a mad freedom'.[35] However, some care is needed here. In the quotation above, he argues that

[28] His discussions of international relations and law are mainly found in 'Idea for a Universal History' (1784), above n 5; 'On the Proverb' (1793), above n 23; 'Towards Perpetual Peace' (1795), above n 4; and *The Metaphysics of Morals* (1797), above n 12. See below 235–39, for a discussion of confusion as to whether Kant's view of international law is analogous, or an approximation, to state legal orders.

[29] 'Towards Perpetual Peace', above n 4, at 112 [8:348 footnote].

[30] See *ibid* at 117 [8:357–8]. For example, Kant writes that international law need not be a 'world republic' but 'only the negative surrogate of an enduring, ever expanding federation that prevents war and curbs the tendency of that hostile inclination to defy the law'.

[31] 'Toward Perpetual Peace', above n 4, at 115 [8:354].

[32] *Ibid*.

[33] *Ibid* at 112 [8:348].

[34] 'Idea for a Universal History', above n 5, at 35 [8:26].

[35] 'Towards Perpetual Peace', above n 4, at 115 [8:354].

it is states' 'close proximity' to each other which causes injury and this seems broader than a Hobbes' characterisation of the state of nature. In Chapter 7, I argued that injury is caused by each individual human agent successfully acting on its unilateral will. It is the potential to limit the capacity of others to act by successfully acting which gives rises to a right-infringement and is a potential source of conflict. This same view is clearly expressed in Kant's characterisation of the 'state of war' in international relations. He writes: 'if even only one of these [nations] had only physical influence on another, they would be in a state of nature, and consequently they would be bound together in a state of war'.[36]

This broader way of thinking about injury seems to imply that we should reject the view that the state of war is a Hobbesian state of hostilities or potential hostilities, and in which each is diffident to others.[37] Rather like Kant's general legal theory, the state of war appears to describe a community of states in which each can have a physical influence on each other by acting on, and achieving, their unilateral judgments. State action can be said to alter or *restructure* the relations between states by altering the possibility that other states can achieve their purposes. We might, then, presume that as a system, international relations are structured by the relative power of states to achieve their respective purposes. This reading explains why Kant writes, 'wars are . . . so many attempts . . . to bring about new relations among nations'[38] and why the state of war should not be seen interpreted through a Hobbesian lens. This interpretation clarifies Kant's claim that:[39]

> [t]he elements of the right of nations are these: (1) states, considered in external relation to one another, are (like lawless savages) by nature in a non-rightful *condition*. (2) This non-rightful condition is a condition of war (of the right of the stronger), even if it is not a condition of actual war and actual attacks being constantly made (hostilities).

Before moving to explain why the state of war is not-rightful, it is useful to illustrate Kant's characterisation of the state of war by way of an example. This example concerns a dispute between the United States and the European Union over the Helms-Burton Act. This Act was enacted by the US Congress on 12 March 1996. It was intended that it would further US foreign policy in Cuba by increasing its economic isolation. Specifically, the Act allowed US nationals and companies to claim punitive damages in a US court against any foreign person or company which

[36] 'Towards Perpetual Peace', above n 4, at 112 [8:348].

[37] See below 229–32.

[38] 'Idea for a Universal History', above n 5, at 35 [8:24–5]. This seems very similar to Rousseau's description of the causes of war. Rousseau writes that '[w]ar is a permanent state which presupposes constant relations . . . there is a constant flux which constantly changes relationships and interests.' See JJ Rousseau, above n 18, at 35.

[39] *The Metaphysics of Morals*, above n 12, at 114–15 [6:344].

owned (or more generally 'trafficked' in) any property that was confiscated by the Castro Government at any time after 1 January 1959. It also allowed non-US nationals who trafficked in confiscated property to be excluded from the United States. As of the end of 1997, 1,300 international companies were considered to be engaged in trafficking by the US Government.[40] Lowe claims that the 'Helms-Burton Act is the expression of a parochial policy of the United States towards Cuba, which the European Union has little or no interest in supporting'.[41] Instead, the European Union's policy with regard to Cuba was one of attempting to increase economic links with Cuba and so to promote peaceful economic and political reform. The Council of Europe passed a directive which gave protection to EU companies. Specifically, it prohibited compliance with the Helm-Burton Act and provided for claw-back mechanisms by which a national of, or company incorporated in, an EU state could obtain recovery from the assets held in the European Union by a successful US plaintiff.

The EU and US policies can be considered, for the sake of argument, justified attempts to encourage reform in Cuba when considered against their internal decision-making processes. But they are incommensurable with, and each directly undermine, the other. Both policies are, as Kant puts it, 'attempts . . . to bring about new relations among nations'[42] but both cannot be the case at the same time. Therefore, for the United States to succeed in its policy is harmful for the European Union, and vice versa. Furthermore, given that enforcement is likely to take place through domestic or EU courts, this means that whether the policy is successful depends upon whether the plaintiff or defendant has assets in the European Union or United States.

Why is the State of War Not-rightful?

Kant now needs to show why the state of war is not-rightful. One argument which he offers is that the state of war violates the categorical imperative, and hence it is immoral for any state, regardless of their subjective interests, to will it. To explain, in the state of war, Kant argues that there are certain moral obligations on states which govern when and how states can use force against one other.[43] These cash out into a series of moral maxims whereby states can only go to war with the consent of those they govern, can only go to war when they have been wronged by another

[40] V Lowe, 'US Extraterritorial Jurisdiction: the Helms-Burton and D'Amato Acts' (1997) 46 *International and Comparative Law Quarterly* 378.

[41] *Ibid* at 388.

[42] 'Idea for a Universal History', above n 5, at 35 [8:25].

[43] *The Metaphysics of Morals*, above n 12, at 116 [6:346].

state, cannot use spies or 'poisoners', and so on.[44] Most importantly, however, all states must leave the possibility of peace open because to do otherwise would 'reveal . . . a maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible and, instead, a state of nature would be perpetuated'.[45]

This final moral obligation which states are under implies that to deny peace through law when using force constitutes a contradiction in the 'will' of a state and a violation of the categorical imperative. Why is this the case? One answer which Kant gives is that such a maxim would, if universalised, imply a denial that any state could achieve its purposes or that it could conclusively acquire things which are useful to the community it governs. To explain further, in the last chapter, it was argued that Kant's argument about property is properly considered as an example of a more general point. This point is that in a social setting, a successful act necessary constrains the ability of others to achieve their will. Read in this light, a state of nature in international relations is not-rightful because what is the case is determined by the relative power of states to achieve their unilateral purposes, and to universalise this implies systemically that no state can have a conclusive right to achieve their purposes. This is why Kant writes:[46]

> [s]ince a state of nature among nations, like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition, before this happens any rights of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely provisional.

The problems which arise in the state of war are solved by making a judgment which conclusively determines what is the case for states involved in any particular co-ordination problem. The 'right of nations', or international law, arises from this need to establish omnilaterally what is the case in the relations between states and by doing do so to concretise such relations. Institutionally, if this achieved through ad hoc arrangements, such as, for instance, third-party diplomacy, states cannot predict how others will act and omnilateral judgments will be purely reactive to disagreements. This is why Kant argues that states must 'stand under common external constraints'[47] which are 'independent, universally valid laws that restrict the freedom of everyone'.[48] Such universally valid laws establish zones of freedom for each state and pre-empt disagreement. This is why it can be said that Kant argues that international law is reflected by the Autonomy Thesis.

[44] *The Metaphysics of Morals*, above n 12, at 115–17 [6:345–7].
[45] *Ibid* at 118–19 [6:349].
[46] *Ibid* at 119 [6:350].
[47] 'Towards Perpetual Peace', above n 4, at 116 [8:355].
[48] *Ibid* at 116 [8:356–7].

The substantive content of these zones of freedom may be determined by state consent, but they need not be, and international law-making might be institutionalised differently. Kant's own view seems to be that consent is a condition by which international law is created: he writes that states are constrained by 'commonly accepted [principles of] of *international right*'.[49] This view of international law will be considered in detail below. But, the central point is that by establishing such zones, international law allows states to achieve their purposes so long as they do not interfere with the freedom of others. Therefore, for Kant, without international law, co-ordination problems are solved by force, international relations are structured by the will of the most powerful states, and no state can have a conclusive right to claim or do anything. To will a state of war is to will that states cannot have a legal right to achieve their purposes, whether those purposes are consistent with morality or otherwise.

The Integrated-Autonomy Thesis and the Sovereignty of International Law

There are three additions which must be made to this argument. The first is that this argument must imply the *sovereignty of international law*. This is because international law determines what is the case for states omnilaterally and override each of their unilateral wills. Without this being true, states remain in a state of war.

Secondly, Kant argues that the states which are subjects of international legal order must be 'republican'.[50] This point is crucial: for Kant, it is because states are republican that the international legal order takes an interstate form which he calls a 'federation of states'. Although this point will be built on in detail in Chapters 9 and 10, it will be recalled that the sovereign state is a particular and familiar institutional form which a legal order can take. But law can be institutionalised in ways that are different to state legal orders and this is what, in my view, Kant is arguing for. A familiar way in which we could conceive of international law is as an interstate system in which republican states have administrative roles in the creation, interpretation and enforcement of international law. In such a system, the sovereignty of international law—that is, the competence to determine what is the case for a community of states—is held collectively by states in some way.

Thirdly, Kant's general argument for law is predicated on the claim that the state of nature is *immoral* and should be avoided. But it is normally understood that Kant's argument only shows that an omnilateral will

[49] 'On the Proverb', above n 24, at 88 [8:311].
[50] 'Towards Perpetual Peace', above n 4, at 115 [8:354].

should establish *conventional* zones of freedom. Law need not have a particular substantive character. It is not clear whether this sort of reasoning applies to Kant's concept of international law, but if it does, it is, I think, false for the same reasons that were set out in Chapter 7.

To explain, for Kant morality is explicable in international relations. The key example of this is in his discussion of the moral constraints on states when they use coercive force against other states. If this is the case, then states are under two sorts of moral obligation. As just mentioned, states have to act in accordance with the moral obligations they owe their recipients. But secondly, it has also been shown that states have a moral obligation to enter into the civil condition and accept the rule of international law. However, if morality is explicable, then it is possible to evaluate the moral quality of international legal norms. For example, an international legal norm which allowed states to use 'poisoners' would violate the moral obligations states' owe to each other.

If Kant's argument for international law reflects his general legal theory, as I think it does, then conflicts between legal and moral obligations are resolved by the former overriding the latter.[51] However, while this may be the case, and states' judgments about the moral quality of international legal norms may be ultimately incorrect (because of human fallibility), it is surely irrational to will an international legal order which is not designed to attempt to be consistent with morality. This argument, in itself, seems to preclude the bare-AT as a system of international law in which the content of legal norms is conventional. It must be, on the other hand, rational to will an international legal order modelled on a version of the AT which is designed to solve recurrent co-ordination problems which occur in international relations in a way that is consistent with morality.

The Rousseauian turn which was taken at this stage of the argument in Chapter 7 can be employed usefully here to explain the relationship between legal and moral obligations. It will be recalled that Rousseau adopts a *moral* conception of freedom (which is analogous to autonomy in Kant)[52] which is defined as being free from the will of others. So, to 'be unfree is to obey a foreign will, and freedom is always being free of the will of another'.[53] To be 'unfree' is to be understood through the concept of dependency. Dependency, broadly speaking, refers to those actions which limit the capacity of others to achieve their will as well as, more narrowly, one's reliance on others for one's economic and psychological well-being. Rousseau argues that it is possible to restructure social relations though

[51] See above 175–77.

[52] See above 177–81. On the relationship between the international theory of Kant and Rousseau see G Cavallar, *Kant and the Theory and Practice of International Right* (Cardiff, University of Wales Press, 1999) 49–50; 79–80.

[53] Neuhouser, above n 21, at 381.

law so as to remove these sources of dependency so that these relations are 'less injurious to freedom'.[54] It was also argued that in order to do this, law must ensure the objective conditions by which each agent can exercise their freedom. Reading this in line with Gewirth's argument for generic rights, such conditions are embodied in the concept of human dignity.

This same argument can be applied to consider the moral content of international law. In international relations, even if states attempt to respect the moral obligations they have towards human agents and other states, their choices will limit the ability of others to achieve their will. Furthermore, the relations between states are ones that can often be characterised by dependency. Such relations are frequently not conducive to the moral freedom or autonomy of states, or those in the communities they govern. From this perspective, Kant's state of war is not-rightful because each state, individual and community can have their rights infringed simply because of patterns of dependency which arise from international relations. To will an international legal order based upon the bare-AT implies that legal norms may reinforce rather than remove sources of dependency. Put the other way round, it is practically reasonable to will an international legal order which restructures social relations so as to alleviate the pernicious aspects of these forms of dependency which are inimical to both human dignity and the collateral moral rights of states. This is why the international legal order must be based upon the integrated-AT.

The central argument in this chapter is justified by building upon Kant's concept of international law. The concept of international law is described by the integrated-AT. But this is a thin claim and it is developed in the rest of this chapter. Specifically, it is argued that it is possible for international law to adopt two sorts of institutional form, each of which may describe an international legal order which is consistent with the integrated-AT.

INSTITUTIONAL DESIGN

The foregoing argument explains at a very general level how international law is best conceived as an institutional system which expresses the omnilateral will of states and which attempts to restructure the relations between states so as to reduce dependency both for states and human agents. It does not, however, explain how international law can be institutionally structured so as to achieve these ends. In this section, I do not defend a particular institutional form of international legal order, but

[54] *Ibid* at 386. Höffe reads Kant as adopting a view similar to this. See Höffe, O, *Kant's Cosmopolitan Theory of Law and Peace* (A Newton (trans), Cambridge, Cambridge University Press, 2006). For a modern exponent of this view of the nature and function of international law see M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907.

merely set out two possibilities. These are considered as ways of establishing international legal order in Chapters 9 and 10.

One problem when considering the question of institutional design is that our intuitive idea of law is closely connected to the institutional form which is the sovereign state: it is difficult to imagine alternatives to it to govern the relations between states. Kuper makes this point. He observes that as social life has begun to transcend relatively fixed geographically territorial groupings through the process called globalisation, there appears a 'glaring absence of a corresponding increase in our capacity to exercise political control over this enmeshed world'. He claims that '[t]his deficit is partly due to a peculiar way in which our practical imagination is constrained'.[55] The constraints he describes, I contend, are exhibited in the *idea* of the sovereign state and work in two ways. The first is that those who have argued that the sovereign state must be regulated by global institutions tend to replicate the state's fundamental features at the global level. So, for example, thoughts on the accountability of international institutions turn to domestic analogies, such as the democratic state. Secondly, international regulatory techniques are often perceived as unrealistic or utopian because it is either impossible or unwise to attempt to institutionally transcend a society of sovereign states. The first of these ideological constraints employs the idea of the sovereign state to justify particular structures for international institutions. Those advocating the second constraint employ the idea of the sovereign state as a reason for rejecting these very international institutions. It may be that these constraints do, in fact, show that international law is extremely difficult, or impossible, to achieve. However, I think that this view is too extreme. It is possible, as I will show in later chapters, for international law to have an institutional form which does not imply a global or universal state. In the rest of this chapter, it is argued that there are two main ways of considering the institutional design of the international legal order. Using the distinction made by George Scelle, the first is a suprastate system, which reflects the universal or global state, and the second is an interstate system, which reflects the horizontal system of international law with which we are familiar.

International Legal Order as a Suprastate System

As just mentioned, the state, as a form of legal order, dominates our intuitions about how legal institutions should be designed. Following this reasoning, we might think that international legal order can only be established through a suprastate system which is institutionally analogous to

[55] A Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions* (Oxford, Oxford University Press, 2004) 2.

the hierarchical and vertical state legal order. This can be called the universal state or a suprastate system. In such an institutional system, states are subordinate to the institutions of the international legal order.[56] This familiar view can be easily set out.

As mentioned in the first section of this chapter, the state is understood to fulfil three distinctive roles which correspond to three sorts of institution which create, interpret and enforce the omnilateral will. These three functions are, for Kant, logically implied by any attempt to practically institutionalise the omnilateral will.[57] These institutions describe an institutionalised version of law, which is hierarchical and vertical, which we call the state legal order. The same reasoning could be applied to international relations. This implies a universal or global state which contains centralised, hierarchical and autonomous legal institutions which administer state conduct in international relations.

This might seem unrealistic or inappropriate to some, but it is, in principle *a way* of establishing an international legal order which is consistent with the integrated-AT.[58] In brief, the international legal order would look like this: the limited domain of norms which comprise international law are created through suprastate institutions. Such institutions are procedurally and substantively responsive to the vital interests of all human beings in the world. This implies forms of global democratic accountability instantiated through, for example, a universal legislature which is the source of legal norms. This can be said to be a cosmopolitan body in the sense that it is responsive to human dignity and institutionalised through global institutions.[59] Similarly, the universal state would have a global court and executive which resolve disputes over the content of legal norms and enforce such norms against those states which violate them. States, on this model, are parts of a kind of federal system rather than being independent sovereign entities. There even may be grounds for the subjects of international law to be communities of individuals with common interests (such as, for example, professions) instead of states.[60]

International Legal Order as an Interstate System

One central difference between states and human agents is that states have a character both as a subject and institution. Kelsen, for instance, argues that, collectively, states form an institutional system by which international

[56] See, eg, Lauterpacht, above n 1.
[57] *The Metaphysics of Morals*, above n 12, at 90–1 [6:313].
[58] For a discussion of this point, see below 245–69.
[59] See also D Held, *Democracy and the Global Order* (Cambridge, Polity, 1995) 226–31.
[60] See below 218–29 for further discussion of this idea.

relations can be governed.[61] It may, then, be appropriate to establish an international legal order whose institutional functions are, by-and-large, administered by states. This is an interstate system.

Fairly obviously, the interstate system is a way of describing the familiar horizontal model of international legal order. The interstate system is an appropriate way of achieving international legal order, in a way that cannot be achieved in the relations between human agents, for at least two reasons. First, states are able to undertake administrative roles in the international legal order. For example, states through their mutual agreement, are able to create a stable body of international legal norms and thus can have an institutional role in the creation of international law. This idea is familiar. For instance, Kelsen observes that 'the state representatives who are active in concluding a treaty between their two states make up a compound but unitary organ, an organ of the community of states constituted by general international law . . . therefore[,] the state representatives active in concluding the treaty are, as suborgans of the collective organ creating the treaty norm, primarily organs of the international legal community'.[62] Georges Scelle's discussion of this point in his theory of *dédoublement fonctionnel* is similar, but he claims that it can equally apply to the other institutional functions normally associated with state legal orders. Cassese describes his view of the role of the state in international law in the following way:[63]

> As there are no 'specifically international rules and agents' . . ., national members of the executive as well as state officials *fulfil a 'dual' role*: they act as state organs whenever they operate within the national legal system; they act *qua* international agents when they operate within the international legal system. Thus, when the heads of state of the state legislature take part in the formation of a law-making treaty, they act as international law-making bodies; by the same token, any time a domestic court deals with a conflict of law question, it acts *qua* an international judicial body; similarly, any time one or more state officials undertake an enforcement action (resort to force short of war, reprisals, armed intervention, war proper) they act as international enforcement agencies.

It is important to notice that, for both Scelle and Kelsen, when states administer this role in law-creation, norms (like the law of treaties) establish the conditions under which states can exercise these public

[61] H Kelsen, *Introduction to the Problems of Legal Theory* (S Paulson and B Litschewski-Paulson (trans), Oxford, Clarendon Press, 1992, first published in 1934) 123 [para 50(h)].

[62] *Ibid*.

[63] See A Cassese, 'Remarks on Scelle's Theory of "Role-Splitting" (*dédoublement fonctionnel*) in International Law' (1990) 211 *European Journal of International Law* 210, 212–13. Cassese considers the influence of Kelsen on Scelle in *ibid* at 221. See also Waldron, above n 16, at 18.

international functions.[64] As such, they can be said to be constitutional norms of the international legal order.[65]

The second reason why an interstate system can establish an international legal order concerns a central difference in the way states and human beings are bound by legal constraints. This difference is that for human beings, law is only binding *in foro externo*.[66] Law cannot bind them *in foro interno*: this is the domain of moral constraint. However, states can be bound internally, but *in foro externo*, through various procedural mechanisms such as democracy, judicial review, and so on. So, if a state pursues a policy which is inconsistent with international law this can, in some circumstances, be legally challenged in domestic courts and, if successful, a judgment can be enforced against the state. Taking this one stage further, and in a different theoretical context, Jellinek argues that international law can be rendered 'external state law' and enforced through various domestic institutions against the state.[67] While Jellinek employs this argument to undermine claims of the autonomy of the international legal order, it does highlight how violations of international legal norms could be enforced through democratic procedures (that is, voting the elected government out of power) or review procedures (challenging the legality of state actions against international legal norms)[68] within the state. It is for this reason, that international legal norms can be internally binding and enforced *in foro externo* in a way that state laws cannot be for the communities of human agents they govern.

These two reasons show that many administrative functions of international law could, in principle, be delegated to states, and international legal order be institutionalised as an interstate system. On this basis, part of being a state under international law implies having not only various legally respected sovereign rights, but also a responsibility to act as a legislator, interpreter and enforcer of international law. It is for this reason that it can also be said that the sovereignty of international law is collectively held by states.

For Scelle, this view of international law is only possible in a solidarist international community.[69] Solidarism, in this context, means that the

[64] See M Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge, Cambridge University Press, 2001) 333 and below 245–47. The most obvious examples of this would be (i) the law of treaties which determines when the consent of states is legally binding; or (ii) the laws on collective security which distinguish between illegal and unilateral uses of force under international law; and (iii) the law of state responsibility.

[65] See below, 247.

[66] See Chapter 9, 218–20.

[67] *Ibid*.

[68] See for eg *Campaign for Nuclear Disarmament v Prime Minister of the United Kingdom, Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for Defence* [2002] EWHC 2777.

[69] Scelle's view diverges considerably from the Kantian approach taken in this book. This said, Koskenniemi shows that while solidarism is rooted on an anti-individualist epistemology,

international legal order relies upon states having a moral responsibility to each other, to the communities they govern, and having common, collective or meta-national values and interests. Within an interstate system, it is this moral responsibility that leads a state to undertake administrative functions on behalf of all states and communities rather than act on its own subjective interests. It also places substantive constraints on state action so that it is consistent with the community's solidarist interests. Hurrell summarises this point in the following way: '[w]ithin the solidarist order states are no longer to act for themselves as sovereigns; but rather, first, as agents for the individuals, groups and national communities they are supposed to represent; and second, as agents or interpreters of some notion of an international public good and some set of core norms against which state behaviour should be judged and evaluated'.[70]

In ideal theory, solidarist values are presupposed because it is also presupposed that states have and accept specific moral obligations towards other states and human agents in general. When exercising public international functions, states are (i) committed to a respect for fundamental values associated with human dignity, and (ii) are held accountable *in foro interno*. If these conditions are met, an international legal order, which is consistent with the integrated-AT, could be achieved by adopting an interstate system. It should be noted that this argument seems plausible because in ideal theory it is presumed that states have, and act on, solidarist values. Kant, by claiming that a 'federation of nations' (which is a form of interstate system) must comprise 'republican states', perhaps is making this sort of argument. It is not, however, obvious that this reasoning would follow for non-ideal theory.

Interstate or Suprastate Institutional Design?

It seems that both suprastate and interstate forms of institutional design can, in principle, establish an international legal order which is consistent with the integrated-AT. In Chapters 9 and 10, I build upon the claim just made and show that how we conceive of international relations is logically related to the institutional design of the international legal order. But to complete this chapter, I want to highlight some international lawyers' views about the viability of these two institutional forms.

Scelle argues that there are many shortcomings with an interstate system. One is that in such a system, adjudication and enforcement is under-

it has often reverted to social contractarian arguments to ground its central concepts and a concept of the common good in order to explain how moral obligations bind individuals to each other. See Koskenniemi, above n 64, at 290–300, 319.

[70] See A Hurrell, 'Global Inequality and International Institutions' in T Pogge (ed), *Global Justice* (Oxford, Blackwell Publishing, 2003) 39.

taken by states on their own behalf and leads to abuse of power. For the same reason, Lauterpacht argues that while states should be able to create international legal obligations through consent, they should not be able to interpret the contents of their obligations under international law. He explains: 'the organs of the formation of the will of the international community are, in default of an international legislature, States themselves, their consent being given by custom or treaty and being capable of impartial ascertainment and interpretation by international tribunals'.[71] This implies that international legal order can be established through an interstate system, but it relies upon a separation of powers by which states cannot be judges in their own case. It is 'in flat contradiction to the principle of equality and independence of States [if] each State has the right to constitute itself judge in disputes with its neighbours'.[72]

A further problem which Scelle perceives with the interstate system is that it is functionally ill-equipped to administer international law in accordance with collective, meta-national or solidarist values. He hoped that a suprastate system would emerge that was better able to response to global concerns. Lauterpacht's views on this point are similar to Scelle's. He thinks that his general concept of law is most clearly represented by paradigm cases of state legal orders and this gives us pointers to how international law might develop in an institutional sense. He writes: '[o]f these institutions the State is, in the relations of the individual, the normal and typical manifestation'.[73] Thus, paradigm cases of international law fail because of 'the absence of an international commonwealth organized as a State'.[74] Therefore, '[i]nternational law will not achieve a full measure of reality until it is organically woven into the fabric of a supra-national entity'.[75] The failure to empirically establish such suprastate institutional forms should be seen as defects, but in the following way:[76]

> [t]hese defects, even when viewed in their alarming comprehensiveness, are not destructive of the legal nature of international law so long as they are conceived as associated with a transient state of immaturity which humanity, prompted by the growing interdependence of the modern world, is destined to overcome by conscious effort. So long as this is borne in mind, it is better to admit the various defects of international law than to try to explain them away by unconvincing arguments such as, for instance, that which asserts the enforceability of international law by means of a war or reprisals.

[71] Lauterpacht, above n 1, at 17. This is clearly reflected in Lauterpacht's views on France's reservation to the declaration by which it accepted the compulsory jurisdiction of the ICJ in *Norwegian Loans (France v Norway)* [1957] ICJ Rep 9.

[72] Lauterpacht, above n 1, at 29. Lauterpacht does not rule out the possibility that third states could resolve such disputes within an interstate system.

[73] *Ibid* at 47.

[74] *Ibid*.

[75] *Ibid*.

[76] *Ibid* at 31.

This seems to suggest that international legal order should take a suprastate institutional form to effectively realise the objectives of the international legal order. But, as has just been shown, Lauterpacht does accept that international law can work, to some extent, as an interstate system. These are interesting and valuable arguments because they collectively highlight that the problem we must face is why international legal order should be institutionally designed one way rather than another. This is considered in Chapters 9 and 10.

CONCLUSION

In the introduction to this chapter, I mentioned that my methodological and substantive conclusions about international law were similar to those advanced by Lauterpacht. It is as well to set out this connection by way of conclusion to this chapter in order to bring together my arguments. But it is also useful to do this because it positions my argument within a tradition in modern international legal scholarship.

Lauterpacht and the Progressive Interpretation of International Law

Hersch Lauterpacht's work on the philosophy of international law is scattered throughout his work. However, in his second volume of collected works, his son, Elihu Lauterpacht, brings together a number of his more reflective and theoretical essays. As I set out at the beginning of this chapter, Lauterpacht's view is that cognition of international law requires an a priori concept of law by which to comprehend and organise the paradigm cases of international law. He argues against positivism by holding that a morally substantive concept of law should be taken. He writes that: '[a] more satisfactory solution [to the positivism of Kelsen and Anzilotti] can be found in the hypothesis which, by courageously breaking with the traditions of a past period, incorporates the rational and ethical postulate, which is gradually becoming a fact, of an international community of interests and functions'.[77] The 'interests' and 'functions' of the international community are defined by his statement of the social purposes of international law.

Lauterpacht's view is that international law has five social purposes. The first is 'to protect and secure the independence of States by the prohibition of the use of force and by the collective enforcement of that prohibition'.[78] Secondly, a purpose of international law is 'to render the

[77] Lauterpacht, above n 1, at 18.
[78] *Ibid* at 47. All the following quotations are from the same page.

elimination of force tolerable and durable by the provision of an absolute duty of judicial settlement of disputes and of submission to the decisions of a supra-national political authority decreeing changes in the existing law and existing rights'. Thirdly, 'to give effect, through appropriate limitations and international supervision of the internal sovereignty of States, to the principle that the protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international'. Fourthly, 'by fostering the sentiment of and obedience to law among nations, to develop and finally establish the consciousness of the essential identity of moral standards applicable to States and individuals alike'. The fifth and final purpose of international law is 'the creation of conditions and institutions calculated to bring about the transition to the realizable and certainly not infinite ideal of the Federation of the World conceived as a commonwealth of autonomous States exercising full internal independence, rendered both just and secure by the power of the impersonal sovereignty of the *civitas maxima*'.

Each of these arguments is extremely close to the substantive view of international law offered here. They imply the protection of states' rights (purpose 1) and human rights (purpose 3) through a set of institutions which authoritatively resolve disputes (purposes 1, 2 and 5). Purpose 4 points towards the point made by Scelle that an international legal order should ideally rest upon a set of meta-national or solidarist values. I agree with Lauterpacht when he argues that such values reflect states' rights and human rights.

Lauterpacht takes his methodological approach one stage further in an interesting way. He argues that we should adopt the concept of international law just set out as a lens through which we cognise reality. First, it requires us to engage in what he called 'progressive interpretation'. This means that:[79]

> [i]t is within the province of the science of international law to supply a progressive interpretation of these constitutional charters and of any supplementary instruments calculated to add to their effectiveness and their authority. Such a progressive interpretation is fully consistent with the main established canons of construction, namely, with the principles of effectiveness and interpretation by reference to general legal principles and the social ends of law.

This, then, allows him to interpret paradigm cases of international law. So, various multilateral treaties (such as the Vienna Convention on the Law of Treaties or the Charter of the United Nations) should be construed as constitutional documents rather than being interpreted through a positivist lens. He also saw such developments as attempts to make international law a reality rather it being merely an a priori concept. Thus, in his essay 'International Law after the Second World War' written in 1950

[79] *Ibid* at 44.

he argued that there are 'three principal contributions of the post-war period to the development of international law'.[80] These 'lie mainly in the undoubted improvement of the structure of international organization; in the growing acceptance of the principle of enforcement of international law not only in relation to States, but also against individuals acting on their behalf; and in the recognition of the inalienable rights of the individual conceived as the ultimate unit of all law'.[81] It is my view that this interpretative approach is correct and it clearly reflects the methodological claims set out in this book. So, we should interpret paradigm cases as attempts to establish an international legal order. That they succeed or fail can then be appraised through the conceptual lens which is the concept of international law. This approach to method is not unusual: it is, after all, the same sort of interpretative process that is undertaken by Weil. But I hope to have shown that, like Lauterpacht, there are conclusive reasons for the adoption of the concept of international law which is consistent with human dignity.

Taking this one step further, this interpretative approach does not allow us to argue that international law is, for example, constitutively racist or imperialist, as Anghie would suggest. But we can say that the various ideologies, which are backed by coercive force, which justify, under the banner of international law, the violation of human dignity, which enslave or subordinate communities, or which deny the right to self-determination, cannot be examples of international law. These are merely normative practices which use the word 'international law' to legitimate the unreasonable and immoral practices of the powerful. Such ideologies barely reflect the *concept* of international law. But it is this concept which allows us to interpret such ideologies which are backed by force as failures to establish international law.

Unanswered Questions

The foundations of international law comprise an account of its purposive orientation and institutional character. Furthermore, it includes an explanation of how we should view the normative practices which are normally referred to as international law. In this chapter, I have begun to develop this account by outlining the concept of international law which arises from the general concept of law set out in Chapter 7. However, as the discussion of the suprastate and interstate systems has shown, the institutional nature of the international legal order remains unclear.

[80] Lauterpacht, above n 1, at 167.
[81] *Ibid*.

There are a range of considerations which arise when attempting to answer this question. It could be that there are fundamental differences between international relations and the relations between human agents, which may entail adopting one of these institutional forms over the other. Alternatively, such differences may irrevocably undermine the argument for international law set out in this chapter. Furthermore, it may be that states can perform a more significant role in the administration of international law in ideal theory than they can under non-ideal theory. In Chapters 9 and 10, these questions are considered. By providing answers to these questions, it is possible to establish a comprehensive account of the foundations of international law.

9

The Discontinuity Thesis

THE INTERNATIONAL LEGAL order is a system of omnilateral willing which restructures international relations so that they are consistent with morality. Our paradigm cases are forms of international law to the extent that they conform to this concept. The international lawyer, engaged in 'progressive interpretation', should, where possible, interpret such cases as attempts to establish or apply international law. Thus, documents like the UN Charter, or doctrines, like sovereign equality, should be interpreted through this conceptual lens. Those documents or doctrines which cannot be interpreted through this lens are best considered a negation of international law, as pathological or as a fundamental failure to realise international legal order as a practically reasonable normative practice.

This argument, in itself, tells us something about the general structure of international law and the substantive values which it must protect. It is, however, premised upon Kant's claim that states and human agents, and the social situations in which each interacts, are similar in various ways. Specifically, the argument in Chapter 8 works if (i) human being X is, in all relevant ways, the same as state Y; (ii) the environment in which human being X finds himself is, in all relevant ways, the same as that in which state Y finds itself; and, (iii) the requirements of morality are the same for human being X and state Y. If (i) to (iii) hold, then it is plausible to argue, at least, that the relations between states should be governed by international law for the same reason as law governs the relations between human agents. At most, this argument shows that international law should institutionally take a suprastate form which is described by the global or universal state.[1] If any of these premises can be rejected, then the argument in Chapter 8 is threatened. This chapter is concerned with arguments which reject (i) and (ii). I argue that they do not threaten the argument for international law, even though they may well threaten arguments for the universal state.[2]

[1] See above 204–5, for a description of a suprastate institutional form.

[2] With regard to (iii) see above 193–95. It is plausible, as has been argued, to hold that moral constraints are the same for both an individual human being and a collection of individuals artificially organised as a state, even though the specific rights and duties which arise for both sorts of agent may differ. Therefore, in what follows, this point will not be considered.

There are a range of arguments which hold that premises (i) and (ii) are unsustainable and so suggest that states are not like human agents in various ways, or that international relations are not like the relations between human agents. Such premises may have implications for the structure, or possibility, of international law. An example of this argument is that there are various structural factors which effectively constrain the actions of states which are absent from social relations among human agents. One familiar variant of this argument is advocated by 'democratic peace' theorists, like Doyle,[3] who argue that a world of such states is peaceful and relatively well-ordered and therefore there is no need for some sort of universal state.[4]

In this chapter, I will consider a range of theories that claim that there are *relevant* differences between states, human beings and the environment in which both act, and which can be understood to undermine the argument for international law set out in Chapter 8. That there might be relevant differences can be called the *discontinuity thesis*. The general form of the discontinuity thesis is that there is no contradiction implied by a denial of the application of the logic which explains why law is justified in the relations between individual human agents, to the relations between states. Three versions of the discontinuity thesis which are found in the literature are: (a) sovereign states are not, in relevant ways, similar to human beings; (b) the environment in which sovereign states find themselves is not similar, in relevant ways, to the environment in which human beings find themselves; and (c) the sovereign state cannot be considered a purposive agent.

A fourth form of the discontinuity thesis will be familiar and it perhaps provides the motivation for the versions of the other theses just described. It concerns the widespread scepticism about the extent to which international law can replicate the centralised coercive institutions associated with state legal orders. So, an international legal order cannot be instantiated empirically, especially if this also implies a universal state. Equally, it is unwise and dangerous to centralise legal power in this way to govern international relations. This version of the discontinuity thesis, which does not rest upon a logical refutation of the argument for the universal state, can be put this way: (d) the universal state or international legal order is a justifiable but unrealistic utopia.

There are three broad views about the institutional design and possibility of international law which arise from versions of the discontinuity thesis:

[3] MW Doyle, 'Kant, Liberal Legacies, and Foreign Affairs' (1983) 12 *Philosophy and Public Affairs* 205 and MW Doyle, 'Kant, Liberal Legacies, and Foreign Affairs, Part 2' (1983) 12 *Philosophy and Public Affairs* 323.

[4] See below 219–20.

(1) there is a problem in international relations, but this can be solved in a way *other than* by international law;
(2) international law *in any form*, should be rejected on the grounds that there is no reason, or even need, for it; and
(3) international law cannot be achieved and a more modest form of regulation which *approximates to law* is the best that can be hoped for.

As will become clear, versions of the discontinuity thesis do not map squarely onto these conclusions about institutional design. For example, Kant rejects the universal state because 'laws invariably lose their impact with the expansion of their domain of governance, and after it has uprooted the soul of good a soulless despotism finally degenerates into anarchy'.[5] But it is not whether he then defends a federation of states which is a form of international law (and a rejection of the discontinuity thesis) or whether he advocates an approximation to international law (which implies (3)).[6] Further alternatives (1) to (3) are often made concurrently by those who ascribe to the discontinuity thesis and this makes exposition difficult. However, what is important here are the institutional implications of the discontinuity thesis and this is focused on in what follows.

Each of these forms of the discontinuity thesis is considered as an attempt to undermine the Autonomy Thesis (or AT). The AT, it will be recalled, is the idea that international law establishes the conditions by which states can co-operate and co-exist. To achieve this end, international law must adopt an institutional form which allows it to generate a set of authoritative omnilateral or general norms which pre-empt disputes which arise when states act on their unilateral judgements.[7] In this chapter, I show that each version of the discontinuity thesis must imply, at least, the AT. However, it is the case that versions of the discontinuity thesis are able to undermine claims that international law must adopt a suprastate institutional form. So, I conclude that the differences between states and human agents allow international law to be institutionally structured in an interstate form, or even supplemented or replaced by transgovernmental institutional forms of regulation, but need not be modelled on the universal state.

[5] I Kant, 'Towards Perpetual Peace: a Philosophical Sketch' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992, first published in 1795) 125 [8:367].

[6] Both of these views are set out by I Kant, *The Metaphysics of Morals* (M Gregor (trans), Cambridge, Cambridge University Press, 1996, first published in 1797) 119–20 [6:350–1]. See below 235–39.

[7] See above 197–203.

ALTERNATIVES TO INTERNATIONAL LEGAL ORDER

The first set of arguments all claim that international relations are in some sort of state of nature, but that this need not be solved by international law. Instead, it implies some alternative way of solving the problems associated with the state of nature. There are two versions of this argument, both of which require a reorganisation of, or a different way of thinking about, state legal orders. The first draws a distinction between human beings and states qua agents. This view is set out by theorists who claim that states are able to auto-limit, on the one hand, and various theorists who argue for a democratic peace thesis, on the other. Both of these arguments suggest that if states are able to self-constrain themselves then this solves the problems with the state of nature in international relations without the need for international law. The second version of this thesis has it that it is theoretically suspect to consider states as agents. This is a fiction, which has proved useful in the past, but which now needs to be fundamentally reconsidered in light of the developments associated with globalisation. This indicates that instead of international law, we should adopt trans-governmental forms of legal regulation which regulate sub-state institutions. In this section, I show that neither of these arguments in any way undermine the need for international law, but instead show that such arguments do imply a rejection of the suprastate institutional forms associated with the universal state.

Sovereign States are Not Similar, in Relevant Ways, to Human Agents

As just mentioned, there are two versions of this argument, each of which focuses on some relevant difference between sovereign states and human beings as types of agent. As a result of these differences, problems in international relations can be solved by states adopting a particular internal institutional structure.

Auto-limitation

The first version was sketched out in the discussion of the interstate system in the last chapter, but needs to be reconsidered here. This argument is that the sovereign state is capable of binding itself *in foro externo*. This means that it is capable of binding itself by *internal positive* laws which are enforced by domestic courts through, for example, review powers. Norms governing international relations can be enforced against the state by virtue of the same set of review powers. Such enforcement is an *external*

guarantee which is held to preclude the need for either an *autonomous* international legal order or the universal state. Human agents, on the other hand, are only capable of binding themselves *in foro interno* to morality.

Jellinek makes a claim like this in his 'two-sides' theory.[8] The juridical side leads to the conclusion that the sovereign state cannot be subject to a higher law like international law, but rather has a 'will' that can only bind itself.[9] The problem identified by critics of Jellinek was that such an obligation vanishes once the state changes its mind. It might, then, be questioned whether this really does constitute a legal obligation. His response is that this ignores a state's capacity for self-legislation. He explains that administrative law is an exercise in self-legislation, but it is odd to think of such norms as a set of contingent norms which can be violated at will. So, by the same token, why should international law—which is also an exercise in self-legislation—be considered any different to state public law when it comes to questions of its binding effect? On this basis, those commitments a state undertakes with regard to other states are enforceable as 'external state law' in domestic courts.

Jellinek's argument is that the state cannot be legally bound to autonomous legal institutions as part of a general analysis of sovereignty. Furthermore, whether such 'external state law' is actually binding on the state is contingent upon the constitutional arrangements within the state. For example, under English law, a strong doctrine of non-justiciability, which correlates to certain prerogative powers of the executive, largely prevents the executive being held to account for breaches of obligations it has voluntarily undertaken with other states. However, this sort of argument can be used to argue that if states are able to auto-limit themselves, then the problems of the state of nature in international relations could be overcome without the need for international law. Domestic constraints are sufficient to ensure that states act reasonably with regard to each other. If all the states in the world applied such domestic constraints, it could establish a peaceful world order, governed by law, without the need for an autonomous international legal order.

Democratic Peace

The second version of this argument is that states qua democratic, liberal or republican[10] states act reasonably in international relations. Therefore, if all states were like this in their internal structure, their mutual relations would be conducted reasonably. This marks a fundamental difference

[8] G Jellinek, *Allgemeine Staatslehre* (3rd edn, Berlin, O Häring, 1914) and M Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge, Cambridge University Press, 2001) ch 3.

[9] The other, sociological, side is considered below at 233.

[10] Formally, it does not much matter whether we characterise such states as 'democratic', 'liberal' or 'republican'.

between states and human agents. An early example of this claim is made by Kant: '[t]he republican constitution . . . provides for this desirable result, namely perpetual peace'.[11] Similarly, Doyle shows that liberal states exist within a 'zone of peace' or 'pacific union'. He claims to demonstrate that: '[e]ven though liberal states have become involved in numerous wars with nonliberal states, constitutionally secure liberal states have yet to engage in war with one another'.[12] This is because '[t]heir constitutional structure makes them—realistically—different'.[13] The logical corollary of this empirical claim is that war would cease if all states were liberal. If the avoidance of conflict is a key problem in international relations (which it presumably is, at least in part), then it could be solved by states becoming democratic, liberal or republican rather than through the development of autonomous international legal institutions which express the omnilateral will of the community of states. Once again, states which are able to self-constrain themselves are able to act reasonably in international relations. The problem of the state of nature in international relations can be solved without the establishment of an autonomous international legal order.

A Rejection of the Universal State, Not International Legal Order

These two versions of the discontinuity thesis hold that the problems of international relations can be solved by states adopting a particular internal structure. Therefore, a well-ordered community of states can arise without the need for overarching international legal institutions. We might say, after Rawls, that both of these arguments claim that a realistic utopia in international relations, which is described by ideal theory, is possible without international relations being governed by international law.[14] Viewed against a realistic utopia, the situation described by non-ideal theory—which describes a world of, amongst others, liberal, republican, monarchist, despotic and outlaw states—is an irrational state of nature. This irrational state is *solved* by a move to a society of reasonable states rather than international law. This argument, I will argue, should

[11] Kant, 'Towards Perpetual Peace', above n 5,at 113 [8:351]. 'Republican' does not automatically imply 'democratic' for Kant. Furthermore, it is questionable whether Kant's 'federation of states' is a form of, an approximation to, or a rejection of, international law. See below 235–39 and P Kleingeld, 'Kant's Theory of Peace' in P Guyer (ed) *Cambridge Companion to Kant and Modern Philosophy* (Cambridge, Cambridge University Press, 2006) 477 at 494.

[12] Doyle, above n 3, at 213. See also G Cavallar, *Kant and the Theory and Practice of International Right* (Cardiff, University of Wales Press, 1999) chapter 4. For a critique of these sorts of claim about democratic states see S Marks, *The Riddle of all Constitutions* (Oxford, Oxford University Press, 1999) eg 42–45.

[13] Doyle, above n 3, at 235.

[14] J Rawls, *The Law of Peoples* (Cambridge, Mass, Harvard University Press, 1999) 89–90 and J Waldon, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law and Public Policy* 15 at 22.

not be understood as an argument against an autonomous international legal order but, instead, as a version of it.

In these versions of the discontinuity thesis, the state is able to act reasonably in international relations. By the same token, though, states might act unreasonably. So, for example, an outlaw state which acts aggressively towards its neighbours, or a state which refuses to enforce its external law through its domestic courts, behaves unreasonably. But in the versions of the discontinuity thesis just described, there is no need for an autonomous international legal order if all states are reasonable. But here is where a problem arises: there is a crucial difference between reasonable states being reasonable and reasonable states being morally infallible. It may be that appropriate internal procedures ensure that public judgments made within states are based upon procedures which allow effective public deliberation or ensure accountability. Furthermore, this may induce a careful examination of issues, open negotiation, and an other-regarding attitude when such a state engages in international relations. It could, for the same reason, be plausible to hold that states make better decisions than human beings judging unilaterally. But these arguments do not entail that reasonable states are a morally infallible or quasi-divine entity. Co-ordination problems still emerge between states because each acts on its own subjective judgments, it physically claims property and resources, and so on. As was shown in Chapter 8, this situation is described by Kant's 'state of war' because what is the case in international relations is not determined as a matter of legal right.

This point seems to undermine the claim that a community of reasonable states gives rise to a reasonable state of affairs in international relations. But an immediate response to this point could be that states in a world of reasonable states will always settle their differences peacefully and without the need for autonomous legal institutions. Reasonable states can simply 'muddle through' by being prepared to give up their considered judgments or compromise. While this seems a stronger claim than theories of democratic peace or auto-limitation make, we might assume that reasonable states should take this stance.

The problem with this argument is that 'muddling through' is not an example of non-legal problem solving. It is rather an attempt by states to concretise their relations, and therefore solve the co-ordination problems which they have, through ad hoc agreements. This is a paradigmatic example of how states can employ their institutional character qua states to resolve their co-ordination problems and implies a decentralised and ad hoc interstate system of international legal order. These versions of the discontinuity thesis are not arguments against international law, but they are arguments against the idea that international law adopts a distinctive suprastate institutional form which is a centralised, hierarchical, universal state.

Put this way, the question such theories consider is not whether such states must submit to an omnilateral will and its necessary institutional

corollaries. Instead, the question is whether it is appropriate for international relations in a world of reasonable states to be governed by a form of international law institutionally characterised by these ad hoc systems for solving co-ordination problems. There are reasons for and against international law taking this form. One reason why it might be appropriate for international law to take this form concerns enforcement. Presumably, external and centralised enforcement mechanisms are not required if states are reasonable and are prepared peacefully to resolve disputes. Legal judgments are simply acted on by states rather than requiring external coercion.[15] However, against this, and for the reasons given in Chapter 8, it remains the case that co-ordination problems must be solved and we might question whether the ad hoc system is always appropriate. For example, a stable set of international legal norms which can arise through state consent, can pre-empt disputes and remove the need for ad hoc agreements. If this is better as a way of solving co-ordination problems than ad hoc solutions, then it is to be rationally preferred even for a community of reasonable states. Either way, however, these sorts of arguments are best construed as being concerned with institutional design and *not* about the need for an international legal order.

The Sovereign State Cannot be Considered an Agent

The argument for international law which was set out in Chapter 8 is predicated on the claim that states are artificial *agents*. This claim rests upon the familiar ontological assumption, that is normally made by international lawyers, and which is closely associated with realism in international relations, which is that '[s]tates interact with one another within that system like billiard balls: hard, opaque, unitary actors colliding with one another'.[16] Once this is assumed it is possible to draw the analogy between the sovereign states and human beings as being two sorts of agent, which allows the argument for international legal order to progress unimpeded. However, it has long been recognised that there is an air of unreality about this assumption. This challenge to the state as an artificial agent can be viewed as a version of the discontinuity thesis. It allows its proponents to argue that global regulation can take place without international law. Instead, transgovernmental systems of regulation are able to successfully solve our global co-ordination problems. Furthermore, it could be argued that they are easier to establish, more effective or more legitimate than international law. As in the previous section, I want to show that this

[15] See below 255.

[16] AM Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503, 507.

challenge in no way undermines the claim for international law modelled on the AT, but it does potentially undermine claims that international law should be institutionalised through suprastate institutions associated with the universal state. This version of the discontinuity thesis may also indicate how our global systems of legal regulation, of which international law is but one element, may need to be reconsidered in light of social processes associated with globalisation.

It is obvious that human agents perform administrative roles on behalf of the state. Also, within states, the same agents develop strong transnational networks with their colleagues performing similar roles in other states. The first of these claims has a long history. For instance, we find an example of it in Bentham's essay 'The Objects of International Law'. Here, he throws scorn on the proposition that 'A nation has its property—its honour—and even its condition'.[17] That is, he rejects the claim that the state is an agent which can have these features. Furthermore, he argues:[18]

> Will it be said that it has its person? Let us guard against the employment of figures in the matter of jurisprudence. Lawyers will borrow them, and turn them into fictions, amidst which all light and common sense will disappear; then the mists will rise, amidst the darkness of which they will reap a harvest of false and pernicious consequences.

By rejecting this fiction, he can claim that 'there is properly no other criminal than the chief: individuals are only his innocent and unfortunate instruments'.[19] Therefore, he rejects the idea that responsibility should be attributed to the state. Instead, responsibility should be directed towards its leader(s) and so 'it would be no great evil if, at the close of his career, every conqueror were to end his days upon the rack'.[20] Therefore, Bentham regards the idea that the state is a 'person distinct from the persons of individuals' as an implausible account of both how certain decisions are made and how responsibility should be attributed for acts in international relations.

The same sort of point is also made by Roscoe Pound. He argues that 'the transition [from monarchical to state sovereignty] . . . was easy and led to ready acceptance of the juristic dogmatic fiction that treated the mass of a population collectively as the equivalent in moral responsibility of an individual man'.[21] He then said:[22]

[17] J Bentham, *Principles of International Law: Essay 1: The Objects of International Law* 3. The text of Bentham's four essays on international law can be found on the UCL Bentham Project website.

[18] *Ibid*.

[19] *Ibid*.

[20] *Ibid*.

[21] R Pound, 'Philosophical Theory and International Law' (1923) II *Bibliotheca Visseriana* 73, 79. More generally, see Q Skinner, *The Foundations of Modern Political Thought* (Cambridge, Cambridge University Press, 1978).

[22] Pound, above n 21, at 78.

> Juristically the people as a collective entity took the place of the king. But to speak of a people as sovereign in the same sense in which Louis XIV was sovereign is a juristic or political dogmatic fiction. International law no longer had to do with the personal conduct or personal relations of single individuals wielding sovereign power. It had to do with the conduct and relations of a greater or smaller but fluctuating group of men who acted in the name and to an increasing degree in the fear of an indefinite collectivity, with all the irresponsibility and proneness to act on suggestion and instinct rather than on reason which psychology has taught us is characteristic of the crowd.

These same ideas have been reinvigorated in Anne-Marie Slaughter's writing. Like the earlier views of Bentham and Pound, she claims that the ontological assumption of the state which resides at the heart of international relations and international law scholarship is false and should be reconfigured. Furthermore, once we realise this, it becomes clear that the 'real business'[23] of international relations takes place at the transgovernmental level. Broadly speaking, transgovernmental activities describe the host of global networks which arise between various actors and institutions across state boundaries. Such networks emerge in diverse activities like terrorism, arms dealing, drug dealing, money laundering, as well as in the activities of multinational banks and other companies. Given the widespread development of these networks, it is appropriate for those seeking to effectively regulate international relations to re-orientate the way they look at the world and alter their modes of regulation so that such networks can be effectively governed. International legal regulation, especially that modelled on suprastate institutional forms,[24] should be recast as transgovernmental law.

This version of the discontinuity thesis bears some parallels to the arguments made above that states can bind themselves *in foro externo* and that democratic states behave better. Indeed, these observations might help *explain why* these states act in accordance with the international obligations they undertake. The difference between the arguments considered in the previous sub-section and here is that the state is presumed to have *agency*, while for Slaughter this assumption should, at least partially, be rejected. However, she is somewhat equivocal concerning how the state should be viewed. For example, she says that '[t]he state is not the only actor in the international system, but it is still the most important actor'.[25] This statement could be understood as indicating that we should broaden the category of actors subject to international law to include the International Labour Organisation, the Holy See or the Sovereign Order of Malta, alongside states. This is, however, not what she means. Rather, 'the state is not disappearing, but it is disaggregating into its component insti-

[23] AM Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183.
[24] AM Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004) 6–7.
[25] *Ibid* at 18.

tutions, which are increasingly interacting principally with their foreign counterparts across national borders'.[26] The state, then, is not a different kind of agent to the human being, but rather it should not necessarily be cognised as an agent at all:[27]

> [t]he concept of the unitary state is a fiction, but it has been a useful fiction, allowing analysts to reduce the complexities of the international system to a relatively simple map of political, economic, and military powers interacting with one another both directly and through international organisations. But today it is a fiction that is no longer good enough for government to work.

This suggests that there are functional reasons for re-orientating our ontology away from a world of sovereign states. By undertaking this re-orientation, it is possible to consider new forms of regulation beyond the familiar dichotomy of state legal orders and international law (and where the universal state is 'a chimera').[28] So, in summary, this version of the discontinuity thesis rejects the premise that the state is an agent; or at least holds that it should be rejected as the central focus of regulatory debate.

This claim is intuitively plausible and is not particularly controversial epistemologically. After all, the idea that the world comprises autonomous sovereign states is merely one way of cognising the social, legal and political systems which govern our lives. By way of alternatives, we could take a monistic viewpoint and see the world governed by a sovereign and universal legal order in which states are units of a global federal system.[29] Or we can take a viewpoint which refuses to adopt the lens which sees human social relations demarcated into intrastate and interstate relations and instead adopt a transgovernmental viewpoint. Upon what grounds might it be appropriate to consider the global regulatory framework one way rather than another?

According to the quotation just set out, it seems that Slaughter's criterion by which she chooses the transgovernmental frame is on the grounds of its 'usefulness'. This might mean, in a pragmatic sense, that by viewing the world through this lens it is easier to see the relevant human social relationships which need regulating.[30] But it expands in Slaughter's writings to encompass further normative and descriptive claims.

To explain, her argument encourages us, as legal scientists, to cognise human relations transgovernmentally. This claim is then normativised

[26] Slaughter, above n 23, at 184.
[27] Slaughter, above n 24, at 32.
[28] Slaughter, above n 23, at 183.
[29] See H Kelsen, 'Sovereignty' in S Paulson and B Litschewski Paulson (eds), *Normativity and Norms: Critical Perpsectives on Kelsenian Themes* (Oxford, Clarendon, 1998) ch 28.
[30] *Ibid* and P Capps, 'Sovereignty and the Identity of Legal Orders' in C Warbrick and S Tierney (eds), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (London, British Institute of International and Comparative Law, 2006) 19–73.

against a standard of effective regulation: the world is *better* regulated by understanding human relationships as a complex set of overlapping transgovernmental networks rather than demarcating these relationships into national and international modes. There is also a descriptive element to this argument: these institutional frameworks are actually developing and becoming increasingly significant aspects of human interaction. So, the initial epistemological claim is (i) we can see the world in a particular way. This then splits into two further claims: (ii) it is better to see the world in this particular way; and, (iii) seeing the world in this way is a more accurate description of 'real' social processes. We should also, at this point, distinguish transgovernmental *activities* from transgovernmental *forms of regulation*. The argument is that the existence of the former implies the latter as a regulatory technique.

Transgovernmental Law Instead of International Law?

This sort of theory is highly plausible as an account of the changing nature of global relations. As a version of the discontinuity thesis, it implies that global co-ordination problems are transgovernmental in nature and are better regulated through transgovernmental forms of regulation instead of international legal structures. I want to claim that this argument does not fundamentally undermine, but instead elaborates upon, the argument for international law set out in Chapter 8. It explains how international law is properly seen as one element of a unified omnilateral system of global law.

To explain, those who advocate transgovernmentalism argue this: in the past, social relations between individuals represented a (relatively) closed system in which disputes were authoritatively determined by state institutions. Interrelations between communities normally took an interstate form and these relations were the focus of international legal regulation. However, an element of globalisation is that these closed systems no longer exist in the way that they used to. Transgovernmental activities are now prevalent but span the jurisdiction of more than one state.

These new problems may lead to a 'race to the bottom' as transgovernmental activity moves to states with the most permissive regulatory frameworks. An example of this would be a bank moving its assets to offshore 'tax havens' to avoid tax laws. Also, it may mean that a number of states all claim to determine how a transgovernmental co-ordination problem should be solved. The classic example of this are disputes between states attempting to enforce their different laws regulating anticompetitive practices by multinational companies. Another topical example is the co-ordination problems which arise concerning the responsibility of states for the supervision of transgovernmental banking insolvency problems.[31]

[31] See H Davies and D Green, *Global Financial Regulation* (Cambridge, Polity, 2008) 34–5.

Both of these problems amount to the same thing: a co-ordination problem arises because two or more states claim the legal authority to regulate a particular transgovernmental activity. Slaughter may claim that this is exactly where new forms of transgovernmental legal regulation are required. This sort of regulation can arise through various forms of regulatory machinery and can take the form of suprastate (eg the World Trade Organization), interstate (eg the Refugee Convention 1951) or genuinely transgovernmental forms of regulation (eg the Basel Committee on Banking Supervision). Each is a normative mechanism by which the co-ordination problems which emerge from the development of global networks can be resolved.

There is a problem with this justification for transgovernmental forms of regulation. To explain, a characteristic of these new forms of regulation is that they have a substantive, rather than territorial, jurisdiction. Each determines what is the case with regard to a particular sort of activity, rather than for persons within a territorial space. But each *individuated legal subject* (whether an individual, company or state) will be subject to the regulatory techniques of a whole range of transgovernmental, interstate, suprastate and state legal institutions. The obligations which arise from these forms of law may conflict: compliance with transgovernmental regulations could give rise to violations of local law or international law.[32] The recent judgment of the European Court of Justice (ECJ) in *Kadi* raised this possibility. The ECJ held that it did not have the jurisdiction to cast doubt on the legality of Security Council Resolutions (which required the seizure of assets of those suspected of funding terrorism). Nevertheless, it decided that the Council Regulation implementing the Resolutions was unlawful as a matter of EU law insofar as it breached fundamental rights. As a result of this decision, Member States of the European Union may well now be put in a situation where they have to choose between following their obligations under international law or their EU law obligations.

Seen from the point of view of a legal subject the problem is that while transgovernmental regulatory networks match up to various global social networks, for a particular legal subject, there are a multitude of potential authoritative sources each of which may require incommensurable actions to be undertaken. So not only is it unclear what the legal subject must do to act in accordance with the law, but a new sort of co-ordination problem arises at the level of legal institutions. This dispute is between a number of legal institutions concerning the question of which has authority.

Co-ordination problems like these, as we have just seen, can arise when two or more *states* seek to regulate the same activity. According to the argument in Chapter 8, international law is required to resolve the co-ordination problem and thus establish which state has the jurisdiction to regulate a particular activity. But if states qua regulatory systems are required to resolve

[32] Joined Cases C-402/05P and C-415/05P, *Kadi and another v Council*, 3 September 2008. See also *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

their co-ordination problems through international law, the same reasoning must also apply to the co-ordination problems which emerge between other regulatory systems. This implies further institutions which make authoritative decisions about which transgovernmental form of regulation has supremacy or jurisdiction. What are the implications of this argument for the way in which we should see global regulation?

It seems that there must be a way of resolving co-ordination problems which emerge in the relations between both states and transgovernmental forms of regulation. Neither can exist independently of each other as partial omnilateral communities, as this just leads to a multiplication of co-ordination problems.[33] Instead, each should be integrated as an element of a unified omnilateral system of global law rather than a series of disparate regulatory forms. States, transgovernmental forms of regulation, interstate and suprastate forms of international law all are elements of this system. Without each element being part of a unified system, our co-ordination problems remain unsolved or are even multiplied as various regulatory systems claim authority to determine what we are legally required to do. A system can be said to be unified if it contains a series of mechanisms by which co-ordination problems between various regulatory institutions can be resolved.

Practically, such unification could take place in the following way: legal power could be dispersed globally through various regulatory bodies but all are held as elements of a unified system through constitutional norms. In paradigm cases, such constitutional rules are often found in the texts of interstate agreements by which states allocate powers and competences to transgovernmental or suprastate institutions. However, this is obviously an imperfect system in which serious conflicts cannot be solved straightforwardly by an examination of the constitutive documents. To return to the *Kadi* judgment, by way of example of this point, it is well-established that Article 103 of the Charter of the United Nations affords supremacy to Security Council Resolutions over other legal norms. However, the ECJ held that Article 103 could not permit the implementation of Council Regulations which violated fundamental rights.[34] That such problems are not obviously solvable indicates that paradigm cases describe an incomplete or imperfect system of omnilateral governance.[35]

[33] See B Kingsbury, 'Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law' (2005) 104 *Journal of International Law and Diplomacy* 98.

[34] See above n 32.

[35] Krisch argues that the problem of contested jurisdictions is not a problem for the international legal order and can actually enhance its legitimacy. Of course, it may be impossible to completely avoid the problem of contested jurisdictions in practice. However, my view is that international law should be institutionalised in order to minimise these problems, and there should be institutional mechanisms which can resolve these sorts of conflict in a way that is consistent with human dignty and states' rights. See N Krisch, 'The Pluralism of Global Governance' (2006) 17 *European Journal of International Law* 247.

In Chapter 10, I will explore the implications of this argument in more detail. However, the point has been made that transgovernmentalism does not undermine the argument for international law set out in Chapter 8. Instead, it shows that various forms of state, international and transgovernmental regulation must be elements of a unified and omnilateral system of global governance. However, the literature on transgovernmental systems of governance shows how our appreciation of various regulatory problems must expand beyond individual communities governed by states and the relations between such states, to new and more complex forms of human association. This, in turn, implies the development of new forms of legal regulation which may lie outside of our traditional legal paradigms.

REJECTION OF INTERNATIONAL LEGAL ORDER

The arguments set out in the previous section attempt to offer alternatives to international law. Each recognises that co-ordination problems exist in the relations between states, but do not see a form of international law as a solution. Each sees some other solution (such as the spread of democracy or the development of transgovernmental forms of regulation) as the way to resolve such problems. In this section, attention is turned to the argument that states need not will international law for the reasons that human agents must, or that the environment in which states act is not unreasonable in the way that it is for human agents. Thus, it is not that some alternative to international law solves the problems which arise in international relations, but rather it is that *no solution* is required.

Sovereign States are Not Similar, in Relevant Ways, to Human Beings

Some reasons why states are different to human beings was considered in the previous section. There is, however, a stronger version of this argument. This is that the relevant difference between states and human agents is that states are *not* vulnerable in the way that human beings are. Consequently, states do not necessarily have to rationally *will* the international legal order at all. Put another way, states can be better off, or at least no worse off, by remaining in a state of nature in some circumstances. This version of the discontinuity thesis has the potential to short-circuit the argument for international law made in Chapter 8.

Hobbes, while accepting the existence of a state of nature in international relations, sets out an argument like this. He argues that states need not will, for prudential reasons, that international law governs international relations. His point is better made by his commentators. Bull

claims that for Hobbes, '[s]tates, after all, are very unlike human individuals'.[36] Harrison similarly notes that 'something has to be different at the state level'.[37] Spinoza explains what this difference is. He says, 'a man is overcome by sleep every day, is often afflicted by disease of the body or mind, and is finally prostrated by old age; in addition, he is subject to troubles against which a commonwealth can make itself feel secure'.[38] Therefore, because states are able to protect themselves and those they govern in a way that human agents cannot, they *need not* subject themselves to international law.

This version of the discontinuity thesis is based upon the prudential reasoning of states. This means that states are able to secure their long-term interests or security from attack by other states. States do this by increasing their power so as to ensure that they can (a) achieve their purposes, and (b) establish the conditions by which they, or those they govern, are able to have security from others. If it is able to achieve (a) and (b), a state can prudentially will that international relations remains in a state of nature and thus the argument for international legal order is fatally undermined.

Prudence and International Legal Order

Hobbes' argument is based upon states acting in accordance with prudential reason. In this book, it has been argued that states have moral obligations to their recipients, which comprise both other states and human agents. As a matter of moral reason, a state of nature in international relations is not-rightful and states must subject themselves to international law regardless of what might be in their prudential interest. However, and despite what Hobbes claims, it may be possible that prudential reason can give rise to the same conclusion.

It was just argued that this version of the discontinuity thesis holds that it is sometimes preferable, in a prudential sense, for states to remain in a state of nature so that they are better able (a) to achieve their purposes and (b) to have security. We might immediately question whether (b) is the case. State officials may revel in the glory of the state power which they administer, and this may make them think that the state is invulnerable, but it is hard to conceive that a state can genuinely be in this position. Bull, for instance, thinks that powerful states may have been able to render

[36] H Bull, *The Anarchical Society* (Basingstoke, Palgrave, 2002, first published in 1977) 47.

[37] R Harrison, *Hobbes, Locke and Confusion's Masterpiece* (Cambridge, Cambridge University Press, 2003) 95.

[38] B Spinoza, 'Tractatus Politicus, III, ii' in AG Wernham, *The Political Works of Spinoza* (Oxford, Clarendon Press, 1958) 293. See also H Lauterpacht, *International Law, being the Collected Papers of Hersch Lauterpacht*, vol II, *The Law of Peace, Pt 1* (E Lauterpacht (ed), Cambridge, Cambridge University Press, 1975) 23–4.

themselves invulnerable, but adds the rider: 'the spread of nuclear weapons to small states, and the possibility of a world of many nuclear powers . . . raises the question whether in international relations . . . a situation may come about in which "the weakest has strength enough to kill the strongest" '.[39] This situation may soon, or has, come to pass. When coupled to other threats which Bull does not consider, such as global terrorism, the distinction between states and human agents, upon which this version of the discontinuity thesis draws, is threatened. While states are able to take steps to protect themselves and those they govern, they cannot be invulnerable.

A more serious problem with this version of the discontinuity thesis arises from reflection on (a). In Chapter 7, it was argued, after Kant and Rousseau, that when any action takes place in a social context: successful action limits or enhances the ability of others to act. Rousseau asserts that this problem is acute in international relations. Describing one version of the state of nature,[40] Roosevelt comments that for Rousseau '[n]atural man on his own merely seeks sustenance and repose'.[41] States, on the other hand, cannot be self-sufficient: '[f]or although it may be true that theoretically each one could be self-sufficient, we will find that in fact their relations with each other cannot help but be more intimate than the relations among individuals are'.[42] They are 'intimate' for a number of reasons. On the one hand, the populations of states interact with other state populations and states are porous in a way that human agents are not. Such interactions might be both beneficial (eg trade) or harmful (eg transborder pollution). Furthermore, the distribution of global resources often implies that states are fundamentally *interdependent* upon one another.

On the basis of the argument in Chapter 8, international law can be said to attempt to restructure international relations so that action by states is consistent with certain fundamental moral interests. But on the basis of (a), states choose, on the basis of prudential reason, to reject this argument. This is because they claim that they are better off, prudentially, in a state of nature. Instead, a state can build up its capacity to coerce others so that it can achieve its objectives, and fashion international relations as a reflection of these objectives. Any example taken from the history of imperialism illustrates this point.

Weaker states can be said to have their capacity to achieve their purposes limited by the actions of powerful states. The prudentially rational choice of action for weaker states is to alter the balance of power so that the

[39] Bull, above n 36, at 48.

[40] See above 178–79.

[41] GG Roosevelt, *Reading Rousseau in the Nuclear Age* (Philadelphia, Temple University Press, 1990) 39; JJ Rousseau, 'The State of War' in S Hoffmann and D Fidler (eds), *Rousseau on International Relations* (Oxford, Oxford University Press, 1991) 37.

[42] *Ibid*.

will of powerful states is not always the case. By doing this, they are better able to achieve their own objectives. Weak states might either attempt to achieve this unilaterally or, alternatively, join together with all the other states which are subject to the will of the powerful state, with the aim of preventing its judgment holding sway. Bentham illustrates this argument with reference to Great Britain's relation to other European states: '[s]o many as fear you, join against you till they think that they are too strong for you, and then they are afraid of you no longer; meantime they all hate you, and jointly and severally they do you as much mischief as they can'.[43]

But what does this point to? Surely, it describes international relations comprising state actions which are based on continual attempts to gain the upper hand and which are characterised by war and probably the destruction of various states. Dispositionally, such a state of affairs must be as irrational for states as it is for Hobbes' prudential human agents. Certainly, no state can achieve its objectives or protect its citizens in the long term in such a system. As Rousseau puts it, international relations based upon prudence is useless because 'everything is left to chance.'[44] Of course, a system of international law which is institutionally ineffective in constraining the actions of states is problematic for the same reason. However, it seems prudentially rational to will a system of international law which does not have these flaws. Therefore, Hobbes' argument against international law can be said to be logically suspect even if we accept his conception of prudential rationality.

The Environment in which Sovereign States Find Themselves is Not Similar in Relevant Ways to the Environment in which Human Beings Find Themselves

Some have argued that the differences between the environment which is international relations and the environment in which human beings naturally find themselves, gives rise to a form of the discontinuity thesis. They argue that these differences mean that the environment in which states find themselves is not unreasonable and therefore it is not one in which there is a serious problem which international law has to solve. There are two versions of this argument.

[43] Bentham, above n 17. Rousseau makes the same point. See JJ Rousseau, 'Saint-Pierre's Project for Peace' in in S Hoffmann and D Fidler (eds), *Rousseau on International Relations* (Oxford, Oxford University Press, 1991) 65–6 and 86.

[44] *Ibid* at 86.

Structural Constraints

One version of this argument can be expressed with reference to the second, sociological or psychological, aspect of Jellinek's 'two-sides' theory of international obligation. This side describes 'the structural constraints imposed on State will by the environment'.[45] But what is different about international relations? Explanations of this difference are not well considered in the literature, but there are a number of options. First, it might be that the relatively small number of states in international relations lowers the chances of a state being able to free-ride. Secondly, it could be that states are economically and politically interlinked in ways that human beings cannot be and this provides a systemic constraint by which states will act reasonably. Rousseau, who has already been cited, argues that the relations between states are 'more intimate' than the relations between individuals.[46] Furthermore, where one state ends, it is normally the case that another begins. So, it is not that states are different, but rather that they exist in a confined space or are small in number: it is the environment in which they act that is different. As such, social constraints are present in international relations that are absent from large communities of individual human agents. Thus, the state of nature in international relations is not an irrational or unreasonable state of affairs.

Industry and Agriculture Can Take Place in the State of Nature in International Relations

A second version of this argument is that in the environment in which states find themselves there are certain human activities that take place which could not take place in a state of nature between natural agents. It is because these activities can take place, that the state of nature in international relations is not unreasonable.

Hobbes makes this argument. He remarks that 'there is no place for Industry . . . no Culture of the Earth; no Navigation . . . no commodious Building . . . no Knowledge of the face of the Earth, no account of Time; no Arts; no Letters; no Society; and, which is worst of all, continuall feare, and danger of violent death' without a sovereign state.[47] However, according to Bull these problems 'do not obtain in international anarchy'. So '[t]he absence of a world government is no necessary bar to industry, trade and other refinements of living. States do not in fact so exhaust their strength

[45] Koskenniemi, above n 8, at 201. See also Lauterpacht, above n 38, at 9–11.
[46] Roosevelt, above n 41, at 37.
[47] T Hobbes, *Leviathan* (Cambridge, Cambridge University Press, 1992, first published in 1651) at 89 [62].

and invention in providing security against one another that the lives of their inhabitants are solitary, poor, nasty, brutish and short'.[48] This explains Hobbes' meaning when he writes that sovereign states 'uphold . . . the Industry of their Subjects' and so 'there does not follow from it, that misery, which accompanies the Liberty of particular men'.[49] It is for this reason that a state of nature in international relations is not unreasonable and hence international legal order need not be rationally willed.[50]

Are International Relations Not Unreasonable?

The arguments associated with this version of the discontinuity thesis rest upon the claim that international relations are not unreasonable in the way that relations between human beings are. There is something different about the environment within which states act which precludes the argument for the international legal order being implied. The versions of the discontinuity thesis under consideration are that (i) states are fundamentally more intimate than human beings, and (ii) a world of sovereign states provides a stable system of property rights. Neither argument is conclusive.

Considering (i), the physical intimacy of states is as much a cause of conflict as a characteristic of international relations which prevents it. Pound,

[48] See Bull, above n 36, at 45.

[49] Hobbes, above n 47, at 90 [63].

[50] The work of Grotius has not been widely considered in this book. One key reason for this is that he is, after Kant, an 'irritating comforter' in that he rejects that international law is an attempt to peacefully resolve international co-ordination problems. (See I Kant, *Perpetual Peace* (L White Beck (trans), New York, Macmillan, 1957, first published in 1795) 17. This phrase is not contained in the Humphrey translation which has been used throughout this book.) Instead, he considers that international law is essentially a set of natural laws which can be unilaterally interpreted and enforced by states in a thin form of international society. There is a key difference between this international society and Kant's 'right of nations'. The latter is a system of omnilateral willing and as such is a collective attempt to overcome the problems of a system of unilateral willing. For Grotius, *jus gentium* is a system of unilateral willing. In Grotius' thin international society, which is 'lacking a superior (under God) and bound only to natural (and divine) law, [states] may justly declare war and attack, destroy, and seize the people and property of other states when that state has acted unjustly' (Harrison, above n 36, at 145). Therefore, it is states acting unilaterally who interpret and enforce natural law. However, Grotius thinks that in communities of human agents it is better to will state institutions to administer the law. Why should this not pertain in international relations? I would suggest that, for Grotius it is effective for questions of distributive justice in a community of individuals to be organised by the state, in international relations this organisation is achieved by the explicit or tacit agreement between states as to their respective jurisdictional boundaries. This suggests that an effective system of stable property rights does exist in international relations without the need for international institutions. If this analysis is correct, it is similar to the argument made by Hobbes set out in the text. (See Harrison, above n 37, at 145; R Tuck, *The Rights of War and Peace* (Oxford, Oxford University Press, 1999) 84; Bull, above n 36, at 25–7; and Tuck's introduction to H Grotius, *The Rights of War and Peace* (Indianapolis, Liberty Fund, 2005, first published in 1625) xix at n 21.)

for example, tells us that an 'individual may grow from youth to manhood without encroaching on or interfering with his neighbors. There is, as one might say, ample interhominal space to allow of each attaining any height and any girth that human nature will permit, without coming into conflict with his fellows'.[51] However, in international relations, 'there is no such international space. In the crowded world in which we live peoples which are growing may grow only by expanding within their own bounds and the bounds within which some peoples find themselves are perilously cramped'.[52] The problem is that '[a]ll expansion beyond a certain point, however normal, involves conflict with a neighbour and the claim of the one people to expand and of the other people to be secure within their territorial bounds, create a situation without parallel in the ordering of international relations'.[53] Rousseau says much the same thing.[54] So while it is possible to conceptualise global interconnectedness as a constraint on state action, it might also be seen as a source of conflict. Evidence can be found to support both views.

With regard to (ii), while a world of sovereign states might establish a system of stable property rights, this in no way implies that serious co-ordination problems would not occur in international relations. Without property rights being determined as a matter of international law, the holding of property depends upon contingencies such as relative strength or luck. If this is the case, to claim that the state of nature in international relations is not unreasonable is a weak argument. As Kant, as well as Grotius,[55] suggest, in such a state of nature states must unilaterally interpret, act upon and enforce wrongs which are committed in violation of their property rights. Surely this implies a global distribution of property rights which is dependent upon power and luck rather than a matter of conclusive ownership under international law. That Grotius considers this a reasonable state of affairs is exactly why Kant refers to him as an 'irritating comforter'.[56]

APPROXIMATIONS TO INTERNATIONAL LAW

An intuition or instinct which may drive the versions of the discontinuity thesis advanced so far is that an international legal order, which takes the form of a universal or global state, is an unrealistic utopia. However, this

[51] Pound, above n 21, at 79.
[52] *Ibid*.
[53] *Ibid* at 80.
[54] Roosevelt, above n 41, at 37; JJ Rousseau, above n 41, at 37–41; JJ Rousseau above note 43 at 65. See also J Madison, A Hamilton and J Jay, *The Federalist Papers* (London, Penguin, 1987, first published in 1788) paper 6 on why commerce might actually cause war.
[55] See above n 50.
[56] See above n 50.

charge can be seen as a version of the discontinuity thesis in itself and it is considered in this section.

A useful way of thinking about this version of the discontinuity thesis is to consider John Rawls' distinction between a realistic and unrealistic utopia which has been discussed in earlier chapters. He considers that '[p]olitical philosophy is realistically utopian when it extends what are ordinarily thought of as the limits of practical political possibility'.[57] The universal state, for Rawls, is not a realistic utopia. It should not be sought because it 'would either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy'.[58] Rawls' argument is based directly on comments made by Kant. Kant writes (i) laws 'invariably lose their impact with the expansion of their domain of governance';[59] and (ii) the universal state will be 'a soulless despotism' which 'finally degenerates into anarchy' 'after it has uprooted the soul of good'.[60] The universal state, for these reasons, can be said to be an unrealistic utopia.[61]

These two forms of the discontinuity thesis are ambiguous in the following sense. It is not clear whether they are a rejection of international law or an attack on a particular, suprastate, institutional form which is the universal state. But it is unclear whether Rawls and Kant are questioning the possibility of establishing any form of international legal order.

Rawls does not provide a clear answer to this ambiguity. He does suggest that states, for ideal theory, must honour the agreements they undertake with other states, which, in turn, implies a system of treaty creation, responsibility for international wrongs, and so on.[62] Furthermore, he talks broadly about basic charters which regulate interstate conduct.[63] There is, however, little else in *The Law of Peoples* on the question of international law. These arguments for a system of norms which govern international relations in ideal theory could, in principle, be developed into a theory about international law, and this is one way of viewing my argument in Chapter 10. More problematically, however, Rawls does not consider international law in relation to non-ideal theory, which is where international law may well have an even more vital role to play. Instead, he describes some principles of political morality which should guide unilateral state conduct. So, for

[57] Rawls, above n 14, at 6. On the relationship between Kant and Rawls see T Mertens, 'From "Perpetual Peace" to "The Law of Peoples": Kant, Habermas and Rawls on International Relations' (2002) 6 *Kantian Review* 60.

[58] Rawls, above n 14, at 36.

[59] Kant, 'Towards Perpetual Peace, above n 5, at 125 [8:367].

[60] *Ibid*.

[61] A stronger version of this argument is that power interests in the current world order have too much to lose through the establishment of a global state. See P Allott, *Eunomia* (Oxford, Oxford University Press, 1990) 242–3; E Hobsbawm, *Nations and Nationalism* (Cambridge, Cambridge University Press, 1990) chs 1 to 3.

[62] Rawls, above n 14, at 37.

[63] *Ibid*.

example, he explains why states are morally justified in using force against outlaw states and owe certain basic obligations to help burdened states. This lack of a theory of international law for non-ideal theory is, as will be seen in Chapter 10, a deficiency. However, it is perhaps prompted by Rawls' scepticism about the possibility of forging effective international legal institutions in such a world.

It is clear that Kant rejects the universal state. It is also possible, contrary to the interpretation of his theory set out in Chapter 8, that he rejects international law in general. This can be seen in his discussion of the 'right of nations' as an approximation to law. On this reading, international law (understood in terms of an omnilateral will which governs the relations between states) can be said to be an unrealistic utopia. However, it is possible to conceive of a form of regulation which is an approximation to international law, which will alleviate the problems of the state of war. In the remainder of this section, I will discuss the plausibility of this claim.

Surrogates, Analogues and Approximations

Kant claims that the 'right of nations' should not be a 'world republic' (or universal state) but 'only the *negative surrogate* of an enduring, ever expanding *federation* that prevents war and curbs the tendency of that hostile inclination to defy the law'.[64] In Chapter 8, I argued that this federation was an analogue to the universal state: that is, a form of international legal order which is an omnilateral will, but which is institutionalised through an interstate system comprising 'republican' states. However, it could also be considered something less than, or an approximation to, international law.

To explain, the possibility that the 'right of nations' is an *analogue* to the universal state, and a system of law, requires a focus on Kant's claim that the federation of states is a 'universal *association of states* (analogous to that by which a people becomes a state)'.[65] In this association the 'civil constitution of every nation should be republican'.[66] The association of states should 'stand under common external constraints'.[67] These external constraints form a system of legal norms: 'while there is no cosmopolitan commonwealth under a single head, there is nonetheless a rightful state of federation that conforms to commonly accepted [principles of] *international right*'.[68] Kant seems to be suggesting that the 'right of nations' is

[64] Kant, 'Towards Perpetual Peace', above n 5, at 117–18 [8:357].
[65] *The Metaphysics of Morals*, above n 6, at [6:350].
[66] 'Towards Perpetual Peace', above n 5, at 112 [8:349].
[67] *Ibid* at 116 [8:355].
[68] I Kant, 'On the Proverb: That May Be True in Theory, But Is of No Practical Use' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992, first published in 1793) 88 [8:311].

an interstate system of legal regulation which governs a federation of republican states.[69] To reject international relations being structured this way means that action will be determined 'not by independent, universally valid laws that restrict the freedom of everyone, but by one-sided maxims backed by force'.[70] Thus, it is a solution to the state of war, and is a form of law.

This interpretation would appear to be born out when Kant writes that:[71]

> without a contract among nations peace can be neither inaugurated nor guaranteed. A league of a special sort must therefore be established, one that we can call a *league of peace* . . . which will be distinguished from a *treaty of peace* . . . This league does not seek any power of the sort possessed by nations, but only the maintenance and security of each nation's own freedom, as well as that of the other nations leagued with it.

By establishing the freedom of states, the right of nations would appear to be a form of law like any other for Kant. However, while this appears to justify a system of law to govern international relations, Kant completes the last sentence quoted by claiming that the states in the 'league of peace' do not have 'to subject themselves to civil laws and their constraints (as men in the state of nature must do)'.[72] This suggests that the 'right of nations' is not like other forms of law. Furthermore, in *The Metaphysics of Morals*, Kant argues for an *approximation* to international law:[73]

> So *perpetual peace*, the ultimate goal of the whole right of nations, is indeed an unachievable idea. Still, the political principles directed towards perpetual peace, of entering into such alliances of states, which serve for continual *approximation* to it, are not unachievable. Instead, since continual approximation to it is a task based on duty and therefore on the right of human beings and of states, this can certainly be achieved.

This is not a 'federation' but rather a 'congress of states' whose institutions '[states] accepted as arbiter'.[74] A federation is permanent and has a consti-

[69] Kant holds that 'republicanism' requires state institutions to be committed to principles which are 'akin in spirit to the laws of freedom which a people of mature rational powers would prescribe for itself'. See I Kant, 'The Contest of Faculties' in H Reiss (ed), *Kant's Political Writings* (2nd edn, Cambridge, Cambridge University Press, 1991) 186–7. While Kant's conception of republicanism is wider than modern conceptions of democracy, and can include, for Kant, non-democratic but constitutionalised forms of government, Höffe and Kleingeld consider Kant to be a democrat. See O Höffe, *Kant's Cosmopolitan Theory of Law and Peace* (A Newton (trans), Cambridge, Cambridge University Press, 2006) and P Kleingeld, 'Kant's Theory of Peace' in P Guyer (ed) *Cambridge Companion to Kant and Modern Philosophy* (Cambridge, Cambridge University Press, 2006) 477 at 481.

[70] 'Towards Perpetual Peace', above n 5,at 116 [8:356–7].

[71] *Ibid* at 117 [8:356].

[72] *Ibid*.

[73] *The Metaphysics of Morals*, above n 6, at 119 [6:350]. See Kleingeld, above n 69.

[74] *Ibid* at 119–20 [6:350–1]. He gives the example of the 'assembly of States General at the Hague'.

tution. The congress, however, can be '*dissolved* at any time'.[75] The 'arbiter' as suggested above is 'one to be established for deciding their disputes in a civil way, as if by lawsuit, rather than in a barbaric way (the way of savages), namely by war'.[76] Such an arbiter deals with disputes 'as if by lawsuit', but it is not an *analogue* to the universal state; merely an *approximation*.

The 'federation' seems to be an analogue to international law, but the 'congress' is an approximation to it. This is an important difference, for the following reasons. If Kant is in favour of a federation, international law is possible. Kant's arguments against the universal state do not imply a rejection of international law. The congress, however, is an approximation to international law and therefore is a rejection of the possibility of international law in general. It also entails that the problem of disorder in international relations cannot be conclusively solved. This, more sceptical, claim is defended because, as Rawls puts it, international law is an unrealistic utopia. How should we view this sort of sceptical argument?

The Possibility of Perpetual Peace

For Kant, if the best that can be achieved empirically is an approximation to international law, it is because international legal order is an unrealistic utopia. This rests upon the view that it is failed in the past or that it is impossible given the way the world is structured today. However, it is clear that it is not possible to infer from the truism that human beings have failed to transcend the state and establish international legal order in the past to the general truth that they cannot do it in the future. This is merely a replication of the riddle of induction. The assumption is that 'a regularity in the past is *pro tanto* good evidence that it will hold in the next case'.[77] But it is logically the case that 'the number of past cases is not necessarily the arbiter of merit for a theory' operating as a general truth about human social life.[78] Kant, himself, actually makes this same point: '[e]ven if it were found that the human race as a whole had been moving forward and progressing for an indefinitely long time, no-one could guarantee that its era of decline was not beginning at that very moment'.[79] By the same token 'if it is regressing and deteriorating at an accelerated pace, there are no grounds for giving up hope that we are just about to reach a . . . turn for the better'.[80] To dismiss the possibility of international legal order on the basis of past evidence is logically equivalent to attempting to divine the future.

[75] *Ibid* at 120 [6:351].
[76] *Ibid*.
[77] M Hollis, *Models of Man* (Cambridge, Cambridge University Press, 1977) 48.
[78] *Ibid*.
[79] Kant, 'The Contest of Faculties', above n 69, at 180.
[80] *Ibid*.

In 'Contest of the Faculties' Kant says something about what it is rationally possible to say about the future prospects of human societies. He claims that '[i]n human affairs, there must be some experience or other which as an event which has actually occurred, might suggest that man has the quality or power of being the *cause* and (since his actions are supposed to be those of a being endowed with freedom) the *author* of his own improvement'.[81] But, such improvements (such as the constitutional state) 'can be predicted as the effect of a given cause only when the circumstances which help to shape it actually arise'.[82] This is perhaps the best way of putting this version of the discontinuity thesis. International legal order is an idea, which might be the cause of beneficial changes in our life, but it can only occur in the right circumstances, and these are not with us. So, we might say Kant thought that international law was not possible because of the nature of international relations at the time he was writing. But, for the reasons just cited, we cannot hold that such conditions would not arise in the future.

We might guess that Kant would consider that these conditions have come about through the spread of democracy around the world, the cataclysms of the two World Wars, and the global response to them, or through the social changes associated with globalisation. Kant was prepared to accept that changing conditions could give rise to new possibilities for governance. For example, Kant thought that constitutional government, which is 'by its very nature disposed to avoid wars of aggression',[83] was an idea which had become reality as an outcome of the French revolution. But this revolution was only possible because the political, economic and social circumstances were right. This gave Kant considerable hope for the future of mankind:[84]

> I now maintain that I can predict from the aspects and signs of our times that the human race will achieve this end, and that it will henceforth progressively improve without any more total reversals. For a phenomenon of this kind which has taken place in human history *can never be forgotten*, since it has revealed in human nature an aptitude and power for improvement of a kind which no politician could have thought up by examining the course of events in the past.

It seems unlikely, given Kant's philosophy of ideas, that he would have thought that international law is impossible. Rather, he may have considered that international legal order could not be achieved at the time he was writing, or that approximations to it were the first step to establishing a genuine system of international law. As just mentioned, it might be that Kant would have considered that the possibilities for regulation which

[81] Kant, 'Contest of the Faculties', above n 69, at 181.
[82] *Ibid*.
[83] *Ibid* at 182.
[84] *Ibid* at 184.

emerged as a result of the Second World War made international law possible. On these claims we can only speculate. However, this speculation becomes irrelevant if the interpretation of Kant set out in Chapter 8 is correct and he was making an argument for international law (if not the universal state) at the time he was writing.[85]

CONCLUSION

The versions of the discontinuity thesis offered in this chapter do not succeed in undermining the concept of international law set out in this book. What they do, however, is indicate that the way we conceive of the state and international relations can have serious implications for the way we think about international law in an institutional sense. It may be, then, that widespread respect for human rights and democracy within states can allow international law to be established as an interstate system. This is perhaps what Kant and Rawls are advocating. Alternatively, in a world like ours, where states are not like this, it may imply more substantial suprastate institutions to establish international legal order. Furthermore, with the development of new and different sorts of co-ordination problems which emerge through the process of globalisation, we may well need to consider new ways of ensuring that such problems are managed through law. In the final chapter of this book, I explore these possibilities.

[85] Kleingeld notes, probably correctly, that Kant can plausibly be interpreted in a number of different ways which can be substantiated by his work. See above n 69 at 482–484.

10

International Legal Order in Ideal and Non-ideal Theory

THE FOUNDATIONS OF international law comprise an account of international law's purposive orientation and institutional character. International law is purposively orientated toward restructuring international relations so that dependency is reduced for both human agents and states. Substantively, this requires that international law protects human and states' rights. These rights are valuable to all human agents because of the positive valuation such agents must make about their purposes. These rights are 'solidarist' in the sense that they reflect universal principles of human association. International law, then, can be said to be purposively orientated towards the protection of these solidarist values.

Institutionally, international law is described as an omnilateral will which concretises the relations between states. An omnilateral will implies legal institutions which create, interpret and enforce international legal norms. A state legal order is but one way in which these institutions can be arranged. In Chapter 8, two institutional forms which international law can take were set out. The first is a suprastate form which is associated with the universal state. International legal order is like a global sovereign state and has a global legislature and court, as well as centralised enforcement mechanisms. Secondly, it could be that international law should be institutionalised as an interstate system. In this system, states have roles in the administration of the international legal order. In an interstate system, the sovereignty of international law is held collectively by states, whereas in a suprastate system, international legal institutions can be said to hold sovereignty over states.

We are familiar with both sorts of institutional forms. Most substantive international law is created by states through their consent in accordance with the law of treaties. This reflects an interstate system. On the other hand, the Security Council is more like a suprastate form of governance in that it can require states to act in particular ways without their specific consent. Added to these two sorts of institutional design, there are new forms of regulation emerging to deal with transgovernmental activities like the global banking system or international terrorism.

This chapter elaborates upon these loose claims about the institutional form of international law. It is my contention that what counts as appropriate institutional form necessarily depends upon how we conceive of international relations. This relationship between international relations and institutional form has already been suggested in Chapters 8 and 9. For example, it has been argued that the differences between international relations and the social relations between human agents can lead to international legal order being able to have an interstate character. This is because reasonable, benign or democratic states are able to undertake institutional roles in the administration of the international legal order in a way that other sorts of states cannot.

In order to make this argument the chapter discusses the institutional form of international law in both ideal and non-ideal theory. Ideal theory, for Rawls, concerns 'the extension of the general social contract idea to the society of liberal democratic states'.[1] In the context of this book, ideal theory is to be understood to describe a community of states, where each is understood as being consistent with the *moral concept of the state* outlined in Chapter 8. The moral concept of the state describes a legal-political regime which attempts to act in accordance with certain moral obligations. Specifically, such a state accords with the internal requirement that it respects the human dignity of its subjects and is responsive to their collective interests. This is described by the integrated-Autonomy Thesis which sets out the institutional form a state legal order must take to be consistent with these obligations. Not only this, such a state respects the moral rights of states and human agents who are its recipients in its external relations. Each state also accepts that its conduct must be consistent with international law, given the argument for international law in Chapter 8.

When considering non-ideal theory, Rawls undertakes a discussion of how various non-liberal and non-democratic regimes must either (i) accept his principles of political morality, or (ii) be coerced if they refuse to accept it.[2] This is a perfectly acceptable strategy to take, and it, at least in part, resembles Kant's approach to non-ideal theory.[3] It is not, however, the approach taken here. This is because for non-ideal theory (which better describes the world in which we live) there are no states which irrevocably and eternally accord with the moral concept of the state. Therefore, to start from the premise that there are some states which exist alongside other sorts of regime, as Rawls does, is problematic. If the world described by non-ideal theory reflects our world, states, at best, can be said to blip in and out of existence. This problem is not faced by Rawls, but it is of

[1] J Rawls, *The Law of Peoples* (Cambridge, Mass, Harvard University Press, 1999) 4–5.

[2] Furthermore, it includes a discussion of the duty of assistance towards 'burdened societies', *ibid* at 5.

[3] Above 199–201. Kant argues that states must accept certain moral norms in the state of nature.

central importance for international lawyers. International legal order, for non-ideal theory, must have a way of dealing with the problem of the legal personality of those states or regimes which do not fully conform to the moral concept of the state.

It will be argued that international legal order must adopt different institutional forms for ideal and non-ideal theory. Specifically, for ideal theory, international law can largely be based upon interstate institutions, and for non-ideal theory, further suprastate institutions are implied. This distinction between ideal and non-ideal theory is relatively unsophisticated as a way of thinking about international relations. However, this argument is meant to show how our conception of international relations has implications for the institutional form of the international legal order. Specifically, my intention is to show that the concept of international law *mediates* between our conception of international relations and questions of institutional design. More broadly, the discussion in this chapter attempts to provide the groundwork for a critical and progressive analysis of the structure of international legal institutions, given the nature of international relations.

IDEAL THEORY

As just mentioned, ideal theory describes a community of states which are assumed to conform to the moral concept of the state but which are fallible in their judgment.[4] It was shown in Chapter 8 that such a community of states must rationally will international legal order. It is argued in this section that international law can be institutionalised through interstate institutional forms in this community. To begin with it is useful to recap on what an interstate system of international legal order is like.

An interstate system requires that states, acting collectively, play a vital role in the creation, interpretation and enforcement of international legal norms. This dual role is described by Scelle's concept of *dédoublement fonctionnel*. His concept is described by Cassese in the following way: 'national members of the executive as well as state officials *fulfil a "dual" role*: they act as state organs whenever they operate within the national legal system; they act *qua* international agents when they operate within the international legal system'.[5] The success of this institutional form, for Scelle, is predicated upon the community of states taking responsibility, not only for the affairs of the population they govern, but also the meta-national or solidarist values which reside in the international community as a whole.

[4] Above 195–97.

[5] A Cassese, 'Remarks on Scelle's Theory of "Role-Splitting" (*dédoublement fonctionnel*) in International Law' (1990) 1 *European Journal of International Law* 210.

Ideal theory *presumes* that the community of states is orientated towards acting in accordance with solidarist values. The interstate system works because states exercise international legal powers in a way that is consistent with these values. Such legal power requires that they undertake roles in the creation, interpretation and enforcement of international legal norms. How, exactly, can states have this *dédoublement fonctionnel* in ideal theory?

For Scelle, the interstate system administers the international legal order in the following way. First, state consent creates international law. So, 'when the heads of state of the state legislature take part in the formation of a law-making treaty, they act as international law-making bodies'.[6] Secondly, domestic courts interpret and apply international law in matters of dispute: 'any time a domestic court deals with a conflict of law question, it acts *qua* an international judicial body'.[7] More generally, the procedural mechanisms which exist in the administrative law of states, such as judicial review, provide a guarantee that international law is complied with by state institutions. Thirdly, states enforce international law: 'any time one or more state officials undertake an enforcement action (resort to force short of war, reprisals, armed intervention, war proper) they acts as international enforcement agencies'.[8] If these international functions are undertaken by states consistently with jointly-held solidarist values, then it seems that an interstate system can be a rational way of institutionalising international legal order.

In order to elaborate on this argument, I want to consider the three functions of international legal order: norm-creation, interpretation and enforcement within an interstate system. My approach is to explain how the interstate system is often able to fulfil the institutional requirements which are associated with international law for ideal theory. Where appropriate, I will also explain how this might permit us to interpret paradigm cases of international law as attempts to institutionalise such an interstate system.

Norm-Creation

It is well accepted that states create international law through their consent. In ideal theory, when states create international law through their consent, they would do so in a way that is consistent with solidarist values. Therefore, as a fundamental feature of international law is that legal norms must be consistent with such values, it is plausible to argue that international law can take an interstate form. This seems plausible. However, a

[6] A Cassese, 'Remarks on Scelle's Theory of "Role-Splitting" (*dédoublement fonctionnel*) in International Law' (1990) 1 *European Journal of International Law* 210.

[7] *Ibid*.

[8] *Ibid*.

problem with this argument is that it is unclear when states are exercising a legal power to create international law. Obviously, states can consent to various undertakings but these need not always give rise to legal obligations. This point is one that is central to the viability of an interstate system: when are states acting unilaterally as a subject of international law and when are they administering the international legal order?

Constitutional norms establish when legal powers may be exercised in all forms of law with which we are familiar. Such norms, for example, transform the citizen into legislator or judge. Equally, such norms perform the same role in the interstate system. They tell us when states can exercise their legal power to create international law and under what circumstances. This view was set out by Verdross in 1926. He used the word 'constitution' to describe 'those norms which deal with the structure and subdivision of, and the distribution of spheres of jurisdiction in, a community'.[9] More recently, Tomuschat elaborated on this usage:[10]

> [t]ogether with the rules on discharge of the executive and judicial functions, the rules on law-making form the constitution of any system of governance. All these sets of prescriptions can be logically characterized as meta-rules, rules on how the bulk of other rules are produced, how they enter into force, how they are implemented, and who, in the case of differences over their interpretation and application, is empowered to settle any ensuing dispute.

This indicates that constitutional norms establish when states are able to exercise law-making, and other, powers.

There are plenty of candidates which could fulfil this constitutional role in paradigm cases. The leading example is obviously the Vienna Convention on the Law of Treaties. From the perspective of the international legal order, the rules in this document should be understood as a system of *constitutional* rules which set out the way in which states can fulfil their institutional role in the interstate system in terms of creating international legal norms. This point is controversial from a positivist perspective which commonly holds that the validity of this document arises from state consent.[11] However, this follows because we see such paradigm cases through a positivist lens. There are strong reasons, which have been set out in this book, why we should not adopt this perspective. If

[9] A Verdross, *Die Verfassung der Völkerrechtsgemeinshaft* (Wein, Springer, 1926) v, quoted from B Fassbender, 'The Meaning of International Constitutional Law' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge, Cambridge University Press, 2007) 315.

[10] C Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993-IV) 241 *Recueil des Cours* 195 at 216. There is a large literature on this subject which I cannot adequately consider here. However, see B Simma, 'From Bilateralism to Community Interest in International Law' (1994-VI) 250 *Recueil des Cours* 217; P Allott, 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31 and *Eunomia* (Oxford, Oxford University Press, 1990) Pt 2.

[11] However, this implies a regress. See J Hampton, *Hobbes and the Social Contract Tradition* (Cambridge, Cambridge University Press, 1986) 122–8.

international legal order requires constitutional norms which establish when states can exercise a law-creating power, then we must consider whether any paradigm cases are successful in establishing such rules.[12] The Vienna Convention can be viewed in just this way. In this context, Article 53 of the Vienna Convention stands out, given the requirement that law-making has to be consistent with solidarist values. This provides that '[a] treaty is void if . . . it conflicts with a peremptory norm of general international law'. A peremptory norm is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'. It is commonly accepted that these mainly concern manifest violations of human rights (ie genocide or apartheid) and state sovereignty. It is the case, though, that solidarist values describe a more extensive set of principles beyond that which is normally associated with *jus cogens*.

This description of law-making for ideal theory is incomplete. As has been argued, international law resolves, and thus pre-empts, common co-ordination problems. It is instrumentally rational for international law to have *facilitative* institutions that can generate appropriate proposals as to how co-ordination problems can be solved through law. Also, it is equally rational to provide states with the opportunity to consider and criticise such proposals. Therefore, while the primary competence to create international legal rules remains with states, various paradigm cases of international law (such as the Sixth Committee of the General Assembly, the International Law Commission and the General Assembly of the United Nations) are extant and useful forms of facilitative suprastate governance.

Custom

An interstate system like that just described seems, to a large extent, to be an appropriate way in which international legal norms can be created for ideal theory. This said, various customary legal norms are some of the most well-established paradigm cases of international law. Such norms are said to arise through state practice rather than the explicit consent of states. How can customary international law be created in an interstate system? This matter is too complex to consider in detail, but an outline of the problem and a potential solution will be considered here.[13]

[12] H Lauterpacht, *International Law, being the Collected Papers of Hersch Lauterpacht*, vol II, *The Law of Peace, Pt 1* (E Lauterpacht (ed), Cambridge, Cambridge University Press, 1975) 44.

[13] The argument presented here bears some similarity to Finnis' views on customary international law. See J Finnis, *Natural Law and Natural Rights* (Oxford, Oxford University Press, 1980 238–45. For an interesting collection of essays which examines the issues briefly considered here, see A Perreau-Saussine and J Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge, Cambridge University Press, 2007). Also see M Byers, *Custom, Power and the Power of Rules* (Cambridge, Cambridge University Press, 1999).

To begin with, it seems plausible to argue that customary norms can, in principle, arise in ideal theory as states will act upon common solidarist values. But while this explains how state practice has a particular substantive range, it says nothing about how customary law emerges. The crucial distinction, like before, is between state practice and state practice which has a law-creating effect.

It has been argued throughout this book that the function of international law is to resolve a set of co-ordination problems by concretising natural social relations in a way that is consistent with morality. Such co-ordination problems can arise with regard to both *state conduct*, as well as *conduct of states in accordance with norms*. Regarding state conduct, a co-ordination problem emerges when, for example, state A and B both attempt to claim resource U. A co-ordination problem regarding conduct in accordance with norms arises when state A and state B disagree over the norms which govern their conduct. A may think that the norm which governs A and B is that the territorial sea extends six miles; B consider the norm to set the distance at three miles. Disagreements concerning the content of customary law are of the second type: they are disagreements about the content of norms.

For a state to act on the basis of a norm which it considers binding on it means that it *guides*, rather than merely governs, the state's behaviour.[14] Specifically, the state's officials believe that acting in accordance with the rule is the correct thing to do (but not necessarily in a legal sense at this stage). Furthermore, acting in accordance with this norm gives rise to an *expectation* about how the state will act in the future. Other states will base their future actions on the expectation that states will act in accordance with the same norm in similar circumstances. Thus, state practice in accordance with norms gives rise to a network of expectations about how states will act. However, this gives rise to a set of predictive, and not normative, oughts.

The predictive ought becomes a normative ought in two ways. First, state A may be frustrated in achieving its purpose *P* if state B does not act upon norm *N* which A expects it to act in accordance with.[15] Therefore, for state B to deviate from norm *N* can give rise to a co-ordination problem in its relations with A. So B, by acting on *N*, can be said to act wrongly by frustrating A's purpose *P*. Secondly, conflicts between subjective norms arise if state A cannot act on norm *O* if state B acts on norm *N*. Thus, by acting on norm *N*, B acts wrongfully according to A because B prevents A acting on norm *O*.

[14] On the distinction between norm-governance and norm-guidance, see S Shapiro, 'On Hart's Way Out' in J Coleman (ed), *Hart's Postscript*: *Essays on the Postscript to the Concept of Law* (Oxford, Oxford University Press, 2001).

[15] G Postema, 'Custom in International Law: a Normative Practice Account' in A Perreau-Saussine and J Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge, Cambridge University Press, 2007) 293.

These two sorts of co-ordination problem, it should be noted, are other versions of the problem which is solved by establishing an international legal order which was set out in Chapter 8. One way in which this can be solved is by states employing legal powers to establish an agreement which resolves their dispute and concretises their relations. Through such an agreement norms *N*, *O* or *M* (which is a compromise) can become legal norms. For customary rules to arise, we need to consider how *state practice* gives rise to legal norms like *N*, *O* or *M*.

Customary law emerges somehow from *converging practice*. This is not simply from converging norm-guided practice: that is, A and B both act on *N*, *O* or *M*. Rather, it is suggested that states' norm-guided behaviour embodies an implicit claim that it is a standard to which all relevant states should comply. This is why it is a putative customary legal norm, which can either be accepted or rejected by states through their conduct, rather than merely a norm upon which the state usually acts. So, when a co-ordination problem arises between A and B, A both acts on the basis of *O and* claims that B should follow *O ceteris paribus*. *O* is the solution to the co-ordination problem offered by A. If B acquiesces and acts in accordance with *O* rather than *N*, then we can say that a customary law has arisen between A and B. If B continues to follow *N*, then the co-ordination problem remains and the customary law does not arise. In order to establish the legal rule, explicit agreement may be required.[16] But the point is that customary law becomes entrenched through states self-consciously altering their practice to accord with putative omnilateral rules expressed in state conduct.[17] Whether these norms are consistent with the substantive moral concerns of international legal order does not arise in ideal theory. This is because states, by definition, attempt to act in accordance with the moral rights of their recipients.

Interpretation

It is a familiar idea that states can have an important role to play in the interpretation of international law. By developing this idea, the same sort of argument to that just set out with regard to norm-creation could also be developed with regard to interpretation. However, there are grounds by which one should have reservations about an interpretative role being played by states in the administration of international law.

As just stated, it is widely accepted that states, and their domestic judicial organs, have an important role in the interpretation of international

[16] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and the Netherlands)* [1969] ICJ Rep 3.

[17] See B Tierney's discussion of Suarez's concept of custom in 'Vitoria and Suarez on *Ius Gentium*, Natural Law, and Custom' in Perreau-Saussine and Murphy, above n 15, at 118.

law. However, whether this is appropriate is another matter. Scelle and Kelsen were prepared to accept that states could undertake this role as an organ of an interstate system.[18] Lauterpacht was sceptical and argued for a strong distinction between law-creation (which could be administered by states) and law-interpretation (which should be undertaken by supra-state judicial organs).[19] He wrote that for states to interpret international law is 'in flat contradiction to the principle of equality and independence of States, each State has the right to constitute itself judge in disputes with its neighbours'.[20] In a world described by non-ideal theory like ours, Lauterpacht's concerns should be taken very seriously. But does this concern equally arise in ideal theory?

To explore this possibility, it is as well to start with paradigm cases of international law. There are two familiar ways in which states can interpret international law. First, the law of state responsibility describes an interstate system by which states have an institutional role in determining whether there has been a breach of international law by another state. As such, states can be said to be organs of the international legal order which administer international law in line with legal rules (which are found, for example, in the Articles on Responsibility of States for Internationally Wrongful Acts 2001). Secondly, the domestic courts of states can both hold other parts of the state responsible for wrongs under international law and be a forum for the resolution of disputes between other states.

Auto-interpretation of International Law by States

That states can interpret international law and hold other states responsible for wrongs under international law can be called the auto-interpretation theory of international law. Can such an interstate system establish a way of interpreting legal norms in accordance with the concept of international law in ideal theory?

Ideal theory presupposes the existence of a set of solidarist values that are held by states. If morality is explicable,[21] the conduct of states can be considered morally wrongful against this set of moral values. It seems equally plausible to assume that states can determine when there is a violation of a legal obligation. This suggests that states are indeed able to interpret international law as organs of an interstate system. International law is, in this sense, *auto-interpreted*.

[18] See above 205–8.

[19] See *Norwegian Loans Case (France v Norway)* [1957] ICJ Rep 9 and Lauterpacht, above n 12, at 17. Also see above 210–12.

[20] *Ibid* at 44.

[21] See above 175–7.

Before rushing to this conclusion, a distinction must be made between two sorts of judgment that states may make. States may make a unilateral judgment about what international law requires or may make an omnilateral judgment, as an organ of an interstate system of international law, that a legal wrong has been committed. Within traditional paradigms of state responsibility an attribution of responsibility is a unilateral judgment made by a state that *may be* legally or omnilaterally vindicated.

Such legal vindication may take place when the state which has committed the putative wrongful act simply agrees with the other state's interpretation of international law and affords reparations to the injured state. Thus, the dispute is concretised through the agreement of states. If the state which has committed the putatively wrongful act does not agree with the unilateral interpretation, a dispute arises. In such a circumstance the dispute must be resolved through a legal judgment. Whether any pressure (for example, countermeasures) placed on the state which has committed the putative wrong is justified is also dependent upon this legal vindication.

Legal vindication does not arise just because states unilaterally assert that a legal wrong has been committed. To allow such an assertion to become law would simply be to replicate the problem which international law is designed to solve: to resolve co-ordination problems in the relations between states. Rather, legal vindication requires that the dispute is resolved through the concretisation of the relations between the disputing states. For ideal theory, this could occur through diplomacy which leads to a legally binding agreement, as has just been seen. It could involve arbitration by a third party or an arbitral body which could either be a domestic or suprastate judicial body. However, in each case, and given the argument in Chapter 8, states have a moral obligation to resolve their disputes through law when they cannot do so by diplomacy or conciliation. When states cannot do so, they must turn to third states or suprastate institutional machinery to resolve their dispute.

Franck's views of the necessity and function of international dispute settlement are useful to develop this approach to interpretation. Franck rightly shows that it is the capacity of norms to be authoritatively interpreted which makes them legal norms and not simply unilateral assertions of state's intent. Franck makes this point when he writes: '[y]et it is only when the rule-writers make provision for an institutional process to apply the rules to specific disputes that a rule takes on the gravity which distinguishes it from the verbal shields and swords of diplomatic combat. Only an international law which is subject to case-by-case interpretation via a credible third-party decision-making process is a serious norm'.[22] For

[22] T Franck, *Fairness in International Law and Institutions* (Oxford, Oxford University Press, 1995) 317.

ideal theory, many international disputes can be simply resolved through diplomacy and agreement between the states involved. However, Franck is right to claim that all international legal norms must be capable of being interpreted by third parties for them to be legal norms; ie norms which can be legally vindicated. If this is not the case, then it is not that a norm fails to be a 'serious norm', but, rather, it is that international law fails to govern the dispute. This is because the dispute over the correct interpretation of the norm is not solved.

For Franck, the success of dispute-settlement mechanisms rest upon conceptions of 'judicial usefulness' and 'achieving closure'.[23] It is correct that dispute settlement is about 'closure' (ie a solution to the co-ordination problem). But Franck thinks that these conceptions refer more to the willingness of a litigant state to subject itself to a legal dispute-settlement process when co-ordination problems emerge. Institutionally, he says that 'judicial usefulness' 'results in satisfactory settlement of disputes by a process which does not frighten away potential litigants. Not surprisingly, the judiciary—national as well as international—is most comfortable when deciding a case which each disputant would rather lose than continue to fight'.[24] This seems to reflect some sort of instrumental approach to dispute settlement.

This point is clear when Franck compares the *Gulf of Maine* case to the *Nicaragua* and *Nuclear Tests* cases. For the latter, '[s]uch very high profile disputes are rarely settled by the Court's decision and tend to leave at least one party dissatisfied with the Court'.[25] But this amounts to saying that 'satisfaction' with a court's decision is dependent upon state self-interest. If the judgment is not in a state's interests, law is not invoked. Practically speaking, it fails as a system of law because it only sometimes solves co-ordination problems, and, moreover, only does so in low-profile disputes.

The argument developed in this book is that rather than dispute settlement by international legal institutions being a process which states should instrumentally consent to, states must, as a matter of moral obligation and in all case of disputes, settle their disputes over what the law requires through international legal institutions when they cannot do so through negotiation or acquiescence. Of course, it is possible for a state to be dissatisfied with the procedural and substantive legitimacy of the interpretative institution (for example a court) which is determining a dispute. So, for example, if a state does not have the opportunity to make its case adequately or relevant factors were not taken into account, then it is appropriate for the state to feel aggrieved. However, other than in these sorts of circumstance, that the judgment is not in the state's favour is irrelevant.

[23] *Ibid* at 318.
[24] *Ibid*.
[25] *Ibid* at 318–19.

The view of interpretation which appears from this comparison with Franck is as follows. States are under a moral obligation to resolve their co-ordination problems peacefully. In ideal theory, states recognise this. Often states can simply resolve their disputes through diplomacy. Sometimes diplomacy leads to a legal agreement; that is, states *create* law to concretise their relations. In other circumstances, states should accept the resolution of their problem through dispute-settlement mechanisms. In none of these cases, however, is the state a judge in its own case. To do this would simply be to dress states' unilateral assertions up as legally vindicated judgments about what international law requires. Instead, states have a role in the interpretation of international law as part of a set of legal institutions which settle disputes and interpret norms. It is in this sense that states have a role in the interpretation of international law, but it must be supplemented by other sorts of institution which interpret international law and resolve disputes when states cannot, themselves, achieve agreement. There is, however, another way in which the interstate system can interpret international law. This is through domestic courts.

International Adjudication in Domestic Courts

It is commonplace for domestic courts to hold state organs responsible for violations of international law. This raises the possibility that domestic courts, within an interstate system, can have an important role in interpreting international law as organs of the international legal order. This idea is familiar: one way of conceptualising the requirement that litigants exhaust local remedies before an international claim is that domestic courts operate as lower courts in the international legal order.[26]

The approach to interpretation in ideal theory just set out indicates the possibility that domestic courts could exercise a role in the interpretation of international law. They could, for instance, operate as a forum which other states can turn to resolve their disputes. Alternatively, they can hold the state, *of which they are an organ*, to account for violation of international law.[27] The obvious problem with this interpretative system is that international legal norms may be interpreted differently from state to state. This problem concerns the *functionality* of domestic courts in administering international legal order. Divergence in interpretations of international legal norms by domestic courts undermines the predictability and stability which international law is meant to bring to inter-state conduct. While this would seem to be a justification for suprastate forms of adjudication, there

[26] See CF Amerasinghe, *Local Remedies Rule in International Law* (2nd edn, Cambridge, Cambridge University Press, 2003) ch 15. See J Waldron, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law and Public Policy* 15.

[27] See above 205–8.

is an interstate solution to this problem. Domestic courts can co-ordinate their interpretations of international law by relying upon and developing each other's views. Slaughter, amongst others, has argued that this sort of transnational body of interpretation is currently developing between judges in liberal and democratic states.[28] Thus, domestic courts can play a role in the interpretation of international law, but only can do so as part of a system of international legal decision-making.

Enforcement

Enforcement is a more important topic in non-ideal theory because it is here that some states refuse to comply with international law. However, in ideal theory, enforcement is to be understood in terms of states acting on their legally vindicated judgments. As was explained in the discussion of Kant's justification for law,[29] coercion is not only a feature of a legal order, but is a *structural feature of action*. Human agents constrain the capacity of others to act simply by successfully acting on their purposes.[30] The same logic can be applied to the relations between states in ideal theory.

As has been shown, international law pre-empts the unilateral claims of states and *determines what constitutes a rights-infringement for the community of states*. In an ideal community, by determining that state S has a right to *O*, international law gives all relevant states a sufficient reason not to infringe S's right to *O*. But the legal judgment itself cannot be said to enforce S's right; it rather vindicates S's attempt to enforce its right by acting to claim *O*. Enforcement can be said to take place simply by S acting on the basis of the omnilateral or legal right. Therefore, coercion is a feature of both Kant's state of war and international legal order. In the former, coercion is defined in terms of action on the basis of a unilateral judgment. For international law, enforcement takes place in pursuance of an omnilateral or legal judgment. This is why there is no need for centralised mechanisms of enforcement, which can be an 'external guarantee' of the legal rights of states, for a community of states described by ideal theory.

Failure of Interstate Design for Ideal Theory

There are situations in ideal theory where various sorts of human association cannot be adequately regulated by an interstate system. Persistent co-ordination problems which emerge as a result of increasingly dense

[28] See AM Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004) ch 2.
[29] See above 164–75.
[30] See above 164–8.

social integration (such as the management of global economics, the environment or the provision of basic goods) may often require systems of suprastate governance.

For Kingsbury, these forms of governance exist as part of a burgeoning system of global administrative law. He explains that these forms of law have developed on a largely ad hoc basis and are 'partial international communities capable of operating omnilaterally within their special domains of competence'.[31] For forms of global administrative law their 'special domain' is based upon a form of human activity, whereas for states the 'special domain' is primarily territorial.[32] So, institutions ranging from the World Bank to the International Standards Organisation govern particular domains of human activity.

The sorts of human association governed by these forms of suprastate institution are extremely complex and transnational in nature. Suprastate institutions are deemed necessary because states acting unilaterally cannot regulate these forms of association effectively and because states acting through an interstate system are not sufficiently responsive to events in these rapidly developing areas of human activity. Kingsbury, however, argues that the forms of global administrative law which have emerged empirically have failed to 'meet adequate standards of transparency, participation, rationality, and legality' as well as failing to provide effective review mechanisms.[33] It would seem that in order to be a form of international law, such institutions must be designed so as to track solidarist values, be accountable (presumably to states and to those they regulate) and be effective in administering their special domains. Most importantly, however, such institutions must be part of a unified omnilateral system of global law, rather than as Kingsbury puts it, partial omnilateral communities. As was argued in Chapter 9, the effective legal regulation of co-ordination problems can be undermined without the unification and integration of various regulatory institutions. Without this integration, co-ordination problems can be multiplied. This will imply constitutional norms which define the powers of various elements of the legal order as well as the relations between them. Furthermore, it suggests mechanisms for resolving disputes which arise when those institutions exercising legal competences come to diverging judgments about the same social

[31] B Kingsbury, 'Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law' (2005) 104 *Journal of International Law and Diplomacy* 98, 99. Global administrative law is based upon two central ideas: (i) to solve global problems it is better to focus on various communities of common interest rather than on nationality; therefore, global problems are often transnational rather than domestic or international; and (ii) that forms of legal regulation must be sensitive to this way of characterising such problems rather than being based upon a state, interstate and suprastate distinction for achieving a global legal order.

[32] See the introduction to P Capps, M Evans and S Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Oxford, Hart, 2003) xix–xxiv.

[33] Some proposals are set out by Kingsbury, above n 31, at 100.

practice.[34] Multilevel governance is justified in this sense, but each regulatory form must be part of a *system* of omnilateral judgment governing global co-ordination problems.[35]

This view of international legal order under ideal theory has it that an interstate system is largely justified. Thus states, by administering the system, administer the omnilateral will of the international community through the creation, interpretation and enforcement of legal norms. In such a system, states can be said to collectively hold the sovereignty of the international legal order. However, there may be strong functional reasons for the development of suprastate institutions in some circumstances. This is certainly the case in areas of persistent and complex co-ordination problems. Here, specialised suprastate institutions and courts are required with the specific competences to deal with such problems.

NON-IDEAL THEORY

At least as far as an ideal community is concerned, Hurrell is correct to argue that 'state action . . . is crucial both in fostering the emergence of [international] civil society and in providing the institutional framework that enables it to flourish'.[36] There is, however, an obvious problem with any views expressed about institutional design in ideal theory: the world is not described by it, nor is likely to be. Ideal theory, however, is not practically nor theoretically redundant in light of this observation. It does, after all, explain how, under certain circumstances, it is appropriate for states to administer the international legal order. Within a group of states which aspire to democratic standards and a respect for human dignity there are grounds for collective decision-making roles to be undertaken by state organs. Furthermore, we might tentatively suggest that the better states are, the greater the role they can play in the administration of international law. But it is now important to consider whether an interstate system is able to administer international law for non-ideal theory which is 'an arena of politics . . . in which the good and thoroughly awful coexist'.[37] It will be argued that it cannot and a substantial suprastate international architecture is required in order to establish international legal order.

[34] *Ibid* at 108–9.

[35] There is an extensive literature on this subject. See, eg, J Habermas, *The Divided West* (Cambridge, Polity, 2006) 135–9; N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999). More generally, see the collection of essays in N Walker (ed), *Sovereignty in Transition* (Oxford, Hart, 2003).

[36] A Hurrell, 'Global Inequality and International Institutions' in T Pogge (ed), *Global Justice* (Oxford, Blackwell Publishing, 2003) 33, 35.

[37] *Ibid*.

Non-ideal theory describes international relations as comprising all sorts of forms of political association which exercise coercive power and which is a closer reflection of the world in which we live. Some of these associations are liberal in nature, and others are not. This broad category of political associations can be referred to as 'regimes' in that they are institutions which attempt to regulate, through norms, the lives of those subject to them through the deployment of physical and ideological power. Some regimes more or less reflect the moral concept of the state. Others may be relatively benign systems of governance, in that they broadly accept human rights but not, perhaps democratic rights, or they may be aggressive, corrupt or ultraist regimes.

For non-ideal theory, no regime will, in either a dispositional or occurrent sense, be consistent with the moral concept of the state. It is for this reason that such regimes cannot be said irrevocably to have the collateral rights associated with statehood. Therefore, the central problem which international lawyers have to face is not, as Rawls suggests, whether liberal states can coerce non-liberal states, or the extent to which states must redistribute resources. Rather, the problem is how it can be said that there are any states at all.

Juridical and Moral Concepts of the State

As just stated, the moral conception of the state set out in this book does raise a very serious problem for international legal theory. While human agents have rights intrinsically qua human agents, regimes do not have any intrinsic rights. Such rights only arise to the extent that they have a particular internal structure which reflects the moral concept of the state. The problem is that once we adopt a strict moral concept of statehood, we negate the subject of international legal order for non-ideal theory.

This issue is not novel. International lawyers normally conceive of statehood in terms of conditions of effectiveness and legitimacy, even though their views vary about the exact balance between these two conditions. So, international lawyers have often been asked to consider whether unjust regimes, that are effective, are states. The way in which this problem tends to be resolved is to restrict the issue of statehood to certain extreme cases. So the problem emerges only with regard to failed states, secession, succession, civil war, situations where a regime denies those it governs the right to self-determination or when it adopts a normative practice, like Apartheid, which is fundamentally antithetical to basic human rights.[38] Thus, statehood is considered uncontroversial in the

[38] See J Crawford, *The Creation of States in International Law* (2nd edn, Oxford, Oxford University Press, 2006) 56.

majority of cases. This is perhaps best seen as a strategy which supports an important observation which underlies any attempt to institutionalise a system of international law. This is that if statehood is variable or unclear, then the obligations which states owe to each other become unstable. If this is the case then international law is not able to effectively co-ordinate the behaviour of states. Thus, attempting to minimise controversy over statehood is vital if international law is to effectively co-ordinate the activities of those entities subject to it.

To explain further, it was argued in Chapter 8 that the rights and duties associated with statehood are predicated upon the state being a thing of *moral value*. However, the moral concept of the state exacerbates this problem because statehood will be highly unstable in most circumstances. No putative state will either occurrently or dispositionally attain the standards reflected by the moral concept of the state. The rights and obligations various regimes owe to each other then become unstable and the capacity of international law to co-ordinate the behaviour of states is undermined. Also, once criteria of legitimacy are introduced, statehood becomes extremely subjective. So, there may be a great deal of disagreement about whether a putative state conforms to various moral standards by which it can be said to have collateral moral rights associated with sovereignty.

These problems emerge because the moral concept of the state is being employed in a unilateral instead of a legal, or juridical, sense. To explain, international law resolves the co-ordination problems which emerge in international relations. However, for non-ideal theory, a serious source of co-ordination problems arises if statehood is unstable. Specifically, this problem is characterised by each regime or state claiming statehood for itself, and either affording or denying it to others, *unilaterally*. To avoid this problem a *juridical judgment* must be made concerning the existence or otherwise of statehood in order to limit this instability. This legal judgment clarifies any doubt as to the rights and duties owed by particular regimes and states towards each other qua subjects of international law. To explain the nature of this juridical judgment, it is necessary to survey briefly the way in which international lawyers have considered personality under international law.

International lawyers have sometimes distinguished between de facto regimes and states. De facto regimes exercise power within a community through a relatively well-organised system of governance and sovereign states are characterised as exhibiting a form of legitimate governance.[39] Various implications may arise from this legal distinction: it may allow de facto regimes to be denied rights, such as those associated with sovereign immunity. In extreme circumstances, a denial of rights may permit military

[39] See J Frowein, *Das de facto-Regime im Völkerrecht* (Berlin, Carl Heymanns Verlag, 1968) 7–8 and passim and S Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: *Tertium non Datur*?' (2004) 75 *British Yearbook of International Law* 101, 103.

intervention. The legal distinction between regimes and states seems useful when making a juridical judgment about statehood and allocating rights under international law. States are those de facto regimes which correspond to the moral concept of the state and have states' rights. De facto regimes which fail against such standards do not have these rights. However, three crucial questions remain unanswered by this distinction. What rights do states have? What conditions must be met for statehood to arise? How are international legal institutions to determine when statehood arises? These three questions will be considered in turn.

States' Rights

If a regime is a state, what rights does it have? This matter need not be dwelt on at length. In Chapter 8, two general moral rights were set out. These are rights to non-interference in the internal affairs of states and moral autonomy in international relations.[40] In international legal order, these moral rights are protected and articulated through a set of legal rights.[41] Furthermore, international law aims to establish a system in which states are free to act in accordance with the law and are protected from interference by other states. They also have the right to invoke legal institutions, or act themselves as legal organs, to ensure that such rights are protected. Regimes which accord with the moral concept of the state have collateral moral rights. For non-ideal theory, however, the acquisition of such state rights depends upon how statehood is determined for any putative regime.

Conditions of Statehood

There are two views as to how statehood is determined which have been expressed in state practice. The first is that if a form of governance corresponds to various criteria of effectiveness then it can be considered a state and has sovereign rights under international law. Jellinek's formulation reflects the standard approach: 'a State exists if a *population*, on a certain *territory*, is organized under a *public authority*'.[42] Thus, it implies a concept

[40] See Crawford, above n 38, at 67–89.

[41] G Simpson, *Great Powers and Outlaw States* (Cambridge, Cambridge University Press, 2004) 42–49 for a discussion of the general legal principles which protect state sovereignty. Talmon lists legal rights associated with statehood as follows: inviolability of territory; co-operation to maintain world peace; independence; self-defence; immunity; freedom to choose its political system; accede to open treaties; participate in the formation of customary international law; granting nationality; sail ships on the high seas; honour and dignity; ability to hold another state responsible; and apply countermeasures. These are all, in principle, acceptable as legal rights which protect the broad moral rights of states. See Talmon, above n 39, at 148–52.

[42] George Jellinek's view is summarised by Talmon, *Ibid*, at 101, 109–10.

of the state which is wider than the moral concept of the state set out in this book. On this line, a state fails to exist as a subject of international law when it fails to be an effective form of governance. Secondly, according to Crawford, the modern understanding of personality under international law incorporates further requirements of *legitimacy*. Effectiveness remains a condition for statehood, but it is coupled to other conditions like a democratically elected authority, the right to self-determination, the prohibition of apartheid and the prohibition of the use of force in the creation of the state.[43] Statehood, as well as the rights associated with it, is denied to effective regimes which systematically violate these rights. This seems to come closer to the moral concept of the state. However, Crawford is careful not to push his view too far. He writes that 'there is so far in modern practice no suggestion that as regards statehood itself, there exists any criterion requiring regard for fundamental human rights'[44] beyond those specific categories just mentioned.

The modern understanding of statehood which is based upon effectiveness and legitimacy and the moral concept of statehood can be said to distinguish between de facto regimes, which are 'political entities that exercise actual control over territory and call themselves independent', and states, which have rights.[45] Prima facie, it would appear that, from the point of view of non-ideal theory, international law should adopt a concept of statehood which distinguishes between de facto regimes and states, rather than one based purely on effectiveness. I am not convinced this follows, for reasons which will now be set out.

Omnilateral Judgments on Statehood

The third issue concerns how statehood is to be determined by international law. As has already been discussed, statehood does not arise naturally, as it does with human agents. Instead, it must be determined by *international law* whether a de facto regime is a state. This is necessary to stabilise international relations and avoid a multiplication of coordination problems. Statehood is, then, determined by a juridical judgment rather than it being a unilateral moral judgment or an a priori given. How can this judgment—which is often highly complex and controversial—be made?

There are two general approaches in the literature concerning how this judgment is to be made. The first is constitutive theory. This is based upon positivism. Its central premise is described in this way by Crawford:[46]

[43] Crawford, above n 38, ch 3.
[44] *Ibid* at 148.
[45] Talmon, above n 39, at 103. See also Frowein, above n 39, at 7–8 and passim.
[46] Crawford, above n 38, at 13.

> the obligation to obey international law derived from the consent of individual States. If a new State subject to international law came into existence, new legal obligations would be created for existing States. The positivist premiss seemed to require consent either to the creation of the State or its being subjected to international law so far as other States were concerned.

Therefore, statehood is based upon existing states accepting the obligations which arise from a new state coming into existence. This can be understood as a form of interstate system where the juridical judgment concerning personality is made by states. The problem with this theory is well put by Kelsen. He argues 'the legal existence of a state . . . has a relative character. A state exists only in its relations to other states. There is no such thing as absolute existence'.[47] Similarly, Talmon argues that '[t]he most compelling argument against the constitutive theory is that it leads to relativity of the "State" as subject of international law. What one State may consider to be a State may, for another, be a non-entity under international law'.[48] So, while the constitutive theory explains how states can have an institutional role in the juridical determination of statehood for the international legal order, it leads to the possibility that statehood has a relative character. Furthermore, states may exercise such a judgment on the basis of all sorts of reasons, many of which may be unconnected to effectiveness or legitimacy. For both of these reasons, for statehood to be determined in this way reflects an instrumentally irrational form of international legal regulation because it remains unclear what has the rights and duties associated with statehood. The circumstances under which states can exercise that judgment as organs of the international legal order also remain unclear. Such an approach cannot obviously solve the co-ordination problems which arise from questions of statehood, and which the international legal order must solve. Crawford makes this exact point:[49]

> [i]f individual States were free to determine the legal status or consequences of particular situations and to do so definitively, international law would be reduced to a form of imperfect communications, a system for registering the assent or dissent of individual States without any prospect of resolution. Yet it is, and should be, more than this—a system with the potential for resolving problems, not merely expressing them.

The second model is the declaratory model. Here, recognition by other states merely confirms, and is not constitutive of, international legal personality. So, if a system of governance is effective and/or legitimate, it *is* a state notwithstanding whether other states recognise it as such. No judgment by international legal institutions need be made.

[47] H Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 *American Journal of International Law* 605, 609 (quoted from Crawford, above n 38, at 21).

[48] Talmon, above n 39, at 102.

[49] Crawford, above n 38, at 20.

Declaratory theory is problematic for different reasons to constitutive theory. Declaratory theory presumes that difficult questions of statehood do not arise, or that answers to questions about statehood are obvious. Whether conditions of effectiveness or legitimacy are present is a *fact* rather than it being necessary for it to be *determined by legal judgment*. As already has been stated, experience tells us that this is not the case and often difficult judgments must be made as to whether a regime has fulfilled the conditions of statehood. If hard cases concerning statehood do arise, as they appear to arise in non-ideal theory, the international legal order must have a way of resolving them.

Lauterpacht argues that states, collectively, could undertake this institutional role as part of an interstate system. This introduces a qualified constitutive theory. States exercise an administrative role when they apply and interpret legally established criteria of statehood (eg criteria of legitimacy and effectiveness). This interstate system is preferable to the constitutive theory because recognition by states is constitutionally structured by legal norms. States act as organs of the international legal order when they recognise other states in accordance with conditions of effectiveness and/or legitimacy. Lauterpacht writes:[50]

> the full international personality of rising communities . . . cannot be automatic . . . [A]s its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be someone to perform the task. In the absence of a preferable solution, such as the setting up of an impartial organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty.

This system of making a legal judgment about personality merely reduces rather than removes the problem of variability of statehood. The problem remains that such a judgment is one that requires a complex balancing of matters of fact and law. As states occurrently fail against standards of effectiveness and legitimacy for one reason or another, the state can be said to blip in and out of existence. Furthermore, who is to say that other states are, in themselves, able to fulfil this institutional role if they themselves occurrently fail against standards of effectiveness and legitimacy? It seems that constitutive, qualified constitutive theory and declaratory theory cannot be employed to solve the problem concerning how statehood should be determined.

Let us start again. The issues raised here are of two types. The first type concerns the substantive judgment about what conditions must be present for a state to exist under international law. The second concerns the appropriate institutional mechanism to make this legal judgment.

[50] H Lauterpacht, *Recognition in International Law* (Cambridge, Cambridge University Press, 1948) 2 (Quoted from Crawford, above n 38, at 20).

Regarding the first issue, imagine a state which has suspended democratic rights or has acted aggressively towards a neighbour. It can be said that the state has failed against criteria of legitimacy and is in violation of international law. There are two ways in which the international legal order can respond to the actions of this state. It could (i) remove statehood and the rights associated with statehood (possibly temporarily); that is, the violation of the legitimacy condition by an effective regime indicates that it is not a state for the purposes of international law. Alternatively, (ii) international law could consider that the state has acted wrongfully under international law. The international legal order establishes obligations which require the state to stop committing the wrongful act. If it does not comply, it can, in principle, be coerced to do so by various measures.

Is there a substantial difference between (i) and (ii)? The deprivation of rights in (i) can be said to be a coercive response by the international legal order in light of a violation of international law. However, the response in (ii), whereby international law attempts to coerce the state to ensure that it complies with its obligations, is structurally much the same. This is because for (ii) such coercive acts (which may take the form of countermeasures, sanctions or the use of force) can be seen as deprivations of sovereign rights states would normally have. Therefore, whether the judgment is made on the basis of (i) or (ii), the state is deprived of sovereign rights and therefore, it makes little difference whether it is conceptualised as having lost personality, or whether its actions constitute an illegality. There are good reasons to argue that (ii), however, is a superior way of balancing the need to ensure that states act in accordance with the legal obligations they are under against the need for stability in the international legal order. Talmon adopts the tenor of this second view in his elaborate analysis of state practice with regard to non-recognition.

He claims that in general 'serious breaches [of international law] are likely to be addressed by competent international organizations, including the Security Council and the General Assembly'[51] rather than such breaches depriving a state of personality. On this basis, statehood is determined by effectiveness alone, and illegal acts under international law can allow sovereign rights to be withdrawn from states via various acts of enforcement. Talmon thinks that non-recognition is an enforcement action of this type and can be seen as part of a spectrum of rights-deprivations which could be imposed upon the state committing an illegality. Another example of a rights deprivation in response to the illegal conduct under international law is the removal of the right of a state to engage in the international law-making process.[52] At the far end of this spectrum is the

[51] Talmon, above n 39, at 177.

[52] For example, through expulsion from international organisations. See J Makarczyk, 'Legal Basis for Suspension and Expulsion of a State from an International Organization' (1982) 25 *German Yearbook of International Law* 476. Against standards of legitimacy embodied

withdrawal of the right to territorial inviolability of the state which, in turn, would allow external interference in the internal affairs of the state. Thus, statehood is determined by de facto effectiveness, and legitimacy conditions form the basis of legal norms against which state conduct is judged and coercion by international legal institutions justified.

To characterise such infringements as violations of standards of legitimacy embodied in international legal norms, rather than as status-denying acts, is advantageous for a number of reasons. First, it implies that states do not blip in and out of existence when they fail to respect international law and it promotes stable personality within the international community. Secondly, rendering such a wrong an illegality encourages compliance. This is because the responsibility of the state is maintained for the illegal acts and any enforcement action normally suspends rather than extinguishes sovereign rights. Also, to deny a state personality is to deprive it of all sovereign rights and this may be disproportionate in many circumstances.

This way of thinking about personality can now be built into our considerations of the moral concept of statehood. Statehood is determined juridically on criteria of effectiveness, but such states act illegally when failing to comply with international legal norms which reflect the moral concept of statehood. Thus, the moral concept of the state is employed to devise normative standards which are applied by international legal institutions. States (which are de facto effective) are held to account against such norms.

Institutional Architecture and Norm-Creation

This way of approaching personality is preferable to others as it stabilises international relations while at the same time ensuring that states are accountable for wrongs against standards of legitimacy set out in the moral concept of the state. However, this analysis leaves the question open concerning how institutions make various judicial judgments in non-ideal theory. It is to the issue of norm-creation, interpretation and enforcement in the international legal order that our attention will be now turned.

in the international legal order, it seems almost bizarre that such states should have an unfettered international law-making power. Tasioulas writes, concerning the consent theory of legal obligation, 'the consent in question is that of a sovereign state, as presently understood in international law. But a state can be sovereign even if the government that controls it represses its people, with the result that its consent to international norms is granted or withheld in accordance with the perceived self-interest of a tyrannical ruling clique'. J Tasioulas, 'Customary International Law and the Quest for Global Justice' in A Perreau-Saussine and J Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge, Cambridge University Press, 2007) 314. See also Pogge, above n 36, at 19.

It will be recalled that international legal order requires that international relations are restructured so that sources of dependency are eliminated or reduced. Substantively, this implies that international law is forged on respect for solidarist values like human dignity and states' rights. The interstate system is often appropriate for ideal theory because states adopt the same set of solidarist values and these are articulated when such states collectively engage in the administration of international law. Non-ideal theory considers international institutions in a community of states in which there are substantial levels of moral disagreement and in which some states are unwilling or unable to respect solidarist values. As international law attempts to restructure international relations to reflect these core solidarist values, it seems unlikely that an interstate system will be able to create, enforce and interpret norms in a way that is consistent with these values.

Regarding norm-creation in non-ideal theory, states cannot be left to create international law through their consent. This might indicate that norm-creation should be allocated to a global legislature, but there is widespread scepticism about this as a pragmatic option. With this in mind, is it possible to conceive of an interstate system of norm-creation in non-ideal theory?[53]

One possibility is that states could retain a competence to create international law, but such laws are judged against general standards of legitimacy by suprastate institutions. This is not odd: it is feasible for the International Court of Justice (ICJ) or the Security Council to render treaty provisions void for violations of *jus cogens*. However, this solution implies (i) a set of constitutional norms which set out the conditions by which states can exercise this power (which includes substantive and procedural constraints); and (ii) suprastate institutions which are able to monitor the law-creation process to ensure that these conditions are met. Regarding (i), paradigm cases of international law such as the UN Charter, the main human international human rights instruments and the Vienna Convention on the Law of Treaties should be progressively interpreted as attempts to articulate these sorts of constitutional norms.[54]

For (ii), the problem is that, given that states are unlikely to will or act in accordance with solidarist values, our practical imagination quickly turns to cosmopolitan proposals for the reform of the United Nations' bodies so

[53] The following proposals need to be developed in further work. Four good analyses of the various ways in which global legal decision-making can take place in a way that is both effective and legitimate are N Krisch, 'The Pluralism of Global Governance' (2006) 17 *European Journal of International Law* 247; M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907; R Keohane and A Buchanan, 'The Legitimacy of Global Governance Instititions' (2006) 20 *Ethics and International Affairs* 405; A Buchanan, 'Human Rights and the Legitimacy of the International Order' (2008) 14 *Legal Theory* 39.

[54] On progressive interpretation, see above 210–12.

that it is able to create international law in a way that is consistent with such values.[55] I am not sure this need necessarily follow. Bodies like the General Assembly are enormously useful as a forum to ensure that the lines of communication between states are kept open, and to deepen the global integration of solidarist values, and to co-ordinate collective enforcement action, but law-making should be largely left to states for the following reason.

States can exercise a law-creating power if two conditions are met: (i) that norms are consistent with solidarist values, and (ii) that an agreement must be reached. Given that states exhibit a high level of moral heterogeneity in non-ideal theory, it is likely that there will be many cases in which these conditions are not met. In response to (i), this suggests supra-state institutions which can invalidate those international legal norms which are inconsistent with solidarist values. In response to (ii), such institutions should *require* states to create norms so as to restructure their relations with other states. So, for example, a state which refuses to act in a peaceful way with regard to its neighbours may be required by international law to commit itself to legal constraints. If it does not do so, it can be coerced into doing so. This can be said to be an international version of Rousseau's maxim that 'whoever refuses to obey the general will shall be constrained to do so by the entire body; which means only that he will be forced to be free'.[56]

There is a nascent institutional architecture in international law that is able to exercise these institutional roles. Various institutions (such as the Security Council or the Human Rights Committee) are, in principle and in accordance with their constitutive documents, able to wholly or partially invalidate, or can suspend the application of, those obligations states have consented to.[57] Furthermore, the Security Council has required states to negotiate and come to agreement in matters of international peace and security.[58] Whether such institutions are either effective or are procedurally and

[55] See D Archibugi, 'The Reform of the UN and Cosmopolitan Democracy: a Critical Review' (1993) 30 *Journal of Peace Research* 301 and 'Models of International Organisation in Perpetual Peace Projects' (1992) 19 *Review of International Studies* 295; A Linklater, *The Transformation of Political Community: Ethical Foundations for a Post-Westphalian Era* (Cambridge, Polity Press, 1998); D Held, *Democracy and the Global Order: From the Nation State to Cosmopolitan Governance* (Cambridge, Polity Press, 1995); J Caney, *Justice Beyond Borders: a Global Political Theory* (Oxford, Oxford University Press, 2005) ch 5.

[56] JJ Rousseau, *On the Social Contract* (JR Masters (trans), New York, St Martins Press, 1975, first published in 1762) 155 [1.7.8].

[57] Although this is not a perfect example, see SC Resolution 1816 (2008). This concerned piracy against international shipping in Somalian waters and allows the suspension of the normal rights Somalia has over its territorial sea so that foreign vessels can effectively enforce the Resolution. See also *Rawle-Kennedy v Trinidad and Tobago* (1999) CCPR/C/67/D/845/1999.

[58] See SC Res 1031 (1995) and 1088 (1996). Both recognise that former Yugoslav states have an obligation to (ie 'shall') co-operate with the International Criminal Tribunal for the Former Yugoslavia and with each other to implement a peace settlement.

substantively legitimate is highly questionable.[59] However, it is clear that in non-ideal theory, there is a much greater need for suprastate institutions with regard to norm-creation. This need not, however, imply the universal state.

Enforcement

Non-ideal theory presupposes that states may refuse to comply with their international legal obligations. Therefore, unlike states in ideal theory, enforcement cannot be presumed to take place simply by states acting on their legally vindicated judgments. When are international legal institutions justified in enforcing international law against states when they fail to resolve the co-ordination problems which arise with other states through law and when they fail to submit to dispute settlement?

The justification of coercion can be established by further reflection on Kant's claim that all state action is coercive in the sense that it attempts to restructure international relations. In the absence of an international legal order, what is the case in international relations is determined by states acting unilaterally. For non-ideal theory, such action by states restructures international relations in a way that may or may not be consistent with solidarist values. However, international legal order can be said to be an attempt to restructure international relations in a way that is consistent with those legal norms which express solidarist values. The unilateral actions of states which violate international legal norms are, then, those actions which undermine the omnilateral articulation of solidarist values. Therefore, the enforcement of international legal norms is an attempt to restore or to establish a state of affairs in which solidarist values are protected. To not enforce international law is to allow international relations to be unilaterally structured in a way which reflects the values of the most powerful.

In a sense, then, there is no need to justify coercion. Coercion is a characteristic of any social environment, whether it is unilateral or omnilateral in nature. However, coercive acts which attempt to establish a system in which solidarist values (that is, human dignity and states' rights) are systematically protected, is to be morally and rationally preferred.

This does not explain the structure of these coercive international legal institutions. This is a complex matter, and requires a detailed investigation of matters of effective institutional design, and how international legal

[59] See Franck, above n 22, at 242–4; I Johnstone, 'Security Council Deliberations: the Power of the Better Argument' (2003) 14 *European Journal of International Law* 437; I Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 *American Journal of International Law* 275; and, Krisch, above n 53.

institutions can be procedurally and substantively legitimate. The matter will only be considered briefly here.

In paradigm cases, the Charter of the United Nations authorises states to collectively engage in enforcement action through a variety of forcible and non-forcible means when the Security Council authorises it. In principle, an institutional arrangement like this could be appropriate to fulfil this requirement. However, the well-established problem with this system of enforcement as it stands is that its actions (or inactions) are often considered to be driven by ideology or self-interest rather than a considered attempt to ensure that international laws are enforced through proportionate means when necessary.[60] This implies procedural mechanisms to assess the rationality of decision-making in line with this purposive orientation. In turn, the literature concerning how review powers can and should be afforded to the ICJ to achieve this exact role is valuable.[61]

Self-defence

It has been shown that in various circumstances it is appropriate for international law to be administered by states. Self-defence is an example of this in relation to the enforcement of international law. In this sense, self-defence by states is not a pre-legal 'inherent right' as suggested in Article 51 of the Charter of the United Nations. Except for this unfortunate language, the idea that self-defence as a legally regulated right is expressed in the rest of Article 51. Thus, it is made clear when and how states can engage in self-defence as organs of the international legal order. Specifically, it is integrated into a legal response to aggressive acts by states through the obligation to report any action taken in self-defence to the Security Council. As is well-known, the Council then has the authority to determine what measures must be taken in order to restore international peace and security. Understood this way, self-defence is part of an attempt by international law to carefully control the exercise of coercive power of states, qua organs of the international legal order, to enforce international law.

[60] See Simpson, above n 41.

[61] See Franck, above n 22. This issue was also discussed in the preliminary stages of the ICJ decision on *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of the ICJ, 26 February 2007. See D Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 309.

THE CONCEPT OF INTERNATIONAL LAW AND THE ROLE OF THE INTERNATIONAL LAWYER

The international legal order for non-ideal theory implies a suprastate institutional architecture, but it does not imply the universal state. Instead, I have suggested that States, in conjunction with suprastate institutions like the primary organs of the United Nations and others, form a nascent international legal order which is largely consistent with the concept of international law set out in this book. However, there are some key reforms which need to be made so that international legal order can be fully established. Centrally, this requires improvements in both the effectiveness and legitimacy of suprastate institutions so that they can effectively restructure international relations so that they reflect solidarist values. Rather than offering some sort of utopian vision of international legal order, it is my view that international legal order can be established by strengthening existing institutions. It also requires, in my view, states to reconsider their role within such a system of law. Much of the details of the proposals just set out can be left to later work. This chapter, however, concludes with three points.

First, it is useful to outline the process by which more detailed proposals to develop international law can be worked out by the international lawyer. His starting point is the claim at the heart of this chapter, which is that the way in which we conceive of the ontology of international relations determines how international legal institutions should be structured. To put it bluntly, if states are reasonable, they can administer the international legal order through constitutionalised interstate systems. Suprastate institutions may only be required for the purposes of the resolution of disputes, the interpretation of international legal norms, and in circumstances where the complexity of various forms of human association demand the development of specialised institutions. For non-ideal theory, further suprastate institutions are implied to regulate states when they exercise international legal roles, and when they act unilaterally. Therefore, the relationship between the ontology of international relations and the institutional response of international legal institutions is *mediated* by the concept of international law. Institutional theory concerns how we can effectively ensure that international relations are restructured so that the solidarist values integral to the concept of international law are protected.

The distinction between ideal and non-ideal theory is not particularly subtle and does not address the extremely complex and multifaceted problems which beset the modern world. This is, in fact, why my substantive proposals are quite general. However, it is my view that the international lawyer should employ the concept of international law in the mediating role just described when addressing the question of how to regulate the complexities of our social world. This is so that more concrete

and substantive proposals to develop international law can be set out. To do this requires a much richer and more complex understanding of international relations than is offered here. In this sense, the international lawyer's project also requires the insights of political scientists, sociologists and macro-economists. The international lawyers' task is to consider whether different institutional proposals are better or worse at achieving international legal order in the light of social problems that are identified by those who study the structure of international relations.

The second concluding point concerns methodology. In this chapter, I have shown how the concept of international law can be applied to conceptualise international legal order for both ideal and non-ideal theory. Fundamentally, this argument is based upon the methodological claim that international law should be conceptualised from a practically reasonable viewpoint.

Those norm systems which fall short against the concept of international law cannot be considered cases of international law in a focal sense. While they share similarities to international law, they are distinct, or 'other', to international law, because they do not share its focal purpose of law. This is how normative positivism, for example, should be viewed. Returning to the Aristotelian analysis set out in Chapter 2, such normative practices may be described by ordinary language-use (correctly) to be *similar* to international law, or indeed (incorrectly) as a *form of international law* because they bear a similarity to the concept of international law. On these grounds, I accept some aspects of the 'central-case-as-mediator' approach to concept formation. However, international law is not to be conceptualised through catch-all concepts which encompass everything that can be ordinarily understood as falling within its extension.[62] Rather, the concept of international law is the focal case, which rests upon the attribution of focal purpose set out in this book.

The third and final concluding point is that the argument in this book presupposes that legal orders govern the relationships between human agents, and international legal order governs the relationships between states. Together, they could be said to be a system of global law. As we have seen, though, there are a range of other sorts of transnational human associations which are regulated by, for example, private international law, the law of diplomatic protection or refugee law.

Empirically, this sort of transnational interaction, which is part of the process of globalisation, has become a more significant source of dispute.[63]

[62] V Rodriguez-Blanco, 'Is Finnis Wrong?' (2007) 13 *Legal Theory* 257.

[63] See Hurrell, above n 36, at 33. He writes 'globalization involves the dramatic increase in the density and depth of economic, ecological, and societal interdependence, with "density" referring to the increased number, range, and scope of cross-border transactions: and "depth" referring to the degree to which that inter-dependence affects, and is affected by, the ways in which societies are organized domestically'.

This may imply new forms of regulation, as has been seen. Institutionally, this should play out as a unified system of global law which comprises a range of state, interstate, suprastate and transnational regulatory forms. These regulatory forms are unified through a global civil constitution.

The end is achieved through a process of global civil incorporation. This process must be undertaken regardless of whether there are transnational and international relations. If there is, for example, a Rousseauian asocial state of nature in international relations, then global civil incorporation is completed by the establishment of state legal orders alone. In another world, where there are no relatively discrete communities in territories and rather a series of constantly shifting and overlapping communities, a different sort of global civil incorporation will be necessary. This all depends on one's ontology. I have presumed a world of communities which are (at least historically) relatively discrete, but which engage in international and transnational relations, and this why the sort of global civil constitution just suggested follows. Whatever the ontological starting point, global civil incorporation is a rational end-point for all human agents. It is for this reason that Kant's injunction that '[a]ll men who can mutually influence one another must accept some civil constitution'[64] is correct, and implies global civil incorporation.

[64] I Kant, 'Towards Perpetual Peace: a Philosophical Sketch' in *Perpetual Peace and Other Essays*, Cambridge, Hackett Publishing, 1992, first published in 1795) 112 [8:348 footnote].

Conclusion

THE PURPOSE OF this book is to show that legal science, that is objective knowledge about legal phenomena, is possible and that this knowledge can be profitably employed in debates on the concept of international law. Methodologically, I defend focal analysis. I have claimed that normative practices like law must be understood as purposive phenomena. On this basis, I argue that the general concept of law should be understood as a set of institutions that create, interpret and enforce the omnilateral will of a community. In doing this, law attempts to restructure the natural social relations between human agents so that such social relations are rendered consistent with human dignity. Kant argues that '[a]ll men who can mutually influence one another must accept some civil constitution',[1] that is, governance through law. Because international relations describes a situation in which 'men can mutually influence each other' it, too, must be governed by law. It is for this reason I think that the general concept of law gives rise to a type of law, called international law, which governs the relations between states.

International law, then, is derived from the general concept of law. Substantively, the concept of international law can be summarised in the following way:

(1) International law, like all forms of law, is a normative practice which is value-orientated towards the respect and protection of certain rights associated with human dignity. The rights of states are, in a moral sense, corollaries of this fundamental value-orientation. Jointly, these rights reflect solidarist values. The practice of juridical states (which are de facto effective regimes) is to be judged against these values (which are articulated as international legal norms). Violations of such norms constitute wrongs under international law and may entail deprivations of certain rights which states have.
(2) International law is an omnilateral system of judgment that governs the relations between states. This system, to be effective, requires international institutions which are able to create, interpret and enforce

[1] I Kant, 'To Perpetual Peace: a Philosophical Sketch' in *Perpetual Peace and Other Essays* (T Humphrey (trans), Cambridge, Hackett Publishing, 1992) 112 [8:348 footnote].

such judgments for the international community. Legal norms pre-empt states disputes and institutions interpret international law authoritatively to resolve disputes over the content of norms in a way that is consistent with solidarist values. Enforcement is an attempt to restructure international relations so that it reflects these values, rather than the interests of the most powerful.

(3) While, for ideal theory, international law can, by and large, adopt an interstate form, there are serious concerns with attempts to adopt such a system for non-ideal theory. Given the value-pluralism exhibited by juridical states in non-ideal theory, an interstate system is not adequate as a way of creating international law consistently with solidarist values. For non-ideal theory, more extensive suprastate institutions are required in order to ensure that this is the case. This, however, does not imply a universal state, and even in non-ideal theory states can play an important institutional role in the administration of international law.

(4) There are good reasons for the development of suprastate institutions to deal with co-ordination problems of particular complexity (like, for example, the global distribution of economic goods). But these must be part of a unified and constitutionalised system of international regulation so as to not simply move co-ordination problems up a level whereby regulatory institutions conflict over which has authority to determine the outcome of a dispute.

(5) The concept of international law offered here is in the tradition of which Lauterpacht is a modern exponent. Another contributor to this tradition is Kant and I stated in the introduction to this book that my approach is broadly Kantian.[2] Whether or not the specific conclusions reached here are those which would have been accepted by Kant can only be speculated upon. While Kant clearly held that the peaceful settlement of disputes is a fundamental function of international law, it is not so clear whether international legal order had (i) to be consistent with the fundamental solidarist values connected to human dignity, or whether (ii) it implied an institutional architecture which is instrumentally rational in achieving this end. I suspect that he did not fully accept either (i) or (ii), and if this is the case, I think that he was mistaken.

It is not my aim to offer a radical or utopian account of international law. Nor is it my aim to chart the commonalities between various normative practices, individuated norms and institutions which we normally refer to

[2] While Lauterpacht was sceptical about some of Kant's arguments, they are unified in seeking peace in international relations as a fundamental human interest. See H Lauterpacht, *International Law, being the Collected Papers of Hersch Lauterpacht*, vol II, *The Law of Peace, Pt 1* (E Lauterpacht (ed), Cambridge, Cambridge University Press, 1975) 47.

as international law. Instead, I want to offer a methodologically defensible explanation of the essential features of international law, and if this defence is close to paradigm cases, then so be it. In the main, paradigm cases of international law can constitute cases of international law if they are reformed so that they are more effective as well as more responsive to solidarist values. So, if it is possible to alter the structure and procedures of the Security Council so that it is responsive to solidarist values instead of state self-interest, or if the International Court of Justice has compulsory jurisdiction and is able to review the exercise of international legal power by other international institutions, it would render our paradigm cases of international law much closer to the concept of international law set out in this book. Thus, it is possible to reform extant paradigm cases of international law so that they are rendered consistent with the concept of international law. Contrary to some utopian proposals, we do not need to tear up what has been achieved and start again. Rather, we can build on existing structures so that they can be rendered closer to the concept of international law.

More generally, the concept of international law tells us what is distinctly legal about these paradigm cases. This sort of inquiry is not odd: international lawyers frequently disagree, for instance, whether so-called 'soft law' is really international law. However, it is my view that one's answer to this question depends upon one's concept of international law. The concept of international law does not pop up by itself from our paradigm cases. Rather, it relies upon a set of judgments made by the legal scientist about the value-orientation of international law which gives rise to an account of its essential nature. This is why I disagree with Allen Buchanan's approach when he writes:[3]

> What I say about how international law ought to be will of course make certain assumptions about what currently is international law, but these assumptions will be relatively uncontroversial and largely neutral as to the positivist/naturalist debate. Moreover, I will attempt to resist the temptation to which some naturalists succumb and which positivists rightly criticize: letting my beliefs about what the law should be distort my judgment about what law is.

My claim is that one's beliefs (or, specifically, values), fundamentally orientate how we view 'what law is'. The problem for legal science is to ascertain whether our beliefs can be vindicated one way rather than another and doing this is the basis for a concept of international law. Once the concept of international law is in place, it is then possible to appraise our paradigm cases as attempts to institutionalise international law. Some attempts may be successful, others unsuccessful, and others pathological as attempts to institutionalise international law.

[3] A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford, Oxford University Press, 2004) 21–2.

In conclusion, the foundations of international law, refer, in part, to the concept of international law. This comprises a description of its purposive orientation and essential features. In defending this claim, I hope to have shown how the debates over the concept of law are fundamental to the philosophical analysis of international law. Returning to the theme of Chapter 1, the historical perspective should be properly understood as an attempt to critically appraise a series of normative proposals which envisage ways of creating an international legal order through time and space, through progressive interpretation. The practitioner of international law should work out pragmatic proposals by which the concept of international law defended in this book can be made reality. Regarding the sceptic's perspective, I hope to have shown that some arguments concerning one's value-orientation are more rationally defensible than others, and that scepticism is misplaced or unfounded. In sum, debates on the foundations of international law require an analysis of how we should employ law to restructure international relations so that they are rendered consistent with human dignity.

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