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The Elements of International Legal Positivism

*Devika Hovell**

Abstract This article contains a plea for continuing attention to the elements of international legal positivism. Using the language of 'elements' deliberately plays on the positivist tendency to describe the legal discipline as a legal science. Yet law's elements differ in important ways from the usual objects of scientific inquiry. Law's method does not seek to address the structure and behaviour of the physical world, but that of a particular society with its own political polarities, structure and functions. The fact that international law inherits its positivist method from the domestic legal context therefore presents complications. While the adoption of positivism as international law's predominant legal method was animated in part by a desire to provide international law with the imprimatur it needs to claim credibility as a legal system, it has also served as an impediment to international law's development in a distinctive fashion from domestic law. International law's attachment to the positivist method has at times extended to an attachment to certain presuppositions more closely associated with the development of the modern European state. This article takes the position that it is important to engage with international legal positivism on its own terms. Part I traces the lineage of three important traditions of international legal positivism ('social thesis' positivism, 'system-based' positivism and 'teleological' positivism) highlighting their different emphases and in doing so identifying key elements. Part II interrogates certain presuppositions sometimes associated with these traditions and considers whether it is appropriate to rethink or re-engineer these aspects in their application to the international legal system. While positivism is sometimes associated with 'purifying' law as a discipline, the article takes the position that the positivist method can only endure if complemented by a rich legal, political and social discourse focused on understanding its relationship to the elements of the international legal system, in particular, international law's community, authority and functions.

Keywords: positivism; sovereignty; international community; legal authority; monism; dualism; Lassa Oppenheim; Hans Kelsen; Hersch Lauterpacht

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As lawyers, we carry in our heads a picture of the legal system in which we work. This is not to say that all lawyers will share the same mental construct. If we imagine the world's lawyers heading out to work each morning, in all likelihood they would do so with quite different ideas about where they work, the object of their endeavours, the measure of their success, the nature of their opponents, even the discipline within which they work.[1] Scholars of jurisprudence (often situated within particular legal cultures) have worked hard to provide us with a deeper understanding of the structure of law and legal systems and the role of law in society. Yet legal context necessarily inflects these questions of legal design. For example, attempts to extend jurisprudential understandings of domestic law to international law have not always been illuminating. Measured by such constructs, international law has tended to scrape a 'bare pass' at best.[2] More concerningly, attempts to explain how international law fits a concept of law designed for the domestic legal context has worked distortions into the concept of international law itself.

It has become common to seek to understand international legal positivism by reference to its domestic counterpart.[3] By way of contrast, this article takes the position that it is important to engage with the question of international legal positivism on its own terms. 'Positivism' is used here as short-hand for the legal method adopted by the majority of practising international lawyers, a method that has been described as the *lingua franca* of international lawyers.[4] Use of this shorthand will curl the toes of sedulous and studied legal theorists. Indeed, while the 'massive edifice of legal positivism' has been described as 'unimpeachable doctrine for most of us',[5] it is also said to have been 'long abandoned' by international legal theorists who regard it as 'but a pawn in their grand narratives about the historical development of international legal theory'.[6] Positivism, legal theorists warn us, is far from a monolithic theory or method. There are vast differences between differing streams

[1] D Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 Leiden Journal of International Law 9.

[2] J Crawford, *Chance, Order, Change: The Course on International Law* (Brill 2014) 39.

[3] See, eg, D Lefkowitz, *Philosophy and International Law* (CUP 2020), which engages in a philosophical investigation of the nature of international law by reference to John Austin, HLA Hart and Ronald Dworkin.

[4] A-M Slaughter and S Ratner, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 American Journal of International Law 291, 293.

[5] N Onuf, 'International Legal Theory: Where We Stand' 1 International Legal Theory (1995) 3; A Boyle and C Chinkin, *The Making of International Law* (OUP 2007).

[6] J Kammerhofer, 'International Legal Positivism' in A Orford and F Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016) 407-408.

of legal positivism and we misunderstand everything by approaching the method in an a-historical manner.[7] Hence, the paradox described by Kammerhofer that '[p]ositivism is as dead as it is all-pervading'.[8]

Yet this disconnect between the cloistered jurisprudential lament on positivism and its public life leaves international lawyers and international law in something of a predicament.[9] The positivist method that we deploy in our everyday practice as international lawyers is described by legal theorists as, at best, a 'pseudo-positivist self-understanding'[10] or mere 'emanations' from the positivist creed that 'are mostly unsupported by a theoretical superstructure'.[11] Yet the practical reality is that the majority of international lawyers (not to mention domestic lawyers engaging with international law) do not have the time, even if they did have the inclination, to be theoretically self-reflective.[12] The result is that international legal method has developed out of the 'accumulated bricolage' discussed by Koskenniemi, 'the haphazard collection of bits and pieces from available argumentative techniques so as to deal with practical problems as they emerge in the routines in which international lawyers participate'.[13] While jurisprudential theorists are meticulous and painstaking in developing a sharper picture of the history, origin and particularities of different streams of positivism, many of these writings are considered only of esoteric interest and has not yet taken many of us closer to understanding the positivist method with which international lawyers actually work. In these circumstances, to paraphrase Wittgenstein, 'isn't the indistinct picture often exactly what we need?'[14]

[7] For monumental works on the historical development of international legal positivism, see M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (CUP 2001); and M García-Salmones Rovira, *The Project of Positivism in International Law* (OUP 2013).

[8] Kammerhofer, 'International Legal Positivism' (n 6) 407, 407.

[9] Borrowing from language used by Dipesh Chakrabarty in describing the 20th century discipline of history: D Chakrabarty, *The Calling of History: Sir Jadunath Sarkar and his Empire of Truth* (Chicago UP 2015), cited in N Bhuta, 'A Thousand Flowers Blooming, or the Desert of the Real? International Law and its Many Problems of History', IILJ Working Paper 2022/1, 6.

[10] F Hoffmann, 'Teaching General Public International Law' in J Kammerhofer and J d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 349, 361 (n 42).

[11] Kammerhofer, 'International Legal Positivism' (n 6) 407, 408.

[12] See M Shaw, *International Law* (9th edn, CUP 2021) 52: '[t]he search for an all-embracing general theory of international law has been abandoned in mainstream thought'.

[13] Koskenniemi, *Gentle Civilizer* (n 7) 351.

[14] L Wittgenstein, *Philosophical Investigations* (PMS Hacker, J Schulte eds, 4th edn, Wiley 2009) para 71. On Wittgenstein's influence on positivists such as HLA Hart, see N Stavropoulos, 'Hart's Semantics' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP 2001).

It may be a fool's errand to identify a coherent set of premises encompassing all legal positivisms. By the same token, international legal positivism is not in such a state of entropy that it is impossible to identify the main strands of a 'classic view'. Respected contemporary international legal positivists such as Prosper Weil, Bruno Simma, Andreas Paulus, Christian Tams and Antonios Tzanakopoulos have sought to describe this classic view, which they define as characterised by three core claims.[15] The first claim connects international law to the will of states. The second claim is that law is generated through the formal sources of international law, which form the foundation of a self-contained unified legal system. A third claim dissociates law from non-legal factors (such as natural reason, moral principles and political ideology) so as to secure law's objectivity and determinacy. My problem with this classic view is that rigid insistence on these core claims—which connect to broader questions about the scope and structure of international law's community, authority and values–threatens to entrench misconceptions about international law's elemental aspects.

In the following article, my aim is weed out some of these misconceptions that currently interfere with a broader understanding of the nature of international law and its predominant legal method. In Part I, I trace the lineage of three important streams of international legal positivism, providing a somewhat stylised account of each approach. The aim is to identify the key elements of international legal positivism while at the same time highlighting the contrasting emphases of different positivist traditions. In Part II, I interrogate certain presuppositions inherited from these traditions, identifying their interconnectedness to the development of the modern European state. The exercise is essentially a reconstructive one. Breaking down the international positivist method into the three elements of law's community, law's authority and law's function, I examine six dichotomies, setting some of the main presuppositions attaching to these elements against alternative possibilities (as summarised in Figure 1). The aim is to reflect how the international legal positivist method can move beyond certain misconceived and inessential presuppositions, adopting instead possibilities that will enhance our understanding of the concept of international law understood in positivist terms.

[15] P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413, 420–1; B Simma and A Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 American Journal of International Law 302, 303-305; C Tams and A Tzanakopoulos, 'Use of Force' in Kammerhofer and d'Aspremont, *International Legal Positivism* (n 10) 498, at 500–2.

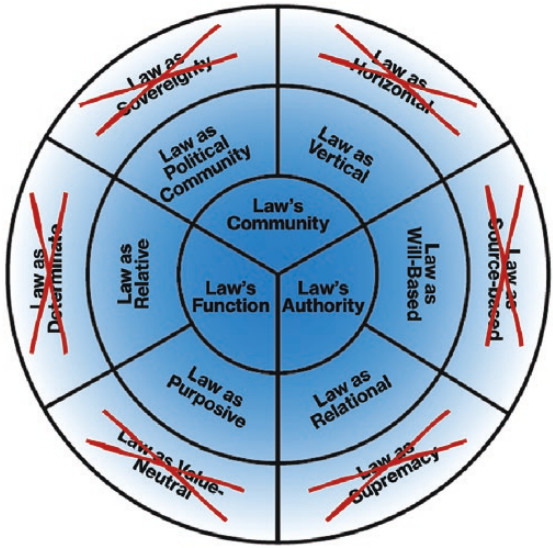

Figure 1. Elemental legal positivism.

1. *Three Traditions of International Legal Positivism*

This article aspires toward an elemental understanding of international legal positivism. Using the language of 'elements' deliberately plays on the positivist tendency to describe the legal discipline as a legal science. Yet law's elements are distinct in important ways from the usual object of scientific inquiry. Law's method does not seek to address the structure and behaviour of the physical and natural world. As Mónica García-Salmones Rovira describes, law does not spring into existence unintentionally 'like mushrooms in the woods or stones in the earth'.[16] Rather, the positivist method recognises that law is the 'deliberate product of joint human endeavour' established through the decisions of human beings in society.[17] Law's disciplinary method belongs firmly to the humanities, sharing more genetically with politics, history and sociology than with physics, chemistry or mathematics.

We can trace the elements of the positivist legal method from its basic premise. Put simply, according to positivist theory, law is a matter of

[16] García-Salmones Rovira, *The Project of Positivism* (n 7) 117.

[17] H Kelsen, *Pure Theory of Law* (Max Knight tr from 2nd edn, Law Book Exchange 2009 repr, Berkley UP 1967) 31, 32. See also J Raz, 'Legal Positivism and the Sources of Law' in *The Authority of Law; Essays on Law and Morality* (OUP 1979) 37.

what has been validly posited. Positivist methodology prescribes that a norm only belongs to the law where it is based on another legal norm that supports its validity. This leads us to the uncomfortable paradox at positivism's core. The ultimate norm in any legal system, the one whose juridical nature conditions all the others, is necessarily not a product of positive law. Indeed, at the heart of positivist theory, buried in exemplary positivist concepts such as the basic norm and rule of recognition, are black boxes of political and constitutional theory that do a lot of the unexplained work in determining law's normativity.[18]

It does not hurt to be reminded of the essential connection between legal and political theory. Without political theory, law ends up in a conceptual cul-de-sac. One problem in adapting legal positivist theory developed in the domestic setting to the international realm is that the foremost legal positivists developed their method to respond to the context of the modern European state. To sharpen our understanding of international legal positivism, we need to pay more particular attention to international law's lineage(s) and the legal and political theory underlying international legal method. In the following part, I will examine three traditions of international legal positivism, namely 'social thesis' positivism (which situates law's origin in social facts), 'system-based' positivism (which locates law's authority in a unified and hierarchical system) and 'teleological' positivism (which connects law's normativity to its underlying functions). These accounts assume Lassa Oppenheim, Hans Kelsen and Hersch Lauterpacht respectively as their ideational icons, though in fact the approaches of these scholars are far more nuanced and overlapping than my stylised accounts depict. The aim behind the stylised accounts is to draw out the key elements of international law's predominant legal method (which I locate in law's community, authority and functions), and to generate debate about the nature and relevance of these elements to our understanding of international legal positivism. This division is useful because it highlights, not fundamental differences between the three accounts, but the possibility of different emphases in our interpretation of the elements of international legal positivism. This forms a helpful foundation for discussion of some of the more questionable presuppositions connected with these different elements.

[18] Hart acknowledged that many of the concepts at the heart of his theory, including authority and the nature of an official, 'bestride both law and political theory': HLA Hart, *The Concept of Law* (1961, 2nd edn, OUP 1997) 98. See further, D Dyzenhaus, *The Long Arc of Legality* (CUP 2022) ch 3.

A. *Social thesis positivism*

The classic view of international legal positivism is perhaps most closely related to the social thesis of positivism. The idea is that law does not describe a set of 'personal' rules, or even 'universal' rules, but rather describes a system of rules binding a particular *community*. In essence, the normativity of law is a social normativity. Among the most renowned contemporary international lawyers to have articulated a social thesis of international legal positivism was Lassa Oppenheim. According to Oppenheim, the first essential condition for the existence of law is the existence of a community.[19] Oppenheim observed as a 'reality' that the common interests of states and necessary intercourse which served these interests had 'long since united the separate States into an indivisible community' known as the 'Family of Nations'.[20] International law in turn gains its validity, or objective binding nature, from the will of this community of states. This exercise in world-making through law can be traced back to the early modern age. Gentili was one of the first scholars to recognise a realm of positive law whose normative force stemmed from a history of practice rather than nature, grounded in the consensus of a specific political community with a shared historical past. European cultural homogeneity became an alibi for the idea of a 'common European conscience', laying the ground for the emergence of a shared international law.[21] The idea of a positivist foundation for international law found favourable conditions in the German intellectual tradition, aided by the Hegelian idea of the state.[22] Yet Hegel's idolisation of the European nation state created a conundrum for international law in terms of how to reconcile the free sovereign will of the state with international law's supposedly objective binding nature. This reconciliation was at the heart of Jellinek's theory of *Selbstverpflichtungslehre* or auto-limitation. While Jellinek's theory recognised that states are bound only by their own will, this will was not merely subjective but also had a socio-psychological manifestation, arising from the binding ties of the inter-state community. The fact that the state's existence and actions

[19] L Oppenheim, *International Law*, vol 1 (Longmans 1905) 8. See further B Kingsbury, 'Legal Positivism as Normative Politics' (2002) 13 European Journal of International Law 401, 409.

[20] L Oppenheim, *International Law*, vol 1 (R Roxborough ed, 3rd edn, Longmans 1920) 10.

[21] F Iurlaro, *The Invention of Custom: Natural Law and the Law of Nations, CA. 1550–1750* (OUP 2021) 12, 15–6.

[22] J von Bernstorff, 'German Intellectual Historical Origins of International Legal Positivism' in *International Legal Positivism* (n 10) 50.

were contingent on membership in the community of states created a sociological necessity to recognise a binding law of nations.[23] Triepel and Anzilotti's conceptions of international law built on Jellinek's theoretical foundations to recognise that the validity of international law was necessarily grounded in the will of a community, or society of states, as distinct from its members.[24] German émigré Lassa Oppenheim was an heir to this intellectual tradition. In his role as one of the first lecturers of international law at the LSE and later Whewell Professor of International Law at Cambridge, he married his German intellectual heritage with an English preoccupation with the future of the British Empire to produce a theory of international law that was distinctly state-based and civilisational.[25] Oppenheim's legal method was the 'historical product of an *elite* of intellectuals' reflection' that '[i]t was possible…to find in the *völkerrechtliche Gemeinschaft* the objective principle of international law because it was based on a common legal consciousness….historically founded and shared in the Western world'.[26]

B. *System-Based Positivism*

System-based positivism inverts the relationship between law and community. According to this tradition, law is constitutive of community such that the community is identical with the legal system.[27] Law is a social technique for the organisation of political power and is grounded in a logical impulse to systematise law's authority. Law's normativity derives from the fact a norm is part of a legal system and is recognised as legally valid by that system. At the base of this structure is the fundamental rule according to which the norms of the system are to be created. The exemplar of this fundamental rule is the *Grundnorm* or basic norm

[23] J von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010) 70; J von Bernstorff, 'Georg Jellinek and the Origins of Liberal Constitutionalism in International Law' (2012) Goettingen Journal of International Law 659, 671; Koskenniemi, *Gentle* (n 7) 208.

[24] Triepel, *Völkerrecht und Landesrecht* (1899) cited in Jörg Kammerhofer, 'Hans Kelsen in today's international legal scholarship' in J Kammerhofer and J d'Aspremont, *International Legal Positivism in a Post-Modern World* 81, 91.

[25] Bhuta, 'A Thousand Flowers Blooming'(n 9) 25–6; R Parfitt, 'Theorizing Recognition and International Personality' in *The Oxford Handbook of the Theory of International Law* (n 6) 583.

[26] L Nuzzo, *Lawyers, Space and Subjects: Historical Perspectives on the Western Legal Tradition* (Pensa 2020) 76, 66.

[27] H Kelsen, *Das problem der souveränität und die theorie des völkerrechts* (1920, 2nd edn, JCB Mohr 1928) 276-278, cited in von Bernstorff, *Believing in Universal Law* (n 23) 127.

in Kelsenian theory. Kelsen's explanatory model has been described as a 'radical programme of re-imagining the theoretical and epistemological basis' of law,[28] breaking from the orthodox German tradition described above by casting off the dogma of sovereign will as the absolute necessary basis of all international law.[29] For Kelsen, the ultimate basis of law's validity is found neither in the metaphysical forces that form the basis of natural law (God, morality, reason) nor in positive law but must be 'presupposed' as a 'hypothesis of juristic thinking'.[30] Kelsen's system-based model builds its core around a kind of legal 'big bang' moment, a single 'constitutional' moment of juristic consciousness where the decision is made as to who or what is authorised to make law for that community. Like the big bang theory, the story of the *Grundnorm* is one of a process of creation, where the 'basic norm' is the 'original law-making fact'.[31] The basic norm is the wellspring of a linear notion of law, where law follows in a chain of validity from this originating source. The legal system, according to this theory, is structured around the delegation of authority: '[n]orm-creating power is delegated from one authority to another authority' creating a dynamic system in which the system's norms are created through acts by those individuals or entities who have been authorised by a higher norm to create norms. Law is understood as a 'unidirectional projection of authority', traceable along a line of hierarchical sources back to the basic norm.[32] As Kelsen describes in his later writings, 'No imperative without an emperor, no norm without a norm-creating authority, i.e. no norm without an act of will whose sense it is'.[33] Systematic positivism reserves an elemental role for *authority* in determining law's validity and explaining its normativity.

C. *Teleological Positivism*

A third tradition of positivism is driven by more teleological factors and a focus on law's *function*. This connects with a positivist tradition that sees

[28] J Kammerhofer, 'Hans Kelsen in Today's International Legal Scholarship' in Kammerhofer and d'Aspremont, *International Legal Positivism* (n 10) 81, at 83.

[29] A Somek, 'Stateless Law: Kelsen's Conception and its Limits' (2006) 26 Oxford Journal of Legal Studies 753, 754.

[30] H Kelsen, *Principles of International Law* (1952, repr, Lawbook Exchange 2012) 412 (see also 314); Kelsen, *Pure Theory of Law* (n 17) 199–200.

[31] Kelsen, *Pure Theory* (n 17) 199.

[32] M Walters, 'The Unwritten Constitution as a Legal Concept' in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 42.

[33] H Kelsen, *Allgemeine Theorie der Normen* (Manz 1979) 187, cited in Kammerhofer, 'Hans Kelsen in Today's International Legal Scholarship' (n 28) 89.

the stitched-in partition between positive law and natural law as increasingly 'hoary and threadbare'.[34] In a line running from Hugo Grotius through to Christian Wolff, Emer de Vattel and George Frederick de Martens, positive law and natural law were traditionally recognised as coexisting as part of a total corpus of binding international legal principles.[35] Against this backdrop, twentieth-century positivism was a revolution in legal thought, animated by its deliberate differentiation from natural law.[36] The lineage from Grotian tradition was nevertheless continued by certain scholars, such as Hersch Lauterpacht for whom Grotius was an 'acknowledged spiritual father'.[37] Lauterpacht refused to accept that legal science can be understood in a neutral or value-free way. He critiqued '[t]he orthodox positivist doctrine' that extolled the virtues of sovereignty and statehood, while in fact enabling attitudes of extreme nationalism and serving to erect an'insurmountable barrier between man and the law of mankind'.[38] For Lauterpacht, Hobbesian and Hegelian philosophy separated law and philosophy from what was rationally right.[39] Lauterpacht shared with Kelsen the constructivist idea that law's development should be the role of impartial and responsible officials. Yet he felt that certain positivists, including his teacher Kelsen, were disingenuous in renouncing any role for natural law. ('For who are the positivists of whom it may be said, with any approach to accuracy, that they regard the will of sovereign states as the exclusive source of international law?')[40] Lauterpacht grounded international law's binding force in the law of nature, expressly acknowledging the Grotian tradition that regarded the law of nature as 'the ever-present source for supplementing the voluntary law of nations, for judging its adequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations'.[41] Lauterpacht describes

[34] J Waldron, 'Normative (or Ethical) Positivism' in Coleman, *Hart's Postscript* (n 14) 418. See also Dyzenhaus, *The Long Arc of Legality* (n 18) ch 2.

[35] As Roberto Ago explains, 'The adjective 'positive' is used in the thought of the 19th century to indicate the particular part of international law in force which is produced by the consent of states, as opposed to that part for which the adjective 'natural' or 'necessary' is reserved': R Ago, 'Positive Law and International Law' (1957) 51 American Journal of International Law 691, 694.

[36] S Coyle, 'Thomas Hobbes and the Intellectual Origins of Legal Positivism' (2003) 16 Canadian Journal of Law and Jurisprudence 243, 244, 245, 248, 254.

[37] Koskenniemi, *Gentle Civilizer* (n 7) 357. See H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 British Yearbook of International Law 1.

[38] H Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950) 6, 77.

[39] Koskenniemi, *Gentle Civilizer* (n 7) 359.

[40] Lauterpacht, 'The Grotian Tradition' (n 37) 22.

[41] Lauterpacht, 'The Grotian Tradition' (n 37) 22.

the foundation of law in decidedly teleological terms, locating the initial hypothesis in the 'rational and ethical postulate, which is gradually becoming a fact, of an international community of interests and functions'.[42] For Lauterpacht, the 'legitimate province [of international law and international lawyers] is and must remain the exposition and progressive interpretation of the existing law in terms of the abiding purpose of the Law of Nations'.[43] He identified these purposes as collective enforcement of the prohibition of the use of force, provision of an absolute duty of judicial settlement of disputes, protection of the human personality and its fundamental rights as the 'ultimate purpose of all law', fostering of the sentiment of obedience to law among nations and 'the gradual integration of international society in the direction of a supra-national Federation of the World—a development which must be regarded as the ultimate postulate of the political organization of man'.[44]

2. *Elements: Myths and Presuppositions*

Like many of its key tenets, international law inherited its mainstream method—positivism—from the domestic legal context. Domestic legal positivism continues to influence international lawyers in contemporary times, with the main jurisprudentially informed schools of international legal positivism heavily reliant on the work of scholars of domestic legal positivism. Yet while the adoption of positivism as international law's predominant legal method has been animated in part by a desire to provide international law with the imprimatur it needs to claim credibility as a legal system, it has also served as an impediment to international law's development. The attachment to positivism has at times extended to an attachment to certain presuppositions developed in the course of its application to the domestic legal and political context. In the following section, I will examine some of the presuppositions underlying legal positivism (many of which developed in response to the modern European state)

[42] H Lauterpacht, *The Function of Law in the International Community* (1933, OUP 2011) 430–1.

[43] H Lauterpacht, 'The Reality of the Law of Nations', in E Lauterpacht (ed), *International Law: Collected Papers*, vol 2 (CUP 1975) 47. If Oppenheim might be understood as international law's Hart, and Kelsen as an international law's (well) Kelsen, Lauterpacht's method of 'progressive interpretation' can be compared to that of Ronald Dworkin. See further P Capps, 'Lauterpacht's Method' (2012) 82(1) British Yearbook of International Law 248.

[44] Lauterpacht, 'The Reality of the Law of Nations' (n 43) 47; Lauterpacht, *International Law and Human Rights* (n 38) 46.

and consider whether it is appropriate to rethink or re-engineer these presuppositions having regard to international law's distinctive community, authority and functions. I set these out as dichotomies in the headings (i)-(vi) below, structuring these headings to contrast 'classical presupposition/re-engineered presupposition'. The aim is not a critique of positivism as such, but rather a critique of the rigid and ill-fitting model of positivism that international law inherits in the absence of such reflection.

A. *Law's Community*

While resolute about distinguishing their theory of law from sociology or political theory, most positivists acknowledge the social foundations of law and legal system. For positivists, the starting point of law is not the individual, but society. Law is product of and servant to complex political societies with a pluralism of will and interests. Robinson Crusoe and Friday had no need for law. Nor, according to Hart, would there be a need for law in a small community existing in a stable environment, closely knit by ties of kinship, common sentiment and belief.[45] Speaking broadly, one of the preconditions of a positivist legal system is the existence of an identifiable political community, which is both the source of the law and is sustained by it. Of course, the social foundations of positive law entail their own sorcery. The act of drawing individuals or indeed states into a defined legal system admits of the need for what Arato describes as a 'mythical group construct'.[46] In order fully to understand law's foundation, we must first tackle the difficult question of how to construct legal unity out of the natural plurality and diversity of humankind. In the context of the modern European state, this question is one that has fallen largely to political theorists, such that domestic legal positivists essentially 'presuppose' the existence of and explanations for legal community. The problem for international legal theory is that these presuppositions have been carried through to the international legal sphere without adequate consideration of the very different foundations and structure of the international legal community.

(i) Law as Sovereignty/Law as Political Community

With important qualifications,[47] there has been a tendency in positivist theory to fuse and dissolve important questions relating to the identity

[45] Hart, *The Concept of Law* (n 18) 92.
[46] A Arato, *The Adventures of Constituent Power: Beyond Revolutions?* (CUP 2017) 29.
[47] Most notably, Kelsen, *Das problem der souveränität* (n 27).

of legal communities in the crucible of sovereignty. Historically, this can be explained on the basis that the shift from natural law to positive law happened at around the same time as a radical demarcation of political community and the 'territorialization' of political rule into sovereign states. For the forefathers of positivism, including notably Hobbes, the profound intellectual challenge was to locate the source of the unity that was to provide a foundation for social order. For Hobbes, writing in the context of the breakdown in shared moral, political and religious values in the 17th century, the solution to the threat of constant civil war was both contractarian and positivistic. The maintenance of stability and social order was possible if members of society agreed to regard the expressed commands of the sovereign as the authoritative expression of the laws of nature.[48] Natural law lost its practical importance at the moment the people concluded the original state compact, after which it served only to justify the binding force of positive state legislation.[49] The effect was a territorialisation of political rule with the sovereign assuming supreme authority within the territory of the state, displacing feudal lords and the Church. For Hobbes, the territorial sovereign represented the 'artificial unity of wills' through which the Multitude was united in one Person, 'the Mortal God, to which wee owe…our peace and defence'.[50]

For centuries, legal and political authority was considered to vest exclusively in sovereign states. Yet, while the concept of sovereignty is longstanding, it is a mistake to regard it as exhaustive of the description of political and legal community. Sovereignty does not after all refer to 'an actual object', but 'operates in the realm of imagination and ideas'.[51] As the political world expands beyond territorial borders, many consider that the legal imagination is increasingly hampered by focus on a single polity.[52] Over time, sovereignty has become conceptually overburdened.[53]It is quite clearly no longer the exclusive locus of political (and legal) identity, but is in regular competition with other 'social imaginaries'.[54] Indigenous peoples, Palestinians, Europeans and victims of genocide must all appeal

[48] T Hobbes, *Leviathan* (first published 1651, repr CUP 1996) 9–10, 120–21.
[49] W Grewe, *The Epochs of International Law* (De Gruyter 2000) 349.
[50] Hobbes, *Leviathan* (n 48) 120.
[51] D Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia UP 2015) 8.
[52] M Koskenniemi. 'Imagining the Rule of Law: Rereading the Grotian "Tradition"' (2019) 30 European Journal of International Law 17, at 52.
[53] N Walker, 'Sovereignty Frames and Sovereignty Claims' in R Rawlings, P Leyland and A Young (eds), *Sovereignty and the Law* (OUP 2013) 24.
[54] C Taylor, *Modern Social Imaginaries* (Duke UP 2004).

to laws developed outside the formal state context, and it is artificial to attempt to ground the source of these laws exclusively in the will of the territorial sovereign. Michael Fakhri references the *Circumpolar Inuit Declaration on Sovereignty in the Arctic*, and its recognition that '[o]ld ideas of sovereignty are breaking down as different governance models… evolve', such that sovereignties now overlap and are 'frequently divided… in creative ways to recognise the right of *peoples*'.[55]

Therefore, while international law clearly has 'something to do with states' (to deploy Gerry Simpson's para-phrasing), international law's origin should not be reduced to sovereignty.[56] As Kingsbury notes in his reflection on Oppenheim's positivist legal method, sovereignty is both 'less durable as a universal, and less important as a basis for international law, than the concept of international society'.[57] Even the conception of international society is not a fixed concept. The creation of legal meaning—captured in Robert Cover's term 'jurisgenesis'—is based in a social construction of reality, which is itself jurisgenerative.[58] International society is not so much a 'fact' as a normative idea.[59] Therefore, the boundaries of international community have ebbed and flowed from Grotius' 'society of states…[with] men its ultimate members'[60] to Oppenheim's 'Family of Nations' based on a community of interests with its civilisational overtones and perhaps ultimately to Lauterpacht's aspiration of a 'Federation of the World conceived as a commonwealth of autonomous states…rendered both just and secure by the power of the impersonal sovereignty of the *civitas maxima*'[61] or Kelsen's dream of a *Weltstaat*.[62] The essential point is that, at this point in history, it seems appropriate to recover the idea that law's foundation is not in the right to sovereignty but in the right to self-determination, possessed not exclusively by states but by peoples forming a political community.[63] Salvaging the idea that

[55] M Fakhri, 'Third World sovereignty, indigenous sovereignty, and food sovereignty: Living with sovereignty despite the map' (2018) 9 Transnational Legal Theory 218, 238 (my emphasis).

[56] G Simpson, 'Something to Do with States' in *The Oxford Handbook of the Theory of International Law* (n 6) 564.

[57] B Kingsbury, 'Legal Positivism as Normative Politics' (n 19) 401, 414.

[58] R Cover, 'Nomos and Narrative' (1983) 97 Harvard Law Review 4.

[59] B Kingsbury, 'Legal Positivism as Normative Politics' (n 19) 401, th403.

[60] J Westlake, *The Collected Papers on Public International Law* (CUP 1914) 78.

[61] Lauterpacht, 'The Reality of the Law of Nations' (n 43) 47.

[62] Kelsen, *Pure Theory* (n 17) 328; H Kelsen, *General Theory of Law and State* (1945, Routledge 2005) 326.

[63] A Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12 Constellations 223. See also A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 48: 'Thus society rather than sovereignty is the central concept used to construct the system of international law'.

law is a product of political community rather than sovereignty seeks to distil rather than corrupt the essence of positivism, achieving a restorative rather than progressive move.

(ii) Law as Horizontal/Law as Vertical

One of the central problems with the idea of positivism and sovereignty moving in lock-step is that it pre-empts an answer to the question of the source of international law. In the words of Roberto Ago, it has generated 'the myth of the will of the state as the only origin of law'.[64] This myth has created a number of structural challenges for international law and for positivism. If sovereignty is 'the greatest power of command',[65] it becomes difficult to explain international law's capacity to regulate the coexistence and cooperation of these 'basically disparate entities'.[66] This conundrum has given rise to the 'voluntarist' theory of international law: a school of thought that international law can only ever be 'contractual' in nature, based on a horizontal agreement between independent states as to the rules regulating their mutual behaviour.

It is important to understand the historical context in which the voluntarist conception of international law emerged. Hobbes' sovereign artefact (or should that be artifice) served to unify a political community in one respect, but it also served to separate it from other political communities. In doing so, Hobbesian theory distinguished itself from the pre-existing Grotian idea of an inter-individual political community, where the individual and not the state was the ultimate unit of all law. While the relation between states was not Hobbes' focus, scholars such as Vattel subsequently built on a Hobbesian analysis to develop a conception of international society.[67] Hedley Bull therefore contrasts the Grotian 'solidarist' view of international society with the Vattelian 'pluralist' view.[68] For Vattel, international society was 'a much looser form of society than that which is necessary within domestic life'. Political

[64] R Ago, 'Positive Law and International Law' (1957) 51 American Journal of International Law 691, 699.

[65] J Bodin, *The Six Bookes of a Common-weale* (1962, Richard Knolles trans, Harvard UP) 84.

[66] Weil, 'Toward Relative Normativity' (n 15) 418.

[67] Vattel, Préliminaires §10 (pp 5–7). See analysis in Q Skinner, *From Humanism to Hobbes: Studies in Rhetoric and Politics* (CUP 2018); A Hurrell, 'Vattel: Pluralism and its Limits' in I Clark and IB Neumann (eds), *Classical Theories of International Relations* (MacMillan Press 1996) 236.

[68] H Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia UP 1977).

society among individuals was most appropriately constituted at the domestic level, for 'as soon as a considerable number of [individuals] have united under the same government, they become able to supply most of their wants; and the assistance of other political societies is not so necessary to them'. Vattel imagined a much thinner public sphere at the international level, built around the independence of states and the cornerstones of which were the (natural law) duties of a state to preserve and perfect itself.

Though the natural law foundations of Vattel's theory ultimately gave way, his conception of the society of sovereign states was maintained as a structural relic. In this way, Vattel has been described as preparing the ground 'for the era of uninhibited positivism'.[69] The voluntarist strand of Vattel's thinking was developed by the German positivist intellectual tradition and the theory of *Selbstverpflichtungslehre* (or 'autolimitation'). According to this view, propounded most famously by Jellinek, the foundation of international law could not differ from that of state law, such that only the state sovereign could be considered a law-creating entity.[70] According to Jellinek, 'the only possible path for a legal grounding of international law is…in the free will of states or nations'.[71] Triepel's scholarship in turn built on Jellinek, and Anzilotti in turn followed Triepel, with Anzilotti being credited with writing the famous 1927 *Lotus* dictum, regarded as the classic expression of the early twentieth century positivist school of international law. Here we find the classic statement that '[t]he rules of law binding upon States…emanate from their own free will…Restrictions upon the independence of States cannot therefore be presumed'.[72]

The *Lotus* dictum has come to be associated with a theory of state-centred voluntarism, denounced by Brierly as 'the extreme positivist school that the law emanates from the free will of sovereign independent states'.[73] It is a view that has been dismissed, including at the highest level, as redolent of 'the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by

[69] L Gross, 'The Peace of Westphalia, 1648-1948' (1948) 42(1) American Journal of International Law 20, 39.

[70] G Jellinek, Die rechtliche Natur der Staatenverträge (1880) 1–2, cited in Jochen von Bernstoff, 'German Intellectual Historical Origins' (n 22) 64.

[71] Ibid 65.

[72] *The Case of SS Lotus (France v Turkey)* (1927) PCIJ Ser A No 10.

[73] JL Brierly, 'The Lotus Case' (1928) 44 Law Quarterly Review 155.

other tendencies'.[74] Yet it is also arguably a caricatured interpretation of the scholarship on which it is based.[75] Quincy Wright's description of Vattel's system of law as 'the atomistic theory which holds that international law is *merely* a series of contracts between wholly independent states' ignores the natural law foundations of Vattel's theory.[76] The caricatured contractual position ignores significant and persistent strands of legal thought, including that of Jellinek, Triepel and Anzilotti, that identified a community aspect to international law and a common juridical conscience separate from the independent will of states. Jellinek did not see international law as a matter of subjective will, but as objectively binding law. He ascribed the binding nature of international law to the sociological context in which the will was expressed. 'Objective law' arose from the nature of the relations between states, namely 'membership in the "community of states"'.[77] Jellink recognised a psychological foundation for law arising out of the fact that it is recognised as binding by the members of the society.[78] Triepel, building on Jellinek, countered that the source of international law was not in the individual will of states, but in the common will (*Gemeinwille*) achieved through agreement between states (*Vereinbarung*), arguing that '[o]nly the common will of many states, joined as a unity of will through a unification of will, can be the source of international law'.[79] Anzilotti, following Triepel, explained that international law and domestic law are enacted by 'different wills': 'international law stems from the collective will of several States, while rules of municipal law are always the expression of the will of a State'.[80]

[74] Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 1, [51]. See also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Declaration of Bedjaoui, 270; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of* Kosovo (Advisory Opinion) [2010] ICJ Rep 403, Declaration of Simma, para 8.

[75] R Collins, 'Classical Legal Positivism in International Law Revisited' in Kammerhofer and d'Aspremont (n 10) 39.

[76] Q Wright, *A Study of War* (2nd edn, Chicago UP 1983) 229–30.

[77] von Bernstoff, 'German Intellectual Historical Origins' (n 22) 71.

[78] Jellinek (n 70) 46–9 cited in Lauterpacht, 'International Law and General Jurisprudence', in E Lauterpacht (ed), *International Law: Collected Papers, Vol 2* (CUP 1975), 10.

[79] Triepel, Völkerrecht und Landesrecht (1899) cited in Kammerhofer, 'Hans Kelsen in today's international legal scholarship' (n 28) 81, 91.

[80] D Anzilotti, Scritto di diritto internazionale pubblico (1956–7) 319–20, cited in G Gaja, 'Positivism and Dualism in Dionisio Anzilotti' (1993) 3 European Journal of International Law 123, 134.

Problematically, the caricatured contractual theory of international law imagines law as a horizontal relationship. This misconceives the essential structure of positivism, which understands law as creating a vertical relationship between a political community and its individual members. While law is sometimes described as an act of will, it is more appropriately understood jurisprudentially as based on a form of collective conscience. The binding authority of the legal order finds its foundation in a form of jural-political consciousness that ties individual members to their society. Law is not so much a contract between members of a society as a covenant entered into between a society and its members. Therefore Hobbesian theory envisages a 'covenant of every one to every one' which is 'more than Consent, or Concord; it is a reall Unitie of them all' and speaks of law as a 'publique Conscience'.[81] To 'opt out' of the covenant is to opt out of the community. International legal positivists all recognise this psychological component of law in their recognition of international law as containing a normative commitment to being part of a jural community, a psychological commitment reflected in legal concepts such as *pacta sunt servanda* and the concept of *opinio juris*. Therefore, Oppenheim recognised that admittance to a community entails a duty to submit to all the rules in force[82] and Lauterpacht referred to international law as a realm where a state's individual interests were 'recognized, measured and adjusted…by reference to the…interests… of the international community as a whole'.[83] Recognition of a legal system is an alloyed mindset, including not merely recognition of applicable rules, but also recognition these rules are complied with as part of membership of a community.[84] The relationship constituting legal system is not a horizontal one between members of the community, but a vertical one, on the one hand, between members of the community and, on the other, the political community of which they form part.

[81] Hobbes, *Leviathan* (n 48) 150–1, 120, 223.

[82] L Oppenheim, International Law, vol 2 (R Roxborough ed, 3rd edn Longmans 1921) 17. It is also interesting to consider Oppenheim's early booklet on *The Conscience* (Das Gewissen) (1898) in which he discusses 'conscience as a psychologically and socially developing product that culturally advanced peoples have deepened and amplified in scope', in connection with his civilisational theory of international society: García-Salmones Rovira, *The Project of* (n 7) 51.

[83] Lauterpacht, *The Function of Law* (n 42) 438.

[84] Hart, *The Concept of Law* (n 18) 94; Kelsen, *Das Problem der Souveränität* (n 27) 204–5; L Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 American Journal of International Law 313, 317; J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 37; Dyzenhaus, 'The Janus-Faced Constitution', in J Bomhoff, D Dyzenhaus and T Poole (eds), *The Double-Facing Constitution* (CUP 2020), 20, 22.

B. *Law's Authority*

In many languages, there are two words for law, capturing a narrow and broad sense of what it means to be 'legal': for example, *lex* and *ius*, *Gesetz* and *Recht*, *loi* and *droit*, and so on.[85] These different inflections on the concept of law emphasise the possibility of narrower and broader (or 'thinner' and 'thicker') foundations for law's authority. 'Thicker' lines of inquiry tend to open up questions about law's morality or legitimacy.[86] Yet these thicker or substantive questions of law's authority are not the central focus of positivist methodology. For those interested in the foundations of law and legal system, positivism supplies only part of the answer. Positivism is essentially a process for identification of valid law, with validity bound up with the way in which law comes into existence. In terms of law's authority, the central question for the legal positivist is 'Who says?' or 'On whose authority?', with the focus on identifying who is authorised to enact law, or to bring law into existence.

A methodological consequence has been that the positivist critique of international law has tended to focus on the difficulty of identifying international law's law-making or law-ascertaining authorities. The lack of organised and centralised mechanisms for developing, interpreting or enforcing the law have often been regarded as international law's distinct institutional weakness or imperfection.[87] International law famously, or perhaps notoriously, remains an 'uncrowned system'.[88] The Hobbesian view that law's authority stems from the enactment of laws by the single and supreme political sovereign has created scepticism about international law's authority. John Austin deemed that the absence of a political superior in the international legal system meant that international law was not law 'properly so-called'.[89] Hans Morgenthau lamented that the decentralised character of international law and absence of a supreme authority beyond the subjects of the law themselves 'shakes the very foundation of international law'.[90] Kelsen regarded international law as 'still in a state of far-reaching decentralization', while Hart noted that 'international law lacks a legislature, states cannot be brought before

[85] J Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 American Journal of Jurisprudence 199.

[86] C Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 Oxford Journal of Legal Studies 729.

[87] Lawrence, 252.

[88] Oppenheim, 'The Science of International Law' (n 84) 313, 355.

[89] J Austin, *The Province of Jurisprudence Determined* (first published 1832, repr CUP 1995)) 124.

[90] Hans Morgenthau, *Politics Among Nations* (1948) 253–68.

international courts without their prior consent, and there is no centrally organized effective system of sanctions'. For Hart, these deficiencies meant that the international legal system could only be regarded as a 'simple form of social structure' found in 'primitive communities', such that 'the question "Is international law really law?' can hardly be put aside'.[91] It is a problem that continues to compromise the acceptance of international law as 'law'.[92]

According to this critique, international law is trapped in the paradox of having at the same time no sovereign and too many sovereigns, rendering its law-making process problematically decentralised and diffuse. The solution for many scholars has been to imagine a trajectory for international law that culminates in the establishment of a centralised legislature. For these scholars, the route to international law's recognition as positivist law (the moment when 'the sceptic's last doubts about the legal "quality" of international law may then be laid to rest'[93]) involved international society transitioning towards a form that would bring it nearer in structure to a municipal system.[94] Yet, considered from an elemental perspective, the idea of a necessary umbilical cord between law and an ultimate legislature is not part of legal positivism at all. Instead, international law's institutional design must be considered with attention to international law's very different structure, function, polarities and politics. The deliberate plurality of the international realm makes the quest for singular law-making bodies inappropriate. In this setting, singular notions of a 'world government', a 'global legislature' or an 'International Court of Appeal' are legal unicorns that we believe in only naïvely.

In this section, we focus attention on what it means to interpret international law's law-making processes as the source of its authority under a positivist framework. Building on the idea in the previous section that international law's foundations are located in the will of the relevant community, this section examines the question as to who has been authorised by the international community to enact that will. First, it is important to disaggregate the question of law's authoritative sources from the question of its authoritative law-ascertaining organs, acknowledging that positivist methodology is far more engaged with the latter. Second, we examine the idea that international law's authorities

[91] HLA Hart, *The Concept of Law* (1961, 1997 ed) 214.
[92] Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 Harvard Law Review 1791.
[93] HLA Hart, *The Concept of Law* (1961, 1997 ed) 237.
[94] Hart, *Concept of Law* (n 18) 236; Kelsen, *General Theory* (n 62) 326.

increasingly overlap with or operate in relation to legal authorities applying law in other legal systems, and that law's structures must respond to the contemporary reality of legal pluralism.

(iii) Law as Source-Based/Law as Will-Based

Leading positivists have described law as a 'source-based enterprise'.[95] Certainly, it is common to see the positivist approach to international legal method explained by reference to respect for international law's recognised sources, generally deploying Article 38 of the Statute of the International Court of Justice as a blueprint.[96] Yet the terminology of 'source' does not adequately reflect the foundation of law's validity according to positivist methodology. In particular, it fails to draw a sufficiently sharp distinction between law's sources and law's authoritative law-ascertaining organs. Law's sources do not relate to law's authoritative organs in the way that a water source relates to the aqueduct or vessel that carries water to its place of use. The positivist method does not regard law as a tangible inert thing, waiting to be discovered at its source. Rather, the creation of law's source and ascertainment of law's content are both regarded as products of human endeavour; they are both acts of will.

For early positivist thinkers, the identities of law's authoritative sources and law's authoritative organs were conflated such that law's source was said to be grounded in the command of law-making authorities. Hobbes' status as the forefather of legal positivism is essentially connected to his determination that law is the promulgated command of the sovereign. John Austin extricated this idea from its political philosophical context and made it a central tenet of his 'command' theory of positive law.[97] According to Austinian theory, positive law is that made by a 'sovereign person, or a sovereign body of person' and is addressed 'to a member or members of the independent political society wherein that person or body is sovereign or supreme'.[98] Jean d'Aspremont explains how Hart and Kelsen's retreat from Austin's command theory was achieved via a revolution in positivist methodology which saw a reversal in the relationship between law and authority.[99] Rather than placing authority at

[95] F Schauer, 'Law's Boundaries' (2017) 130 Harvard Law Review 2434, 2435–6.

[96] As Jennings articulated, 'we need some list of sources if we are to make a beginning': R Jennings, 'General course of public international law' (1967-II) 121 RCADI 323, 329.

[97] J d'Aspremont, *Formalism and the Sources of International Law* (OUP 2011) 48.

[98] J Austin, *The Province of Jurisprudence Determined* (first published 1832, repr CUP 1995) 212.

[99] d'Aspremont, *Formalism* (n 97) 48.

the origin of legal rules, the legal system is said to precede authority and provides law-making authorities with their law-making powers.

The effect is to separate the 'will' establishing law's general sources from the 'will' determining its particular content. The concept of will underlying positivist methodology emerges as a multi-dimensional concept. Specifically, it must be disaggregated into its theoretical (general) and practical (particular) manifestations in order to be adequately understood. In the previous Part, we discussed the fundamental theoretical idea underpinning positivism of the connection between law and the will of the relevant community. Yet an equally fundamental aspect of the positivist methodology is the need to identify the law-applying authority responsible for identifying or 'certifying' this general will. Though the foundation of this will is theoretically in the relevant community, the practical manifestation of this will is the enactment by the individual or set of individuals identifiable as law's authoritative organs. Therefore, Kelsen distinguishes 'organized' legal systems as those in which there is a functional division of labour between individual members of a legal community and those qualified to act as organs of a community, authorised to perform functions that can be attributed to the community.[100]

Turning to international law, the pivotal question is who has been authorised by the international community to enact its will, or to speak law on its behalf. If we consult Article 38 of the Statute of the International Court of Justice, widely regarded as reflecting international agreement on international law's operating framework,[101] we see that it identifies not only its primary sources but also 'subsidiary means for the determination of rules of law', in a sense recognising the significance of identifying both international law's authoritative sources as well as its authoritative law-making organs. While the position in the case of treaties is simpler ('rules expressly recognized by…states'), it is more difficult (and commensurately more important) to identify authoritative organs able to ascertain its more diffuse sources such as customary international law and general principles.[102] Here, the subsidiary means identified by Article 38 are 'judicial decisions' (courts) and 'teachings of

[100] Kelsen, *Pure Theory* (n 17) 150–8.

[101] D Hollis, 'Why Consent Still Matters—Non-State Actors, Treaties and the Changing Sources of International Law' (2005) 23 Berkeley Journal of International Law 137.

[102] A Perreau-Sassine, 'Three Ways of Writing a Treatise on Public International Law: Textbooks and Teachers as a Contemporary Source of Public International Law' in A Perreau-Sassine and JB Murphy (eds), *The Nature of Customary Law: Philosophical, Historical and Legal Perspectives* (CUP 2006) 231.

the most highly qualified publicists of the various nations' (scholars). While courts are readily regarded as law-makers by even the most rigid domestically-oriented positivists,[103] the idea of scholars as law-makers will strike most domestic lawyers as odd, even alarming. Yet, as the history of international law reflects, international law was for a long time a literary-historical tradition, first developing as a complete system of rules as a product of scholastic thought.[104] In the era in which the original version of Article 38 was initially drafted in 1920, Oppenheim identified scholars as 'as yet and for some time to come the only means of ultimately ascertaining what the law is'.[105] For Oppenheim, '[t]he writers on international law, and in especial the authors of treatises, have in a sense to take the place of the judges and have to pronounce whether there is an established custom or not, whether there is a usage only in contradistinction to a custom, whether a recognised usage has now ripened into a custom, and the like'. Writing a few decades later, Lauterpacht takes a more institutional perspective. In 1942/43, he drafted a scheme for an international rule of law, allocating courts a range of major tasks (including determination of the existence of 'war' and the setting the limits of international legislation) and creating a system of effective enforcement of judgements.[106] For Lauterpacht, the role of courts was essential.[107] While there was 'substance in the view that the existence of a sufficient body of clear rules is not at all essential to the existence of law, … the decisive test is whether there exists a judge competent to decide upon disputed rights and to command peace'.[108] Moreover, on account of the absence of an international legislature, courts were responsible not only for dispute resolution, but should also take on the task of law-making.[109]

[103] J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (5th edn, R Campbell ed, John Murray 1885) 634. See also H Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Paulson and Stanley Paulson trans, OUP 1997) 88; Kelsen, *Pure Theory of Law* (n 17) 348–56; H Kelsen, 'Essential Conditions of International Justice' (1941) 35 Proceedings of the American Society of International Law at Its Annual Meeting 70, 83; Hart, *Concept of Law* (n 18)132, 204–5.

[104] Iurlaro, *The Invention of Custom* (n 21).

[105] Oppenheim, 'The Science of International Law' (n 84) 313, 315. Note here the distinction he draws between 'scholars at large' and scholars of authority.

[106] Undated memorandum, 1942/1943, *Collected Papers*, 3, pp 474, 481, 483, cited in Koskenniemi, *Gentle Civilizer* (n 7), 390.

[107] For Lauterpacht, to contemplate the absence of courts was 'to strain [international law's]…legal character to breaking point', *Function of Law* (n 42) 434.

[108] Ibid 424.

[109] Lauterpacht, *The Development of International Law by the International Court* (first published 1958, repr, CUP 1982) 37–47; H Lauterpacht 'The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals' (1930) 11 British Yearbook of International Law 134, 144–54.

Lauterpacht considered that '[j]udicial legislation, so long as it does not assume the form of deliberate disregard of the existing law, is a phenomenon both healthy and unavoidable'.[110] If self-judgment by states is to be ruled out as a matter of legal principle (as Lauterpacht determined it should be), authority could reside only in courts. As Koskenniemi notes, not uncritically, 'the final resting-place of Lauterpacht's argument lies in the enlightened responsibility of judges and lawyers, their ability to manage the world order by equitable compromises, by overruling unjust laws, and suggesting desirable legislative changes'.[111]

While courts and scholars are for the time being authorised legal organs according to the language of Article 38, it is clear the international juristic mindset will continue to develop (indeed it may have done so already). The key point is that made by d'Aspremont: the international legal system possesses the ability to renew itself from within, though this requires continuous attention to the evolving mindset and practice of international law's authoritative organs, broadly conceived.[112] An elemental approach to legal positivism reflects the need for continuing theoretical and pragmatic legal work on understanding international law's sources and—perhaps more importantly—the identity of its law-ascertaining authorities.

(iv) Law as Supremacy/Law as Relational

International law does not merely face challenges in identifying its authority within the international legal system, but also from without. One of the most vexing questions impacting the authority of international law has been the nature of its relationship to other legal systems and, more particularly, domestic legal systems. The debate has been complicated by two by-products of positivist theory, dualism and monism. The dualist theory of the relationship between international and domestic legal systems relates to the idea connected with certain positivist traditions that international and domestic legal orders are separate from each other. Monist theory emerges from Kelsen's logical tradition and its associated doctrine of the unity of all law. The upshot of both dualist and monist theories is that, in any particular legal system, only one body of law can claim supremacy. Yet in a world of plural interconnected legal orders, theories based on singularity, separation and supremacy seem inadequate to the task.[113] James Crawford dismissed both monist

[110] Lauterpacht, *The Development of International Law* (n 109) 155–7.
[111] Koskenniemi, *Gentle Civilizer* (n 7) 406.
[112] d'Aspremont, *Formalism* (n 97), 223.
[113] B Çali, *The Authority of International Law* (OUP 2015) 135.

and dualist theory as best abandoned to 'the glacial uplands of juristic abstraction'.[114] Nevertheless, on the basis both theories continue to influence the relationship between international and domestic law, the jurisprudential case for their abandonment merits further analysis.

Dualist theory finds its adopted home in the 'social' thesis of positivism though its bloodline runs to an absolutist conception of sovereignty. It connects to the idea of state will as supreme such that any law not originating in the will of the state cannot be recognised as part of the domestic legal order. Dualism was picked up by the social tradition of legal positivism on the basis of the 'sociological separation' between international and domestic societies.[115] Therefore Oppenheim regarded international law and domestic law as 'essentially different from each other'.[116] While international law regulated the relations between the member states of the Family of Nations, domestic law regulated the relations between individuals within a state or between individuals and the state.[117] For Oppenheim, international law could not 'as a body nor in parts be *per se* a part of Municipal Law' unless its rules have 'by adoption become at the same time rules of Municipal Law'.[118]

This 'dualist' structuring of legal relations is outdated, both in terms of its conception of state sovereignty and its conception of international society. The conception of international society underlying the dualist conception of legal relations is distinctly classical, based on an assumption that individuals are not subjects of the international legal order. Examining this classical construction through the prism of political theory, 'international law deals with humans the way it deals with whales and trees', namely 'as an object or, at best, as a consumer of outcomes, but not as an agent of process'.[119] It posits domestic state governments as the gatekeeper between individuals and the international legal order, based on an assumption that international law need only reach individuals

[114] J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 47.

[115] G Arangio-Ruiz, 'L'Etat dans le Sens du Droit des Gens et la Notion due Droit international' (1975) 26 Österreichische Zeitschrift für öffentliches Recht 265, 404, cited in Gaja (n 80) 56.

[116] Oppenheim 1905 (n 19) 25.

[117] Ibid 26. For similar views, see H Triepel, Völkerrecht und Landesrecht (1899) 20; Anzilotti, Il Diritto Internazionale nei Giudizi Interni (1905) reprinted in Scritti di Diritto Internazionale Pubblico (1956) Vol I, 281, 320; G Arangio-Ruiz, 'Le Domaine Réservé. L'Organisation Internationale et le Rapport entre Droit International et Droit Interne' (1990-VI) 225 Recueil des Cours 9, 448, all cited in Gaja (n 80) 54.

[118] Oppenheim 1905 (n 19) 26.

[119] J Weiler, 'The Geology of International Law—Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547, 558.

indirectly through provisions of domestic law.[120] The idea of domestic law as the supreme authority within states relies on the persistence of the idea of 'a perfect or almost perfect fit between the sovereigns and the affected stakeholders—its citizens'.[121] Yet, as Benvenisti notes, '[t]he private self-contained conception of sovereignty is less compelling than it was in the past because of the glaring misfit between the scope of the sovereign's authority and the sphere of the affected stakeholders'.[122] Of course, the possibility of an essential contradiction between the will of a state government and the will of peoples within its territorial boundaries has become all too apparent in the course of modern history. Writing against the backdrop of the Second World War, Arendt notes that the 'right to belong to some kind of organized community' became apparent where 'the loss of home and political status become identical with expulsion from humanity all together'.[123] To the extent dualism persists, it has outlived the conceptions of sovereignty and international society that gave it life, a theoretical zombie repurposing international law as domestic law and thereby cutting off international law norms from the international legal system in which they find their source, sense and subjects.

The alternative prevalent theory of the relationship between legal systems is that of monism. This connects to Kelsen's doctrine of the logical unity of law. For Kelsen, there is no difference between the subjects of international and domestic law— '[t]he subjects are in both cases individual human beings'.[124] On the basis that '[i]t is not logically possible to assume that simultaneously valid norms belong to different mutually independent systems', '[t]he unity of national and international law is an epistemological postulate'.[125] To the extent it is possible to identify different legal orders, they 'must be in a relationship of superiority and inferiority'.[126] The consequence is either the supremacy of international law (international law monism) or the primacy of domestic law (domestic law monism). Kelsen did not believe legal theory should get involved in the choice between these two forms of monism, arguing the

[120] G Gaja, 'Dualism—A Review' in JE Nijmann and A Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP 2007) 54.

[121] E Benvenisti, 'Sovereigns as Trustees of Humanity: Of the Accountability of States to Foreign Stakeholders' (2013) 107 American Journal of International Law 295.

[122] Ibid.

[123] H Arendt, *The Origins of Totalitarianism* (first published 1951, repr Meridian 1962) 297.

[124] Kelsen, *Principles of International Law* (n 30) 402.

[125] Kelsen, *General Theory of Law* (n 62) 363, 373.

[126] Ibid 373.

choice was a matter of political ideology. He analogised the choice to that between the Ptolemaic viewpoint that the sun rotates around the earth or the Copernican view that the earth revolves around the sun. Domestic law monism has suffered the fate of Ptolemy's theory and has been all but abandoned in contemporary legal philosophy.

Yet, somewhat paradoxically, even when international law monism is applied, international law's supremacy ultimately gives way in practice to domestic law supremacy. For Kelsen, the 'essential function of international law' is to determine the territorial, personal and temporal spheres of validity of the domestic legal orders.[127] Once delimited, coercive power is then delegated to the domestic legal orders.[128] Kelsen acknowledges that in practice international and national law can contradict each other such that '[w]hen a state enacts a statute which is contrary to some norm of international law, this statute may nevertheless be considered as valid' while simultaneously 'the norm of international law remains valid'.[129] Kelsen evades the obvious logical contradiction between international and domestic legal systems by distinguishing between an invalid and an unlawful norm and vesting law's normativity in whichever legal system has coercive power over the relevant actor. As Kammerhofer notes, 'Kelsen simply accords the name "law" to the most effective normative order'.[130] As long as there is no recognised procedure of invalidating an internationally-unlawful domestic law or decision, its validity cannot be questioned. For Kelsen, this meant that individuals could only have international rights if there was an international court before which they could appear as plaintiffs.[131] He reassures himself that '[i]t is only in exceptional cases that international law directly obligates or authorizes individuals' otherwise 'the borderline between international and national law would disappear'.[132]

The problem is that these reassuring words have lost their effect, with the border between international and domestic law becoming significantly more blurred since Kelsen's time. As Judge Simma recognised in a 2008 lecture, '[i]nternational law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between states, but also incorporates common interests of the international community as a whole, including not only states but all human

[127] Ibid 350.
[128] Ibid 351; Kelsen, *Principles of International Law* (n 30) 415.
[129] Kelsen, *Principles of International Law* (n 30) 419.
[130] Kammerhofer, 'Hans Kelsen in Today's international legal scholarship' (n 28) 101.
[131] Kelsen, *General Theory of Law and State* (n 62) 347.
[132] Kelsen, *General Theory of Law and State*, 348.

beings'.[133] International law is more than an interlocutor between states, but has also become an interlocutor between states and individuals and potentially between individuals, states and the international community. Both dualism and monism appear to have outlived their utility in an increasingly pluralist and interconnected legal environment. If we accept that law attaches to a political community, we must also accept that there are multiple overlapping political communities and therefore multiple overlapping legal systems. Law and legal system is not a singular concept, but one that admits of plurals. Like the communities they regulate, there is overlap and intersection between different legal systems. The hermetic seal placed between domestic and international legal orders by Lord Oliver in the *International Tin Council* case has clearly come unstuck. The idea that international law and domestic law exist on different planes, where international law is 'judicial no-man's land' for domestic courts, is not defensible in a multipolar inter-dependent world. A legal system exists not above or below but *in relation to* other legal systems.[134] This involves recognition that its normative space will be determined, in part, by other legal systems.[135]

As is the case with private international law, the nature of the relationship between legal systems is not organic but must be created by law and legal systems. Certain scholars have suggested a new category of 'tertiary rules', with the proposal they should join primary and secondary rules as a necessary element of a 'concept of laws'.[136] Other scholars describe these as 'interface norms' or 'linkage rules'.[137] There is no consensus as to the content of these rules. The crucial thing to note is an emerging consciousness that legal systems cannot be exclusionary of other systems. Notions of supremacy must be replaced by relational notions. Law must develop ways of becoming in effect three-dimensional in order to enable actors to operate within and across the various legal systems that apply to them.[138]

[133] B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 European Journal of International Law 265, 268.

[134] K Knop, R Michaels, A Riles, 'International Law in Domestic Courts: A Conflict of Laws Approach' (2010) 103 Proceedings of American Society of International Law 269 at 271; N Roughan, *Authorities* (OUP 2013); Çali, *The Authority of International Law* (n 113) 66.

[135] R Michaels, 'Tertiary Rules' in N Krisch (ed), *Entangled Legalities Beyond the State* (CUP 2021) 442.

[136] ibid.

[137] Nico Krisch's 'interface norms' and Detlef von Daniels' 'linkage rules': N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010); D von Daniels, *The Concept of Law from a Transnational Perspective* (Routledge 2016).

[138] Roughan, *Authorities* (n 134) 157.

C. *Law's Function*

As is well known, legal positivism emerged in a context in which its main ideological rival was natural law. Legal positivism offered a distinctive solution to the pressing issue of the need for order in the face of widespread disagreement over moral values and the potentially open-ended nature of rational argumentation about their content.[139] One of the central aims of positivist theory has accordingly been to render law conceptually distinct from morality, religion, ideology and other value-systems. This has led on occasion to a misrepresentation of positivist theory as normatively inert or value-neutral.[140] The caricature is of international legal positivists as 'Bright-Liners' who believe in the existence of 'clear and rigid rules' capable of independent and objective determination and admitting of little discretion.[141]

Yet, though positivism aspires to the exactness of a legal science, the law upon which it operates is more than a scientific catalogue or digest of rules. While scholars such as Hart and Kelsen claim no 'necessary' connection between law and morality,[142] the conclusion that these authors thereby support the idea that positivism requires a complete separation between law and other value systems is misconceived and arguably incoherent. As Leslie Green points out, law is by its nature a normative system, 'promoting certain values and repressing others'.[143] In this Part, I engage with the role of law's function in positivist theory. Rather than seeing positivist methodology as 'value-neutral', I examine the purposive orientation of positivist approaches. Attention to law's purpose or function is also relevant to the question of law's determinacy. The idea of positive law as determinate and complete is an aspiration of the positivist method rather than an inherent characteristic of law. To treat law's determinacy as a presupposition obscures the creative element integral to law's ascertainment, an element the positivist method does not deny. Yet, to date, international legal positivist theory has paid inadequate attention to the space between the ascertainment and existence of the law, detracting from the intelligibility of this legal method in the international legal setting.

[139] Coyle (n 36) 244, 245, 248, 254.
[140] Gardner (n 85) 202.
[141] M Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime' (2013) 151 European Journal of International Law 24.
[142] Hart, *Concept of Law* (n 18) 268; Kelsen, *Pure Theory* (n 17) 68.
[143] L Green and T Adams, 'Legal Positivism' (Winter 2019 edition) *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/> accessed 20 August 2022.

(v) Law as Value-Neutral/Law as Purposive

It is increasingly appreciated that the positivist tradition is one that makes significant value-based claims and does so for normative reasons.[144] Far from being value-neutral, the positivist legal method has evolved and been shaped by explicit social, political and moral considerations. In an illuminating exercise, Michael Reisman tracks the 'Nine Lives' of Oppenheim's treatise, tracing its development through nine editions and generations of different editors. Notably, while Oppenheim was largely responsible for writing the first three editions (he died in the course of writing the third edition), Hersch Lauterpacht substantially assisted Arnold McNair in the editing of the fourth edition and was sole editor of the fifth through to the eighth editions.[145] Reisman reflects that the updated treatise takes on a 'paleontological character' such that the careful reader may be able to discern 'different layers and sediments in a state of uneasy coexistence'. While he recognises that this can serve at times to leave the 'superstructure shaky',[146] he saves his greatest criticism for the ninth edition edited by Sir Robert Jennings (then-President of the International Court of Justice) and Sir Arthur Watts (former Legal Adviser to the British Foreign Office). Reisman argues that this edition breaks sharply from the original conception of Oppenheim's treatise, not because it develops a different theoretical vision, but because it appears to lack any underlying theoretical vision. For Reisman, '[t]he Ninth edition contains no explicitly theoretical discussions, no larger systemic conception, and none of the morals that gave insights into the theoretical orientation of the prior editors and the original author'.[147]

Oppenheim, Kelsen and Lauterpacht were all explicit in their discussion of the 'task' or 'function' of their legal method, devoting articles and sometimes entire books to the subject.[148] This connects with a longer positivist engagement with law's purposive nature, in recognition that the concept of law is defined by both its nature and its functions. In his book on *Bentham and the Common Law Tradition*, Gerald Postema explains the importance of law's purpose to the task of jurisprudential theory, explaining that law's practices are not 'mere and mindless habits,

[144] B Kingsbury, 'Legal Positivism as Normative Politics' (n 19) 403.

[145] Reisman reflects that 'Lauterpacht probably left an imprint on the book as great as that of Oppenheim himself': WM Reisman, 'Lassa Oppenheim's Nine Lives' (1994) 19 Yale Journal of International Law 255, 268.

[146] Ibid 256.

[147] Ibid 271.

[148] Oppenheim, 'The Science of International Law' (n 84); Kelsen, *Das Problem der Souveränität* (n 27); Lauterpacht, *Function of Law* (n 42).

or behavioural routines with no intrinsic significance…[but] are intelligible social enterprises with a certain, perhaps very complex *meaning* or *point*'.[149] To be intelligible, law's method must be not 'be divorced from consideration of the aim, point or function of institutions of law'.[150]

Taking our three representative traditions of international legal positivism, we can trace the significance—and arguably the evolution—of descriptions of international law's purpose. The function of international law shifts from a thin law of co-ordination between states (Oppenheim) to a cosmopolitan law constitutive of an international community (Kelsen) to a constitutional law of humanity (Lauterpacht). The tradition with which I have associated Oppenheim belongs to the era of the *Lotus* decision, in which the functions of international law were described as the governance of relations between independent states 'in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims'.[151] International law was intended to be a slender body of rules regulating the co-existence and co-operation of states, 'not of their citizens', the latter being the exclusive subjects of domestic law.[152] Lauterpacht describes Oppenheim as 'perhaps the best instance of [the]…school of thought' that saw international law as a necessarily weak law,[153] a characterisation chiefly derived from Oppenheim's firmly articulated view that 'there is not, and never can be, a central political authority above the sovereign states'.[154] Oppenheim's narrow statist vision of international society was also avowedly pluralist and he explained his rejection of the idea of a world state on the basis that 'variety brings life, but unity brings death'.[155] Oppenheim has been described as a 'theoretical pragmatist',[156] who conceived of international law as 'the empirically identifiable product of the political will of states rather than as a natural feature of life'.[157] For Oppenheim, it was essential that international law's structures mapped onto a distribution of power in society among

[149] Gerald Postema, *Bentham and the Common Law Tradition* (Clarendon Press 1986) 334.
[150] Ibid 335.
[151] *SS Lotus* (n 72) 18.
[152] Oppenheim 1920 (n 20) 18.
[153] Lauterpacht, *Function of Law* (n 42) 412.
[154] Oppenheim 1920 (n 20) 93-4.
[155] Oppenheim, *The Future of International Law*, §18. Weil took this further, elaborating that 'the right to differ is now proclaimed as one of the attributes inherent in the very notion of sovereignty': Weil, 'Towards Relative Normativity' (n 15) 419.
[156] García-Salmones Rovira, *Project of Positivism* (n 7) 52-53.
[157] Reisman, 'Lassa Oppenheim's Nine Lives' (n 145) 264.

states and that its progressive development was intricately connected to 'real State interests'.[158] He sought to strip classic international law of its 'natural law' structure and substitute this with an international society structured around a narrower category of 'common interests'.[159] This is not to deny the normative substructure of his international legal method, expressly acknowledged in his discussion of the seven 'morals' to be deduced from the history of the development of the Law of Nations.[160] Oppenheim regarded international law as 'merely a means to certain ends outside itself', explaining that 'the task of the science stands in the service of these ends'.[161] The aim of Oppenheim's scientific legal method was to create a basic structure for the maintenance of international order, which would serve to 'lessen doctrinal differences and contribute to the dissemination of the idea of a peaceful international society where disputes are solved by law and not by wars'.[162]

Kelsen's normative vision has been described as a 'radical reimagination of modern international law as an institutionalized community'.[163] Kelsen and his school were buoyed by a cosmopolitan spirit that sought to transcend traditional doctrines of international law, chiefly their foundation in the concept of state sovereignty and the will of individual states. Jochen von Bernstorff draws an analogy to the ambitious motivating spirit that accompanied projects such as the establishment of the League of Nations, as described by Joseph Kunz: 'Away with power politics! No more secret diplomacy, no more entangling alliances, no longer the forever discredited balance of power, no more war! Democracy and the rule of international law will change the world…'.[164] If Oppenheim's icon was the state, Kelsen's was the 'universal individual'.[165] Yet Kelsen also deliberately depicted his 'pure' theory as value-neutral. The law was not to be regarded as an end in itself, but a 'specific social technique for the achievement of the ends determined

[158] Oppenheim 1920 (n 20) 94.
[159] Oppenheim 1905 (n 19) 92.
[160] Oppenheim 1920 (n 20) 93-97.
[161] Oppenheim, 'The Science of International Law' (n 84) 314.
[162] M Schmoeckel, 'The Story of a Success: Lassa Oppenheim and His "International Law"' in M Stolleis and M Yanagihara (eds), *East Asian and European Perspectives on International Law* (Nomos 2004).
[163] J von Bernstorff, 'Autorité Oblige: The Rise and Fall of Hans Kelsen's Legal Concept of International Institutions' (2020) 31(2) European Journal of International Law 497, 522–3. See also von Bernstorff, *Believing in Universal Law* (n 23) 234.
[164] JL Kunz, 'The Swing of the Pendulum: From Overestimation to Underestimation of International Law' (1950) 44 American Journal of International Law 136.
[165] García-Salmones Rovira (n 7) 122.
[166] Kelsen, *The Law of the United Nations* (first published 1950, repr Lawbook Exchange 2000), xiii.

by politics'.[166] On this basis, he cautioned that '[w]hoever seeks to find the answer as to what stands behind the positive law will find…neither…metaphysical truth nor the absolute justice of natural law…[but] the Gorgon head of power'.[167] Kelsen's stated aim was to purify legal method of all those 'elements foreign to the specific methods of a science whose only purpose is the cognition of law'.[168] However, Kelsen's claim to objectivity barely conceals the normative vision that lies beneath. Von Bernstorff depicts Kelsen's objective construction of international law as simply reflecting his confidence in the potential power of the medium of international law to achieve his normative vision of a thoroughly juridified cosmopolitan order. The effect of his monist construction of international and domestic law discussed above was to subordinate all politics (domestic and international) to law. Kelsen's postulate of the unity of law, reflecting ultimately a clear preference for international law monism, is also a postulate of peace.[169] On this basis, Lauterpacht described Kelsen's monist theory as the 'back door' by which the 'ghost of natural law' had 'crept into the cast-iron logic of…[Kelsen's] system'.[170]

Lauterpacht shifted the postulate of peace from the political background to the legal foreground. For Lauterpacht, peace was not only a moral idea but was 'pre-eminently a legal postulate'.[171] Lauterpacht viewed international law as a value-based constitutional law of humanity to which all members of the international community, including its member states, were subordinate. Lauterpacht was highly critical of the generations of international lawyers who had confined their activity to 'a registration of the practice of States' and thereby 'discouraged any determined attempt at relating it to higher legal principle, or to the conception of international law as a whole'.[172] The shift from Oppenheim's vision of international law to Lauterpacht's is transcribed clearly in the pages of his editions of Oppenheim's treatise. In the fifth edition, when Lauterpacht takes over as sole editor, Oppenheim's text visibly turns on its original creator, stating that, '[w]hatever may have been its merits in the past history of International Law, rigid positivism can no longer be regarded as

[167] Kelsen, 'Comment', Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 3 (Berlin 1927) cited in Dyzenhaus, *The Long Arc of Legality* (n 18) 380.

[168] Kelsen, *General Theory of Law and State* (n 62) xiv.

[169] H Kelsen, *Law and Peace in International Relations* (Harvard UP 1948) 1, cited in Dyzenhaus, *The Long Arc of Legality* (CUP 2022) 167; Kelsen, 'Essential Conditions of International Justice' (n 103) 72.

[170] H Lauterpacht, 'Kelsen's Pure Science of Law' in E Lauterpacht (ed), *International Law: Collected Papers*, Vol 2 (CUP 1975) 423.

[171] Lauterpacht, *Function of Law* (n 42) 446.

[172] Ibid 446.

being in accordance with International Law. Probably […] the Grotian school comes nearest to expressing correctly the present legal position'.[173] Lauterpacht was intent on placing natural law back in the picture. For Lauterpacht, while we may 'have abandoned the theory that statutes repugnant to natural justice are void, … that does not mean that we have ceased to shape positive law and to interpret it, sometimes out of recognition, by ideas for which the term natural law is an elastic and convenient expression'.[174] Following the Grotian tradition, Lauterpacht recognised '[t]he significance of the law of nature…as an ever present source for supplementing the voluntary law of nations, for judging its adequacy in light of ethics and reason and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations'.[175] For Lauterpacht, international law must be rooted in, on the one hand, the 'realities of international life' and, on the other hand, an appreciation of the 'modern "natural law with changing contents," "the sense of right," "the social solidarity," the "engineering" law in terms of promoting the ends of the international society'.[176]

To connect international legal positivism with its theoretical and moral foundations is not a revolutionary move, but rather enables us to understand its evolution. The writings of scholars such as Judith Shklar and Susan Marks alert us to the problem of wilful blindness to implicit ideological positions implicated in the use of legal structures and methods.[177] Attention to the purposive underpinnings of the key positivist traditions helps us to lift the veil of law's determinacy and focuses our attention instead on how different positivist traditions address the inevitability of law's incompleteness.

(vi) Law as Determinate/Law as Relative

Positivism is most succinctly described as a process for identification of valid law. This focus on validity has led to a tendency to think of law in

[173] Lauterpacht (ed), Oppenheim's International Law (5th edn, Longmans, Green & Co 1937).

[174] Lauterpacht, *Function of Law* (n 42) 425-6.

[175] Lauterpacht specified that '[t]his aspect of the system of Grotius has become an integral part of the doctrine and of the practice of the modern law of nations—a part more real than the accepted terminology in the matter of sources of international law has accustomed us to assume': Lauterpacht, 'The Grotian Tradition' (n 37) 22.

[176] H Lauterpacht, 'Westlake and Present Day International Law' in E Lauterpacht (ed), *International Law: Collected Papers*, Vol 2 (CUP 1975) 393–4.

[177] J Shklar, *Legalism* (Harvard UP 1964); S Marks, 'Big Brother is Bleeping Us—With the Message that Ideology Doesn't Matter' (2001) 12 European Journal of International Law 109, 113.

binary terms, as either valid or invalid. Law's completeness is interpreted as dependent on the capacity to classify conduct as either legal or illegal, where the idea of 'degrees of legalism' threatens to expose law's vanishing point. In a 1983 article, Prosper Weil sharply criticised the developing trend of 'relative normativity' in international law. According to Weil, this 'pathological phenomenon' risked introducing a 'sliding scale of normativity', encompassing pre-normative law that had a 'certain legal value' (eg soft law) through to super-law of 'greater specific gravity' (eg. *jus cogens*, *erga omnes* and international crimes). Relative normativity threatened essential features of international law, described by Weil as voluntarism, ideological neutrality and (the corollary of these) positivism. The most serious aspect of this relativisation of normativity was that, in his view, international law would eventually be disabled from fulfilling its proper functions.[178] Weil perceived an essential connection between international law's positivism, determinacy and function, warning that '[w]ithout this positivistic approach, the neutrality so essential to international law *qua* coordinator between equal, disparate entities would remain in continual jeopardy'.[179]

Weil's critique of relative normativity connects with Oppenheim's functional analysis of international law described in the previous section, an analysis also reflected in the *Lotus* decision. The connection to the *Lotus* decision is significant because its famous dictum is often cited to substantiate the claim of the essential correlation between international legal positivism and law's determinacy according to a binary formula. According to the classical formulation of this principle, 'whatever is not explicitly prohibited by international law is permitted'. Law's completeness is assured by the idea that whatever is not unlawful under international law is lawful. It is somewhat paradoxical that Weil defends this binary structure out of concern to preserve international law's ideological neutrality. His reliance on the voluntarist caricature of the *Lotus* decision adopts Hegelian philosophy that freedom is the ultimate object of the rule of law, recognising protection of the sovereignty and independence of states as international law's main functions.[180] He is highly critical of the idea of an 'international community', arguing that the sovereign equality of states is in danger of becoming an empty catch phrase

[178] Weil, 'Towards Relative Normativity' (n 15) 441.
[179] Ibid 421.
[180] It is interesting to note that the iconic definition of absolute sovereignty was written by Max Huber, the then-President of the Permanent Court of International Justice who cast the deciding vote in *Lotus*: *Island of Palmas (Netherlands, USA)* (1928) II RIAA 829, 838 (per Arbitrator Max Huber).

if the majority or a representative proportion of states can speak in the name of all and impose its will on other states.[181] Given he was writing at a time when the world was clawing its way out of the colonial era only to find itself in the grip of two superpowers waging a Cold War, it is difficult not to sympathise with Richard Falk's characterisation of Weil's formulation as 'a highly nostalgic view of international political life'.[182]

Yet even without removing the scales from our eyes from an ideological perspective, it is clear that the 'lawful/unlawful' binary is far from a guarantee of law's determinacy. Max Huber, the President of the Permanent Court of International Justice who cast the deciding vote in the *Lotus* decision, considered that the famous case dictum had been misinterpreted to the extent it was understood that the absence of a rule prescribed freedom of action. According to Huber, '[t]he absence of a rule for deciding between the rights of States…does not give rise to a state of anarchy in which each state has the right to disregard the situation of others'. Rather, '[w]here rights genuinely collide, the law must furnish a solution'.[183] Even the exercise of assessing what is lawful in any particular case requires an interpretation of the infinite variety of state practice to determine whether a sufficient number of states have engaged in a general and consistent practice evidencing their intention to be bound by a certain principle. Such an exercise is necessarily selective, often resulting in the privileging of the practice of certain (powerful) states over others. Oppenheim himself acknowledges that the catalogue of state practice from which he derives the principles reflected in his treatise is not exhaustive.[184] Reisman calculates that the 594 pages of his first volume cites to only 54 cases and incidents.[185] Given the significant methodological space between lawful and unlawful, the need to recognise 'greater shades of nuance' in international law has been recognised. In the *Kosovo Advisory Opinion*, Judge Simma criticised the 'old, tired view of international law, which takes the adage, famously expressed in the "Lotus" judgment' according to which 'everything which is not expressly prohibited carries with it the same colour of legality'.[186] Judge Simma advocated an approach that accommodated instead the 'possible

[181] Weil, 'Towards Relative Normativity' (n 15).
[182] R Falk, 'To What Extent are International Lawyers Ideologically Neutral?' in A Cassese and JHH Weiler, *Change and Stability in International Law-Making* (De Gruyter 1989) 137.
[183] (1931) 36-I Annuaire de l'Institut de Droit International, at 79, 84–5.
[184] Oppenheim 1905 (n 19) vii–viii.
[185] WM Reisman, 'Lassa Oppenheim's Nine Lives' (n 145).
[186] (n 74) Declaration of Judge Simma, para 2.

degrees of non-prohibition, ranging from "tolerated" to "permissible" to "desirable"'.[187]

Law does not become incoherent if we acknowledge its indeterminacy. We only deceive ourselves if we fail to comprehend that we have a choice between ways of understanding what we have and what is yet to be in filling out law's incomplete canvas. Though Weil considered a 'simplifying rigor' was essential to legal method, it is equally arguable that our international legal method needs to be able engage with law's complications. Lauterpacht recognised that the problem of law's completeness and the problem of gaps in the positive law was not confined to international law, though noted that international law was peculiar in several ways that aggravated the bulk and intensity of the gaps.[188] The task of the legal method is to offer tools with which to accommodate and mitigate law's indeterminacy. The three streams of positivism potentially offer different routes by which to accommodate a more nuanced approach to law's validity. According to the social thesis, the degree of normativity possessed by posited norms could be assessed by reference to their level of social recognition or correspondingly, the level of social reaction to their violation, accommodating degrees of legalism depending on whether certain conduct was supported, tolerated or condemned by members of the international community. A related approach is that proposed by Basak Çali, who recognises that international legal norms can be deliberately constructed to make 'different types of authoritative claims on state officials', distinguishing between strong, weak and rebuttable duties.[189] A system-based approach would measure normativity by reference to the relative authority of decision-making organs. Even Weil accepted that 'the risks arising from…indeterminacy would be diminished if, as some had intended, it were left not to the individual states but to the International Court of Justice to appraise'.[190] Rosalyn Higgins explains that international legal claims 'will *always* require contextual analysis by appropriate decision-makers—by the Security Council, by the International Court of Justice, by various international bodies'.[191] Jonathan Charney invites recognition that '[r]ather than state practice and *opinio juris*, multilateral forums often play a central role in the

[187] (n 74) Declaration of Judge Simma, para 8.
[188] Lauterpacht, *Function of Law* (n 42) 78–84, 89.
[189] Çali, *The Authority of International Law* (n 7) 74–5.
[190] Weil, 'Towards Relative' (n 15) 427.
[191] R Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 247.

creation and shaping of contemporary international law'.[192] A teleological approach invites reflection on the degree to which a given norm corresponds to international law's purposes or functions. For Lauterpacht, the problem of international law's gaps extended beyond the non-existence of legal rules to 'gaps from the point of view of the approximation of its rules to the essential purposes of international law and to the requirements of international justice'.[193] Therefore Lauterpacht amends Oppenheim's treatise to reflect that '[i]t is now generally admitted that in the absence of rules of law based on the practice of States, International Law may be fittingly supplemented and fertilised by recourse to rules of justice and to general principles of law, it being immaterial whether these rules are defined as a Law of Nature in the sense used by Grotius, or a modern Law of Nature with a variable content, or as flowing from the "initial hypothesis of International Law", or from the fundamental assumption of the social nature of States as members of the international community, or, in short, from reason. …In adopting Article 38 of the Statute of the International Court of Justice the signatory states sanctioned that practice'.[194]

D. *Conclusion*

H.L.A. Hart wrote *The Concept of Law* with his undergraduates in mind.[195] Undergraduate students encountering public international law have not been so well served. For domestic law students engaging with international law, it is often difficult to grasp the shape and structure of the international legal system. By the time students come to study international law (if they choose to study it at all), the picture they carry in their heads of 'their' legal system has been sketched in intricate detail—a William Hogarth etching crowded with judges, the Houses of Parliament and Gaols Committees, all eyes fixed squarely on the laws being made, applied and enforced within the nation state. International law comes to them as if out of an Edward Hopper painting, an anomic landscape, the subject isolated from the action, action that one senses is actually happening elsewhere. It is very common for our undergraduate students to express uncertainty, consternation, even exasperation

[192] J Charney, 'Universal International Law' (1993) 87 American Journal of International Law 529, 543–4.
[193] Lauterpacht, *Function of Law* (n 42) 142.
[194] H Lauterpacht (ed), Oppenheim's International Law (8th edn, Longmans, Green & Co 1955) 107.
[195] Hart, *Concept of Law* (n 18) 238.

when they meet international law for the first time, unclear as to how to make use of the assertions of authorities, and without proper views for the valuation and appreciation of its cast of actors. This article is written for undergraduate students, but also for experienced domestic lawyers forced somewhat later in the day to place international law in the picture.

The other more ambitious hope for this article is to encourage continuing debate among international lawyers about the foundations, structure and contours of international law's mainstream positivist method. Positivism emerged out of a perceived need to rescue law from the formlessness of natural law, yet it has led to a stigmatisation of the need for continuing legal and political imagination about law's structural core. Though positivism's rise signalled the denouement of a century-long collapse of the authority of the old religious orders, the positivist method has exhibited a tendency to adorn itself with the habits of religious faith. A closer look reveals it is based on as many bells and smells, postulates and presuppositions as any religion, with devout positivists seemingly compelled to follow the gospels of Austin, Hart and/or Kelsen. Yet, in the positivist quest to provide international law with the imprimatur of a legal science, we must avoid neglecting its quite distinct nature. CK Allen argued that '[w]ithout the examination not only of law, but of the implications of law as a function of society, the 'pure' essence distilled by the jurist is a colourless, tasteless and unnutritious food which soon evaporates'.[196] The positivist method can only endure if complemented by a rich legal, political and social discourse focused on understanding the elements of the international legal system: its community, authority and purpose. For undergraduates, seasoned domestic lawyers and international lawyers alike, the complexity of the legal task requires first an understanding of what is elemental.

[196] CK Allen, *Law in the Making* (Clarendon Press 1964) 57.