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Chapter 2

Classical Legal Positivism in International Law Revisited

Richard Collins

1. Introduction

In historical narratives on the development of modern international law the nineteenth century is often portrayed in terms of a theoretical battle between naturalist and positivist schools, with international legal positivism winning out by the century's end.¹ The growing dominance of legal positivism during the century is, in turn, seen to buttress the sovereignty of states as a growing tide of nationalism eventually boils over into the outbreak of the First World War.² The emergence of 'modern' international law in the wake of the war – with its increasingly humanitarian agenda, diversification of legal actors and growing institutionalisation – sets itself up against this 'classical' legal positivism, which is dismissed as both theoretically untenable (falling foul of the so-called Austinian challenge)³ and ideologically dangerous in sustaining the dominance of state sovereignty at the expense of international legal regulation.

In this chapter I want to revisit this image of classical positivism in light of a recent resurgence of interest in the history of international law, with a number of authors beginning to challenge the accuracy of this portrayal of classical doctrine. I argue that this negative portrayal arose more as a result of the rhetoric of *inter-bellum* jurists themselves as they sought to explain why international law had failed, thus far, to operate as an autonomous restraint in international politics. In fact, I will argue that late-nineteenth century jurists were well aware of the kind of theoretical problems which they were accused of perpetuating, and their positivist method – to the extent that it (controversially) explained international law as grounded in state consent – reflected a desire to carve out a more legitimate, and in that sense persuasive basis to enhance the authority of international law. Modern jurists' reaction to classical doctrine says less about the failings of nineteenth century jurists and much more about the theoretical limitations of the assumption which they share with them: i.e. that international law can be explained as an autonomous legal order by reference to a domestic legal paradigm. I argue instead that it is the falsity of this assumption, an assumption equally shared by modern jurists, which explains the failure of classical doctrine, rather than the specific approach of late-nineteenth century jurists, who themselves sought to formulate arguments to ground international law's autonomy. In this respect, it is this desire to explain the autonomy of international law which is the real legacy of classical legal positivism, demonstrating a greater amount of continuity between classical and modern doctrine than is often thought.

The chapter is structured as follows. In Section 2, I consider how a particularly negative view of classical legal positivism has come to prominence in the writings of many modern jurists, a perception which I reconsider in Section 3 in light of recent critical scholarship. Whilst this scholarship has called into question the overly simplistic portrayal of the late-nineteenth century as characterised solely by a voluntarist–positivist doctrine, I nonetheless acknowledge that a positivist understanding of international law came to dominate legal method by the early years of the twentieth century. However, in Section 4 I cast doubt on the claim that this commitment to legal positivism entailed a voluntarist legal method. I argue

¹ See e.g. Malcolm Shaw, *International Law* (6th edn CUP 2008) 29–30.

² Stephen Neff, 'A Short History of International Law' in Malcolm Evans (ed.), *International Law* (3rd edn OUP 2010) 3–31 at 15–16.

³ See Section 4.

instead that the positivist method in international law can be seen as underpinned by both a social and a teleological assumption about the institutional structure of the international legal order. I observe that such assumptions were necessary to sustain the idea of international law as an autonomous legal order binding on states. Finally then, in Section 5, I argue that it is this claim to legal autonomy which is the main inheritance from nineteenth century legal positivism, but it is the problem of sustaining such a claim in the decentralised international legal order which has caused jurists to take such a jaundiced view of the failure of nineteenth century doctrine. I conclude that the failure of this claim to legal autonomy lies in the assumption that international law's conceptual autonomy can be theorised according to idealised conceptions of legality developed in a domestic legal context. It is this assumption which highlights greater continuity between classical and modern doctrines than is commonly acknowledged.

2. The Birth of 'Modern' International Law and the Rejection of Classical Legal Positivism

'Modern'⁴ international law was born in the wake of the First World War in a spirit of reformism and disciplinary renewal. The existential shock of the war had a profound effect on the development of twentieth century international law. In particular, the idea that international law could, or should have been able to prevent the war but had clearly failed in this respect was a recurring feature of *inter-bellum* debates, prompting jurists to stress the need for revisiting international law's theoretical bases and strengthening its institutional structures.⁵ In this respect, for *inter-bellum* jurists the outbreak of the war was at least in part attributable to the failure of classical legal doctrine, which in both its naturalist and positivist forms was dismissed as either too fanciful and utopian to ground an autonomous legal order, or too deferential in being closely wedded to the sovereign rights of states.⁶ As the American jurist, Manley O Hudson, noted in 1923:

As each belligerent nation sought in vain for a law which would restrain its enemies, as each neutral nation sought in vain for a law which would relieve it of the burdensome incidents of the struggle, the insufficiency of our pre-war law came to be felt in every part of the world. Its principles seemed inadequate, its limitations ineffective, and its bases insecure. In many quarters, belief in the utility of a law of nations was weakened, and faith in the efficacy of any effort to increase its authority was lost. Even our legal profession failed to withstand the effect of the general scepticism, and we allowed to be revived the futile discussions of the Austinian era as to the existence of a law of nations which might properly be called law.⁷

⁴ My use of the term 'modern' and 'classical' as separating the pre- and post-First World War periods is used for illustrative purposes, rather than offering any definitive periodisation of international law's history. In fact, as my argument progresses it will become clearer that there is greater continuity between pre and post-war doctrines than many historical narratives suggest.

⁵ See, inter alia, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Company 1989, reissued by CUP 2005) 159–162; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 124, 127–131; Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press 2010) 103–120; Nathaniel Berman, "But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law' 106 *Harvard Law Review* (1993) 1792–1903 at 1800–1808. For a useful bibliographic summary of the reformist strand of *inter-bellum* international law, see Hersch Lauterpacht, 'The Definition and Nature of International Law and its Place in Jurisprudence' in Elihu Lauterpacht (ed.), *International Law being the Collected Papers of Hersch Lauterpacht*, Vol. 1 (CUP 1970) 9–50 at 10 (n.1).

⁶ As Koskenniemi notes, both types of criticisms can be levelled at naturalism and positivism: the former reduced either to unverifiable moral commands, or related too closely to the idea of natural rights of sovereigns; the latter either too analytical and abstract, or too closely related to state will. Koskenniemi, note 5 at 164.

⁷ Manley Hudson, 'The Development of International Law since the War' 22 *AJIL* (1928) 330–350 at 330–331.

Hudson was no doubt influenced by the critical voice of the famous jurist Roscoe Pound, who expressed similar sentiments about the failure of classical international law:

[I]t is not hard to see why the nineteenth-century achieved so little in international law. The jurists of the last century... did not seek to be active agents in legal development. *They expected legal development to operate itself from some international momentum.* The jurist was able to follow, arranging and ordering and systematizing or observing and verifying and thus discovering the foreordained lines of growth. Creative work in law, as in any other field, requires a plan, a design, a picture of what the worker seeks to make.⁸

Foremost amongst the targets of the *inter-bellum* jurists was the statist positivism which was seen to have prevailed over naturalist theories by the end of the nineteenth century.⁹ It was this kind of positivist dogma which they associated with the Permanent Court of International Justice's (PCIJ) decision in the famous *Lotus* case, where the Court noted how '[t]he rules of law binding upon States ... emanate from their own free will' and that '[r]estrictions upon the independence of States [could not] therefore be presumed'.¹⁰ In a series of lectures on the 'new aspects of international law', delivered at Columbia University around the time of the Permanent Court's deliberation, the Greek jurist Nicolas Politis stressed the poverty of this kind of positivist reasoning:

This explanation is hardly satisfactory, for if a rule of law is merely the product of free will it is not really binding, but remains at the discretion of the States which created it, since by ceasing to will it to be binding they can disregard it. What will has done, will to the contrary may undo.¹¹

Similarly, a couple of years prior to the Court's decision, writing in his first English language publication, Hersch Lauterpacht had decried the limits of legal positivism in even more forceful terms:

[The positivist] method is fraught with danger. There is always the possibility that not only will the practice of states be taken as an unquestionable rule of law, but that the philosophy underlying this practice will be regarded as a true expression of the tendencies and the possibilities of the international society ... Many a mischievous phrase derives its authority from well-meaning international lawyers.¹²

The reaction against classical doctrine, and legal positivism in particular, took many forms and was certainly not confined to international legal doctrine alone. The growth of legal realism and, more generally, the influence of the social sciences in American jurisprudence, particularly for jurists like Pound, led a number of international lawyers towards a more pragmatic, sociological approach.¹³ In its most realist guise this sociological turn would eventually lead to the establishment of a new discipline of International Relations, which was in many

⁸ Roscoe Pound, 'Philosophical Theory and International Law' 1 *Bibliotheca Visseriana* (1923) 1–90 at 88 (emphasis added).

⁹ For perhaps the most critical attack on classical legal positivism, see Hans Morgenthau, 'Positivism, Functionalism, and International Law' 34 *AJIL* (1940) 260–284; though see also James Leslie Brierly, 'The Basis of Obligation in International Law' in Hersch Lauterpacht, CHM Waldock (eds), *The Basis of Obligation in International Law and other Papers by the late James Leslie Brierly* (Clarendon Press 1958) 1–67 and from the perspective of the emerging 'Vienna School' of modern positivism, Josef Kunz, *On the Theoretical Basis of the Law of Nations* 10 *Transactions of the Grotius Society* (1924) 115–142.

¹⁰ *The Case of the S.S. 'Lotus'*, Judgment of 7 September 1927, PCIJ Series A No. 10 (1927) 18. For a typical criticism, see James Leslie Brierly, 'The "Lotus" Case' 174 *Law Quarterly Review* (1928) 154–163.

¹¹ Nicolas Politis, *The New Aspects of International Law* (Carnegie Endowment for International Peace 1928) 5.

¹² Hersch Lauterpacht, 'Westlake and Present Day International Law' 5 *Economica* (1925) 307–325 at 323–324. Similar criticisms are developed in his first monograph on international law: Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927) and see especially 43–44.

¹³ Compare, for instance, Samuel Astorino, 'The Impact of Sociological Jurisprudence on International Law in the Inter-War Period: the American Experience' 34 *Duquesne Law Review* (1996) 277–298 at 280, with Robert Kolb, 'Politis and Sociological Jurisprudence of Inter-War International Law' 23 *EJIL* (2012) 233–241. See also Carl Landauer, 'J. L. Brierly and the Modernization of International Law' 25 *Vanderbilt Journal of International Law* (1993) 881–917 at 884–899 in particular.

ways born of the rejection of the possibility of the kind of legal autonomy pursued by classical positivists.¹⁴ In Europe, the discipline either retreated into a more scientific, normativist positivism,¹⁵ or – with jurists like Lauterpacht or Brierly – embraced a ‘mainstream’ middle-ground, reengaging with natural law traditions whilst grounding them in a more sociological empiricism.¹⁶

As such, whilst modern international law grew up to be defined in many ways by its theoretical heterogeneity, its unity lies in its rejection of the tenets of classical doctrine, which has become associated with the very problem to which modern approaches respond: how to create order in a world of sovereign states.¹⁷ Two particular but related criticisms emerged from this time. First, classical legal positivism was critiqued as theoretically untenable, resulting either in the rejection of international law as law, or requiring a theory of auto-limitation, or voluntarism, which failed to provide an adequate foundation for an autonomous international legal order.¹⁸ Second, because of this limitation, classical positivism is implicated ideologically as sustaining the dominance of state sovereignty at the expense of international legal regulation.¹⁹

I will return to consider the accuracy of the methodological critique in Section 4 below, but before doing so I want to revisit the period in question in light of recent literature which has sought to call into question, first, that pre-modern doctrine can be understood as dominated by legal positivism in this way, and second, to the extent that jurists did embrace a positivist method, that this shift can be seen as aimed at buttressing state sovereignty in the way that is often claimed.

3. Questioning the Traditional Narrative

This image of classical doctrine as theoretically impoverished and overly deferential to state sovereignty remains a popular characterisation of nineteenth century international law, an era depicted often in terms of a move from an older tradition of enlightenment naturalism to a position of state-centric legal positivism. It is this transition, in turn, which is seen to have ‘resulted in the glorification of the sovereign state’,²⁰ or even as giving rise to the kinds of sovereigntist dogma which ‘threatened to destroy international law’.²¹ As Kennedy notes, this

¹⁴ See e.g. the critical remarks of one of the founding figures in International Relations, Hans Morgenthau, in Morgenthau, note 9 at 263–273 in particular. On the birth of international relations as a rejection of legal autonomy, see Martti Koskenniemi, ‘Carl Schmitt, Morgenthau, and the Image of Law in International Relations’ in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 17–34.

¹⁵ Particularly in the works of Hans Kelsen and the so-called ‘Vienna School’. For an overview, see in particular Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010) 44–118. See also Kammerhofer, [Chapter 5 at {5. ■.■}](#).

¹⁶ E.g. Brierly, note 9 at 64–67. Though as Lauterpacht noted, this natural law revival was not ‘the old law of nature’ but ‘rather 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’. Lauterpacht, Westlake, note 12 at 315.

¹⁷ See in this respect, David Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’ 17 *Quinnipiac Law Review* (1997) 99–136 at 113–116 in particular.

¹⁸ E.g. James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (4th edn OUP 1949) 52–55; Brierly, note 9 at 3–9; Lauterpacht, *Private Law Sources*, note 12 at 43–50.

¹⁹ E.g. the criticisms contained in Alfred Verdross, ‘Le fondement du droit International’ 16 *Recueil des Cours* (1927) 247–324 at 262–286. See further Lauterpacht, *Private Law Sources*, note 12 at 51–59.

²⁰ Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press 2004) 110. For a critical reflection on these kinds of narratives, see also Kennedy, note 17, as well as Casper Sylvest, ‘International Law in Nineteenth-Century Britain’ 75 *BY-BIL* (2005) 9–70 at 9–10 and generally.

²¹ Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (Routledge 1997) 18.

depiction of the nineteenth century seems ingrained in the consciousness of modern jurists as ‘an image of the pre-modern, a baseline against which to measure the discipline’s progress and [the twentieth century’s] exceptionalism’.²² However, as a number of critical voices have recently claimed,²³ this depiction is perhaps an overly simplistic representation of the disciplinary transition which occurred at this time; as Kennedy continues:

This image, of a method before frustration with formalism, a doctrine before the erosion of sovereignty, and a legal philosophy before the pragmatic flight from theory, remains an active part of twentieth century disciplinary argument, although it reflects only dimly the actual doctrine, method or philosophy of the field before the First World War.²⁴

Similarly, Koskenniemi has argued that the portrayal of the nineteenth century as an overtly positivist era tends to ignore ‘persistent strands of “naturalism” in the century’s legal doctrine, constantly referring back to the moral and civilizing forces of European law and practices’.²⁵ There is much in this critique. At times this preservation of natural law argumentation was explicit, particularly for many English jurists like Robert Phillimore (1818–1885),²⁶ or Travers Twiss (1809–1897),²⁷ or the more eccentric Scot, James Lorimer (1818–1890),²⁸ whose attachment to the natural law tradition lasted into the last decades of the nineteenth century. For others, natural law arguments were merely replaced by arguments from reason or moral conscience. For example, the English jurist Thomas Lawrence (1849–1919), though espousing a positivist method, retained a residual role for ‘ethical considerations’,²⁹ the preservation of which ‘fulfilled the important function of offering arguments when positive ones were not available’.³⁰ Lawrence’s writings show the influence of the historical school of jurisprudence,³¹ particularly as championed by Henry Sumner Maine (1822–1888), whose approach had done much to discredit Austinian positivism in English jurisprudence. Maine saw in international law the seeds of a juridical evolution similar to that which had come about in domestic legal orders, arguing that international law’s historical grounding in natural law princi-

²² Kennedy, note 17 at 100.

²³ Of note includes: Kennedy, note 17; Anghie, note 5; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2002); Martti Koskenniemi, ‘The Legacy of the Nineteenth Century’ in David Armstrong (ed.), *Routledge Handbook on International Law* (Routledge 2009) 141–153; as well as Chapter 2 of Koskenniemi, note 5 at 71–157; Sylvest, note 20; Michael Lobban, ‘English Approaches to International Law in the Nineteenth Century’ in Matthew Craven, Malgosia Fitzmaurice, Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff 2007) 65–90; Amnon Lev, ‘The Transformation of International Law in the 19th Century’ in Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 111–142.

²⁴ Kennedy, note 17 at 100. See further Skouteris, note 5 at 117–120.

²⁵ Koskenniemi, Nineteenth Century, note 23 at 14. Stephen Neff has made similar claims, even if overall he paints a picture of the century as dogmatically positivist: Neff, note 2 at 18–19.

²⁶ E.g. Robert Phillimore, *Commentaries upon International Law* (3rd edn Butterworths 1879), particularly at 14–29 on the sources of law, which Phillimore expounds according to Grotius’ division between the natural law, divine law and positive law.

²⁷ Travers Twiss, *The Law of Nations Considered as Independent Political Communities* (OUP 1861), particularly 110–111, where he grounds his approach in the co-existence of the *ius naturale* and *ius positum*, propounded previously by Vattel.

²⁸ James Lorimer, *The Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities*, Vol. II (William Blackwood and Sons 1884).

²⁹ Thomas Joseph Lawrence, *A Handbook of Public International Law* (D Bell & Co 1898) 6–7; *The Principles of International Law*, (7th edn MacMillan 1923) 12–13.

³⁰ Koskenniemi, note 5 at 131.

³¹ E.g. Lawrence, *Principles*, note 29 at 10–12.

ples was common to most societies undergoing legal evolution³² and had developed ‘by help of fiction’, only later embracing the ‘scientific jurisprudence’ of the study of positive law.³³

Although there were (and remain) important differences in methodological approach between English jurists and their continental counterparts,³⁴ the influence of historical jurisprudence in some form was pervasive during this period. For instance, the Swiss jurist, Johann Caspar Bluntschli (1808–1881), influenced by the ‘supranational historicism’ of Friedrich Karl von Savigny (1779–1861),³⁵ saw the law’s origins in the historical growth of society generally, a growth which was directed by a kind of cosmopolitan purpose. Thus, international law concerned the relations between states, but states embodied a collective will of their people, which in turn pointed with ‘inner necessity to the higher unity of mankind of which the nations [were] only members’.³⁶

This historical method and cosmopolitan ambition was shared by many of Bluntschli’s contemporaries who sought to professionalise the discipline through the establishment of its first academic journals and professional associations, such as the *Institut de Droit International*. As Koskenniemi has described, although theoretically diverse in many ways, these men shared a liberal-internationalist sensibility which sought to derive the binding force of law from a kind of collective European moral consciousness aimed at the pacification of international relations.³⁷ A good example of this approach is contained in the work of the Swiss jurist, Alphonse Rivier (1835–1898), who described the ultimate source of the law’s authority as the common juridical conscience (‘la conscience juridique commune’) which manifested itself through customary law and was given expression in multilateral treaties, or through ‘les avis et les écrits des jurisconsultes’.³⁸ Similar positions were adopted by fellow members of the *Institut*, such as the Italian jurist Pasquale Fiore (1837–1914),³⁹ and the English liberal, John Westlake (1828–1913). For instance, Westlake argued that international law derived its binding force from the existence of the collective social will underpinning it,⁴⁰ and was defined, in extremely broad terms as ‘dealing with all human action not internal to a political body’.⁴¹

In all, much of the literature from the final third of the nineteenth century suggests that, far from being dogmatically positivist, many international lawyers adopted much more eclectic theoretical positions. Still, in their efforts to professionalise the discipline, to codify and systematise the law, there is little doubt that they paved the way for the study of international law as a positivist science. Already by 1894, Westlake could confidently claim that it was with ‘law as an institution or a fact that the legal student has to deal’.⁴² Westlake’s successor in the Whewell Chair at Cambridge, Lassa Oppenheim (1858–1919), only fourteen years later, was adamant in his assertion that it was now ‘impossible to find a law which has its roots in hu-

³² Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relations to Modern Ideas* (John Murray 1861) 53. For a detailed exposition of Maine’s theory in this respect, see the arguments of Sylvest, note 20 at 42–43.

³³ The quotations are taken from Vinogradoff’s summation of Maine’s position: Paul Vinogradoff, *The Teaching of Sir Henry Maine: an Inaugural Lecture* (Henry Frowde 1904) 16–17.

³⁴ E.g. Lobban, note 23 at 65–66.

³⁵ Koskenniemi, *Gentle Civilizer*, note 23 at 45.

³⁶ See Johann Caspar Bluntschli, *The Theory of the State*, English translation from the 6th German edition (Clarendon Press 1885) 25. And see further, Johann Caspar Bluntschli, *Le Droit International Codifié* (5th edn Guillaumin 1895) 1–2.

³⁷ Koskenniemi, *Gentle Civilizer*, note 23 at 92–97.

³⁸ Alphonse Rivier, *Principes du Droit des Gens*, Tome I (Arthur Rousseau 1896) 27.

³⁹ See Pasquale Fiore, *International Law Codified and its Legal Sanction; or the Legal Organization of the Society of States* (Edwin M Borchard, Baker (tr.) Voorhis & Company 1918).

⁴⁰ E.g. John Westlake, *Chapters on the Principles of International Law* (CUP 1894) 2–3.

⁴¹ John Westlake, ‘Introductory Lecture on International Law, 17 October 1888’ in Lassa Oppenheim (ed.), *The Collected Papers of John Westlake on Public International Law* (CUP 1914) 393–413 at 412.

⁴² Westlake, note 40 at 12.

man reason only and is above legislation and customary law'.⁴³ Oppenheim certainly was not alone in this respect; by the early years of the twentieth century few international lawyers thought of international law as anything other than an artificial law justified through some form of state consent,⁴⁴ and few considered the role of the international jurist as concerned with anything more than an 'analysis of the practice of the institutions of the State'.⁴⁵ Whilst English jurists remained more pragmatic about the binding force of this positive law, a more analytical positivist method took hold in, inter alia, Germany⁴⁶ and Italy,⁴⁷ through the works of e.g. Georg Jellinek (1851–1911), Heinrich Triepel (1868–1946) and Dinisio Anzilotti (1869–1950), which aimed to find a consensual basis for the law's binding force.

Nevertheless, it is misleading to see this transformation as necessarily, or at least deliberately, buttressing state sovereignty. To ground the law in sovereignty reflected a procedural understanding of legal validity: a product of an emerging political and social context increasingly uneasy with a priori philosophical reasoning. The climate of political legitimacy emerging by the late-nineteenth century became increasingly dismissive of such philosophical argumentation, as that which remained of the classical natural law tradition was increasingly used to justify the *raison d'état*, than to oppose it.⁴⁸ Accordingly, late-nineteenth century international lawyers sought new means for legitimising, and new ways of understanding, the legality of interstate relations. Arguments derived from natural law were derided not only as illegitimate and speculative, but were seen also as 'a set of excessively abstract (and in this sense arbitrary) maxims that could not form part of a practical *Jus publicum Europaeum*'.⁴⁹ For instance, Lawrence claimed that natural law 'was false historically, and untenable philosophically' for it 'confound[ed] together the actual and the ideal'. Furthermore, he asserted confidently that state officials no longer appealed publicly to 'innate principles and absolute rights, but to rules which can be proved to have been acted upon previously in similar circumstances by all or most civilised nations'.⁵⁰ This latter observation was in many respects true. One need only compare the reactionary and conservative legitimising principles and purposes underpinning the Vienna Settlement of 1814–1815 with the more liberal purposes and multilateral ordering principles of the Hague conferences at the turn of the next century to see the reality of this transition.⁵¹

What therefore united continental and Anglo-American jurists at this time was a professional ethos, or self-consciousness, to defend the coherence and efficacy of the law as a sys-

⁴³ Lassa Oppenheim, 'The Science of International Law: Its Task and Method' 2 *AJIL* (1908) 313–356 at 329 (emphasis added).

⁴⁴ Anthony Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 1986) 1–11 and generally. On this transition, generally, see Ronald Macdonald, Douglas Johnston, 'International Legal Theory: New Frontiers of the Discipline' in Ronald Macdonald, Douglas Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (Martinus Nijhoff 1983) 1–14 at 6–7.

⁴⁵ Carty, note 44 at 8. As he continues, '[i]n this context there is no significant difference between the common law and civil law jurisdictions in so far as concerns legal method. Study of the "practice" of judicial institutions follows the same analytical, i.e. above all logical, conceptual method, as study of the 'emanations' of the will of the State'.

⁴⁶ On the positivist turn in German approaches, see Koskeniemi, *Gentle Civilizer*, note 23 at 46, 186–188.

⁴⁷ E.g. Chapter XII of Angelo Sereni, *The Italian Conception of International Law* (Columbia University Press 1943) 206 and following.

⁴⁸ This was a common reflection amongst many European jurists writing towards the end of the nineteenth and in the early twentieth century: e.g. Gustave Rolin-Jaequemyns, 'De l'étude de la législation comparée et de droit international' 1 *Revue de Droit International et de Législation Comparée* (1869) 1–656 at 11, 256–267; Fiore, note 39 at 8–9; and Thomas Lawrence, *Essays on Some Disputed Questions in Modern International Law* (Deighton, Bell & Co. 1885) 236–237.

⁴⁹ Koskeniemi, *Nineteenth Century*, note 23 at 146.

⁵⁰ Lawrence, *Handbook*, note 29 at 6.

⁵¹ Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton University Press 1999) 131–132, 153.

tem of norms which could operate as an effective restraint in international politics.⁵² To construct a more convincing vision of an international public order under law, international lawyers sought insights from domestic experience, where sovereignty was seen as having already been reconstructed in more relative terms, tamed and harnessed by principles such as the Rule of Law. This was not simply a matter of deriving law from the practices of states, but making sense of the law by categorising it and – as Lawrence put this at the time – referring legal rules back to ‘certain fundamental principles on which they are based’.⁵³ Accordingly, international lawyers gave shape to modern doctrines under the influence of principles such as juridical equality, non-discrimination and self-legislative justice, principles which they saw as delineating the allocation of political power within the state, as international law became increasingly perceived as an institutional practice structured on the basis of mutual consent and reciprocal equality (at least in a formal sense).⁵⁴ As Anghie notes, the late-nineteenth century jurist saw the role of legal science as ‘a struggle against chaos which could be won only by ensuring the autonomy of law, and establishing and maintaining the taxonomies and principles which existed in fixed relations to each other’.⁵⁵

In this respect, the idea that the turn to positivism expressed an *amoral* view of the conduct of international relations downplays the motivations behind the emergence and eventual dominance of this methodological approach. Not only did classical positivists share in natural lawyers’ ambition of enhancing the authority of international legal rules, but their efforts to build a complete system of law relied essentially on equally moralistic tenets, and, at times, aprioristic reasoning.⁵⁶ As such, if by the beginning of the twentieth century scholars like Oppenheim had come to espouse an avowedly positivist method this has to be understood, at least in part, as a normative position⁵⁷ that such a view would better guarantee a condition of legality in the relations between sovereigns.⁵⁸ As Kingsbury notes:

Oppenheim’s commitment to a positivist approach to international law was not simply an assertion that a positivist concept of law was the only coherent one, but also embodied a normative or ethical view that a positivist understanding of international law was best able to advance the realization in international society of a higher set of values to which Oppenheim adhered.⁵⁹

Oppenheim was clear about these values in an important essay from 1908 in which he set out the ‘task and method’ of the international lawyer, which included not only the study of the existing law, but also its progressive development in line with values which he saw as intrinsic to international law, including inter alia, ‘peace among the nations and the governance of their intercourse by what makes for order and is right and just’.⁶⁰ In order to realise these ends Oppenheim saw it as imperative to distinguish the legal from the non-legal, and only a positivist method would facilitate this. As he put this, the science of international law would not

⁵² Koskenniemi, note 5 at 122–123; Anghie, note 5 at 48–52.

⁵³ Lawrence, *Principles*, note 29 at 1. See further Koskenniemi, *Gentle Civilizer*, note 23 at 51–54.

⁵⁴ Reus-Smit, note 51 at 129–131, 134–135.

⁵⁵ Anghie, note 5 at 51.

⁵⁶ Koskenniemi, note 5 at 131–132.

⁵⁷ On positivism as a normative position see further Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011) 142–146.

⁵⁸ On Oppenheim’s positivism as normative, as opposed to merely methodological, see Benedict Kingsbury, ‘Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law’ 13 *EJIL* (2002) 401–436. On this distinction, generally, see Jeremy Waldron, ‘Normative (or Ethical) Positivism’ in Jules Coleman (ed.), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (OUP 2001) 411–433; as applied to international law in particular, see Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart 2009).

⁵⁹ Kingsbury, note 58 at 431.

⁶⁰ Oppenheim, note 43 at 314 (emphasis added).

succeed ‘unless all authors ... ma[de] an effort to keep in the background their individual ideas concerning politics, morality, humanity, and justice’.⁶¹

As such, to the extent that many jurists founded the source of normativity on state sovereignty, this had little to do with state-centrism, and much more with making sense of international law as an autonomous order in an increasingly secular and pluralist era. A formalised idea of sovereignty as a delineated order of absolute competence provided an explanation for the possibility of autonomous law in the absence of an overarching moral theory or centralised sovereign authority – an idea no more clearly expressed than by the PCIJ in *Wimbledon* (four years before its *Lotus* decision).⁶² As Koskenniemi observes:

From the late nineteenth century onwards, international lawyers have been critics of ‘sovereignty’ as egoism, arbitrariness, and the absolutism of state power. The contrary to sovereignty was international law ... The legacy of the nineteenth century was not excessive deference to sovereignty (arguments against such deference were common then as they are today) but rather the emergence of ‘sovereignty’ as the key *topos* of international law, leading the law into a formal and procedural direction, away from views about the substantive rightness or wrongness of particular types of behavior ...⁶³

Kennedy has made a similar point:

[F]rom the standpoint of international law, the sovereignty consolidated in the late nineteenth century was a very secular matter, a doctrinal project of practicality in a broader legal fabric whose existence, in turn, was simply obvious. *If nineteenth century international lawyers had a blind faith, it was in law, not sovereignty.* Sovereignty was their construct, their response, a project of earnest doctrinal elaboration, opening a space for a new form of statecraft in an ancient legal fabric.⁶⁴

Bearing in mind the nature of this transition which the professionalisation of the discipline brought about, it is perhaps not unfair to conclude that positivism came to hold a dominant position in the practice of international law by the beginning of the twentieth century. Thus far I have maintained that the reason for this transition itself cannot be seen as one of deference to the unrestrained sovereignty of states. Nonetheless, the question remains whether in classical positivist method *de facto* situations resulted in justifying just such a sovereigntist doctrine; whether, in other words, the dominance of classical positivism resulted in the kind of voluntarist dogma later critiqued by modern jurists? It is to this question that I now turn my attention.

4. Classical Legal Positivism Revisited⁶⁵

Whilst few works in international law have sought to give a detailed conceptualisation of classical legal positivism as a coherent approach or method in the study or practice of international law, Stephen Hall has recently provided a useful summation of what is commonly accepted as the classical position, which he claims can be defined by three core legal dogmas:⁶⁶

- in contrast to the preceding natural law tradition, classical legal positivism did not merely make a claim to the validity of positive law as *one species of* international law, but asserted the necessary positivity of international law in its entirety;

⁶¹ Oppenheim, note 43 at 335.

⁶² Essentially, the court explained the ability to enter into international legal obligations (and thus be bound by international legal rules) as an attribute of a state’s sovereignty. See *The Case of the S.S. ‘Wimbledon’*, Judgment of 17 August 1923, PCIJ Series A No. 1 (1923) 25.

⁶³ Koskenniemi, *Nineteenth Century*, note 23 at 150.

⁶⁴ Kennedy, note 17 at 121 (emphasis added).

⁶⁵ Bernstorff, *Chapter 2* at ■ {2. ■.■}.

⁶⁶ Stephen Hall, ‘The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism’ 12 *EJIL* (2001) 269–307 at 272.

- it claimed that for law to be valid it must have been laid down in some form of historical act by an authorised body, the ‘sovereign’; and,
- it denied any *necessary* connection between the reasonableness or moral character of a legal norm and its legal validity as such.

How accurate are these criteria as a summation of those late-nineteenth and early-twentieth century jurists professing to adhere to a positivist method? In relation to Hall’s first criterion, as we saw in the previous section, many of the jurists labelled as positivists in the nineteenth century actually retained a residual role for natural law in providing a basis for legal principles in the absence of positive codification, just as others maintained an important role for reason or juridical conscience in giving shape to the positive law. Nevertheless, as equally noted, argumentation from natural law began to lack legitimacy towards the end of the nineteenth century, ushering in a more exclusive positivist method (espoused in particular by Oppenheim). In this respect, Roberto Ago has similarly maintained that the defining feature of classical positivism was its disavowal of any other form of law other than positive law.⁶⁷ For Ago, this can be contrasted to an older tradition – running from Grotius through to Vattel – where the positive law (*ius positum*) and natural law (*ius naturale*) were seen to co-exist as part of a total corpus of binding international legal principles.⁶⁸

Insofar as one can therefore accept the assertion that classical positivism recognised only laws which have been in this sense posited, following Ago one can also see how Hall’s second and third criteria follow naturally from the first:

From the principle indicating that the distinctive character of law, of all law, is its historical derivation from certain pre-established ‘formal sources,’ there comes logically, as a corollary, the idea that legal science has no other means of knowing the legal force of a norm in any given system but to ascertain whether it was ‘laid down’ historically by a ‘formal source’ of that system. Thus the method of deducing the legal nature of the norms from their origin in given creative factors is considered to be the only one permissible in this science.⁶⁹

Paulus and Simma, more recently, have developed a similar description of classical positivism, arguing that its distinctive feature was the recognition that the law must be laid down in the correct manner; that is, a norm’s legal pedigree is determined by the concrete fact of its promulgation (by the sovereign) not its moral worth or political utility. They write:

Law is regarded as a unified system of rules that ... emanate from state will. This system of rules is an ‘objective’ reality and needs to be distinguished from law ‘as it should be.’ Classic positivism demands rigorous tests for legal validity. Extralegal arguments, e.g. arguments that have no textual, systemic or historical basis, are deemed irrelevant to legal analysis ... For international law, this implies that all norms derive their pedigree from one of the traditional sources of international law, custom and treaty.⁷⁰

Recognising that a norm’s legal validity (in a narrow sense) derives from its source rather than its intrinsic moral worth or political utility is in itself a largely uncontroversial claim in modern jurisprudence,⁷¹ and indeed is a view shared by self-describing (modern) positivists and many natural lawyers alike.⁷² But note here how both Ago and Paulus and Simma do not

⁶⁷ Roberto Ago, ‘Positive Law and International Law’ 51 *AJIL* (1957) 691–733; and see also, more recently, Roberto Ago, ‘Positivism’ in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 3 (Elsevier 1997) 385–393.

⁶⁸ Ago, Positive Law, note 67 at 696–698; Ago, Positivism, note 67 at 385–386.

⁶⁹ Ago, Positive Law, note 67 at 701.

⁷⁰ Andreas Paulus, Bruno Simma, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ 93 *AJIL* (1999) 302–316 at 304–305.

⁷¹ Positive law, as Ago observes, is not about consent as such, but just the need to demonstrate the positing of legal norms. It is scientific; it looks for an historical point of time when law was posited by agreed procedure. Ago, Positive Law, note 67 at 698.

⁷² E.g. Gerald Postema, ‘Law’s Autonomy and Public Practical Reasoning’ in Robert George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press 1996) 79–119 at 81–82. See also the preface to Robert

just stress the idea of formal sources in an abstract sense, but locate the source of legal validity in the will of the state; that is, in the specific act of ‘laying down’ by the sovereign. Ago continues:

Not only was it stated that law created by formal sources is the only true law, but all those acts which are not direct or indirect manifestations of the will of the state are excluded from the category of ‘formal sources’ of positive law, for only the state has the power to lay down legal norms.⁷³

Ago traces this idea to the work of the English legal philosopher, John Austin (1790–1853), who essentially sought to outline a positivist jurisprudence based on a Hobbesian conception of sovereignty, whereby a law’s binding force depended on its promulgation by a sovereign authority. International law being concerned with the ‘the conduct of sovereigns considered as related to one another’,⁷⁴ Austin famously claimed that international law was (like municipal public law), not law as such, but at best ‘positive morality’,⁷⁵ for ‘every positive law is set by a given sovereign to a person or persons in a state of subjection to its author’.⁷⁶ As soon as this connection between formal source and sovereign will is made, one can better understand how the methodological critique arises. For Ago, two alternatives appear open to international lawyers: either to deny the ontological reality of international law, or to derive its binding force from the will of states through their own agreement. It is this latter alternative which is often associated with the kind of neo-Hegelian theory of *Selbstverpflichtungslehre* (‘auto-limitation’) propounded most famously by Jellinek,⁷⁷ which essentially results in a view of international law as ‘external public law’.⁷⁸ As Ago notes, looked at from this perspective it is difficult to distinguish classical legal positivism from a theory of state voluntarism.⁷⁹ This view is echoed also by Paulus and Simma who expressly associate classical legal positivism with the kind of voluntarist rhetoric endorsed by the PCIJ in the *Lotus* case (above).⁸⁰ Reading classical positivism as a theory of state voluntarism one can thus see how the criticism of amorality emerges, with positivism seen as buttressing a position where ‘might makes right’.⁸¹

However, as a unifying claim, the idea of the nineteenth century as imbued with a voluntarist-positivist legal dogma has tended to both exaggerate and over simplify the influence of (neo-) Hegelian ideas of sovereign freedom,⁸² particularly as such views seem to underpin the kind of voluntarist *dictum* which was, in any event, *only later* espoused by the PCIJ in the *Lotus* case in 1927. Certainly, there was a distinctive stream of philosophically informed, continental (though largely Germanic) jurisprudence, which built from Jellinek’s formulation of the *Selbstverpflichtungslehre*,⁸³ but such theories were critically received by most, and were largely caricatured more than they were investigated in detail.⁸⁴ In fact, Jellinek’s theory of auto-limitation is easily misunderstood as implying a view of ‘might makes right’ when, in

George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press 1996) ■■■ at vii–viii, where he notes a certain accord between positivists and natural lawyers in this respect.

⁷³ Ago, *Positive Law*, note 67 at 698.

⁷⁴ John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (Robert Campbell (ed.), 4th edn, John Murray 1873) 231.

⁷⁵ Austin, note 74 at 188.

⁷⁶ *Ibid.*

⁷⁷ Georg Jellinek, *Die Rechtliche Natur der Staatenverträge* (A Hölder 1880) 2, 42–49, 56–58.

⁷⁸ The term ‘external public law’ comes from Koskenniemi’s reading of Jellinek: Koskenniemi, *Nineteenth Century*, note 23 at 145. The idea of ‘äußeres Staatsrecht’ can be found much earlier in the work of Hegel himself: Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (1821) §§ 330–340.

⁷⁹ Ago, *Positive Law*, note 67 at 699.

⁸⁰ Paulus, Simma, note 70 at 303.

⁸¹ Hall, note 66 at 270.

⁸² Shlomo Avineri, *Hegel’s Theory of the Modern State* (CUP 1972), particularly 200–205, where he deals with the implications of this theory for Hegel’s view of international law.

⁸³ See discussion in Koskenniemi, *Gentle Civilizer*, note 23 at 179–265.

⁸⁴ E.g. Koskenniemi, note 5 at 128.

fact, his position is underpinned by a much more objectivist account of state purpose, and the constraining influence of social interaction.⁸⁵ Nevertheless, Triepel and Anzilotti both rejected Jellinek's more philosophical account, for a more socio-empirical basis for international law's validity, which derived the binding force of the law from agreements between states (*Vereinbarung*),⁸⁶ though Anzilotti later moved to a more explicitly normativist framework influenced by the work of Hans Kelsen.⁸⁷ Underlying both, however, is an ethical precept, or an assumption of sociability on the part of states which sits outside the system of international law, which it precedes, and to which it gives force.⁸⁸

Insofar as the idea of the *Selbstverpflichtungslehre* was influential for others, particularly for the German *émigré*, Oppenheim,⁸⁹ few jurists – Oppenheim included – developed this into the kind of sovereigntist dogma which we now associate with the *Lotus* case.⁹⁰ In fact, what became a more noticeable trend from this time was – as Triepel and Anzilotti's approach suggested – the need to ground the validity of rules in the consent of a community, or society of states, as distinct from its members (either individually or in aggregate). One can see this in Oppenheim's work, where he outlines three conditions for the objective existence of international law:

There must, first, be a community. There must, secondly, be a body of rules for human conduct within that community. And there must, thirdly, be a common consent of that community that these rules shall be enforced by external power. *It is not an essential condition either that such rules of conduct should be written rules, or that there should be a law-making authority or a law-administering court within the community concerned.*⁹¹

What was therefore at the base of international law's binding force for Oppenheim, ultimately, was what he referred to as the 'family of nations'; a concept that was not merely an aggregation of the particular interests of states, but an a priori assumption about their inherent sociability.⁹² As Schmoeckel claims:

[Oppenheim] did not have to adopt Jellinek's theory of self-restraint as the foundation of law ... Law was not forced on states because they live in a society, but living in society causes the will to consent. Both seem very close in theory and may have been influenced by the same sources, yet they formed distinct approaches.⁹³

It was only by differentiating the whole from its constituent parts in this way that international lawyers felt that they were able to sustain the idea of international law as an autono-

⁸⁵ Koskenniemi, *Gentle Civilizer*, note 23 at 201, where he notes how criticisms of Jellinek's position 'fail ... to address [his] move away from a pure voluntarism into a more genuinely sociological understanding of the law in terms of the structural constraints imposed on State will by the environment'.

⁸⁶ See generally Heinrich Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld 1899), and Heinrich Triepel, *Droit international et droit interne* (Pedone 1920) 27–61; Dionisio Anzilotti, *Corso di Diritto Internazionale* (4th edn CEDAM 1955) 82–85. See further Giorgio Gaja, 'Positivism and Dualism in Dinisio Anzilotti' 3 *EJIL* (1992) 123–138 at 127.

⁸⁷ See discussion in Gaja, note 86.

⁸⁸ Dionisio Anzilotti, *Scritti di Diritto Internazionale* (CEDAM 1957) 57; and see remarks of Gaja, note 86 at 127.

⁸⁹ However, Oppenheim expressly distanced his own approach from that of Triepel (as much as Jellinek and others). On both this influence and Oppenheim's distinctive approach, see Mathias Schmoeckel, 'The Internationalist as a Scientist and Herald: Lassa Oppenheim' 11 *EJIL* (2000) 699–712 at 701–702, 705–709.

⁹⁰ Schmoeckel, note 89 at 707. Though, as a counterpoint, see the work of Alfred Lasson, *Princip und Zukunft des Völkerrechts* (Hertz 1871), discussed in detail in Koskenniemi, *Gentle Civilizer*, note 23 at 32–33.

⁹¹ Lassa Oppenheim, *International Law: A Treatise*, Vol. 1 (3rd edn Longmans, Green & Co. 1920) 7 (emphasis added).

⁹² Kingsbury, note 58 at 409.

⁹³ Schmoeckel, note 89 at 707; see also Anthony Carty, 'Why Theory? – The Implications for International Law Teaching' in Philip Allott et al, *Theory and International Law: An Introduction* (British Institute of International and Comparative Law 1991) 73–104 at 81.

mous order, binding upon states.⁹⁴ This presumption of sociability, or idea of a society or community of states is the analytical framework upon which classical positivism proceeds.⁹⁵ As Anghie asserts:

[S]ociety, rather than sovereignty, is the central concept used to construct the system of international law ... Despite the positivist claims that the sovereign was the exclusive basis for the international system, *it was only if society was introduced into the system that positivists could approximate the idea of 'law' to which they urged adherence.* Society, then, provides the matrix of ideas, the analytical resources which allied with sovereignty, could establish a positivist international legal order.⁹⁶

International law was legitimate as based in state consent, but this was a broader, community will, not necessarily the same as the aggregated interests of each state in isolation.⁹⁷ One can see this quite explicitly – and perhaps much more pragmatically – in the approach of many of the English jurists who sought to demonstrate the limitations of Austin's conception of legal positivism. Westlake, for instance, claimed that Austin had not exactly erred, jurisprudentially speaking, but had narrowed down his enquiry too far by ignoring the fact that the ultimate binding force of law depended on the willingness of any society to ensure its enforcement.⁹⁸ Westlake described the normative autonomy of the law as related to an underlying social interest or a collective will opposable to that of the individual state,⁹⁹ or as he put this himself, law could be found and enforced through the 'general *consensus* of opinion within the limits of European civilisation'.¹⁰⁰

The stress on the close connection between law and society – *ubi societas ibi ius est* – was a recurring rhetoric from this time, each concept mutually supporting the other. For instance, though a more state-centric concept of community than that applied by Westlake, Oppenheim's idea of a 'family of nations' fulfilled a similar function, as we saw above, ultimately securing the binding force of law through the 'common consent' of the community as a whole.¹⁰¹ For an avowed positivist, such as Oppenheim, Austin was clearly mistaken in missing the social aspect of legal enforcement:

[M]unicipal law, constitutional law, ecclesiastical law, and international law are all branches of the same tree of law in general as a body of rules for the conduct of the members of a community, which rules shall by common consent of the community be *eventually* enforced by external power, in contradistinction to rules of morality which by common consent of a community concerned are to be enforced by conscience only.¹⁰²

Oppenheim accepted a central tenet of Austin's theory – i.e. the need for material sanction in the law – but claimed that Austin had simply confused the nature of sanction in international law, which relied on mechanisms of self-help rather than centralised authority.¹⁰³ Others, however, played down the differences between national and international law. For instance, Lawrence claimed that even at the domestic level the 'command theory' had been discredited, with the recognition that public opinion had replaced the need for physical force as the core of juridical sanction.¹⁰⁴ Similarly, perhaps the archetypal legal positivist, WE Hall (1835–1894), argued that the sanction of international law lay in international public opinion rather than

⁹⁴ Anghie, note 5 at 47 (emphasis added).

⁹⁵ Anghie, note 5 at 48.

⁹⁶ *Ibid.* (emphasis added).

⁹⁷ Triepel makes this point explicitly: Triepel, *Völkerrecht*, note 86 at 56.

⁹⁸ Westlake, note 40 at 11–15; John Westlake, *International Law: Part I, Peace* (CUP 1904) 7–8.

⁹⁹ Westlake, note 40 at 16.

¹⁰⁰ Westlake, note 40 at 78.

¹⁰¹ Oppenheim, note 43 at 317, 331; see also Oppenheim, note 91 at 3–7.

¹⁰² Oppenheim, note 43 at 331 (emphasis added).

¹⁰³ Oppenheim, note 91 at 11.

¹⁰⁴ Lawrence, note 48 at 20–23.

organised force.¹⁰⁵ International law was thus clearly less perfectly formed than domestic law, but this difference did not denigrate the former's categorisation as law per se.

In all, there was widespread acknowledgement that, lacking centralised organs to embody this societal or community will, the international system was less well developed than domestic legal orders. But whilst this might have detracted from the material completeness of international law it did not undermine its conceptual autonomy as such.¹⁰⁶ There was still a sufficient similarity between domestic and international legal orders in order to make the comparison; as Westlake noted:

[S]tates live together in the civilised world substantially as men live together in a state, *the difference being one of machinery*, and we are entitled to say that there is a society of states and a law of that society, without going beyond reasonable limits in assimilating variant cases to the typical case.¹⁰⁷

However, this observation is revealing of a second idea crucial in sustaining this vision for legal autonomy: the idea of international law's development possessing a clear teleology. By claiming that international law's structural dissimilarities compared to domestic law related to its material or institutional underdevelopment, this provided a 'scientific' means for predicting the future evolution of international law. Though many international lawyers had answers to how international law could be enforced in a material way in a decentralised legal order – for example, Oppenheim's reliance on self-help – most drew also on historical and teleological argument in order to demonstrate how international law would develop a more centralised architecture in future.¹⁰⁸ By claiming that international law's structural dissimilarities compared to domestic law related to its material or institutional underdevelopment, this provided a means by which to account for the dissimilarity between international and domestic legal orders whilst at the same time strengthening the basis of the comparison itself.

This teleological argument underpins the sociological claim. The two rely on each other: it was only by acknowledging international society as similar to domestic states that late-nineteenth and early-twentieth century jurists could sustain the idea that it was binding as positive law in the same way; but it was only in assuming that international law would necessarily develop in the future to more fully approximate this domestic paradigm that they could sustain the basis of the comparison in the first place. By introducing teleology into the argument Austin's criticism can be turned on its head as a means of response; international law's weaknesses help prove its similarity to the 'typical case'.

One can clearly see here the influence of the historical jurisprudence developed by Maine, the predecessor of Oppenheim and Westlake in the Whewell Chair at Cambridge.¹⁰⁹ The use of such evolutionary argument allowed lawyers to dismiss Austin, without undermining the basis of the comparison between international and domestic legal orders. Simply by placing his command theory on a linear historical trajectory, they were able to account for positive international law, like the 'law of nations' tradition before it, as an earlier (and imperfect) stage of societal development.¹¹⁰ As Maine was forced to conclude:

¹⁰⁵ William Edward Hall, *A Treatise on International Law* (2nd edn Clarendon Press 1884) 14–15. See also a similar view espoused by the American jurist, Elihu Root: Elihu Root, 'The Sanction of International Law' 2 *AJIL* (1908) 451–457. See also Koskenniemi, *Gentle Civilizer*, note 23 at 82–83, on the presumption of an inherent sociability underlying Hall's position.

¹⁰⁶ Westlake, note 40 at 12.

¹⁰⁷ Westlake, note 40 at 7 (emphasis added).

¹⁰⁸ Oppenheim, note 43 at 317–318.

¹⁰⁹ As Berman notes, this historicist approach seemed primarily to be aimed at tempering the more nihilistic implications of Austin's claims, but without 'recourse to the more murky [sic] (and less legitimate) forms of natural law thinking'. Harold Berman, 'World Law Transcendent' 54 *Emory Law Journal* (2005) 53–77 at 55.

¹¹⁰ Maine, note 32 at 53. For a detailed exposition of Maine's theory in this respect, see the arguments of Sylvest, note 20 at 42–43.

The want of coercive power is, in fact, the one important drawback which attends all attempts to improve International Law by contrivances imitated from the internal economy of states, by something like legislation, and by something like the administration of law by organised tribunals.¹¹¹

5. Straw Men, Scapegoats and the Claim to Legal Autonomy

This attempt to correct Austin's mistakes, just as Triepel and Anzilotti attempted to correct Jellinek's, nevertheless comes at something of a high price. However crude Austin's command theory might have been, in their attempts to refute him many late-nineteenth century jurists also, at least in part, subtly buttress his main argument. In making the comparison between international and domestic legal orders and accounting for the difference between them, these jurists set international law up against a command-based ideal. They might have argued that Austin had misunderstood the basis of sanction in international law (e.g. Hall, Lawrence, Oppenheim), confused a condition of the possibility of international law with the current state of international organisation (e.g. Westlake), or just thought him overly pedantic in what could constitute law in the first place (e.g. Lawrence). But for all concerned, a collective anxiety remained as to the fragility of the edifice of international law as a fledgling order of positive law. The lack of organised and centralised mechanisms for enforcing, adjudicating upon or developing the law appeared – whatever way they could justify it – as international law's distinct institutional weakness or imperfection.¹¹²

To be clear, my point is not to endorse an Austinian understanding of international law. Rather, I seek to show how its main flaw has been overlooked. By accepting a concept of law (however modified or qualified) based on domestic experience, most late-nineteenth century jurists dealt mostly with the empirical observations underpinning Austin's theory, often oversimplifying its central point;¹¹³ but also missing its overall conceptual weakness too. It is true that Austin saw the study of jurisprudence as concerned solely with the study of positive law, and that, for him, positive law could only be derived from the will of the sovereign. However, at no point did Austin deny that what he classified as positive morality was any less binding than positive law (nor in fact did Austin deny that there was such a thing as natural law). However, he thought that legal science should be concerned to study only those laws which actually pertained in any given society in an observable sense – otherwise, one risked substituting one's own moral sensibilities for rules actually in force. As he noted:

Grotius, Puffendorf, and the other writers on the so-called law of nations, have fallen into a ... confusion of ideas: they have confounded positive international morality, *or the rules which actually obtain among civilized nations in their mutual intercourse*, with their own vague conceptions of international morality as it *ought to be*, with that indeterminate something which they conceived it would be, if it conformed to that indeterminate something which they call the law of nations.¹¹⁴

As is clear from this paragraph, Austin clearly saw international law as consisting of rules of conduct applicable to states, but saw a danger of distortion if one were to theorise it on the same basis as either natural law or positive law. Austin's purpose was one of classification, believing that a better understanding of different forms of law would lead to their improvement – he, like his mentor, Bentham, having a clear preference for the certainty and efficacy of positive law.¹¹⁵ In that respect his classification of international law (and domestic constitu-

¹¹¹ Henry Sumner Maine, *International Law: A Series of Lectures Delivered Before the University of Cambridge 1887* (John Murray 1888) 213.

¹¹² Lawrence, note 48 at 252 and generally.

¹¹³ Lobban, note 23 at 80.

¹¹⁴ Austin, note 74 at 222 (emphasis added).

¹¹⁵ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (JH Burns, HLA Hart (eds) Athlone Press 1970). In fact, Bentham had made similarly critical remarks about the weakness of international

tional law) as positive morality was not to suggest that the sovereign was free from any limitations, nor to deny that international law (even if he believed it should be referred to as positive morality) did not bind sovereign states.¹¹⁶

My point here is not that Austin's conceptualisation of domestic law's binding force was correct – the deficiencies of his approach as a conceptualisation of legal normativity generally have been set out convincingly by HLA Hart, amongst others¹¹⁷ – but rather that if one sets out to demonstrate that international law can be theorised as a coercive system by reference to a paradigm of legality developed in a domestic context, then something like the Austinian challenge will arise as a challenge to the cogency of the comparison. As Anghie notes, Austin had already anticipated, for example, Oppenheim's argument of the common basis of custom in all forms of law; his point was merely that it would remain (for him) a form of positive morality, rather than law, until it had been recognised in common law (by a court) or statute (by a legislature).¹¹⁸ That it would be better if international law evolved to introduce central organs designed to enhance this element of legal certainty was rarely contested by international lawyers at the time, or by many since.

Ultimately, by trying to account for international law's source and authority using concepts derived from domestic legal experience the late-nineteenth century professionals erected a view of positive international law as a fragile edifice, craving the legal certainty of autonomous law-giving, adjudicating and enforcing institutions evident in the paradigmatic legal archetype drawn from domestic experience.¹¹⁹ And by arguing that nineteenth century jurists had failed to find a convincing ground for international law's autonomy (rather than questioning the basis on which this autonomy was theorised) the exact same problem faced the *interbellum* jurists and explains why the discipline fractured in the way that it did. For sceptics like Morgenthau the answer was to deny the possibility of autonomy in international law; for a progressive mainstream, following in the footsteps of e.g. Lauterpacht, the desire for legal autonomy has become a postponed goal, requiring the building of institutional structures capable of functionally compensating for international law's formal constitutional weakness. As Lauterpacht was to put this:

International law can form part of jurisprudence only when its present imperfections are regarded as transient. These imperfections are fundamental, and it is only because they are deemed to be provisional that it is possible to treat international law as part of jurisprudence. Once they are regarded as permanent, international law vanishes completely from the horizon of jurisprudence.¹²⁰

law conceived not as a positive law. See remarks quoted in Mark W Janis, 'Jeremy Bentham and the Fashioning of "International Law"' 74 *AJIL* (1984) 405–423 at 411–412. There are important differences in their respective approaches, however. On this point, see further d'Aspremont, note 57 at 47–48.

¹¹⁶ See in particular Thomas Broden Jr, 'The Straw Man of Legal Positivism' (1958–1959) 34 *Notre Dame Law Review* 530–555 at 531–535. That an adoption of Austin's jurisprudential frame need not necessarily lead to a denial of the existence of international law is no more evident than in the work of Thomas Holland, who not only wrote an influential text on the study of jurisprudence (Thomas Holland, *Elements of Jurisprudence* (12th edn OUP 1916) which adopted Austin's central claim that international law had only moral force, but he was also a celebrated international lawyer of his time (occupying the Chichele Chair at Oxford for 36 years, from 1874–1910) and a leading member of the *Institut*. Whilst he saw international law as law by analogy only, Holland differed from Austin only in his classification of international law as 'private law writ large' (at 134–135, 394).

¹¹⁷ E.g. HLA Hart, *The Concept of Law* (2nd edn OUP 1994) 18–25.

¹¹⁸ Anghie, note 5 at 46.

¹¹⁹ It was the troubling nature of this paradox which pushed Holland to describe international law as the 'vanishing point of jurisprudence' – the point being that a command-led view of the law seemed to simply make international law vanish into (super-)state law. Holland, note 116 at 369.

¹²⁰ Hersch Lauterpacht, 'The Place of International Law in Jurisprudence' in Elihu Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht, Volume 1: the General Works* (CUP 1970) 193–215 at 208. (Paper originally published in French as Hersch Lauterpacht, 'Règles générales du droit de la paix' 62 *Recueil des Cours* (1937) 95–422). Lauterpacht was making reference here to Holland's assertion that international law was the 'vanishing point of jurisprudence'. Holland, note 116 at 369.

Such a conclusion seems inevitable if one attempts, as many modern international lawyers do, to follow in the footsteps of an analytical jurisprudence tradition which itself has sought to explain international law's reality according to an ideal of legality developed with reference to domestic legal orders.¹²¹ To explain international law as an ordered, hierarchical legal order, in this way seems to highlight its weaknesses and primitiveness at the institutional level – as both Kelsen and Hart were both later forced to admit.¹²² International law's apparent 'immaturity', particularly its failings when compared to national legal systems, has remained a source of constant apologia in international legal scholarship. Such anxieties seem ingrained into the very substance of international law as a professional discipline and academic practice, which has to constantly reassert its relevance as a controlling force in international affairs. However, that international law should act as a controlling force in this way is an assumption which has undergone little scrutiny within the terms of the inherited theoretical frame which has been bestowed from classical to modern international law.

6. Conclusion

That modern international law moves within this inherited frame is difficult to deny. Rather than revisit the assumptions upon which modern international law has been erected, the modern discipline exists responding to a challenge of the denial of its autonomy according to a concept of legality ill-suited to ground any such claim. Classical jurists' attempts to account for international law against this paradigm had built a 'straw man' figure of Austin's theory as a denial of the law's autonomy, without seeing its conceptual weakness as a tool by which to explain such autonomy in international law. *Inter-bellum* jurists distanced their own approaches from a 'straw man' figure of classical legal positivism, without seeing how their own approaches adopted the same assumptions which had failed pre-war jurists. And it is of little surprise that the 'modern positivism' which characterises much of today's mainstream scholarship has become vulnerable to a further, post-modern attack. As Koskenniemi has argued, burying the knowledge of this theoretical incongruence behind a veil of institutional pragmatism, many modern jurists have assumed 'that frustration about theory can be overcome by becoming technical, or doctrinal'.¹²³ In that sense, the scapegoat of a demonised classical legal positivism lives on in the modern psyche as the embodiment of the problem to which modern jurists are themselves unable to convincingly respond: the problem of legal autonomy in a world of sovereign states.

¹²¹ I reflect on this more in Richard Collins, 'Modernist-Positivism and the Problem of Institutional Autonomy in International Law' in Richard Collins, Nigel White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 22–47.

¹²² For Kelsen's views on the primitiveness of international law, see Hans Kelsen, 'Théorie du droit international public' 84 *Recueil des Cours* (1953) 1–201 at 31–34, 131. He expressed this view most explicitly, perhaps, in his political writings: e.g. Hans Kelsen, *Law and Peace in International Relations, The Oliver Wendell Holmes Lectures* (Harvard University Press 1942) 51–55 especially. See Hart's discussion of international law, Hart, note 117 at 213–237. The perception of international law as a primitive or otherwise deficient legal order has been a recurring theme in international law scholarship. E.g. Angus Campbell, 'International Law and Primitive Law' 8 *Oxford Journal of Legal Studies* (1988) 169–196.

¹²³ Koskenniemi, note 5 at 687.

KEY WORDS: constitutional states, legal positivism, relations between law and morality. 1. INTRODUCTION. 1 Of course, in contemporary debate constitutionalism is not the only antagonist of legal positivism; contemporary natural law theories, such as the one of John Finnis, are important examples of anti-positivistic stances which don't belong to constitutionalism: see J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980). Later on in this paper, a short mention will be made to the opposition between legal positivism and natural law theories, but a closer investigation of the criticisms made out by Finnis and other contemporary natural lawyers to legal positivism would go beyond the scope of this paper. Legal positivism is a philosophy of law that emphasizes the conventional nature of law—that it is socially constructed. According to legal positivism, law is synonymous with positive norms, that is, norms made by the legislator or considered as common law or case law. Formal criteria of law's origin, law enforcement and legal effectiveness are all sufficient for social norms to be considered law. Legal positivism does not base law on divine commandments, reason, or human rights. As an historical matter, positivism arose in opposition to classical natural law theory, according to which there are necessary moral constraints on the content of law. Legal positivism does not imply an ethical justification for the content of the law, nor a decision for or against the obedience to law.