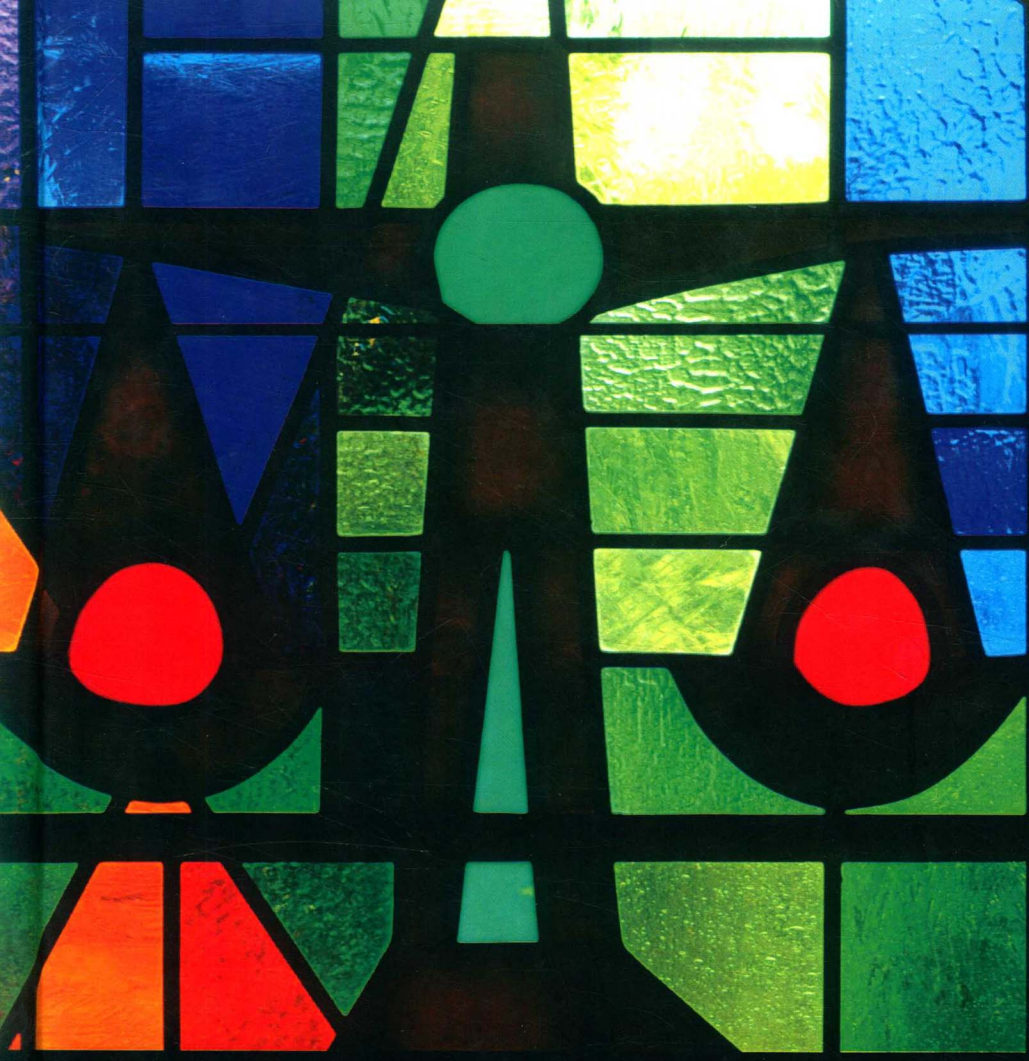

Philosophy of International Law

SECOND EDITION

Anthony Carty

Philosophy of International Law

Second Edition

Anthony Carty

EDINBURGH
University Press

Edinburgh University Press is one of the leading university presses in the UK. We publish academic books and journals in our selected subject areas across the humanities and social sciences, combining cutting-edge scholarship with high editorial and production values to produce academic works of lasting importance. For more information visit our website: edinburghuniversitypress.com

Edinburgh University Press Ltd
The Tun – Holyrood Road
12 (2f) Jackson's Entry
Edinburgh EH8 8PJ

First edition published in 2007

Typeset in 11/13 Adobe Sabon by
IDSUK (DataConnection) Ltd, and
printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon CR0 4YY

A CIP record for this book is available from the British Library

ISBN 978 0 7486 7550 0 (hardback)
ISBN 978 0 7486 7551 7 (paperback)
ISBN 978 0 7486 7552 4 (webready PDF)
ISBN 978 0 7486 7553 1 (epub)

Acknowledgements

The present volume is a second edition of a book which appeared ten years ago. The questions which I set for the first edition have continued to preoccupy me since, and indeed continue to preoccupy me. I have adapted and integrated into the second edition parts, sometimes considerable, of some especially relevant articles and book chapters which I wrote in the intervening time. There are two key articles written before 2007 which are, in part, adapted to chapter 2 of the second edition. In addition, the first edition has been considerably restructured to allow realigning and reformulating of the questions which preoccupy me.

Carty, 'The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law', *European Journal of International Law* (1998) 344–54.

Carty, 'Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law', *European Journal of International Law* 14 (2003) 817–41.

Carty, 'The Moral Theologian, Oliver O'Donovan and International Law', *Political Theology* 9.3 (2008) 339–62.

Carty, 'From a Unipolar to a Multipolar World. A Post-Bush Presidency for a Post-Western World', in *Power and Justice in International Relations: Interdisciplinary Approaches to Global Challenges*, Marie-Luisa Frick and Andreas Oberprantacher (eds) (Routledge, 2009) 13–28.

Carty, 'Vattel's *Natural Liberty of Conscience of Nations in a New Age of Belief and Faith*', in *Vattel's International Law in a XXIst Century Perspective / Le droit international de Vattel vu du XXIe siècle,* Vincent Chetail and Peter Haggenmacher (eds) (Brill, 2011) 189–210.

Carty, 'Doctrine versus State Practice in International Law', in *Oxford Handbook of the History of International Law* ed. A. Peters and B. Fassbender (Oxford University Press, 2012) 972–96.

Carty and Zhang, 'From Freedom and Equality to Domination and Subordination, Feminist and Anti-Colonial Critiques of the Vattelian Heritage', *Netherlands Yearbook of International Law* 43 (Springer, 2012) 53–82.

Carty, 'From Classical Natural Law to "New Natural Law": Where Natural Law Becomes Ideology', in Russell Wilcox and Anthony Carty, *Natural Law and Comparative Law* (Simmonds and Hill, 2015) 375–96.

Contents

Introduction: What Place for Doctrine in a Time of Fragmentation?

A DEFINITION OF DOCTRINE AND ITS PRESENT PROBLEMATIC IN PUBLIC INTERNATIONAL LAW

I intend to begin simply by referring to two recent French works, the *Dictionnaire encyclopédique de théorie et de sociologie du droit* and a colloquium organised by the legal history department of the University of Picardie (Amiens), *La Doctrine juridique*. The first provides us with an authoritative and vital distinction between legal doctrine and legal dogmatics, while the second explains the problematic of keeping the former alive.

The French dictionary distinguishes doctrine from 'dogmatique juridique' (legal dogmatics). The former is defined as 'opinion, theory or thesis', while the latter means the domain of the science of law concerned with the interpretation and systematisation of juridical norms.[1] An essential element of doctrine is that it is supposed to have authority. The theory, opinion, and so forth must be capable of exercising influence. Coming from the tradition of Roman law and canon law, particularly in French and German legal communities, doctrine has authority not as a source of law as such, but as freely and spontaneously held opinion, which is likely to become accepted. Since the seventeenth century the nature of this authority has become contested. It is seen as rooted in theories of *natural right* that were increasingly regarded as the ideological apparatus of a dominant bourgeois class.

Legal dogmatics works within the assumptions of legal positivism, particularly with respect to the sources of law. It is concerned with the interpretation of statutes and jurisprudence. There may be,

1. *Dictionnaire*, 2nd edition, gen. ed. A. J. Arnaud (1993), entries by Sylvie Cimamonti and Aulis Aarnio, respectively.

within this framework, theories of interpretation and methods for the systematisation of written and customary law. However, this supplementary role for the legal writer, whether an academic or practitioner, is not challenged one way or the other by the controversies surrounding doctrine. Theories of interpretation and systematisation do not have to operate only with logic, but any explicit reference to values will be confined to those that it can be argued are immanent to the system of legal norms actually accepted as legally binding in a society. This type of legal activity is an inevitable and integral part of any positive legal order, however narrowly understood.

The crisis facing doctrine, on the contrary, appears to be fatal. It is attributable above all to the collapse of the natural law or law of nature background to both continental civil law and international law that can be taken to have been completed in the West, especially in Europe, by the 1950s, notwithstanding a brief renaissance of natural law after the Second World War. This tradition had allowed the jurist, since the glossators and canonists of the medieval period, to resort freely to notions of natural justice, equity, personal responsibility, public order, harmony, and so forth to develop freely otherwise fragmentary pieces of local custom, regional law, judicial precedents, and even general legislation.

In a sense the tradition was pre-democratic and pre-liberal, in that it is always assumed that somehow there will be present a group of erudite and morally serious people who are able to wrap up legally significant human actions in the texture or framework of reasonableness. It is also assumed that standards are universal and everywhere the same, not only in space but also in time. This favours an old-fashioned form of inter-disciplinarity, which now appears as mere eclecticism. The doctrinal writer will look to history, philosophy, and even literature to support what appears to him just and reasonable in the circumstances.

It is, in the view of the Picardy study on *La Doctrine*, above all Kelsen with his Pure Theory of Law, who is easily recognisable as taking away the foundation for the working method of *doctrine*.[2] According to the Pure Theory of Law, theories of natural law or equity merely conceal the personal preferences of the authors and are subjective. Insofar as the structure of a legal order contains gaps and ambiguities, these can only be filled through political decision, in

2. See, in the Picardy Colloquium, Annick Perrot, *La Doctrine et l'hypothèse du declin du droit* (1993) 180, the entire article, but esp. 198 f.

which the individual jurist has no special part to play. Liberal, voluntarist democracy means that, to find law, one has to return to the primary means that the legal order has agreed for the creation of new norms. In the Pure Theory of Law these primary means do not have to be democratic, although Kelsen himself was a democrat. Given an increasingly regulatory function for law, in Kelsen's view, the details of social life to be so regulated would have to be dealt with by the appropriate public legal authority, whose success would be more or less a matter of effectiveness. Deficiencies could be best remedied by giving authority to the judiciary, an extension of the State, or, as Kelsen preferred, the legal order, to take the necessary additional decisions. Allied to the Pure Theory of Law, as an enemy of the natural law schools, comes Scandinavian realism, which also serves to bury the traditional role of doctrine. Not only does this school attack natural law and so on on epistemological grounds, but it uses the same weapons to attack the basic concepts of positive law that it sees as a legacy of the natural law tradition. These include the concepts of subjective or individual right, the will of the State or of the legislator. The Scandinavian realists would replace such activity with a form of legal sociology that entailed identifying law as a psychological datum, evidence of a sense of obligation in a society, that people felt themselves to be bound by rules that they regarded as law. Instead of the concept of validity, the lawyer should work with a theory of verification that allowed him to identify that there was a social belief that rules existed that were binding upon the people who held the belief.[3]

Given the present structure of international law, which is still primarily customary, this gives a full place to writers, but only within a framework of legal dogmatics.

THE CLASSICAL PLACE OF DOCTRINE IN INTERNATIONAL LAW

The aim of this introduction of the figure of Paulus Vladimiri will be to illustrate how, during the classical medieval period, the distinction between doctrine and dogmatics was clearly understood precisely in the sense outlined in the *Dictionnaire* discussed in the first section. It is only with the coming of the modern period that the former comes to be swallowed up by the latter.

---

3. *Dictionnaire*, entry on Realism, Scandinavian, by Enrico Pattaro. A. Ross produced a *Textbook of International Law* in 1945.

Vladimiri and the 'Higher' Medieval Period

Vladimiri was anxious to carve out a proper space for judicial practice against the hegemonic claims of doctrine in medieval legal disputations. At the same time his doctrinal method, that is the types of material upon which he relied to develop his argument, shows clearly how this method rested upon certain epistemological assumptions that have not been regarded as valid since the classical period. It mattered enormously to Vladimiri, involved in a dispute with the German (Teutonic) Order on behalf of the Polish king, to argue that the proper resolution of the conflict had to be through a judicial process and not merely a reliance upon doctrine. To demonstrate this, he made a clear distinction between the two, which remains valid in a legal culture where it is the claims of judicial practice that are hegemonic. To leave disputations about heresy or the rights of infidels against Christians in the hands of doctrinalists is very dangerous because the nature of doctrine or of science is that it excludes all doubt, and therefore does not accept proof to the contrary, since it is from propositions, which are known by themselves.[4] Whether a war against a heretic or infidel is just and can therefore be undertaken involves questions of evidence as well as of doctrine. Whether in a particular case there is a legitimate cause of attacking, and hence an illegitimacy in resisting, are questions that cannot be answered 'except by way of justice, namely by proof brought in law or by sentence and in consequence by a legitimate declaration'.[5]

Vladimiri's method receives a very lucid analysis from Stanislaus Belch. Here I wish to highlight the place that is nonetheless left to doctrine as against judicial practice. For instance, confusion about what may be done by Christians to infidels arises from a factually incorrect assumption that all infidels commit blasphemy, persecute Christians, and seize their territories. Factually inaccurate assumptions lead to pseudo-doctrinal justifications of what can be done to infidels. Where none of this has been proved, the question arises, which doctrine can appropriately answer: what can be done to infidels as such? The answer comes from natural law: they are entitled to be left in peace. It is the nature of the Christian faith that it is grounded in love. Therefore, nothing coercive can be done in its

4. Ludwig Ehrlich (ed.), *Works of Paulus Vladimiri (A Selection)* (1968) Vol. II, from 1st Tractatus (1417) 203.
5. Ibid., Vol. I, Controversy with Frebach, Quoniam Bror (1417) 308.
6. Stanislaus F. Belch, *Paulus Vladimiri and his Doctrine Concerning International Law and Politics* (1965) Vol. 1, 213–14.

name.[6] The correct question for doctrinal debate was whether 'the infidel nations have the same human rights as the Christians'. To answer this question meant the establishment of the truth of certain principles that alone could serve in any argument as a major premise.[7] This involved Vladimiri in sifting through the opinions of the great doctors of the Church, some of whom did not share this doctrine on the rights of infidel nations. He applied a quite simple style of reasoning to reach his goal. For instance, there was scriptural support (c.3, D 45) concerning directly the prohibition of force in the conversion of the Jews. There, the essence of this canon is that it applies equally to the conversion of all infidels. Again, to take another example, Vladimiri's opponent Vrebach takes Paul's admonition that Christians should not fight infidels to mean not those who recognise the dominion of the Church and the empire. Vladimiri objects that in law we do not usually make distinctions, and so we should not here.[8]

The Renaissance Universality of Resemblances

The justification for this rather extensive treatment of a medieval figure is that it is now widely accepted in the scholarship that modern figures who may compete for the 'fatherhood' of international law, above all Vitoria and Grotius, belong firmly within this medieval world. Haggenmacher emphasises the pre-modernity of Grotius. That is, Grotius's work, which is mainly about the doctrine of just war, is the culmination of a medieval scholastic tradition, which depended upon a medieval and classical Greek concept of natural law. The main feature of this doctrine is that *Man* is embedded in a universal society and in the *Cosmos*.[9] Equally, Vitoria, who was concerned with the same question as Vladimiri, approached it against the backdrop of a presumed universal order. As Bartelson puts it,

> The question was not how to solve a conflict between competing sovereigns over the foundation of a legal order, but how to relate concentric circles of *resemblant* laws, ranging from divine law down to natural and positive law. In his effort to work out a coherent relationship between them, Vitoria relies on a lexicon of legal exempla, in which a wide variety of textual authorities are invoked.[10]

---

7. Ibid., 233.
8. Ibid., 233–6.
9. P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (1983).
10. Jens Bartelson, *A Genealogy of Sovereignty* (1995) 128; emphasis in the original.

The transition from the medieval to what Bartelson calls the classical period, from the seventeenth century at the latest, already disturbed the place of doctrine, if not among international lawyers, then certainly among serious students of international society. Bartelson provides a very illuminating account of the epistemological foundations of the transformation. The essence of this perspective is, of course, a retrospective reflexivity (thanks to a neo-platonic revival). Renaissance knowledge became a knowledge of resemblances between entities whose unity had been shattered. Bartelson sums up what is, in effect, the method of Grotius in the following phrases: 'Through the resemblance of events and episodes it becomes possible to describe and discuss present affairs by drawing on the almost infinite corpus of political learning recovered from antiquity, without distinguishing between legend and document';[11] it becomes possible to describe the deeds of a Moses or a King Utopus in the same terms as one describes 'the recent behaviour of Cesare Borgia or Henry VIII, because it is assumed that they share the same reality, and occupy the same space of possible political experience'.[12] It is inevitable that such a conception of legal order will be, in the modern sense, monist. Neither Vitoria nor Grotius will countenance any opposition between the kind of law that applies between States and within States, since this would imply an absence of law.[13]

THE SOVEREIGN: OR THE OBJECTIVITY OF SUBJECTIVE INTEREST

The epistemological break with the medieval–Renaissance picture supposes a combination of political and philosophical events. The so-called modern State arising out of the wars of religion of the sixteenth and seventeenth centuries is taken as traumatised by its bloody foundation and hence silent about its origins. It becomes the subject of Descartes' distinction between the immaterial subject and the material reality that it observes, classifies, and analyses. Knowledge presupposes a subject, and this subject, for international relations, is the Hobbesean sovereign who is not named, but names, not observed, but observes, a mystery for whom everything must be transparent. The problem of knowledge is that of security, which is attained through rational control and analysis. Self-understanding is

11. Ibid., 108.
12. Ibid., 110.
13. Ibid., 130–1. Bartelson applies these remarks to Vitoria.

limited to an analysis of the extent of power of the sovereign, measured geopolitically. Other sovereigns are not unknown 'others' in the modern anthropological sense, but simply 'enemies', opponents, with conflicting interests, whose behaviour can and should be calculated.

The purpose of knowledge, once again, is not to re-establish resemblances in a fragmenting medieval Christian world, but to furnish dependable information with which to buttress the sovereign State, whose security rests precisely upon the success with which it has banished disorder from within its boundaries on to the international plane. Mutual recognition by sovereigns does not imply acceptance of a common international order, but merely a limited measure of mutual construction of identity resting upon an awareness of sameness, an analytical recognition of factual, territorial separation, combined with a mutual accord of reputation, which, so long as it lasts, serves to guarantee some measure of security.

However, the primary definition of State interest is not a search for resemblances, affinities of religion, or dynastic family. Instead, it is a matter of knowing how to conduct one's own affairs, while hindering those of others. Interest is a concept resting upon detachment and separation. Society is composed of a collection of primary, unknowable, self-defining subjects, whose powers of detached, analytical, empirical observation take absolute precedence over any place for knowledge based on passion or empathy, whether oriented towards sameness or difference.[14]

THE ROLE FOR DOCTRINE IN THE CLASSICAL THEORY OF SOVEREIGNTY

This structure of sovereign relations remains the basic problematic that international lawyers face today. The origin of the State is a question of fact rather than one of law. One may not enquire into its composition or nature. Law is whatever the sovereigns choose to define as such through their will, in treaties or customs as implied treaties. The instability of this supposed legal order is patent. The status of mutual recognition as a means of assuring security is unstable. There is no agreement about the legal significance of recognition. International law is binding but not enforceable. Adjudication exists, but its impact is sporadic. Fundamentally, the problem can be encapsulated in a

14. Ibid., summary of the whole of chapter 5, 'How Policy Became Foreign', 137–85.

sentence. There is what all the parties are willing to identify as law, but there is auto-interpretation of the extent of obligation.

Given the preponderance of the State, the role for doctrine has become marginalised and confined to the question of whether international law is law at all. Perhaps the majority view among the profession is that the question is unnecessary. Emer de Vattel made the point that international law is a law precisely suited to the nature of the State, as a form of independent corporation. Institutional defects in the character of international law, viz. the absence of legislature, judicature, and so on, do not affect the basic need for and suitability of inter-State law for law among States. So Jouannet sees no difficulty in the Vattelian sovereign being integrated into an international legal order. The lack of difficulty is hardly surprising because this new legal order is made by States specifically for their relations with one another. The crucial feature of her argument is that the character of the sovereign is corporate. Because sovereign nations deal only directly with one another, they can only see one another as societies of men of whom all the interests are held in common. It is not a law of nations derived from human nature that rules them, but a law derived from the particular character of the State.[15]

The difficulty remains, accepted by Bartelson and Jouannet, that there is no superior juridical order immediately binding upon States. They agree that sovereignty includes the right to decide the extent of an obligation. Again, both may quote Vattel that 'each has the right to decide in its conscience what it must do to fulfil its duties; the effect of this is to produce before the world at least, a perfect equality of rights among Nations'.[16]

Jouannet describes Vattel as introducing the logic of Hobbesean and Lockean individualism into international law, liberty, and sovereignty that are not unlimited but not subject to any higher order. Bartelson would rather describe this order as the objectivity of subjective interest.

This dilemma is what is meant by the question of whether international law is binding. It troubled doctrine in international law as long as a natural law or Law of Nature tradition continued to have any life in it, thereby posing the question of whether norms or values could have objective character. It was a main preoccupation of international law

15. E. Jouannet, 'L'Emergence doctrinale du droit international classique. Emer de Vattel et l'école du droit de la nature et des gens', PhD thesis, Paris (1993) 447–8, 458–9.
16. Ibid., 472–5; Bartelson, 'How Policy Became Foreign', 194–5.

doctrine in the nineteenth century and early twentieth, encapsulated in debates about whether (1) international law was binding, (2) whether treaties were legal instruments that had to be kept, and (3) whether the sovereignty of States could be legally limited or restricted.

When the traditions of natural law, even of a Vattelian character, evaporated after 1945, there seemed to be nothing left but a legal pragmatism, until the so-called critical legal debate resurrected the issues. The critical legal debate, particularly associated with Kennedy and Koskenniemi, appears to resurrect the role for doctrine at least in the narrow and marginal sense described here. They agonise about the paradox of the need for an international order if equally sovereign States are to have any peace with one another. At the same time they recognise that an objective international order, one that is binding upon its subjects albeit not created by them, is incompatible with the structure of State sovereignty, taken from Vattel, that they do not dispute.[17] This debate now takes upon itself a post-epistemological turn insofar as the parties debate through rhetorical devices that are neo-positivist and neo-naturalist, in that they do not willingly espouse the foundations of either school, even if they continue to contrast the language of the two schools.

In my view, the critical legal approach is useful as a heuristic device for exposing the failure of practitioners to ground appeals to rules of law in *actual*, rather than supposed, evidence of State consent, or in *actual*, rather than concealed or disguised, reference to objective values. However, its 'postmodernism' (its opposition to the idea of any fundamental or absolute values) does not allow it to resurrect any creative role for doctrine, even less so Vladimiri's. Their own sharing of liberal value scepticism leaves critical legal studies with no more than repetitive demonstrations that international law decisions (whether of courts or of States) are precisely that – decisions – so that international lawyers must accept responsibility for the political character of their decisions, in the sense that they are free, undetermined by prior legal rules. Indeed, debate with critical

17. The literature on this subject is now legion. I offer a survey of the main characters in Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law', *The European Journal of International Law* 2 (1991) 66–95. The continued dynamic of this debate is illustrated by the opening and closing paragraphs of John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', *Ox. JLS* 16 (1996) 85–128. He draws a distinction between the positivist statist concept of international society and a natural law orientation that gives a communitarian concept of the society.

theorists has revealed that there is a partiality for the authority of the State that precludes any return to naturalism or any possible contemporary equivalent. For instance, this may be seen in a discussion between Allott and Koskenniemi on this point.[18] I will juxtapose their positions from quotations of their work. According to Allott, international law does not recognise the total social process by which reality is formed, but only that of the interacting of the governments of State societies, as if they constituted a self-contained and self-caused social process. This is precisely the sense of epistemological positivism that Bartelson has focused on in Descartes and Hobbes. Koskenniemi objects that statehood functions precisely as that decision-making process that, by its very formality, operates as a safeguard that different (theological) ideals are not transformed into a globally enforced tyranny.[19] It is obvious that Koskenniemi imposes upon existing State structures the liberal idea of a political order as arbitrator. However, he nowhere demonstrates that States function internationally in this way, even those that suppose themselves to be liberal. Indeed, Tasioulas points out how Koskenniemi's further response to this encounter leads to the odd conclusion that there is a 'tendency of some of these recent trends to yield conclusions surprisingly congruent with Weil's positivist stance'.[20] So, the problem posed by the classical doctrine of sovereignty remains, only now it seems that international lawyers, in a 'postmodern' epoch, are bereft of any tools with which to complement or, alternatively, deconstruct the State. This is the sense in which I pose the question of whether there is any future for doctrine in a world beyond positivism, namely beyond the exclusive role of States as law-definers?

AND MEANWHILE, IN ENGLAND?

I have argued:

> the theory of international law was deliberately 'killed off' by the 'greats' of the discipline in the 1920s and 1930s, in particular by Oppenheim, McNair, Brierly, and even Lauterpacht. It was they who laid the

18. See 'Conclusion', British Institute of International Law (ed.) *Theory and International Law, An Introduction* (1991) 119–21.
19. Referring to M. Koskenniemi, 'The Future of Statehood', *Harvard ILJ* 32 (1991) 397 at 407.
20. Tasioulas, 'In Defence of Relative Normativity', 128.

> intellectual foundations for the so-called practitioners' approach to the discipline, and then sent their successors off into the courtrooms.[21]

This statement risks a number of ambiguities, the first of which has to do with the word 'theory'. This has come to mean the rather abstruse application of French poststructuralism to legal formalism, leaving much of the profession baffled, even intimidated, but hardly convinced that a connection had been made with their concerns.[22] Obviously the argument that theory has died out in England, as everywhere else, needs to be restated in several essential elements.

First, theory should be understood to mean the symbolic, or cultural, ethical significance of the body or system of international law in ordering the relations among States. This disappeared in Britain with the shock of the First World War and the rush to institutions to defend humanity against the sovereignty of States. No more eloquent statement of this view has been made than by Thomas Baty:

> The difference between the 19th century and the present becomes vividly apparent if one peruses such a book as Sir R. Phillimore's *Commentaries on International Law*, written in the 1850s. Grandiloquent, discursive, illbalanced, inconclusive as it often is, one feels as one reads its pages the pervasive presence of a conclusive standard of right and wrong. No such moral standard permeates the works of today.[23]

Whether one esteems such figures as Phillimore as thinkers or intellectuals (and clearly Baty did not), they considered themselves as international lawyers as having a responsibility to address statesmen about how the rule of law should prevail in international society. This had nothing to do with being university teachers, because their primary audience was not the university student. Nor does it help to describe them as 'practitioners' without defining what they practiced.

---

21. A. Carty, 'Why Theory? – The Implications for International Law Teaching', in *Theory and International Law, An Introduction*, 75, 77.
22. J. Crawford, 'Public International Law in Twentieth-century England', in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted, Germanspeaking Émigré Lawyers in Twentieth-century Britain* (2004) 681 at 699. 'Self-conscious exercises in "grand theory" in international law are a more recent phenomenon', referring to the work of David (not Duncan) Kennedy, M. Koskenniemi, P. Allott, and S. Marks. These are the theorists mentioned in the last section.
23. T. Baty, *International Law in Twilight* (1954) 10.

The word is as slippery as 'theory'. For instance, Crawford describes Phillimore as an English-educated civilian. His three-volume international law text 'was written by a civilian practitioner and later judge of the Admiralty Court'.[24]

Phillimore's concept of law rested upon an appeal to the spirit of a God-given moral law governing the universe.[25] So, 'Obedience to the law is as necessary for the liberty of States as it is for the liberty of individuals.' Moral truth demonstrates that independent communities are free moral agents, and historical fact demonstrates that they are mutually recognised in the universal community of which they are members. Law is not to be equated with the notion of physical sanction. Instead, one has to judge critically the impact of historical events upon States as free moral persons. So Phillimore's view, writing in 1879, was that European history since the Danish War of 1864 had been very critical. In 1864 there was a violent change of territory and States did not come to assist as they ought to have done. There followed further injuries that States did not assist others to prevent. So in the 1870s we find that Europe is subject to the prevailing notion that 'a state must seek territorial aggrandisement as a condition of her welfare and security'. There may have been little 'theory' underlying these remarks, but clearly he was addressing them to his political leaders, at least one of whom, his friend William Gladstone, may have been expected to have some sympathy. While it is mentioned that he was a judge of Admiralty, he was also a member of the House of Commons in the 1850s when he wrote the first edition of his textbook. An essay by Gladstone may illustrate how a leading Victorian politician understood law and morality in relations among States. 'England's Mission' gave a central place to the equality of independent States. To Gladstone, an immoral policy is a 'vigorous' policy, which excites the public mind, apathetic with the humdrum detail of legislation, thereby covering up domestic shortcomings; it disguises partisan interests as national and enlists jingoist support. The self-love and pride, which all condemn in individuals, damage States as well, destroying their sobriety in the estimation of human affairs, as they vacillate from arrogance to womanish fears:

---

24. Crawford, 'Public International Law in Twentieth-century England', 686 and 689.
25. What follows comes from Carty, 'Why Theory?', 88, with citations omitted.