The Institutional Problem in Modern International Law

Richard Collins

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Introduction

> To the innocent eye, the formal structure of international law lacking a legislature, courts with compulsory jurisdiction and officially organized sanctions, appears very different from that of municipal law. It resembles … *in form though not at all in content*, a simple regime of primary or customary law. (emphasis added)
>
> HLA Hart, *The Concept of Law*[1]

IN AN ESSAY published at the beginning of the new millennium on the role of law in international politics, the distinguished international lawyer, the late Sir Arthur Watts, posed the rather bold question of whether international law was important—and if so, *how and why*?[2] In many ways this is a peculiar question for, as he noted:

> [W]e would not ask the equivalent question: 'is English law important?' … We assume, rightly, that an effective legal system in our own countries *is* an important element in the fabric of society; we take it for granted that such a system, and the rule of law generally, do exist in practice; and we are generally confident that, given our democratic systems, the rules of law which go to make up those systems reflect a fair balance between the competing interests which exist within our own societies … But at the international level there is a sufficient measure of doubt about each of these three elements to raise questions about the importance of international law.[3]

One can certainly question whether all of these assumptions about state-based legal orders are as widely shared as Watts claimed, particularly outside of the Anglo-American world, but in other respects his observation is an astute one. Whilst few international lawyers today would doubt the reality of international law as a legal system in the sense described, there remain persistent doubts and anxieties over the quality of this system, its overall autonomy from the political realm, and hence its capacity to secure the rule of law at the global level.[4]

[1] HLA Hart, *The Concept of Law*, 3rd edn (Oxford, Clarendon Press, 2012) 232.

[2] A Watts, 'The Importance of International Law' in M Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, Oxford University Press, 2000) 5–16.

[3] ibid 5.

[4] See, eg, A Somek, 'From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law' (2011) 18 *Constellations* 567. And see recently many of the contributions to C Ryngaert, EJ Molenaar and SMH Nouwen (eds), *What's Wrong with International Law?: Liber Amicorum A.H.A. Soons* (Leiden, Brill, Nijhoff, 2015).

These sorts of concern are pathological in the modern discipline—understandable, perhaps, bearing in mind the long-standing scepticism that has surrounded international law. For as long as it has been thought of as a legal system on broadly similar terms to domestic law, international lawyers have had to defend the reality, efficacy and, indeed, *importance* of international law in the conduct of international politics.[5] Primarily, this scepticism has focused on international law's peculiar institutional structure, which, when compared to more 'developed' domestic legal orders, lacks any authoritative, centralised means of law-creation, adjudication and enforcement. It was the recognition of this structural difference during the early nineteenth century, for instance, that led the English legal philosopher John Austin to dismiss the rules of international law as a form of 'positive morality',[6] just as it caused the German public lawyer Georg Jellinek, some years later, to re-imagine international law instead as a form of 'external public law' based solely on states' self-imposed restraint.[7] Insofar as twentieth-century theorists have been able to move past these reductionist accounts in order to defend international law on the same terms as municipal law, their efforts have still tended to point towards international law's 'primitive' institutional structure (eg, Hans Kelsen)[8] or, more damningly, have denied it the status of a legal *system* altogether (eg, HLA Hart).[9]

In response, of course, the discipline has grown to develop something of a thick skin, presenting a number of well-rehearsed (though often also somewhat pragmatic) defences: for example, by paraphrasing Louis Henkin's oft-quoted observation that nearly all states obey nearly all of the rules of international law nearly all of the time[10] or, more persuasively

[5] A Carty, 'Why Theory?—The Implications for International Law Teaching' in P Allott et al, *Theory and International Law: An Introduction* (London, British Institute of International and Comparative Law, 1991) 75, at 80. See further discussion in S Besson and J Tasioulas, 'Introduction' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010) 1, at 6–13.

[6] J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 4th edn, revised and edited by R Campbell (London, John Murray, 1873) 188 and passim.

[7] G Jellinek, *Die Rechtliche Natur der Staatenverträge* (Vienna, A Hölder, 1880). However, I borrow the term 'external public law' from Koskenniemi's reading of Jellinek: see M Koskenniemi, 'Legacy of the Nineteenth Century' in D Armstrong (ed), *Routledge Handbook of International Law* (Abingdon, Routledge, 2009) 141, at 145.

[8] For Kelsen's views on the primitiveness of international law, see H Kelsen, 'Théorie du droit international public' (1953) 84 *Recueil des Cours* 1, at 31–34 and 131. He expressed this view most explicitly, perhaps, in his political writings: see, eg, H Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures* (Cambridge, MA, Harvard University Press, 1942), especially at 51–55.

[9] See Hart's discussion of international law in Ch 10 of Hart (n 1) 213–37. The perception of international law as a primitive or otherwise deficient legal order has been a recurring theme in international law scholarship. See, eg, A Campbell, 'International Law and Primitive Law' (1988) 8 *Oxford Journal of Legal Studies* 169.

[10] L Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn (New York, Columbia University Press, 1979) 47.

perhaps, by drawing upon Hart's empirical claim that, regardless of such compliance, no state actually denies the binding force of international legal rules per se.[11] Furthermore, with the significant material expansion and growing institutional complexity of international law witnessed from the latter half of the twentieth century onwards, it has become very difficult to describe the modern international legal system as in any sense 'primitive'.[12]

Nevertheless, it is hard still not to note the remnants of doubt and anxiety as to the coherence and effectiveness of international law as a legal system. In comparison to a well-functioning rule of law state, the decentralised institutional architecture of international law appears to leave it structurally indeterminate: its rules seemingly more malleable, more open and, overall, more difficult to disentangle from underlying political forces.[13] One need only open any contemporary international law textbook to be told, on the one hand, of the significant growth and expansion of international law in recent years, only then to be warned, on the other, not to expect too much from a decentralised legal order with its inherent structural weaknesses.[14] In fact, this very expansion, or 'maturation', of the international legal order seems, if anything, to have heightened such concerns, as anxieties over the proliferation of increasingly autonomous institutional structures, regimes and dispute settlement bodies are expressed increasingly through the 'post-modern' leitmotifs of 'deformalisation' and 'fragmentation' of international law.[15]

None of the above would matter, of course, if all that was at stake was a purely conceptual, even semantic debate concerning the reality of something called 'international law'—as Glanville Williams once claimed, 'a verbal dispute, and nothing else'.[16] However, it is clear that this is not the case. International lawyers have, in the main, not remained content to simply defend

[11] This, of course, is building on Hart's simple recognition of the 'internal point of view' of international legal participants themselves. See Hart (n 1) 89–91 (on the internal point of view) and 231 (applied to international law).

[12] See, eg, Besson and Tasioulas (n 5) 8–13.

[13] See, principally, M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, Cambridge University Press, 2005).

[14] See, eg, M Shaw, *International Law*, 7th edn (Cambridge, Cambridge University Press, 2014) 4–8; and see in particular M Dixon, *Textbook on International Law*, 6th edn (Oxford, Oxford University Press, 2007) 13, under a section on the 'weakness of the international system': 'International law lacks many of the formal institutions present in national legal systems. There is no formal legislative body, no court machinery with *general* compulsory jurisdiction and no police force … While this may not be a serious defect because of the different purpose of international law, there will always be some difficulties, especially if malefactors are perceived to be able to violate the law with impunity.'

[15] See, eg, M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553; or M Koskenniemi, 'Global Governance and Public International Law' (2004) 37 *Kritische Justiz* 241.

[16] G Williams, 'International Law and the Controversy Concerning the Word "Law"' (1945) 22 *British Yearbook of International Law* 146, at 146.

the reality of international law as a rhetorical practice or specialised form of political discourse. Rather, as I argue in this volume, they have attempted to defend its reality as an autonomous system of rules capable of cohesively regulating international relations and pre-empting the political freedom of states.[17] This is not just to say that they place value on the ideal of the rule of law (though clearly many do).[18] Rather, my claim is that this kind of rule of law idealism is implicit within the conceptual models of law or legal order against which international law is commonly compared and found wanting. On these terms, it becomes almost impossible to avoid the conclusion that international law is somehow deficient or defective at a constitutional level,[19] thus confirming its status as a 'poor relation of domestic law'.[20]

This, in short, is the 'institutional problem' in modern international law. This book is an attempt to engage with this problem: to better understand why it arises, upon what assumptions it is premised, and what effect it has had on our thinking about the nature and potential of legal norms to structure or regulate international politics. However, my aim in engaging with the structural peculiarities of a decentralised legal order is, ultimately, to argue that this condition should not be thought of as a 'problem' at all. In that sense, the word 'problem' in the title, if not exactly a misnomer, carries a certain ambiguity as to exactly what this problem is and where it lies. In fact, I will argue that the view that international law is somehow 'constitutionally deficient' arises only because of the rather incoherent and unrealistic expectations that we have of the international legal order. This is not an argument born from realism or pessimism, suggesting the need to 'water down' our expectations or ideals; rather, I argue that these ideals themselves are premised on an assumed paradigm of legality drawn from domestic experience which itself is increasingly subject to theoretical challenge and contestation. As Samantha Besson and John Tasioulas have acknowledged, 'if international law does not fit the criteria of the concept of law used at the domestic level, it may not (only) be a problem for the legality of international law, but (also) for those criteria themselves and hence for a given legal theory'.[21] In a broader sense, therefore, this book is an engagement between international law and analytical legal theory, aimed

[17] See Koskenniemi (n 13) passim.

[18] Indeed, as Blum claims, for many diplomats and international lawyers, the rule of law appears as 'the single most important goal of the international system'. See G Blum, 'Bilateralism, Multilateralism, and the Architecture of International Law' (2008) 48 *Harvard International Law Journal* 323, 331–2; and see further below in Ch 7.

[19] Somek (n 4). On the perception of 'constitutional deficiency', see also A Somek, 'Kelsen Lives!' (2007) 18 *European Journal of International Law* 409, at 432–34.

[20] As Tasioulas notes, if 'it belongs to the essence of law to claim authority, and if the authority claimed by [international law] is a diluted version of that claimed by domestic law', then it seems that international law's 'status as a poor relation of domestic law is confirmed'. J Tasioulas, 'The Legitimacy of International Law' in Besson and Tasioulas (eds) (n 5) 97, at 98.

[21] Besson and Tasioulas (n 5) 8.

at demonstrating that if the institutional problem is a problem at all, it is one that inheres more in theory than in practice. Let me now explain this problem further.

I. THE INSTITUTIONAL PROBLEM: AN EXPLANATION

To say that international law can be understood as an autonomous legal order begs the obvious question of what one means by law's autonomy in this respect. The claim is certainly not without ambiguity.[22] However, it is within this ambiguity that I can perhaps best explain the nature of the institutional problem (as I have termed it). From one perspective, to recognise the autonomy of international law is to say simply that the international legal order possesses the qualities of a legal system.[23] Despite the evident scepticism noted above, the idea that the international legal order can be thought of as a system in this sense might (now) appear obvious and self-evident,[24] encapsulated in key aspects of the modern discipline such as the doctrine of sources,[25] the idea of 'secondary' rules of responsibility[26] or conflicts of norm principles such as *lex specialis derogat legi generali* or *lex posterior derogat priori*.[27] In its recent study report on the perceived problem of 'fragmentation' in international law, the International Law Commission (ILC) has explicitly confirmed such a systemic reading. As the ILC's Special Rapporteur, Martti Koskenniemi, has stated:

> It is often said that law is a 'system'. By this, no more need be meant than that the various decisions, rules and principles of which the law consists do not appear … randomly related to each other. Although there may be disagreement among

[22] See, eg, BH Bix, 'Law as an Autonomous Discipline' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003) 975–87; and R Unger, *Law in Modern Society* (New York, Free Press, 1976) 52–54. I discuss the ambiguities surrounding the idea of the autonomy of law at length at the start of Ch 6.

[23] See generally E Benvenisti, 'The Conception of International Law as a Legal System' (2008) 50 *German Yearbook of International Law* 393, particularly at 394–95. On the concept of a legal system generally, see J Raz, *The Concept of a Legal System*, 2nd edn (Oxford, Clarendon Press, 1980).

[24] See, eg, V Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in Byers (n 2) 207, at 207–12.

[25] See further below in Ch 3, in section IV in particular.

[26] See, eg, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), particularly at 31–32, paras 1–5; available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. On the technical and somewhat artificial nature of this distinction in international law, see E David, 'Primary and Secondary Rules' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford, Oxford University Press, 2010) 27–33.

[27] For an in-depth discussion of the ordering effect of these principles, see Ch 7 of J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge, Cambridge University Press, 2003) 327–439.

> lawyers about just how the systemic relationship between the various decisions, rules and principles should be conceived, there is seldom disagreement that it is one of the tasks of legal reasoning to establish it.[28]

Accordingly, to recognise that international law can be understood as a system—and in that sense demonstrates a certain autonomy—is to acknowledge the simple, *though no less important*, point that international legal rules are not just 'rules of thumb' or—as Tom Franck put this—'ad hoc reciprocal arrangements'.[29] Rather, they derive their validity from source-based criteria endogenous to, and determined by, the system itself.[30] As self-evident as this understanding might appear, however, the important point is that this systematicity is not something in-built or intrinsic to the very nature of international legal relations. Like any legal system, international law is a social construct and has come to be understood in this way because this systemic understanding is deemed meaningful and important to international legal participants—states, lawyers, diplomats and other actors—as a basis of association in their mutual relations.[31] Indeed, insofar as international society is very much defined by moral agnosticism and political pluralism, the international legal system can be seen to provide an inter-subjective framework—a language or lexicon—by which states and other actors are able to pursue their often varied, though sometimes also more coordinate, objectives through the imprimatur of the legal form.[32] It is this form which provides a stable set of objective standards, allowing a basis of common association (as well as a peaceable means for critical engagement) in the absence of moral and political agreement. In other words, the apparent objectivity of the legal framework allows one to identify 'content-independent' reasons for action (or inaction)—reasons which necessarily claim to displace or exclude any other reasons we might have to act, or refrain from acting, in any given set of circumstances.[33]

[28] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by M. Koskenniemi', UN Doc A/CN.4/L.682, 13 April 2006, at 23, para 33 (footnotes omitted). Available at: http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

[29] TM Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705, at 752.

[30] The sources thesis is a key component of the validity of law under theories of legal positivism, but this view is also shared more broadly amongst a range of contemporary theoretical perspectives. See, eg, the various contributions to RP George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford, Oxford University Press, 1996).

[31] See, generally T Nardin, *Law, Morality, and the Relations of States* (Princeton, Princeton University Press, 1983).

[32] Koskenniemi (n 13) 563–89 and passim.

[33] See, eg, N Gur, 'Are Legal Rules Content-Independent Reasons?' (2011) 5 *Problema* 175, at 178–81 in particular; and see also the discussion in A van Mulligen, 'Framing Deformalisation in Public International Law' (2015) 3–4 *Transnational Legal Theory* 635.

Insofar as states and other participants place value on this kind of legal objectivity, it is possible to say that there is, at least at some level, a broad commitment to the rule of law as a governing principle in international relations.[34] Indeed, as Besson has argued: 'To identify a society as having a system of law, as opposed to some other sort of order, is to identify it as satisfying some or all of the requirements associated with the Rule of Law.'[35] Nevertheless, just like the notion of legal autonomy that it presupposes, the rule of law itself is also a notoriously ambiguous, somewhat amorphous concept.[36] Most often, the ideal of an international rule of law is applied in a more critical, evaluative sense, suggesting the need for law's autonomy in a much stronger form, that is, to require legal rules to objectively restrain or pre-empt the exercise of arbitrary political power.[37] This seems to be particularly the case insofar as international law has increasingly come to be thought of less as a neutral framework for societal co-existence and more as a means to secure the realisation of certain agreed-upon goals, for instance, peace, order, human rights and so on. To speak of the autonomy of law on these terms, then, is to agree with Oscar Schachter that international law should function as 'a means of independent control that effectively limits the acts of the entities subject to it'.[38]

Perhaps unsurprisingly, this more demanding rule of law vision seems perpetually frustrated by the decentralised institutional architecture of the international legal order, which, as Koskenniemi has most famously argued, appears largely *indeterminate* in impacting the political choices of states and other powerful actors.[39] Acknowledging this indeterminacy is not simply to point to the obvious 'open texture' of law generally, as Hart had occasion to discuss and distinguish some years previously.[40] The indeterminacy of international law is rather more *structural* in nature: fundamental to its very nature as a decentralised legal system. In other words, the system is deliberately constructed so as to defer back to states on questions of

[34] Nardin (n 31) passim.

[35] S Besson, 'Theorizing the Sources of International Law' in Besson and Tasioulas (eds) (n 5) 163, at 172.

[36] See, perhaps most extensively, BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press, 2004) 91–113; and see the discussion below in Ch 7, section II, at nn 46–47 in particular.

[37] As Hurd argues, whether applied in a domestic or international setting, it is commonly assumed that 'the rule of law is an alternative to the arbitrary exercise of power; and that the ultimate product of a rule-of-law system is the choice by the law's subjects to *comply* with the rules'. I Hurd, 'The International Rule of Law and the Domestic Analogy' (2015) 4 *Global Constitutionalism* 365, at 367.

[38] O Schachter, 'The Nature and Process of Legal Development in International Society' in R St J Macdonald and DM Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (The Hague, Martinus Nijhoff, 1983) 745, at 747.

[39] Koskenniemi (n 13) passim.

[40] ibid 36–41, making reference to Hart (n 1) 124–28.

the existence, validity, applicability and, ultimately, enforceability of legal norms. Thus, in the absence of any 'single legislative will' behind international legal rules, the 'conflicting motives and objectives' of states cannot be resolved definitively. Indeed, such particular purposes may very well be *advanced* through the legal framework, which provides a means of legitimising as much as condoning state behaviour.[41] As Colin Warbrick has commented:

> The very lack of density to the rules of international law … their uncertainty, their incompleteness and … sometimes their incoherence one with another, increases the opportunity for imaginative interpretation for *whoever takes on the task*. The line between the legal and the political is drawn in a different place in the international legal system than it is in a developed, domestic legal order.[42] (emphasis added).

How should we respond to this apparent structural indeterminacy? It is certainly not self-evident that it should be treated as a problem as such—a fault, defect or deficiency—so much as a central aspect of international law's legitimacy and acceptability for states and other legal participants. Indeed, in the context of the kind of political relations that pertain at the international level, any other view of legal order would not only appear conceptually problematic, but arguably also empirically unrealistic and politically divisive.[43] Nevertheless, structural indeterminacy *will* necessarily (and logically) appear problematic if one presumes that international law must secure *determinate* resolution of particular normative problems or disputes. The problem—the *institutional problem*—therefore arises specifically not only because this kind of presumption is pervasive in the modern discipline, but, more critically, because it is arguably implicit within many of the most dominant modes of conceptual and normative enquiry about law and legal systems more generally—that is, exactly the kind of paradigmatic understandings against which international law is held up to such anxious scrutiny. As I will show at length in Part II, in fact, the dominant analytical approach to jurisprudential enquiry has helped to sustain a view of law which presumes a certain structural hierarchy and functional purport to legal systems, which one might plausibly describe as 'governmental' in character and which therefore appears prima facie incompatible with a decentralised legal system such as international law.[44]

Recognising the pervasiveness of this mode of thinking about law does not, of course, demonstrate that this kind of presumption is wrong.

[41] International Law Commission (n 28) para 34.

[42] C Warbrick, 'Brownlie's *Principles of Public International Law:* An Assessment' (2000) 11 *European Journal of International Law* 621, at 626–27.

[43] Koskenniemi (n 13) 591.

[44] I comment on this specifically in Ch 4, and elsewhere in R Collins, 'The Problematic Concept of the International Legal Official' (2015) 3–4 *Transnational Legal Theory* 608. However, a similar concern to some degree propels Brian Tamanaha's work: see, eg, B Tamanaha, *A General Jurisprudence of Law and Society* (Oxford, Oxford University Press, 2001).

However, it should at least cause us to question the coherence of this paradigm when confronted with clear evidence of international law's existence and operability as a functioning legal system. Furthermore, bearing in mind many of the developing internal debates, critiques and 'globalising' trends witnessed in contemporary analytical legal philosophy,[45] it seems that many of these presumptions, even in the domestic context, are now themselves subject to internal disciplinary critique.[46] In this respect, in what follows I want to argue that much of what is often deemed general and universal about the nature of law is not only inadequate and misleading when applied to make sense of international law as a legal system, but is also methodologically problematic and conceptually incoherent on its own terms. Specifically, in Part II, I will argue that legal theory has essentially fixated on the historically and socially contingent problems of state-based authority, thereby co-opting state institutional features as necessary (rather than contingent) aspects of law in general.

I mount this challenge as I believe that rather than challenge jurisprudential paradigms, international lawyers, in the main, have most often attempted to try to make international law fit this incoherent structural mould. This tendency has resulted in a rather unconvincing and, I believe, self-defeating effort to explain how, despite its apparent weaknesses, international law can nonetheless function as a coercive legal order capable of effectively regulating the conduct of international relations. Most often, this kind of defence has involved 'co-opting' states themselves, or—now more likely—the institutions, courts and other bodies they have created, as functional 'organs' of an increasingly organised (though partly imagined) international community. This response is, I believe, deeply problematic. It not only risks distorting understanding of the peculiar institutional characteristics of international law, but it also potentially bestows a legitimacy and authenticity on state actions and intergovernmental institutional structures which extends well beyond their rather more limited, delegated legal form. In doing so, as I now further explain, this response only serves to further exacerbate or intensify already-existing rule of law concerns.

II. THE LIMITS OF FUNCTIONAL ANALOGY

The argument (or, at least, part of the argument) that I pursue in this book then is that the effort to explain the autonomy of international law as a means of restraining political power typically leads international lawyers

[45] See, eg, Tamanaha (n 44); W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge, Cambridge University Press, 2009); K Culver and M Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford, Oxford University Press, 2010).

[46] I discuss this trend further in R Collins, 'No Longer at the Vanishing Point? International Law and the Analytical Tradition in Jurisprudence' (2014) 5 *Jurisprudence* 265, at 274–75.

into what we might term a form of 'functional compensation'. This form of response to the institutional problem has a descriptive and a normative element: on the one hand, suggesting ways in which contemporary international law functions to compensate for its *formally* decentralised structure, whilst, on the other hand, arguing for necessary institutional reforms in order to strengthen the autonomy of international law in opposition to state sovereignty. This type of argument is, I believe, not only theoretically problematic, but in its dislocation of function and form, it also overlooks the structural and constitutional limitations imposed on the functioning of the international legal system by its purposefully decentralised legal form. In other words, the attempt to overcome decentralisation by 'reading in' a constitutional or institutional hierarchy, or to simply bestow a greater authority on certain bodies, processes or institutions than they otherwise possess, can only serve to highlight, or further exacerbate, certain legitimacy deficits. This is what Alexander Somek means when he describes a 'chain of substitutions' arising out of the desire to respond to the apparent weaknesses of a decentralised legal order, as each attempt to circumvent the problem actually only causes it to resurface in a slightly different form elsewhere.[47] This claim might sound somewhat ambiguous, so an explanation and some examples may help to better illustrate what I mean.

One means of response to international law's perceived deficiency has been to explain how in a decentralised legal order, states themselves can be understood as fulfilling necessary 'constitutional functions' in order to sustain the coherence of the system overall. Relying on a conceptual device like Georges Scelle's notion of *dédoublement fonctionnel*, or 'role-splitting', this argument would suggest that states are able to act both as subjects and 'officials' of the system at the same time.[48] Accordingly, not only can we picture states as bound by the law, but also as being tasked with the role of sustaining and administering the system overall—authoritatively determining its meaning, policing potential breaches and ensuring its enforcement in the last measure. However, this kind of reading only seems to re-describe the structural condition of international law, highlighting its inevitable indeterminacy, as it is precisely because the system defers back to states as authoritative actors in this way that concerns have arisen over the openness and malleability of international legal rules in the first place. As Terry Nardin has argued, whilst states may have an 'authoritative' role in applying, interpreting or enforcing the law, they cannot be seen as authoritatively representative—as 'organs'—of the system in any meaningful sense, that is, in the sense that their determinations would be opposable to all other

[47] Somek (n 4) 568.

[48] See, eg, G Scelle, 'Essai de systématique de droit international (Plan d'un cours de droit international public)' (1923) 30 *Revue Générale de Droit International Public* 116.

international actors (including other states).[49] Antonio Cassese makes a similar point, noting how the effort to bestow functional 'officialdom' on states is something of a misleading analogy:

> Clearly, in relation to the international community, one cannot speak of functions proper: when making law, settling disputes, or enforcing the law, States do not act in the interest and on behalf of the international community; they do not fulfil an obligation, but primarily pursue their own interests … Of particular significance is the fact that each State has the power of 'auto-interpretation' of legal rules, a power that necessarily follows from the absence of courts endowed with general and compulsory jurisdiction.[50]

For this reason, then, it is hardly surprising that the costs or externalities of this kind of state-based 'administration' are usually seen to be compensated for, to some degree, by the development—or potential development—of authoritative international institutions, dispute settlement bodies or other regimes, which together impose certain compliance pulls on states. From the very beginning, particularly since the 'move to institutions'[51] in the wake of the First World War, intergovernmental institutions have often been seen as a means to compensate for the perceived inadequacies of a decentralised legal order, not necessarily mirroring precisely the kinds of constitutional organs found at the state level,[52] but certainly seen to be 'gap-filling' in their absence.[53] Again, however, the functional analogy is misleading. Whilst undoubtedly the effect of international law's institutionalisation has been to radically transform the day-to-day functioning of the international system—particularly in terms of how norms are created, compliance with the law is secured etc—to read these institutions as fulfilling the kind of constitutional roles which, in the state context at least, are seen as having a certain a priori authority over legal subjects seems inherently problematic.[54] Of course, it may well be the case that we need to look beyond the intergovernmental treaty form of the institution to make sense of the contemporary role and functioning of universal organisations such as the United Nations (UN), but this is quite different from suggesting that these institutions can be described in terms of the kind of official roles one commonly finds at the

[49] Nardin (n 31) 162–63.

[50] A Cassese, *International Law*, 2nd edn (Oxford, Oxford University Press, 2005) 6.

[51] D Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo Law Review* 841.

[52] See, eg, J Crawford, 'The Charter of the United Nations as a Constitution' in H Fox (ed), *The Changing Constitution of the United Nations* (London, British Institute of International and Comparative Law, 1997) 3–16; or ND White, 'The United Nations System: Conference, Contract or Constitutional Order?' (2000) 4 *Singapore Journal of International and Comparative Law* 281.

[53] Cassese (n 50) 21.

[54] Arangio-Ruiz makes this point most critically in G Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1979) 199.

state level. The inherent constitutional limitations in any *intergovernmental* organisation suggest limits to such functional expressions of authority in international law. Unlike at the state level, the authority of international organisations remains ultimately grounded in the inter-state constitution, therefore deliberately limiting their capacity to act authoritatively, either on behalf of the international community as a whole or as agents or organs of the international system.

As such, and as I will outline at length in Chapters 8 and 9, whilst there has been an undoubted transformation in international law in recent years, brought about largely, even if not exclusively, through the 'institutionalisation' of the international legal system, it seems increasingly that this kind of 'global governance' has given rise to quite serious accountability deficits and legitimacy concerns. With a clear preponderance and proliferation of increasingly centralised and autonomous regimes, introducing innovative compliance mechanisms and dispute settlement bodies, one witnesses growing anxieties over the impact of institutionalisation on the overall systemic coherence of international law.[55] Not only does this kind of functional authority appear inadequate to effectively uphold and protect global public goods or community interests, suggesting a certain level of 'ad hocism' in global governance,[56] but any claim to authoritatively represent these interests seems precluded by the underlying (pluralist) tenets of the international legal order.[57] Institutionalisation has thus not resulted in any enhanced hierarchy or authority of international law overall, but an increasingly disordered array of non-state and inter-state regimes competing for authority with states, and with their own structural biases and political preferences. The rule of law concern resurfaces again in another form; Somek's chain of substitutions moves on another step.

III. OVERVIEW OF THE ARGUMENT AND STRUCTURE OF THE BOOK

Ultimately, I will show how the failure of this form of response to the institutional problem stems from the falsity of the presumption upon which it is based—a presumption, as I have suggested, widely shared by legal theorists and international lawyers alike—that international law *should* act to somehow 'govern' the conduct of the international community overall. I maintain instead that the purpose of any legal order has to be understood within the context of the kinds of political relations which pertain in the

[55] Compare JHH Weiler, 'The Geology of International Law—Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 547 and M Koskenniemi, 'Global Governance and Public International Law' (2004) 37 *Kritische Justiz* 241.

[56] Cassese (n 50) 66–67.

[57] See, eg, M Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113, at 116.

society or community in question. To see the purpose of international law as one of *regulating* or *governing* international politics is to misconstrue the nature of the political relations which pertain at the international level, which are fundamentally different from the relations of political subordination that exist within the state. The overall 'institutional purpose' of law within a plural, 'horizontal' society (such as arguably exists at the international level) must instead be understood in a way which is meaningful to the participants in that society. As such, by engaging head-on with these presumptions from a legal-theoretical perspective, I show how if the *international* rule of law, and the autonomy of law it presupposes, has meaningful explanatory purchase, it must at the very least presuppose a formal, institutional framework capable of securing a non-arbitrary means for mutual co-existence and cooperation under conditions of political plurality. Rather than reflecting any kind of constitutional deficiency, therefore, the decentralised legal form of the international legal order can be seen as both reflective and protective of this fundamental purpose and as a key aspect of the legitimacy of international legal rules.

To reach this conclusion is not at all to suggest that states and other actors cannot create ambitious hierarchical institutional forms within the international legal order, or that international law itself is incapable of change—this is not a position of conservatism or overtly realist scepticism. In fact, as the argument of the book progresses, I will explain how the international legal order has transformed itself quite dramatically, in both substantive and structural terms, as a result of the proliferation of a range of increasingly powerful institutions and regimes. However, my argument is also that a great deal of the legitimacy concerns that have arisen as a result of this transformation, where the kinds of functional autonomy and authority exerted by many global regimes seems to largely escape accountability, can be explained by the inherent—*and important*—tension this functional autonomy creates in its relation to international law's decentralised legal form. The system overall and the institutions created on its terms have to be understood at least in part by reference to their legal form, which in turn is justified as important and meaningful due to the kind of legitimacy pulls inherent within the international community.

My argument therefore follows from a view of the task of legal theory, and of the legal theorist specifically, which begins from the need to develop, understand and, ultimately, defend a view of law or legal order that is meaningful to international legal participants.[58] However, in beginning in this way, I will suggest that such an approach still requires informed moral

[58] In that sense, my argument and methodology have been greatly influenced by Patrick Capps' recent work. See P Capps, *Human Dignity and the Foundations of International Law* (Oxford, Hart Publishing, 2009). It should be noted, however, as will be clear in Ch 6 in particular, that Capps and I part company on the ultimate function of law and international law in particular.

judgement from the legal theorist: we cannot simply *presume* that certain institutional structures or functions of law are universally shared, based simply on shared legal and political experience of the state context. Any claim to understand what is important and necessary about law, in general or in particular contexts, must seek to understand, evaluate and defend the importance of law's key institutional features in a way which is defensible from the point of view of the kind of political and social relations in which law is present and from within which it takes on specific meaning. As such, whilst the question of international law's meaning and potential in the context of contemporary international relations remains somewhat controversial, the legitimacy of the system overall potentially pulling in different directions, I will seek to defend a view of international law's necessarily decentralised institutional architecture that remains meaningful precisely in its ability to facilitate more ambitious cooperation at the international level. This defence does not seek to present a complete account of the nature of contemporary international law—or, indeed, of the myriad, more specialised forms of 'global law' now arguably in existence[59]—but it does act as a clear normative defence of the international legal system's core structural architecture, understood as a necessary framework upon which much of this more ambitious global governance activity finds some foundation, and against which some form of legal accountability can be secured.[60]

Accordingly, in developing this argument, my aim in this book is to make an important intervention in methodological debates in legal theory as much as an interjection into contemporary debates about the evolving character of international law and global governance. I have divided the book into three discrete parts, each of which is further divided into three chapters. Whilst there is clearly narrative continuity between the three parts, each has a somewhat distinct focus, method and ambition. I have labelled them in turn—perhaps over-enigmatically—'Origins', 'Cause' and 'Effect'.

Part I (*Origins*) is historical, sociological and, to some degree, deconstructive in focus. It explains the emergence of the 'modern' discipline (in Chapter 1) in terms of a collective ambition to reconstruct or re-invent international law from a philosophical to a broadly institutional practice. I explain this transformation in terms of a broad disciplinary effort to account for international law as an autonomous system of positive legal rules on similar terms to state-based legal orders. In charting the scepticism that international lawyers have faced in explaining international law on these terms

[59] See, eg, recently N Walker, *Intimations of Global Law* (Cambridge, Cambridge University Press, 2014).

[60] Here, I have been greatly influenced by the work of Terry Nardin in *Law, Morality, and the Relations of States* (n 31).

(in both Chapters 1 and 2), I aim to illustrate the kind of presumptions, tensions and ambitions underlying this view of modern international law. I do so in order to explain the difficulties that international lawyers have faced in giving a coherent account on these terms—that is, in explaining this kind of autonomy in a decentralised legal system—and thus (in Chapter 3) I argue that this problem has left an overall impression of international law as essentially deficient at a constitutional level.

Part II (*Cause*) is more broadly theoretical and analytical in approach in an attempt to re-orient the focus of the 'institutional problem', specifically by considering and critically engaging with certain presumptions about law perpetuated by dominant ('descriptive-explanatory') approaches to analytical legal enquiry (in Chapter 4). In considering the methodological weaknesses of these approaches in adequately accounting for forms of law and legality beyond the state, I will ultimately advocate (in Chapter 5) the need to take a distinctly evaluative, more normative approach in order to understand law in its many guises. In doing so, my ambition is to defend a 'practically reasonable' concept of law which remains meaningful in a general (or universal) sense, but which can be applied in particular circumstances as a critical tool for engaging with the necessary institutional architecture of non-state legal orders such as international law. On these terms, I will argue (in Chapter 6) that law's empty, abstract autonomy—its formal, systemic character—should alone be seen as its most central (and most important) contribution to any society or political community. This normative idealism thus purposefully blurs the boundary between the *concept* and the *rule* of law, but does so conceiving of the latter as a somewhat abstract ideal that resists any specific institutional form.

Part III (*Effect*) reverts back to questions of international legal theory specifically, and does so primarily to show why the effort to explain international law's autonomy in any stronger, more pre-emptive sense necessarily leads to dangers of distortion and methodological confusion. As such, I first (in Chapter 7) explain why the attempt to apply any more ambitious kind of rule of law ideal to international law is necessarily problematic due to the importance of its decentralised legal form. Whilst I will (in Chapter 8) argue that the ambitious models of institutional cooperation, dispute settlement and innovative international 'governance' arrangements developed since the start of the previous century necessarily compliment *and complicate* the functioning of contemporary international law, I cast doubt on the (increasingly pervasive) view that such changes can be seen to transform or even centralise the nature of international 'legality' at the broadest systemic level. Nevertheless, in Chapter 9, I will go on to show a necessary and growing tension between the functioning of international law in practice, dispersed between increasingly complex sites of institutional and regulatory authority, and its continuing existence, in more formal terms, as

a system of decentralised, non-hierarchical legal relations. I will argue, ultimately, that to understand the ideal of the international rule of law in contemporary international society is to appreciate the necessary *and important* tension between these *functional* and *formal* modes of international legality. In fact, I will show how a number of recent trends in international law scholarship, essentially advocating a less formal concept of international law in order to capture and constrain much of this 'deformalised' and 'fragmented' global governance activity, fail to grasp the continued structural importance of international law's legal form from a rule of law perspective, and thus potentially further exacerbate existing rule of law concerns.