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# *Incommensurability, Purposivity and International Law*

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## **Abstract**

*Within international law, theory is often considered peripheral to more pressing practical problems. In the first part of this article, it is argued that refusal to take account of theoretical and methodological issues entails that particular descriptions of international law lack validity, and, hence, rational reasons cannot be provided as to why one account should be considered preferable to any other. This problem of rational justification, which emerges in a variety of forms, is referred to as the incommensurability thesis. The argument is illustrated with respect to the ninth edition of Oppenheim's International Law. In part two, a methodology is advanced which demonstrates how a justifiable account of international law can be generated which avoids the incommensurability thesis. This methodology states, specifically, that international lawyers must develop (a) a coherent understanding of the kind of function international law performs in maintaining social order in the relations between states and (b) a substantive conception of social order. Therefore, in order for a particular account of international law to possess validity over rival accounts, international lawyers must take account of social theory and moral and political philosophy. The final part of this article discusses the concepts of international law offered by Weil and Kant, which can be understood as examples of the methodological approach offered in this article.*

## **1 Introduction**

According to Koskeniemi, '[m]ost international lawyers are no enthusiasts over theory'. For them, '[t]here may even be a general sense that "theory" is over; or that it serves best as a label to pin on ideas ("theories") of past jurists but that it plays (and should play) little or no role in our present legal practice.'<sup>1</sup> An initial response to this comment is that theory can help, and always has helped, international lawyers to identify the problems with, and the potential for reform of, international legal

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<sup>1</sup> Koskeniemi, 'Theory: Implications for the Practitioner', in *Theory and International Law: An Introduction* (1991) 3.

institutions. A few classic examples can ably illustrate the point. Grotius developed the first systematic argument for freedom of the high seas, the immunity of state officials as well as highly influential work on the nature and role of neutrals in armed conflict.<sup>2</sup> Vattel has been identified as having a profound influence on the development of the consent-based system of international law.<sup>3</sup> Finally, Kant's theory of international peace has taken on somewhat of a prophetic quality since the inception of the United Nations system.<sup>4</sup> The recent revival of Kantian literature on this subject is perhaps testament to this development in the institutional nature of international law.<sup>5</sup>

These examples, whilst not intended to be comprehensive, show how theory may impact upon international legal practice. But whilst these examples may be persuasive, and those of a less cynical disposition may be convinced of the connection between theory and practice, it has not been shown why international lawyers *must rationally* take account of theoretical issues.<sup>6</sup> In section 2 of this article, therefore, it is argued that international lawyers must take account of theoretical concerns if their descriptions of empirical reality are to be justifiable or possess validity. A series of competing descriptions of international law, which are found in the major textbooks and manuals of international law, are taken, and it is shown that no justification is given concerning why one particular description should be preferred over others. The identification of this problem is referred to as the *incommensurability thesis* and the solution to this problem requires a theory of international law that is rationally defensible.

In section 3 of this article, a legal methodology is developed which provides a solution to the incommensurability thesis. I argue that to provide a rationally defensible theory of international law we must (a) determine the 'object-domain' of international law, and (b) determine the purpose of international law. (a) concerns the demarcation of the category of practical reason,<sup>7</sup> which is constitutive of international law. It is considered that the object-domain of international law concerns the regulation of the interrelationships between states. In order to determine the purpose of international law, and hence answer (b), it is necessary to consider the function of international law in maintaining social order. Social order, it is argued, is the state of a social system which is stable in accordance with certain standards of

<sup>2</sup> Nussbaum, *A Concise History of the Law of Nations* (1954) 111.

<sup>3</sup> Allott, *Eunomia* (1990) 243.

<sup>4</sup> Kant, *Perpetual Peace* (1957, first published 1795) and *The Metaphysics of Morals* (1993, first published 1797). See also Friedrich, 'The Ideology of the United Nations Charter and the Philosophy of Kant', 9 *Journal of Politics* (1947) 10.

<sup>5</sup> See, e.g., Rawls, *The Law of Nations* (1999); Teson, *A Philosophy of International Law* (1999); Archibugi, 'The Reform of the UN and Cosmopolitan Democracy: A Critical Review', 30 *Journal of Peace Studies* (1993) 301; and Archibugi, 'Models of International Organization in Perpetual Peace Projects', 18 *Review of International Studies* (1992) 295.

<sup>6</sup> A rational international lawyer is capable of giving justifiable reasons for his judgments. Therefore, it is argued that international lawyers must take account of theoretical issues (as contrasted with purely empirical issues) when providing reasons to justify a particular account of international law.

<sup>7</sup> See *infra* at 648 for an explanation of the term 'practical reason'.

conduct. Therefore, the functional purpose of international law is to sustain a substantive conception of social order.

This argument does not develop a substantive conception of social order which international law is supposed to maintain. However, in section 4, the legal methodology presented in this article is shown to be characteristic of the social contract tradition. For this tradition, law is conceived of as the mechanism which, in turn, maintains a particular substantive conception of social order which, in turn, maintains certain fundamental human interests. Kant's theory of international law is considered characteristic of this approach and his theory is outlined. In conclusion, it is argued that international lawyers must consider what kind of social order is justifiable and how international law can be institutionally designed to maintain this social order.

The overarching theme of this article is to demonstrate that international lawyers cannot rationally ignore theoretical issues and, in fact, descriptions of international law must be based upon a conception of social order which it must maintain. Justifications of particular conceptions of social order have traditionally been the concern of political, moral and legal philosophy and these subjects cannot be avoided by the international lawyer who seeks to provide a justification for a description of international law. Koskenniemi's international lawyer may be unenthusiastic about theory, but he or she must change this attitude. Further, theory is not a label to be pasted onto the past. It is integral to any attempt to describe international legal phenomena.

## 2 The Incommensurability Thesis

How do we account for different descriptions of international law found in textbooks? Three potential answers will be considered. The first answer is that there are no significant differences between the descriptions of international law in textbooks. Whilst there may be divergence on trivial matters, on important matters, such as the sources of international law, there is general agreement. The second answer is that there are significant differences between the descriptions of international law in the textbooks, but these differences can be accounted for by the relative accuracy of the writers in describing empirical reality. Both of these arguments are rejected and reveal a problem which is called the incommensurability thesis. The incommensurability thesis, which will be familiar to those of a critical disposition, is (a) that descriptions of international law are unavoidably bound up with *a priori* criteria which allocate importance or priority to certain features of international law and (b) no justification is given for these criteria.<sup>8</sup> The third answer is that, whilst accepting the incommensurability thesis, differences between descriptions of international law in textbooks are products of different cultural traditions and can be explained by reference to the fundamental values which are presupposed in these traditions. But, it is argued, to use cultural divergences as an explanation for different descriptions of international law

<sup>8</sup> See *infra* at 645–647.

presupposes a degree of commensurability between theorists and, therefore, the incommensurability thesis must be false.

## A

It is hypothetically plausible to suggest that there are no significant differences between the various textbooks on international law within the European tradition. For instance, it could be considered that all textbooks are based upon state consent as the fundamental source of legal obligation. Whilst there may be considerable divergence in descriptions of further issues — for example, the protection of human rights — these divergences are ultimately insignificant.

Carty, in another article in this symposium, has argued cogently that even a basic level of agreement cannot be sustained.<sup>9</sup> He examines *Droit International Public* by Combacau and Sur<sup>10</sup> and *Universelles Völkerrecht* by Verdross and Simma<sup>11</sup> and demonstrates that there are fundamental divergences in their descriptions of international law. Carty states that Combacau and Sur consider that the source of international law is found in state consent. Alternatively, for Verdross and Simma, consent is not the only source of international law. States must recognize each other as equal and must acknowledge the legal validity of norms which permit the creation of further international laws simply by virtue of engaging in international law and *distinct* from their consent. Therefore, on the fundamental issue of the sources of international law, there appears to be an important divergence in these two descriptions.

The accounts of international law by Brownlie and Oppenheim can be considered to demonstrate further divergence on this point. For Brownlie and the current editors of *Oppenheim's International Law*, the search for a clear basis for the sources of international law is, to some extent, futile.<sup>12</sup> Returning to the sources of international law, Brownlie rejects the idea that formal sources of international law can be identified *at all*.<sup>13</sup> Therefore, for Brownlie it is difficult to establish precisely what rules are to be considered legally valid as opposed to those rules which are, for instance, morally valid. Similarly, in *Oppenheim* it is stated that 'little practical purpose is served by

<sup>9</sup> See Carty, 'Convergences and Divergences in European International Law Traditions', elsewhere in this issue of *EJIL*.

<sup>10</sup> Combacau and Sur, *Droit International Public* (1993).

<sup>11</sup> Verdross and Simma, *Universelles Völkerrecht* (1984).

<sup>12</sup> Brownlie, *Principles of Public International Law* (5th ed., 1998, first published 1966); and Jennings and Watts (eds), *Oppenheim's International Law* (9th ed., 1996). In this article, I will generally only refer to the ninth edition of Oppenheim's work. Hereinafter, this work will only be referred to as *Oppenheim*. In earlier editions of *Oppenheim*, the first chapter adopted a more theoretical approach. This was removed from the ninth edition probably because of the more practitioner-orientated market which the work now addresses. For a clear explanation of this point, see Janis, 'The New Oppenheim and its Theory of International Law', 16 *OJLS* (1996) 329.

<sup>13</sup> Brownlie, *supra* note 12, at 3.

attempting to define [the sources of international law] too rigidly'.<sup>14</sup> It should be noted, however, that after making this statement, Jennings and Watts reject the idea that state consent is the only source of international legal obligation and identify general international law (custom) and universal international law (obligations *erga omnes* and *jus cogens*) as representing sources of international law.

These four descriptions of international law offer differing accounts of the sources of international law. Each, to a greater or lesser extent, attempts to describe empirical reality. That is, the familiar practice of international law forms part of the criteria by which these particular accounts of international law can be considered valid. As the sources of international law permit the identification of which rules are, and which are not, to be considered legally valid, such divergences between various descriptions of international law cannot be trivialized.

## B

It has been established, albeit briefly, that there are significant divergences in different descriptions of international law. But how can the validity of these divergent descriptions of international law be assessed? It is important to note that, when considering the validity of particular descriptions, two conditions are true. First, and obviously, it is true that not all the descriptions can be correct. For example, it is contradictory to suggest that the sources of international law are based *solely* on state consent, *and* can be based upon universal legal norms. Secondly, it is true that the textbook writers need some criteria for attributing validity to their description, or else they cannot justify why they should adhere to their point of view rather than any other.

Perhaps 'fit' to empirical reality is the most intuitively plausible starting point to assess the validity of competing descriptions of international law. However, it is contended that 'fit' cannot be sustained as a method for ascribing validity to a particular description of international law. To explain, we can compare the leading French and German textbooks on international law. It has already been shown that Combacau and Sur and Verdross and Simma fundamentally disagree on the sources of international law. For the sake of argument, *Droit Public International* could be considered a more accurate account of familiar international legal institutions and practices than *Universelles Völkerrecht*.

Combacau and Sur consider that a description of international law which contains an account of universal legal norms is *lex ferenda* and hence empirically inaccurate. The evidence, if we examine state practice, would probably reflect Combacau and Sur's description. However, we could take other evidence, such as *jus cogens* or

<sup>14</sup> Jennings and Watts, *supra* note 12, at 23. Janis shows that earlier editions of *Oppenheim* did consider that state consent did, ultimately, provide the only source of international law. This is rejected, as mentioned in the text, by Jennings and Watts. Janis argues that this demonstrates that, whilst eschewing a theoretical approach by removing the first chapter of the work which concerns theory, Jennings and Watts implicitly do make theoretical claims about the sources of international law. See Janis, *supra* note 12, at 335 and *passim*.

obligations *erga omnes*, which are found in important international documents,<sup>15</sup> as reflecting the existence of universal principles of international law divorced from state consent. Obviously, Combacau and Sur can cope with such contradictory evidence. They could say, for instance, that *jus cogens* contained in the Vienna Convention on the Law of Treaties do not represent universal international law, but are rather a reflection of custom which is based upon state practice and, ultimately, consent.<sup>16</sup> However, as much could be said about any empirical evidence, if one accepts that state consent provides the fundamental organizing principle for the description of international law. Combacau and Sur can take in any of the waifs and strays of empirical evidence they like, and accommodate them under the head of state consent, but this does not mean that priority *must* be placed upon state consent as the organizing principle underpinning a description of international law. Clearly, Verdross and Simma can make a different judgment of priority and hence order or organize empirical evidence in a different way to obtain a different description. But the question immediately emerges as to why one familiar feature of international law, such as state consent, should be considered more important in a description of international law than others.

Following this argument through, divergences in descriptions in international law do not emerge from more or less accurate accounts of empirical reality, but rather from divergences in *a priori* judgments of importance which are attached to social phenomena. This insight can be considered under two heads. First, theorists make a judgment concerning what is *relevant* to international law, as opposed to, for example, international politics or diplomatic traditions. This judgment attempts to appropriate the *object-domain* of international law. Secondly, there is a judgment concerning which features within the object-domain of international law are to be considered most important or, more accurately, given *ontological priority*. It is helpful to phrase these judgments as questions. First, there are many empirically observable social phenomena which might be considered constitutive of international law, but which of these social phenomena are to go into the ‘box’ marked ‘international law’? Secondly, once it has been decided what goes into the ‘box’, how are we to gauge the importance of various phenomena when constructing a description of international law?

Often the need to make a judgment of importance or relevance is, to some extent, acknowledged when a description of international law is written with a particular viewpoint in mind. For example, the editors of *Oppenheim* have a distinct viewpoint in mind — that of the legal practitioner. They themselves state that the work is ‘a practitioner’s book, rather than . . . an academic treatise’.<sup>17</sup> Whilst there clearly is a

<sup>15</sup> For example, the Vienna Convention on the Law of Treaties (1969) and the ILC Draft Articles on State Responsibility (1996).

<sup>16</sup> The state practice of Venezuela and France may support this view. They both consider themselves to be ‘persistent objectors’ to *jus cogens* provisions enshrined in Articles 53 and 64 of the Vienna Convention on the Law of Treaties (1969) and hence reflect the attitude that *jus cogens* are part of custom and do not represent universal norms. See Danilenko, ‘International Jus Cogens: Issues of Law Making’, 2 *EJIL* (1991) 42, at 56.

<sup>17</sup> Jennings and Watts, *supra* note 12, at xiii.

'gap in the market' for such a work, and the efforts of Jennings and Watts in producing the current edition are highly impressive, we are still left with the problem of gauging the validity of the work. The practitioner's needs fuel Jennings and Watts' attempt to order the empirical phenomenon called international law. But why should Jennings and Watts' perception of the practitioner's needs shape our description of international law? Why is it more valid than any other viewpoint and hence description? It could be replied that it is not, but then we are left with the problem of ascertaining why — if there is a divergence between different accounts — we should accept the description of international law in *Oppenheim* over another? It would appear that a justification is required for taking the practitioner's point of view.

A third judgment is required which is intrinsic to a description of international law. If international law is concerned with rules, each textbook, more or less, contains an account of which rules are to be considered legally valid and which are to be considered legally invalid (e.g. rules concerning diplomatic relations).<sup>18</sup> This judgment is connected to the two judgments highlighted above, as, first, legally valid rules will be part of the object-domain of international law and, secondly, a judgment of ontological priority will, to some extent, indicate which legally valid rules are to be given priority if there is dispute over their application.<sup>19</sup> More practically, such a judgment is necessary so that those reading the textbook can gain an idea as to which rules legally bind the conduct of states. From the practitioner's point of view, this judgment returns to considerations concerning the sources of law and how state officials identify their respective state's obligations in order to recommend a particular course of action. It has already been contended that there is no consensus upon this matter. However, it follows that unless a justification is found for one's criteria of legal validity, there is no reason to suggest that one particular view of the rules which are to be considered legally valid should be preferred over another view.

It can be expected that some account of, if not justification for, the rules which are to be considered legally valid will be given in a description of international law. However, this point can be pressed further. The chapter on the use of force in *Oppenheim* gives a series of examples — such as the US quarantine of Cuba in 1962, US and South Vietnamese attacks on Cambodian territory in 1970 and Israeli attacks on nuclear installations in Iraq in 1981 — of situations in which states have invoked the right to individual or collective self-defence to justify the use of force. What is curious about these examples of the use of force is that no attempt is made to establish whether, in fact, the right to self-defence was legally valid in these particular circumstances.

<sup>18</sup> The assumption that international law is concerned with the application of rules, is considered below. See *infra* at 648–649.

<sup>19</sup> This appears to presuppose a hierarchy of rules, and some may consider that this is inadvisable and undermines the capacity of international law to perform its function. However, it is clear that to solve conflicts between norms is problematic unless there is relative normativity. See Weil, 'Towards a Relative Normativity in International Law', 77 *AJIL* (1983) 413; and *infra* at 653–656.

Rather, such examples are simply unilateral judgments on the part of states about what they consider represents a legally valid use of force.<sup>20</sup>

The current editors of *Oppenheim* might contend that these examples of state practice provide information to practitioners in order to mount a defence, or for a state official to recommend a potentially legally justifiable course of action. But, by adopting this perspective, the editors of *Oppenheim* perhaps feel justified in side-stepping the issue concerning which rules are to be considered legally valid and thereby can be called international laws. Therefore, instead of providing a justification for ascribing legal validity to certain types of self-defence, these examples establish a 'grey area' which leaves the reader unclear about how to distinguish *realpolitik* from legally justifiable uses of force.

In summary, three interrelated problems lie immanent within a description of international law. These are (a) the identification of the object-domain of international law; (b) a judgment of ontological priority; and (c) a judgment concerning which rules are to be considered legally valid. These problems can be considered themes for the rest of this article. Textbook or manual writers tend to implicitly side-step (a) and (b). However, (a) and (b) are implied in any attempt to describe international law empirically. Most textbook writers will pay considerable concern to (c), but they do not justify why their criteria for establishing legally valid rules are more or less acceptable than any other. In the current edition of *Oppenheim* the issue is simply side-stepped. If a description of international law is to be *preferred* to other descriptions, this presupposes that *justifiable* answers must be given to the questions (a), (b) and (c). Empirical reality cannot give us answers to these questions because, as has been shown, it is the unjustified *a priori* judgments concerning (a), (b) and (c) about empirical reality which is the precise problem that must be faced. Whilst some empirical phenomenon may appear very important to a description of international law, no justifiable reason is given as to why these phenomena should be given greater priority over others. Therefore, there is no *prima facie* reason to suggest that a system which regulates the interrelations between states by placing priority on the practice and consent of states is more or less characteristic of international law than a description which prioritizes human rights.

In such a rapidly developing and nebulous social phenomenon such as international law, it should come as no surprise that empirical reality leaves us with little to fix onto with regard to what features are to form the cornerstones of our descriptions. However, the point being made here concerns more the presuppositions that are entailed by any attempt to describe empirical reality. The two key components to this argument are (a) that empirical accounts of international law are based upon *a priori* evaluations of relevance and importance and (b) that those who provide such accounts do not attempt to justify their evaluations. Hence, in (b), no rational

<sup>20</sup> It should be noted that reference is made to articles in the footnotes of the current edition of *Oppenheim* which discuss the legality of these actions, but the point is that no discussion is made of their legality in the text. It is acknowledged that this may be an example of the inability of what is commonly referred to as international law to make judgments on the legal validity of such acts.



'yardstick' is provided for determining the validity of a particular description of international law over others. This can be called the incommensurability thesis.

## C

Elements of the incommensurability thesis have been developed, in a series of guises, by a variety of legal theorists. Many have focused upon the necessity of an evaluation of importance and relevance as a logically prior condition for the description of empirical reality.<sup>21</sup> For example, Koskenniemi states that 'the facts which constitute the international social world do not appear "automatically" but are the result of choosing, finding a relevant conceptual matrix'.<sup>22</sup> He continues: "This is a conceptual choice, a choice which cannot be evaluated in terms of facts because it singles out those very facts on which it bases its "relevance".<sup>23</sup> For Koskenniemi '[f]acts do not just stand "there" as impartial arbiters of our legal-theoretical controversies' but rather are subjective determinations of relevance, perspective or importance on the part of the theorist. When analysing descriptions of the international law relating to intervention, Carty makes a similar point. He states: 'One cannot simply study the practice of States as evidence of law because it is logically inconceivable to examine any evidence without *a priori* criteria of relevance and significance.'<sup>24</sup> Finnis makes the same point concerning the employment of familiar legal practice to provide the touchstone for a concept of law. Specifically, he accounts for the differences between the legal positivist's descriptions of legality by stating that: 'the differences in description derive from differences of opinion ... about what is important and significant in the field of data and experience with which they are all equally and thoroughly familiar.'<sup>25</sup>

Furthermore, this facet of the incommensurability thesis — that descriptions of empirical reality are based upon subjective, *a priori*, presuppositions of importance — is a common feature of radical and sceptical epistemology.<sup>26</sup> Some writers, such as Quine, argue that whilst knowledge of the empirical world may, ultimately, be based upon unjustified *a priori* presuppositions which structure knowledge of the empirical world, *within* different cultures or traditions, there is agreement on what presuppositions are valid.<sup>27</sup> This epistemological position is called pragmatism. Quine gives a clear example of this approach by considering the modern scientific view of the

<sup>21</sup> However, theorists differ in opinion over whether it is possible to obviate this problem or how to obviate this problem.

<sup>22</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argumentation* (1989) 188–189.

<sup>23</sup> *Ibid.*

<sup>24</sup> Carty, *The Decay of International Law* (1986) 95–96.

<sup>25</sup> Finnis, *Natural Law and Natural Rights* (1980) 9.

<sup>26</sup> See, e.g., Ayer, *Language, Truth and Logic* (1980); Collingwood, *An Essay on Metaphysics* (1940); Quine, 'Two Dogmas of Empiricism', in *From a Logical Point of View* (1963) 20; and Rorty, 'Human Rights, Rationality and Sentimentality', in Shute and Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures* (1993) 116.

<sup>27</sup> Quine, *supra* note 26.

physical laws which govern the characteristics of physical objects. He says that physical objects are:<sup>28</sup>

irreducible posits comparable, epistemologically, to the gods of Homer. For my part I do, quailay physicist, believe in physical objects and not in Homer's gods; and I consider it a scientific error to believe otherwise. But in point of epistemological footing the physical objects and the gods differ only in degree and not in kind. Both sorts of entities enter our conception only as cultural posits. The myth of physical objects is epistemologically superior to most in that it has proved more efficacious than other myths as a device for working a manageable structure into the flux of experience.

This insight can be applied to our present line of inquiry. To explain, pragmatism allows us to argue that different descriptions of international law textbooks are the product of different cultural traditions. Quine suggests that accounts of empirical reality *within* cultures can be judged for validity by assessing the expertise of the theorist to coherently assemble the flux of empirical reality according to the validity claims that are presupposed in particular cultural traditions.<sup>29</sup> However, the incommensurability thesis, ultimately, still holds because rational criteria are not offered for evaluating the validity of the presuppositions which underpin different descriptions of international law in different cultures. Therefore, the pragmatist thesis can be employed to *explain* differences in descriptions of international law.<sup>30</sup>

Despite the initial plausibility of the pragmatist thesis, it is contended that it cannot be employed with the certainty afforded to it by its proponents. To illustrate this problem, the difference between weak and strong incommensurability must be identified. Strong incommensurability is the position where any claims within culture X are unintelligible from the point of view of culture Y. Cultures are unable to speak to one another and hence by being incommensurable, they are also incomparable. Weak incommensurability is where traditions are incommensurable — by virtue of the fact that there is no yardstick by which competing claims can be assessed for validity — but they are comparable. So, therefore, it is possible to say that a certain culture organizes empirical reality in one way and another culture organizes it another way.<sup>31</sup>

Applying this argument to international law, the fact that authors can communicate and assess the relative differences in their descriptions of international law presupposes weak incommensurability. Therefore, whilst criteria for assessing the

<sup>28</sup> *Ibid.*, at 44.

<sup>29</sup> How pragmatism would account for Oppenheim's textbook on international law is an interesting question. For example, Westlake identified the 'special character' of the work in his review of the first edition which, according to Janis, combines 'the German passion for organization and the English love of detail'. See Janis, *supra* note 12, at 330.

<sup>30</sup> Carty, for instance, accounts for the divergences in descriptions of international law by referring to the cultural traditions within which they are written. See Carty, *supra* note 9.

<sup>31</sup> The analysis provided in the text tends to be employed to consider the possibility of translation between different cultures. See, for example, Hollis, 'The Limits of Irrationality', 8 *Archives Europeenes de Sociologie* (1967) 265; and Hollis, 'Reason and Ritual', 43 *Philosophy* (1967) 231; and more generally see Hollis and Lukes (eds), *Rationality and Relativism* (1982). My argument in the text is broadly based upon the argument against Quine in Beyleveld, 'Epistemological Foundations of Sociological Theory' (PhD thesis on file at the University of East Anglia, Norwich, UK, 1975).

validity of competing empirical accounts of international law in different cultures must be rejected, such accounts are comparable, and divergences can be established.

If such cultural traditions are comparable, then the following is true. If we take a statement  $p$ , which is true in tradition  $X$ , but false in tradition  $Y$ , then it follows that it is true that tradition  $Y$  must be able to understand  $p$  and also state that in  $Y$ ,  $not-p$  is true. The statement ' $p$  is true in  $X$  and false in  $Y$ ' can be called statement  $S$ . However, from this it follows that  $S$  must be a true statement in both  $X$  and  $Y$ . More precisely, criteria of validity in  $X$  and  $Y$  both permit the identification of  $S$  as being true for both  $X$  and  $Y$ . Therefore, for  $X$  and  $Y$ , weak incommensurability presupposes commensurability because both must assert the validity of  $S$  to be able to disagree over the validity of  $p$ . Hence, if the incommensurability thesis can be meaningfully stated, it implies commensurability, and therefore must be false. The incommensurability thesis, in this cultural guise, states that criteria of validity are ultimately relative to particular cultures. However, by making this claim, proponents of the incommensurability thesis must presuppose commensurability — in the form of shared validity claims — between cultures.

These rather abstract comments need to be brought back into focus. It has been argued that we can explain the differences between descriptions of international law via pragmatism. These differences depend upon (i) the validity claims which underpin different cultures and (ii) the ability of a writer, within a particular culture, to order the flux of empirical reality in accord with (i). As these differences can be coherently ascertained, this presupposes comparability and hence weak incommensurability. It has been shown that weak incommensurability entails that some validity claims must be cross-cultural. Therefore, when there are divergences in descriptions of international law commensurability must be presupposed for the divergence to be recognized.

What is the nature of this commensurability — or shared validity claims — which underpins disagreement? Traditionally, pragmatism has been employed to explain the relativity of logical principles. Perhaps the commensurability between different international law traditions entails the existence of universal logical principles.<sup>32</sup> However, for international lawyers there is a greater deal of commensurability than this. This commensurability can be explained with regard to one of the problems identified previously concerning the demarcation of the object-domain of international law.

### 3 Purposivity, Functionality and International Law

It has been ascertained that international lawyers, in different traditions, presuppose a degree of commensurability in their writings. These are shared validity claims which underpin their ability to diverge and disagree over descriptions of international law. Therefore, we should not be instantly fooled by those who claim that different descriptions of international law are no more, or less, valid than any other or are based

<sup>32</sup> See *supra* note 31, in particular the articles by Hollis.

upon culturally determined validity claims which are, at root, incommensurable. In this section, I will explain how the idea of commensurability leads to a solution to two of the problems identified above. These problems are the establishment of the object-domain of international law and the judgment of ontological priority. The answers to these problems provide a groundwork for a legal methodology which can solve the problems identified by the incommensurability thesis.

## A

The term ‘commensurability’ refers to shared criteria of validity. Applying this to the present argument, between two different descriptions of international law there must be some level of inter-subjective agreement. This must be presupposed if there is to be a genuine disagreement over different descriptions of international law.<sup>33</sup> But what is commensurable for international lawyers? At its most basic level, and if one accepts a rationalist position, principles of logic and reason are presupposed by any attempt to engage in knowledge of one’s own existence or contemplation of the existence of the external world.<sup>34</sup> However, this is true for any human being and international lawyers agree on more than this. Initially, international law can be understood in terms of practical reason. Practical reason concerns reason as applied to human conduct. More specifically, it concerns the capacity of individuals (conceived of as rational beings) to not just act in accordance with law (like, for example, a physical object or a non-sentient animal) but rather to *conceive of a law* and choose to act in accordance with it.<sup>35</sup> Therefore, as international law directs individuals’ (who normally operate within state institutions<sup>36</sup>) actions, it provides practical reasons why they should act in particular ways. For an international lawyer to disagree with this statement is to accept the possibility that international law is not a normative (i.e. action guiding) phenomenon. If international law establishes reasons for action-guidance, it must establish certain rules which state what conduct is required, permissible or optional. These rules represent standards of conduct. International law must be understood as an institution if it is to be able to maintain such standards of conduct. If international

<sup>33</sup> For an insight into the Aristotelian foundations of this kind of argument, see Fortenbaugh, ‘Aristotle’s Analysis of Friendship: Function and Analogy, Resemblance, and Focal Meaning’, 20 *Phronesis* (1974–1975) 51. For a general analysis of how such insights can be applied to conceptualize law, see Toddington, ‘Method, Morality and the Impossibility of Legal Positivism’, 9 *Ratio Juris* (1996) 283.

<sup>34</sup> For a good account of how it is possible to demonstrate that certain logical principles are universal see Beyleveld and Brownsword, ‘The Implications of Natural Law Theory for the Sociology of Law’, in Carty (ed.), *Postmodern Law* (1989) 126.

<sup>35</sup> Beck gives the example of an animal’s natural impulse to procreate. Both rational beings and non-rational beings feel an impulse to procreate. We could say that it is law of nature that beings procreate. Non-rational beings can only *act in accordance* with the law. Rational beings can, on the other hand, conceive of the law, and choose whether to act in accordance with it. Therefore, international law presents reasons to states (as a collection of individuals that are institutionally organized) about how they should act. States are capable of choosing whether to act in accordance with it. See L. Beck’s introduction to Kant, *Critique of Practical Reason* (1956, first published 1788) xi. For an excellent extended commentary, see L. Beck, *A Commentary on Kant’s Critique of Practical Reason* (1960) chapter 3.

<sup>36</sup> See *infra* at 651 for an explanation of the role of individuals in state institutions.

law is to be able to guide the action of individuals it is a regulatory institution. It logically follows that, whilst it is permissible to disagree over these considerations, by doing so one must reject the view that international law is concerned with the institutional regulation of a category of human action via rules.

The category of human action which international law regulates can be specified. International law can be considered a category of the legal enterprise. The legal enterprise concerns the institutional regulation of human action in general.<sup>37</sup> As a category of the legal enterprise, international law regulates a *certain form* of human action in the same way as European law, tort law or criminal law. But what form of human action does international law regulate? The state — defined as the dominant regulatory institution within a given society — is clearly a prime candidate for the form of human action which international law regulates.<sup>38</sup> Specifically, it is the interrelationships between states which form the subject matter of international law. Of course, other forms of human action are regulated by international law, but the regulation of the state provides a basic starting point which international lawyers can agree upon. This argument seeks to apprehend a particular form of human action for the purpose of regulation and to provide a commensurable basis, which can be concurred with by international lawyers, from which genuine disagreement can take place. To deny this level of commensurability is to deny that international law is concerned with the regulation of the state via rules, which would appear implausible. But this is not the only conclusion which results from a denial of this level of commensurability. For if we examine *Oppenheim*, its opening statement reads: 'International law is the body of rules which are legally binding on states in their intercourse with each other.'<sup>39</sup> Cassese makes a similar point when he states: 'The first salient feature of international law is that it aims at regulating the behaviour of states, not that of individuals.'<sup>40</sup> Furthermore, it is not glib to suggest that all major textbook writers would accept this basic level of agreement.<sup>41</sup> If one denies this level of commensurability, therefore, one denies the possibility of genuine disagreement with the major textbook writers in international law.

This argument does not purport to make any assumptions about the goals and objectives of international legal institutions or how these institutions should be

<sup>37</sup> See Fuller, *The Morality of Law* (1969) 96.

<sup>38</sup> See *infra* at 651.

<sup>39</sup> Jennings and Watts, *supra* note 12, at 4.

<sup>40</sup> Cassese, *International Law in a Divided World* (1990) 9.

<sup>41</sup> Higgins has remarked that 'international law is not rules. It is a normative system. All organized groups and structures require a system of normative conduct — that is to say, conduct which is regarded by each actor, and by the group as a whole, as being obligatory, and for which violation carries a price.' She then contends that international law is not 'rules' but is 'process'. This statement could potentially undermine the argument in the text as my argument appears to depend upon rules being part of international law. However, I consider that Higgins' remarks should be interpreted as a disagreement with the idea that international law is a complete or seamless web of rules, with no lacunae. Her view of international law is that adjudicative institutions apply the law to particular cases by virtue of certain processes which make the link between general rules and specific state practice. See Higgins, *Problems and Process: International Law and How We Use It* (1994) 1 and *passim*.

instrumentally devised. Furthermore, it does not make assumptions about what sort of norms are considered to be legally valid as opposed to legally invalid. All this argument achieves is a baseline of commensurability from which disagreements over institutional design, function, purpose, efficiency and validity can take place.

This has ramifications for attempts to describe international law. This is because institutions, such as international law, are hard to conceptualize. They permeate many other institutions and activities, and it becomes very difficult to see where ‘international law’ ends and, for instance, ‘international politics’, ‘municipal law’ or ‘European law’ begins. Unless we can provide a cut-off point, we might as well attempt to reconstruct all practical action, as all institutions are likely, at some point, to permeate and effect all other actions and institutions. This is the problem, which was mentioned above, of determining the object-domain of international law. Hence, unless it is possible to agree, at some basic and non-question-begging level, what the object-domain of international law is, we cannot differentiate it from other disciplines. But this is exactly what the argument above proposes. To say that international law concerns the regulation of the interrelationships between states via the application of rules is to demarcate where international law ends and other regulatory institutions begin and, therefore, what constitutes the object-domain of international law.<sup>42</sup>

## **B**

When we make statements concerning features characteristic of international law, the term ‘ontological priority’ refers to the problem of ascertaining which of these features should be considered most important in our conceptual framework. The incommensurability thesis identifies that this is implied in any attempt to describe international law. In this section, it is argued that to determine ontological priority one must determine what kind of social order international law maintains. To explain this point, however, it is necessary to return to the idea of practical reason.

Practical reason concerns reason as it is applied to conduct. When an individual decides to do *x* (that is, a given act), he employs reason. The decision to do *x* can be based upon a variety of reasons. Examples are accumulated knowledge of the world in which the individual finds himself, rational reflection upon the general principles one wants to live one’s life by and knowledge or recommendations conferred by other individuals. This knowledge is weighed up via certain criteria that the individual considers are valid (i.e. practically rational), and this precipitates, at least from the subjective point of view of the individual, a justifiable action.<sup>43</sup> The sum of these exercises of practical reason constitutes a social system. Each individual employs

<sup>42</sup> By returning to the analysis of legally valid uses of force in self-defence in *Oppenheim*, this point can be explained (see *supra* at 642–644). As was explained above, in this work there is no attempt to make a judgment on the legal validity of particular uses of force. This could be understood as the result of the inability of the editors to make a judgment about where the realm of international law ends and where international politics starts. See Jennings and Watts, *supra* note 12.

<sup>43</sup> See L. Beck, *A Commentary on Kant’s Critique of Practical Reason* (1960) chapter 3.

practical reason to ascertain how he should act with regard to other individuals within the social system.<sup>44</sup>

Within a social system, there are institutions. These institutions exert a powerful normative influence upon individuals' practical reason and, therefore, how they should act in specific contexts. The family, local government and the law are all examples of institutions which provide reasons to individuals to act in certain ways but not in others.

But what is the relationship between institutions and the social system?<sup>45</sup> An answer to this question appears necessary, at least for international law, because of its regulatory role. To explain, it has been argued that international law is an institution which has a regulatory function. International law regulates the interrelationships between states. This rests upon two ideas. First, the idea of a 'state' must be clarified. A state should not be considered as some kind of 'quasi-metaphysical' entity which has some kind of life of its own. Rather it is conceived as an institution which is made up of individuals with common interests and common goals. Therefore, when referring to a state's interests we are referring to the common goals of those involved in the institution. From the viewpoint of international law, a state's interests refer to the goals of its interrelationships with other states, be they economic, political or otherwise.<sup>46</sup> Secondly, the idea of 'regulation' needs to be clarified in this specific context. That there is a need for regulation presupposes that there is social disorder in the relations between states that needs solving. More specifically, there are standards of conduct which international law seeks to uphold, to which states, in their actions, fall short. Therefore, international law rests upon a judgment concerning how states should act and what sort of standards of conduct they should conform with and hence must be conceived as an institution that functionally maintains certain values within the system as a whole. But, if this is the case, why is it necessary, from the point of view of the system as a whole, for there to be an institution which regulates the interrelationships between states? The answer to this question must be that social disorder in the relations between states, from the point of view of the system, requires rectification.

The focus on international law's function in preventing social disorder presupposes

<sup>44</sup> This argument is influenced by Merton, *Social Theory and Social Structure* (1968) 79 and *passim*; and Toddington and Olsen, *Law in its Own Right* (2000) chapter 3.

<sup>45</sup> Some consider that this question cannot be asked as social institutions, conceived as subsystems, are normatively closed to each other, and hence attempts to understand the relationship between the institution and the social-system is a non-starter. See, for example, Luhmann, *Social Systems* (1995); and Teubner, 'Substantive and Reflexive Elements in Modern Law', 17 *Law and Society Review* (1983) 239; Teubner, *Autopoietic Law: A New Approach to Law and Society* (1988) and Teubner, *Law as an Autopoietic System* (1993). Two important criticisms of this approach are developed by Bankowski, 'How Does It Feel to Be on Your Own? The Person in the Sight of Autopoiesis', 7 *Ratio Juris* (1995) 254; and A. Beck, 'Is Law an Autopoietic System?', 14 *OJLS* (1996). However, it is clear that even Teubner and Luhmann accept the view that law performs a regulatory role for society as a whole. What they are sceptical about is the capability of law to fulfil that role as it tries to regulate closed subsystems.

<sup>46</sup> For an explanation of this conception of the state as an institution, see Hollis and Smith, *Explaining and Understanding International Relations* (1990) chapter 7.

two further points. First, the function attributed to international law indicates that it is a purposive institution. It is directed towards the goal of system stability. Secondly, the idea that international law maintains or stabilizes the system presupposes a substantive concept of social order. To explain, it was argued above that international law maintains certain standards of conduct. If we conjoin this point to the idea that international law maintains system stability, it follows that the standards of conduct that international law attempts to maintain are those which are characteristic of a stable system. Therefore, international law does not just maintain system stability, but it maintains a substantive concept of system stability, or social order. The substantive content of a social order refers to those standards of conduct, and hence norms, which are characteristic of order.

These thoughts can be reconfigured in terms of means and ends. Weber states that social action can be described, ideal-typically, with specific reference to the goal or end the action seeks to achieve.<sup>47</sup> Now, the end or purpose of international law is to functionally maintain social order and this is of fundamental importance when considering how it should be described. Therefore, returning to the problems that were identified with descriptions of international law in textbooks, it is the maintenance of social order which should be given ontological priority in a description of international law. As it has been ascertained that the idea of social order requires an understanding of what standards of conduct are permissible within a given system, the ascription of ontological priority refers to a substantive conception of social order. Once the purpose of international law is clear, we can then describe international law by considering how institutions can be designed which are effective (or instrumentally rational) in achieving this end.

Different determinations of the purpose of international law produce different descriptions of international law. One point of view is that the purpose of international law is to protect the sovereignty of states. This point of view could be justified with recourse to communitarian arguments offered by neo-Hegelians.<sup>48</sup> We can then organize a description of international law by considering how institutions can be designed that are instrumentally rational in achieving this end. A different description of international law would be revealed if the protection of human rights was taken as having ontological priority.

Given that the judgment of ontological priority can potentially produce wildly differing conceptions of international law, the implications for familiar practice should be explained. To do this, it is helpful to distinguish essential from general definitions of international law. General definitions are ones that are commonly accepted, tend to make intuitive common sense and are based, to some extent, upon empirical reality. Essentialism refers to a definition of the term, and a subsequent description of international law, that can be rationally defended over all others. Now, it has been explained how rationally defensible criteria can be established for a particular

<sup>47</sup> See Weber, *The Methodology of the Social Sciences* (1949). See also Merton, *supra* note 44, at 78.

<sup>48</sup> For a useful overview of this kind of argument as applied to international relations, see Brown, *International Relations Theory: New Normative Approaches* (1992) chapter 3.



description of international law if focus is placed upon the function of international law in maintaining a particular conception of social order. If the conception of social order which is selected and the description of international law which flows from this is close to the generalized description, then it might be said that the essential description 'fits', or is an accurate account of, empirical reality. If the conception of social order and the description of international law which flows from it is divergent from generalized definitions, then it might be said that the definition is 'idealist'. However, accuracy in describing empirical reality is not a criterion which should be employed to assess the validity of a description. This is because 'fit' to empirical reality has been already shown to be a misleading starting point for describing international law due to an arbitrary selection of importance. Rather it is the justification for this selection of importance which provides a description of international law with validity. Therefore, if our conception of social order entails an international legal system which is close to generalized descriptions, then all well and good. What is generally considered international law is essentially international law. However, if our conception of social order and international law is divergent from generalized descriptions, then what is generally considered international law is not international law in an essential sense. This point is methodological, rather being a debate over what international law 'is' and 'what it ought to be'.

It would appear crucial in a description of international law to establish the conception of social order which international law is functionally designed to maintain. But to provide such an argument requires us to argue for a substantive conception of social order. This has traditionally been the terrain of moral and political philosophy. Therefore, in conclusion, it would appear that international lawyers cannot ignore theoretical concerns, and must embrace epistemology, social theory and moral and political philosophy if they are to justify their descriptions of international law.

#### 4 Building Descriptions of International Law

It is beyond the scope of this article to develop a comprehensive theory which can provide a justification for a particular form of social order upon which to ground a description of international law. However, an attempt will be made to explain how the previous argument can be, and has been, employed to describe international law. Specifically, I will examine Kant's theory of international law. Initially, however, it is important to expand upon international law's function in maintaining social order.

#### A

International law, it has been argued, can be described with reference to the role it performs in maintaining social order. It has also been argued there is a *prima facie* link between the values which are contained in the social system and the international legal system. An example of this approach is given by Weil in his famous work on the

‘relative normativity’ of international law.<sup>49</sup> He argues that the incorporation of a hierarchy of norms (for example, *jus cogens*) into international law produces indeterminacy and can potentially ‘destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose’.<sup>50</sup> It is clear, therefore, that Weil identifies international law as being a purposive institution which attempts to maintain system stability and social order. But what kind of social order does international law maintain? Given the argument in the previous section, this requires investigation into the standards of conduct, and hence norms, that are characteristic of social order. For Weil, these norms are cooperation and co-existence.<sup>51</sup> This conception of social order is based upon a combination of moral pluralism and a *general agreement* between states that they have a *fundamental interest* in cooperation and co-existence. International law maintains this conception of social order by enabling ‘these heterogeneous and equal states to live side by side . . . [and] to cater to the common interests that did not take long to surface over and above the diversity of states’.<sup>52</sup>

This portrayal of international law draws a distinction between those fundamental values which are agreed upon by states, and those values over which there is disagreement. Traditionally, international law only maintained those fundamental values over which there was agreement, but recent developments have meant that those values over which there is disagreement (such as human rights) are now portrayed as being fundamental (in the form of *jus cogens*). For Weil, the ‘subnormative domain’, which presumably refers to a domain of non-legal rules, is being blurred with the ‘normative’ or legal domain.<sup>53</sup> This leads to indeterminacy and the inability of international law to achieve its purpose of maintaining system stability. This is because there is a discontinuity between the values which the social system generally considers are fundamental and the values which the legal system considers are fundamental.

Why is this discontinuity a problem? Weil answers this question by alerting us to the indeterminacy of these recent developments in international law which is referred to as the ‘blurring of the normativity threshold’.<sup>54</sup> This means that states cannot be certain what rules are, and what are not, normatively binding upon their conduct and therefore international law cannot fulfil its function of ensuring co-existence and cooperation. However, this discontinuity can be attacked on a philosophical level. This attack reinforces the comments made above concerning a connection between

<sup>49</sup> See Weil, ‘Towards Relative Normativity in International Law?’, 77 *AJIL* (1983) 413.

<sup>50</sup> *Ibid.*, at 423.

<sup>51</sup> *Ibid.*, at 418. Co-existence is defined as ‘reducing anarchy through the elaboration of norms of conduct enabling orderly relations to be established among sovereign and equal states’. Cooperation means ‘serv[ing] the common aims of the members of the international community’. For an interesting commentary on this point, see Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case’, 16 *OJLS* (1996) 89; and Fastenrath, ‘Relative Normativity in International Law’, 4 *EJIL* (1993) 3.

<sup>52</sup> Weil, *supra* note 49, at 418.

<sup>53</sup> *Ibid.*, at 421.

<sup>54</sup> *Ibid.*, at 415.

fundamental legal values and fundamental social system values in order to ensure that international law can maintain social stability.

To explain, states hold certain interests which guide their conduct. International law attempts to exert an influence on the conduct of states to try to ensure that they act in accordance with its rules. Sometimes conduct in line with state interests and conduct in line with international law will coincide and sometimes it will not. It follows, however, that if international law is to maintain system stability it must ensure that states comply with its rules rather than act according to their own interests. Postema makes the same point when he states that legal norms must be pre-emptive, which means that they must *override* other reasons for action, in order to maintain a system stability. He states that: 'legal norms not only provide rational agents with positive (first order) reasons to act in certain ways, but they also provide them with second-order reasons for *not acting* on certain *other* reasons.'<sup>55</sup> Therefore, for international law to prevent disorder and ensure stability, its rules must be pre-emptive. But it cannot be presumed that international law is pre-emptive. A justificatory argument is required to establish that it is so.

Returning to Weil's argument, states have a fundamental interest in cooperation and co-existence. Therefore, the leading candidate for the pre-emptiveness of international law comes from its capacity to ensure that states cooperate and co-exist. This perhaps would also provide a theoretical backing to Weil's argument that the development of *jus cogens* and obligations *erga omnes* undermines the capacity of international law to perform its function of maintaining social stability. This is because, according to Weil, there is a lack of general agreement on the validity of such norms and hence there is disagreement concerning their pre-emptive status.

There is a problem with Weil's argument at this point. He cannot simply *state* that cooperation and co-existence are fundamental values which states are agreed upon. For example, it could be equally stated that the development of *jus cogens* and obligations *erga omnes* are actually the product of a greater consensus on fundamental values within the social system to which international law is responding. However, it can be *stated* that states have all kinds of fundamental interests. The problem is providing a *justification* for certain specific *interests* over others. Weil has to demonstrate that states have a fundamental interest in a social order which is based upon standards of conduct which emphasize co-existence and cooperation. If such a justification can be established, and because international law maintains the stability of this conception of social order, international legal rules are also pre-emptive. Presumably, the legal validity of rules comes from the ability of such rules to maintain particular state interests and social stability.

For international law to maintain social order, it is not sufficient to just generate a series of legally valid rules. International legal institutions must also be capable of applying laws to particular situations to resolve disputes, and hence provide or restore social order. Therefore, it follows that an institutional division has to be made between

<sup>55</sup> Postema, 'Law's Autonomy and Public Practical Reason', in George (ed.), *The Autonomy of Law* (1996) 85.

the creation of laws and the application of those laws to particular situations. This presupposes that international law must have an adjudicative function.<sup>56</sup> But what is the rationale for this function? It could be assumed that adjudicative functions in international law simply apply a seamless web of rules directly to disputes. If this is the case, then the pre-emptive reasons underlying particular laws flow through to the judicial decision. However, can the transference of such pre-emptive reasons to adjudicative institutions be assumed? As Postema points out, the purpose of an adjudicative function is to resolve disputes that cannot readily be resolved by recourse to the stock of legal norms.<sup>57</sup> Now, it has been shown that legal norms must be pre-emptive if social order is to be maintained. However, for social order to be maintained, adjudicative institutions must also be pre-emptive. This is for two reasons. First, there is no reason why states should comply with a particular judicial decision if the pre-emptiveness of law stops at norm creation. Secondly, if decisions are being made ad hoc, then individuals will not be able to predict what decisions a judge will make and hence what patterns of conduct they should comply with. Therefore, the idea of social order presupposes an adjudicative institution which incorporates the justificatory reasons which required social order in the first place and were incorporated into legal norms. These justificatory reasons were based upon the fundamental interests states have in the existence of a particular form of social order.

## B

The proceeding argument develops the idea that social order is functionally maintained by international legal institutions. A justificatory argument must be provided to demonstrate why (a) social order is preferable to social disorder; (b) international legal norms are pre-emptive; and (c) why adjudicative institutions are pre-emptive. This form of argumentation is adopted by social contract theorists. These theorists provide a justification why social disorder — or a situation of pre-legality or state of nature — is rationally intolerable from the point of view of certain fundamental human interests. The social contract tradition is often mistaken as a philosophical-anthropological account of the genesis of social order. However, it is actually an *a priori* rationalization of how the problems of social order can be conceived and solved via law and hence it is relevant to the argument in this article.<sup>58</sup>

The justificatory argument which explains why certain human interests, or, in the context of international law, certain state interests, must be valued, can be called  $\emptyset$ . The ideas developed above can be presented formally:<sup>59</sup>

Stage 1      Social disorder, or the state of nature, in the social relations between states is rationally intolerable from the point of view of  $\emptyset$ .

<sup>56</sup> *Ibid.*, at 93.

<sup>57</sup> *Ibid.* See also Higgins, *supra* note 41.

<sup>58</sup> See the introduction by Lamprecht to Hobbes, *De Cive* (1949, first published 1642) xxi, for an explanation of the function of social contract arguments. Carr thinks that Pufendorf makes the mistake mentioned in the text. See Carr (ed.), *The Political Writings of Samuel Pufendorf* (1994) 11.

<sup>59</sup> This presentation of the social contract is adapted from Toddington and Olsen, *supra* note 44, at 125.

- Stage 2 The problem of social disorder at stage 1, which was rationally repugnant from the perspective of  $\theta$ , entails that states must give up certain patterns of conduct that are characteristic of social disorder.
- Stage 3 A legal institution is required to generate a stock of legal norms which are justified by  $\theta$  and hence characteristic of social order.
- Stage 4 The maintenance of social order via the institutionalization of international law presupposes a judicial division of labour to respond to problems which cannot be adequately responded to by direct application of the stock of legal norms established at stage 3. However, if such norms are to resolve social conflict, they must be predictable and normatively justified. This can only be achieved if judges attempt to justify their decision in accordance with  $\theta$ .

## C

A defensible description of international law is generated by considering the conception of social order which international law maintains and certain justifiable interests which it upholds. However, what are such justifiable interests? In traditional social contract arguments, certain specified human interests were given priority. It has been stated that international law maintains certain state interests. But what is meant by the term 'interests'?

Interests have been defined as values individuals or states seek to attain and which guide their conduct. It has been established that for international law to be coherent, it is necessary to ascertain why, on a fundamental level, states have an interest in the existence of a particular form of social order. However, all kinds of potential justifications for this can be provided. Unless we can find a way of assessing the validity of different justifications, we are thrown back to the incommensurability thesis.

Traditionally, social contract theorists have attempted to ground a theory of justifiable interests by arguing that an individual's subjective interests presuppose certain objective interests. For Hobbes, survival must be valued by all agents regardless of their purposes and is required because it maximizes the individual's chances of survival. Social order is maintained by law characterized as a sovereign or leviathan who has the unilateral power to make and enforce its judgments.<sup>60</sup> Cooperation and stability is ensured by law, as the 'primary role of the sovereign is to render cooperation rational by threatening sanctions that lower the payoffs individuals can expect from trying to take advantage of one another'.<sup>61</sup>

<sup>60</sup> This argument is somewhat controversial. See Gauthier, 'Thomas Hobbes: Moral Philosopher', 75 *Journal of Philosophy* (1979) 547; and Gert, 'Hobbes's Account of Reason', 75 *Journal of Philosophy* (1979) 559.

<sup>61</sup> See Kavka, 'The Rationality of Rule-Following: Hobbes' Dispute with the Foole', 14 *Law and Philosophy* (1995) 5.

But is self-interest sufficient to ensure that individuals value social order in all circumstances? A comprehensive answer to this question cannot be given here. However, it does follow that if an individual can get away with it, or is sufficiently powerful to avoid the imposition of a sanction by a sovereign, then it will sometimes be rational to disobey the law. If there are circumstances where it is rational to disobey the law, it can be questioned whether self-interest alone provides sufficient normative grounding to ensure the maintenance of social order.<sup>62</sup>

This point is realized by Liberal Intergovernmentalists, such as Moravcsik, who argue that the reason for a state's compliance with any intergovernmental law is determined by the relative costs of defection from a legal norm.<sup>63</sup> If the costs of defection outweigh the costs of compliance, then the state will defect.

One way to avoid this problem is to provide a justification for human interests whereby human beings have a rational interest in respecting other individual's rights and cooperating in social order irrespective of their self-interest. Therefore, rather than grounding legality in prudential reason, legality can perhaps be more profitably based upon moral — or other-regarding — considerations.

Kant develops a moral theory of international law in the *Metaphysics of Morals* and *Perpetual Peace*.<sup>64</sup> The categorical imperative forms the cornerstone of Kant's practical philosophy and reads 'Act only on that maxim through which you can at the same time will that it should become a universal law'.<sup>65</sup> This principle is categorically presupposed by any being who is capable of reasoning practically (which roughly corresponds to all human beings).<sup>66</sup> Therefore, whatever interests a rational being has, it must accept the validity of the categorical imperative.<sup>67</sup>

The moral requirements of the categorical imperative provide the fundamental interest that individuals have in maintaining a particular form of social order maintained by international law. Kant contends that, in the state of nature, states violate the categorical imperative and thereby 'degrade humanity'.<sup>68</sup> Therefore, states should enter into a 'constitution' which maintains the rights of states and individual human beings. Returning to the social contract model developed above, these comments can be expanded upon:

<sup>62</sup> For a sophisticated argument along these lines, see Hampton, *Hobbes and the Social Contract Tradition* (1995) chapter 7.

<sup>63</sup> Liberal Intergovernmentalists consider that state actions can be rationally understood according to a presumption that such states will always act in their own self-interest. See Moravcsik, 'Preference and Power in the European Community: A Liberal Intergovernmentalist Approach', 31 *Journal of Common Market Studies* (1993) 473.

<sup>64</sup> Kant, *supra* note 4.

<sup>65</sup> Kant, *The Groundwork of the Metaphysics of Morals* (1948, first published in 1785).

<sup>66</sup> For a discussion of Kant's derivation of the categorical imperative, see Beyleveld, 'Gewirth and Kant on Justifying the Supreme Principle of Morality', in Boylan (ed.), *Gewirth: Critical Essays on Action, Rationality and Community* (1999) 97.

<sup>67</sup> This statement is reflective of Kant's argument for the categorical imperative in Part 3 of *The Groundwork of the Metaphysics of Morals* (1785) and *The Critique of Practical Reason* (1788).

<sup>68</sup> Kant, *Perpetual Peace* (1795) 16.

- Stage 1 The problem of social disorder or the state of nature is born of unilateral attempts to decide and enforce what the categorical imperative requires by states. He considers that this amounts to a state of war. He claims: 'In the state of nature among states, the right to go to war (to engage in hostilities) is the way in which a state is permitted to prosecute its right against another state.'<sup>69</sup> Even if states are attempting to abide by the categorical imperative, this still leads to conflict as opinions over the correct application of the categorical imperative vary. Kant goes on to say that '(1) States, considered in external relation to one another, are (like lawless savages) by nature in a nonrightful condition. (2) This nonrightful condition is a *condition* of war (the right of the stronger) . . . [,] is still wrong in the highest degree, and States are under an obligation to leave it.'<sup>70</sup>
- Stage 2 Kant claims that: 'For states in their relation to each other, there cannot be any reasonable way out of the lawless condition which entails only war except that they, like individual men, should give up their savage (lawless) freedom, adjust themselves to the constraints of public law, and thus establish a continuously growing state consisting of various nations . . . which may ultimately include all the nations of the world.'<sup>71</sup> Therefore, states must give up their 'lawless freedom' which is the ability to unilaterally judge and unilaterally enforce what is right.
- Stage 3 The problems identified at stage 1 are solved via the establishment of an institution which creates heteronomous rather than unilateral judgments of right. This requires, according to Kant, a federation of states all of which are republican. Therefore, Kant's 'heteronomous will' refers to decisions made by representatives of a confederation of republican states concerning the most justifiable application of the categorical imperative.<sup>72</sup>
- Stage 4 Kant recognizes that a judicial division of labour is presupposed *a priori*.<sup>73</sup> He also claims that the judicial function of law in general operates 'in accordance with the conditions of Right'.<sup>74</sup> If 'Right' is defined as the rules

<sup>69</sup> Kant, *Metaphysics of Morals* (1797) 152.

<sup>70</sup> *Ibid.*, at 151.

<sup>71</sup> Kant, *supra* note 68, at 19.

<sup>72</sup> Waldron, in 'Kant's Legal Positivism', 109 *Harvard Law Review* (1996) 1535, thinks that Kant does not incorporate the categorical imperative into his theory of law and instead states that the 'heteronomous will' is an arbitrary judgment of right. Therefore, for Kant, the need to sustain social order takes priority over the valid application of the categorical imperative. However, this interpretation can be questioned. See Toddington and Olsen, *supra* note 44, chapter 4 for a discussion. I have chosen to take the interpretation of Kant which states that the categorical imperative is incorporated into law-making in variance to Waldron's argument. Given the arguments made above concerning the pre-emptiveness of legal norm creation and adjudication, this would appear the only plausible way in which legal institutions can maintain social order (*supra* at 654–656).

<sup>73</sup> Kant, *supra* note 69, at 113.

<sup>74</sup> *Ibid.*

which can be justified by the categorical imperative, then it would appear that a judicial function must be consistent with the underlying moral premise of the categorical imperative. Kant also claims that states will decide unilaterally what they consider is a correct application of international laws generated at stage 3 unless there exists an adjudicative institution.<sup>75</sup>

This argument illustrates how Kant's moral principle, the categorical imperative, which is presupposed by all social action is, in fact, indispensable for his conception of social order and international law's role in maintaining it. This is because only via international law can moral controversy (that is, disputes between unilateral conceptions of right) be solved and social order maintained.

To fit this argument back into the central question in this article, Kant provides a justified viewpoint from which to describe international law. This viewpoint is the categorical imperative which, according to Kant, is presupposed by any justifiable conception of social order. Moreover, Kant has (a) identified the link between the maintenance of social order and international law and (b) considered that states have a fundamental (indeed categorical) interest in maintaining social order. Kant's approach, therefore, appears to reflect the method employed in this article, and perhaps, through the argument for the categorical imperative, provides a way of filling out the substantive content of such a method.

## D

From the viewpoint of familiar international legal practice, Kant's description of international law may be considered some distance from generalized descriptions. For Kant, international law is characterized by a federation of republican states who have legislative power. If Kant is right, familiar international legal practice cannot be *essentially* referred to as international law. Perhaps we can consider the United Nations a step in the right direction, or an example of a proto-legal institution, but if Kant is right, then international law does not *essentially* exist.

However, this depends upon the validity of Kant's argument. The argument presented does not attempt to justify Kant's argument, but uses it as an illustration of the method advanced in this article. Most importantly, no claim is made concerning the validity of the categorical imperative as a moral principle. However, Kant's derivation of the categorical imperative can be argued over by international lawyers with their new found interest in philosophical issues.

## 5 Conclusions

In order to describe international law, international lawyers must take account of epistemology, social theory and political and moral philosophy. International law

<sup>75</sup> Kant, *supra* note 68, at 18.



textbooks provide few reasons why one description of international law should be preferred to others and this results in the problems associated with the incommensurability thesis. I have sketched out what is considered a response to these problems. Initially, one must make a judgment of the object-domain of international law. This judgment is that international law regulates the interrelationships between states. Secondly, a judgment must be made concerning what should be given ontological priority within a description of international law. It was argued that this judgment can be resolved by examining the function of international law in maintaining a particular conception of social order. Furthermore, there is a link between the conception of social order and what rules are to be considered legally valid. Finally, this method was illustrated with reference to Kant's theory of international law.

It may appear that this article emphasizes form over substance and this is true. However, the central impetus behind this article is to demonstrate why international lawyers must take account of theoretical issues if their descriptions of international law are to possess validity. Furthermore, a groundwork has been provided to ascertain how this may be achieved. On a practical note, it should come as no surprise that in the rapidly changing world in which we live we must focus on justifying the fundamental interests that are characteristic of social order and how this social order can be effectively maintained by international law. The problem is, perhaps, that we cannot decide what these values are in a categorical sense. Hence, we are left unsure about the purpose of international law, how it should be institutionally designed and ultimately, what it is.

