
The Politics of Interest in International Law

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Abstract

The article examines the substance and form of 20th century positivist international law; in particular the way in which each determines the other. The text describes the turn to interests in international law, which evolved slowly in scope and depth. By examining Lassa Oppenheim's focus on 'common interests' that united states and Hans Kelsen's focus on the 'struggle of interests' that constituted politics, the article studies two phenomena produced by the foundational role taken by interests during the 20th century. First, this role contributed to putting an end to the moral discussion about the treatment of native populations. Secondly, it curbed debate about a common political project for a global order, thus creating conformity characterized by abuse of power – all in the name of the neutrality of positivist law. This article suggests that the work of these two leading theoreticians in the field has contributed to the shaping of the legal theory of mainstream positivist international law, and seeks to foreground discussions about the different theories on the role of law in politics. In this manner it aims to help reconceptualize law in such a way as to bring about a situation in which discussions of a common political project for the international arena are more central.

1 The Turn to Interests

The existence of a norm presupposes a common political project or political conflict. When there is valid legislation on an issue, a state, an individual, or a corporation can act and invoke the protection of law. Many of the political conflicts of society are therefore resolved by the very act of creating norms.¹ While the previous statement appears both rational and reasonable, simultaneously, this article adds something fundamental

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¹ Rus, 'La filosofía jurídica de Leonardo Polo', 25 *Anuario Filosófico* (1992) 217.

about this type of thinking: that commonality of interests and conflicts about interests are distinctly different from common political projects or political conflicts.

The notion of ‘conflicts’ became current during the 19th century with a specific meaning that had naturalistic and economic overtones and soon evolved into a cornerstone of the new international law. Positivists of the 20th century, in particular, affirmed that norms protected ‘interests’ which prevailed in the pre-legislative ‘struggle’. Thus, ‘conflicts’ – as these positivists viewed them – arose in relation to ‘interests’.² Positivists who devoted themselves entirely to international law also focused on the importance of interests as the basis of the relations between nations, this time as a tool to eschew the conflicts.³

Long before the concept of ‘interest’ took on a foundational role in 20th century international law, a shift from the notion of ‘common good’ to that of ‘public interest’ had occurred in the European political arena of the 17th century.⁴ The abandonment of natural law in late 19th century international law was thus preceded in modernity by an understanding of domestic societies and the rules which governed them, ‘not as a part of a cosmic order but as the outcome of man’s varying needs and interests’.⁵

Prior to that, ‘interests’ had been a political concept of Roman civil law. But within the context of an ethical view of politics, interests were subsumed in the triad of just, useful, and honest.⁶ The Christian cosmology of the Middle Ages gave precedence to the principle of ‘common good’ and, according to Lazzeri, the concept of ‘interests’ did not appear in legal discourse until the 13th century, and was then used by jurists only in the limited sense of a purely subjective and material notion for ascertaining damage and benefit in the financial legal processes.⁷ However, from the 15th century onwards, the notion of interests took on increasingly clear economic and political contours. This coincided with a great development of the European economy starting in the Italian republics of Venice, Genoa, and Florence, which had abundant financial and commercial resources.⁸ ‘Interests’ became an important part of the political vocabulary of the humanists. But in a world that was still theocentric the term required some justification due to its negative connotations for the moral development of subjects and states. In Henri de Rohan’s influential *De l’intérêt des princes et des Etats de la chrétienté* (1638) the content of concrete interests, both for individuals and for states, becomes verifiable for the first time using objective methods.⁹

² This article is a summary of some of the issues dealt with in M. Garcia-Salmones Rovira, *The Project of Positivism in International Law* (2013).

³ Forcefully in the work by Lassa Oppenheim.

⁴ For a review dealing with the change in English society see J.A.W. Gunn, *Politics and the Public Interest in the Seventeenth Century* (1969). For a brief review of literature in the French case see A.O. Hirschman, *The Passions and the Interests. Political Arguments for Capitalism before its Triumph* (1997).

⁵ This was true of England as depicted by W.H. Greenleaf, *Order, Empiricism and Politics. Two Traditions of English Political Thought, 1500–1700* (1964), at 145.

⁶ On the evolution of the notion of ‘interest’ from Ancient Rome to the 16th century see Lazzeri, ‘Introduction’, in H. Rohan, *De l’intérêt des princes et des Etats de la chrétienté* (1995), at 16.

⁷ *Ibid.*, at 22.

⁸ *Ibid.*

⁹ *Ibid.* at 136; on the subsequent impact of Rohan’s book in England see Gunn, *supra* note 4.

Notwithstanding the moral concern about the idea which arose in previous centuries, by the middle of the 17th century ‘interests’ were equated with ‘self-interests’, and through this process they seem to have been remodelled into abstract qualities of humanity.¹⁰ The main authors of the tradition of interests in the post-17th century period – Hugo Grotius, Thomas Hobbes, David Hume, Adam Smith and Jeremy Bentham – viewed ‘interests’ from a utilitarian perspective.¹¹ In international law, the tradition of interests of positivist-minded lawyers can be traced back at least to Hugo Grotius. Even in the opening chapters of Grotius’s *De Jure Praedae Commentarius*, his first major work on natural law and natural rights theory, it is possible to see that self-love and ‘advantage’ were taken as the basis of law and society.¹² Sometime later, writing about legal philosophy, David Hume understood justice as a foundational virtue, without which ‘there can be no peace among them [creatures] nor safety, nor mutual intercourse.’¹³ It nevertheless had its origin in self-interest.¹⁴

The durability of the theories of the authors belonging to the tradition of interests helped pave the way for the modern theory of law. On a broader level, this article aims to discuss and show how 20th century positivist international lawyers earned their place in the list of eminent names set out above due to their similar atomist philosophy; one which perceived the social world as being grounded on interests. It also aims to demonstrate that that tradition of interests has helped mould the foundations of contemporary international law into an economic form.

Lassa Oppenheim,¹⁵ Max Huber,¹⁶ Hans Kelsen,¹⁷ Hersch Lauterpacht,¹⁸ Manley Hudson,¹⁹ Philip C. Jessup,²⁰ and other towering figures of positivism of the previous

¹⁰ See, for instance, Force generally and with regard to Hume: ‘In Hume’s theory interests and passions are synonymous, because greed is the overarching passion’: P. Force, *Self-Interest before Adam Smith. A Genealogy of Economic Science* (2007), at 213.

¹¹ H. Grotius, *Commentary on the Law of Prize and Booty* (trans. and intro. by M.J. van Ittersum, 2006); T. Hobbes, *On the Citizen* (ed. and trans. R. Tuck and M. Silverthorne, 2007); see on interests and Hobbes: N. Malcolm, *Reason of State, Propaganda, and the Thirty Years War* (2007); D. Hume, *A Treatise of Human Nature* (Dover edn, 2003); A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (ed. and intro. by Edwin Cannan, 1903); J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Dover edn, 2007).

¹² Grotius, *supra* note 11. As pointed out by Richard Tuck, the natural social impulse in human beings of which Grotius was convinced is a point of disagreement between Grotius and other theorists of self-love and self-interest: R. Tuck, *Natural Rights Theories* (1979). However, as Koskeniemi has recently explained, Grotius’s sociability was peculiarly ‘individualist’ since he took the view that reason taught human beings ‘to join society in which their long-term interests would be best served’: Koskeniemi, ‘International Law and the Emergence of Mercantile Capitalism: Grotius to Smith’, in P.-M. Dupuy and V. Chetail (eds), *The Roots of International Law* (2013) 3, at 8.

¹³ Hume, ‘Of the Origin of Government’, in *Essays by David Hume* (Introduction by H. Bennet, 1923), at 56.

¹⁴ ‘Thus Self-interest is the original motive to the Establishment of Justice; but a Sympathy with public Interest is the Source of moral Approbation, which attend that virtue’: Hume, *supra* note 11, at III, II, II.

¹⁵ L. Oppenheim, *International Law* (1905).

¹⁶ Huber, ‘Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft’, 4 *Das öffentliche Recht der Gegenwart* (1910) 56.

¹⁷ H. Kelsen, *Das Problem der Souveränität* (1920); H. Kelsen, *Vom Wesen und Wert der Demokratie* (1920 and 1929); H. Kelsen, *Pure Theory of Law* (trans. M. Knight, 1967).

¹⁸ H. Lauterpacht, *The Function of Law in the International Community* (1933).

¹⁹ Hudson, ‘The Prospect for International Law in the Twentieth Century’, 10 *Cornell LQ* (1925) 419.

²⁰ P.C. Jessup, *A Modern Law of Nations* (1958).

century used the philosophy of the tradition of interests in their work. Some of them shared at least three further common features: the aim of producing a science of law, a belief in the importance of purging the norms of international law from morality, and, crucially, the ambition to imbue the new international law with the quality of universality. Lassa Oppenheim, the author of ‘by common consent the outstanding and most frequently employed systematic treatise on the subject [of international law] in the English-speaking countries’,²¹ and Hans Kelsen, the legal theoretician of the 20th century,²² stand out within this group of lawyers due to their ground-breaking

²¹ A. Nussbaum, *A Concise History of the Law of Nations* (1947). For an overview of the various editions of Oppenheim’s *International Law* see Reisman, ‘Lassa Oppenheim’s Nine Lives’. Review Essay of *Oppenheim’s International Law 9th Edition*, 19 *Yale J Int’l L* (1994) 255. James Crawford stated not long ago that ‘there is no doubt that Oppenheim’s international law won the battle of the international law textbooks’, and it did so ‘not only because of the eminence of his inter-war editors, but initially through its own merits’: Crawford, ‘Public International Law in Twentieth-century England’, in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted. German Speaking Emigré Lawyers in Twentieth-century Britain* (2004) 681, at 697. Benedict Kingsbury’s and Mathias Schmoeckel’s are the most comprehensive and best studies of Oppenheim known to this author. Kingsbury captures much of the richness of Oppenheim as a liberal thinker of the European tradition who was able to combine a liberal internationalism with a European statist position. He emphasizes the role of (German) scientific positivism in Oppenheim’s thinking as the tool for sustaining the tension between the two latter incompatible companions. Although Kingsbury notices that Oppenheim abandoned his jurisprudence based on the psychology of the individual when he turned definitively to international law (for Oppenheim *the science of the states*), he continued to be committed to jurisprudence. Kingsbury seems to suggest that Oppenheim fashioned this commitment to positivist jurisprudence as a pluralistic, higher view of an ethical jurisprudence because he was a liberal and a cosmopolitan. The view of Oppenheim’s normative politics presented in this article attempts to expand and deepen rather than to negate Kingsbury’s argument in Kingsbury, ‘Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law’, 13 *EJIL* (2002) 401. The series of studies by Schmoeckel places emphasis on the German contribution: Schmoeckel, ‘The Internationalist as a Scientist and Herald: Lassa Oppenheim’, 11 *EJIL* (2000) 699, at 701; Schmoeckel, ‘Lassa Oppenheim (1858–1919)’ in Beatson and Zimmermann (eds), *supra*, at 583, 586; Schmoeckel, ‘The Story of a Success. Lassa Oppenheim and his “International Law”’, in M. Stolleis and Y. Masarahu, *East Asian and European Perspectives on International Law* (2004), at 57; Anghie’s analysis of the encounter of international law with the decaying colonies through the work of 19th century positivists, and in particular through Oppenheim’s, gives a definitive account of Oppenheim’s inability to face the political problems of his time: Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’, 40 *Harvard Int’l LJ* (1999) 1; Perreau-Saussine also makes an interesting jurisprudential study of Oppenheim. She focuses on his positivism and on the novel interpretation of the relationship between common law and international law that Oppenheim introduced into the English legal tradition: Perreau-Saussine, ‘A Case Study on Jurisprudence as a Source of International Law: Oppenheim’s Influence’, in M. Craven, M. Fitzmaurice, and M. Vogiatzi (eds), *Time, History and International Law* (2007), at 91.

²² S.L. Paulson and M. Stolleis (eds), *Hans Kelsen, Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (2005); Jabloner, ‘Kelsen and his Circle: The Viennese Years’, 9 *EJIL* (1998) 368, at 371. Kelsen is routinely referred to as the ‘jurist of the 20th century’: R.A. Métall, *Hans Kelsen Vida y Obra* (trans. J. Esquivel, 1976), at v; also Roscoe Pound referring to Kelsen: ‘unquestionably the leading jurist of the time’, quoted by Gross, ‘Hans Kelsen: October 11, 1881–April 15, 1973’, 67 *AJIL* (1973) 491, at 494; J. von Bernstorff, *Der Glaube an das universale Recht: zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (2001); Kammerhofer, ‘Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law’, 22 *Leiden J Int’l L* (2009) 225; J. Kammerhofer, *Uncertainty in International Law. A Kelsenian Perspective* (2011).

and comprehensive theories. To review their work entails, in an unambiguous sense, revisiting the element of novelty in the theory of international legal positivism of the 20th century. For this reason this article examines aspects of their work and presents them as the most brilliant exponents of the tradition of interests of the past century. Clearly, both Oppenheim and Kelsen emerged from particular legal traditions formed during the 19th century, a period during which celebrated jurists, whose theory increasingly revolved around the importance of interests, were active. Figures such as Karl Binding (1841–1920), Karl Bergbohm (1849–1927), Franz v. Liszt (1851–1919), and Heinrich Triepel (1868–1946) were among the most important of these jurists in shaping the future theory of international law.²³ Nonetheless, this article is concerned with the analysis of two members of the next generation of 20th century international legal positivists, who are described here as such mainly due to their more sophisticated elaboration of international legal positivism and on the basis of their work originating in the tradition of interests.

Following the positivist tradition of the previous century (of Travers Twiss (1809–1897), Karl Bergbohm, and Judge Holmes (1841–1935)), the economic aspect of international legal positivism was integrated in law in the manner in which its proponents created the objectivity of the science of law through purification and system. Oppenheim took the view that what united states was their interests. Politics, however, could not be redeemed; law had to be purified from politics, religion, and morality in order to enable the formation of a system of international law. Kelsen regarded the real and political world – or, as he called it, the world of *Sein* – as being economic in a deeply theoretical manner: everyone competes for their interests with everyone else. Interests are therefore an integral part of an epistemological and ontological view of the world. Thus for the law to be objective and value-free it has to be purified of reality. Furthermore, the pure law corresponds with the need for a system that assumes the universal experience of the struggle of interests.

During the 20th century, international legal positivists condensed, as it were, the new theoretical foundation of international public law into the concept of interests and constructed reality anew through interests ranging from the ‘common interests’ of the family of nations (Oppenheim) to the ‘struggle of interests’ of neoliberal democracy (Kelsen). Therefore, the theoretical change of scenario in the foundation of interests was a movement from morality to economy, and interests became a pattern that provided for order. For this reason, and unlike previous members of the tradition, in their treatment of the notion of ‘interests’, 20th century legal positivists no longer analysed how self-interest constructed society. Despite their individualism they took society for granted, as a historical or biological fact.²⁴

²³ In international law, for instance, H. Triepel, *Völkerrecht und Landesrecht* (1899); K. Bergbohm, *Jurisprudenz und Rechtsphilosophie* (1892); F. v. Liszt, *Das Völkerrecht systematisch dargestellt* (1902).

²⁴ Kelsen, ‘The Law as a Specific Social Technique’, in H. Kelsen, *What is Justice? Justice, Law and Science in the Mirror of Science* (1957), at 231.

The specific meaning and content of the concept of interests seem to vary within the tradition, but at the same time maintain a fixed value of an economic nature. In particular, international legal positivists viewed interests as being generally connected to commercial and economic activities. And while ‘interests’ often also referred to political interests, they were as such also increasingly described in a materialistic sense. Oppenheim’s view was that political interests should still be located outside law because they are ‘political’. Kelsen, on the other hand, was comfortable placing them alongside strictly economic interests and, for this reason, political, security, and other similar interests become equally the potential object of exchange or competition in this theoretical framework. No longer does politics constitute a social space in which to discuss the just, the good, or even the survival of the state, but it resembles the clear contours of a physical market in which different values appear in competition. This specific feature lies behind the characterization of the type of 20th century international legal positivist thought described in this article as economic-legal positivism.

Within this new tradition of interests, during the past century international lawyers discovered their mission in studiously determining the content of interests:

Where the nineteenth century sought the vindication of natural rights, it must be our task to vindicate and evaluate interests.²⁵

As a mainstream current of thought in international law even today, positivism asserts the law as it is, and not as it should be; it is usually voluntarist as to the origin of norms, and in its most analytical form it seeks a strict separation of law from reason, morality, and political ideologies and realities.²⁶ It is commonplace to refer to the impossibility of pinpointing the concrete meaning of an abstract ‘positivism’, and indeed many different authors have produced competing definitions of the notion, often employing for that the particular positivism of a determined author.²⁷ However,

²⁵ Hudson, ‘The Prospect for International Law in the Twentieth Century’, 10 *Cornell LQ* (1925) 419, at 435.

²⁶ A similar description can be found in Simma and Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’, 93 *AJIL* (1999) 302; for the importance of positivism today see Klabber’s comments in the review of Antonio Cassese’s, *Five Masters of International Law* that ‘all interviewees confess themselves to be positivists of one sort or another. This is not surprising, partly because positivism is a rather broad school, and partly because it would be difficult to build a big career on non-positivist premises’: Klabbers, ‘Book Review: Antonio Cassese’s, *Five Masters of International Law: Conversations with R-J Dupuy, E Jimenez de Arechaga, R Jennings, L Henkin and O Schachter*’, 22 *EJIL* (2011) 1175, at 1176.

²⁷ De Wolfe Howe refers to Holmes; Hart to Austin, Bentham, and Mill; Simma and Paulus refer to Jellinek and Kelsen; Kingsbury to Oppenheim; Perreau-Saussine to Bentham; Kalmó to Bergbohm; d’Aspremont to Hart; Kammerhofer to Kelsen; Ratner to Simma, and so on. See Hart, ‘Positivism and the Separation of Law and Morals’, in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983), at 49; Simma and Paulus, *supra* note 26, at 302; Kingsbury, *supra* note 21, at 401; Perreau-Saussine, ‘Bentham and the Boots-trappers of Jurisprudence: The Moral Commitments of a Rational Legal Positivist’, 63 *Cambridge LJ* (2004) 346; Ratner, ‘From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities’, in U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, and C. Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), at 155; J. d’Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules* (2011); J. Kammerhofer, *Uncertainty in International Law. A Kelsenian Perspective* (2011); de Wolfe Howe, ‘The Positivism of Mr. Justice Holmes’,

as a historical reality, 20th century international legal positivism has evolved with concrete and defined features. My argument does not attempt to trace all these different nuances of 20th century international legal positivism, but limits itself to the more modest task of contending that legal positivism developed a certain economic form that permitted certain types of legal content and blocked other types of content where these were deemed inimical to its political intuitions. The reason for this is the foundational position of interests in the new theory. This argument is analysed in the next section through an examination of the universalism of 'common interests' in Lassa Oppenheim's new international law and its discontinuity with previous theories of international legal positivism. I suggest that the breach may be seen in the changes introduced with regard to the treatment of native populations. The following section seeks to illustrate the different ways in which reality is understood as a mass of interests by positivists through important principles developed in Kelsen's legal theory, and to advance the thesis that the theory of the normative neutrality of legal positivism is misleading. Adopted as a fundamental premise, both 'interests' and the 'conflict of interests' determine the nature of the political theory about law and the remedies considered most appropriate for the international order. Remarkably, when employed as a foundational element 'interests' distort the political reality. On the one hand, when political conflicts are transformed into 'conflicts of interests', the ideal of law becomes 'neutrality' – the *logicization* of equality towards all sorts of positions – to which Kelsen once referred.²⁸ The world itself becomes a substance for bargaining: merely interests. On the other hand, adjudication becomes the central technique to resolve conflicts within the legal order. However, because they are equal, no justice can be imposed over interests: interests must be balanced.²⁹

The article concludes with a critique which argues that the focus on the notion of 'interests' offers a reductionist view of humanity and a distorted vision of the reality of the international affairs of states, as well as of international and of domestic society – much more unites or, sometimes, divides individuals, peoples, and states than the abstraction produced by a philosophy of interests grounded in economy is able to articulate. Occasionally, focus on interests causes the greatest injustice in the name of the neutrality of law. It is in this sense that, together with Kingsbury and Donaldson, the article submits that 'interests prove a very fragile foundation for an international

64 *Harvard L Rev* (1951) 529; Kalmo, 'Le positivisme de Karl Magnus Bergbohm, son arrière-plan et ses reflets dans la théorie pure du droit de Hans Kelsen', 42 *Droits* (2006) 199. For more comprehensive works see H. Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928); Morgenthau, 'Positivism, Functionalism and International Law', 34 *AJIL* (1940) 260; W. Ott, *Der Rechtspositivismus. Kritische Würdigung auf der Grundlage eines juristischen Pragmatismus* (1976); P. von Oertzen, *Die soziale Funktion des staatsrechtlichen Positivismus. Eine wissenssoziologische Studie über die Entstehung des formalistischen Positivismus in der deutschen Staatsrechtswissenschaft* (1974).

²⁸ Kelsen, *supra* note 27, at 68–70.

²⁹ In 1934, Kelsen stated, 'the principle of balancing of interests is merely an articulation, not a solution to the problem of the lack of a right answer': Kelsen, 'Zur Theorie der Interpretation', 8 *Internationale Zeitschrift für Theorie des Rechts* (1934) 14.

community'.³⁰ However, to state that current positive international law is economic would be a claim exceeding the ambitions of this text. Statehood, diplomacy, security, the practice of international law in diverse international fora, or the specific projects within international law (human rights law, economic law, environmental law, humanitarian law) have political and ideological complexity³¹ that cannot be simplistically labelled as economic – and indeed that will not be attempted here. Instead, this article aims to uncover the important philosophical and theoretical contribution of positivists to an economic understanding of international law. Does this necessarily mean that the insights of the economic-positivists have been perfectly implemented and integrated within the current international legal order? Perhaps the right answer to this question is to state that the legal theories of economic-positivism have become part of the assets of international legal theory, and it is for those who want to benefit from them to use them. Furthermore, it is a fact that the following stand out among the main trends observable in current international law: the development of a single system of universal law and of a unitary concept of law without reference to transcendence or to morality, together with an emphasis on the administrative style that this unification brings about in the working of international institutions; the foregrounding of international legal adjudication in international legal matters, and the participation of the individual in such adjudication. Each of these directions also constitutes a key theoretical contribution for the structural changes needed in law to adapt to a (neoliberal) economic understanding of the world.

Lassa Oppenheim's and Hans Kelsen's work inspired a novel theoretical approach to these orientations during the 20th century, a matter that is the background theme throughout this article.

2 The Universalism of Common Interests

In definitively purging law of its *transcendent quality* – that is, of a reference, beyond the norms themselves, to God, to (human) nature, or to an ideal rationality, or indeed to a combination of all three – the international legal positivists of the past century made the 'economic' the dominant element of positivist international law.³² I use 'economic' to refer to the mode of reasoning that explains both non-economic and economic realities solely as 'interests'.

³⁰ Kingsbury and Donaldson, 'From Bilateralism to Publicness in International Law', in U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, and C. Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), at 79, 82.

³¹ See the post by Bart Smit Duijzentkunst, 'Conveying Complexity: Martti Koskenniemi on the Cambridge Companion to International Law', *Cambridge J Int'l and Comp L*, blog, available at: <http://cjicl.org.uk/2012/02/03/conveying-complexity-martti-koskenniemi-on-the-cambridge-companion-to-international-law-2/> (last visited 12 June 2014).

³² For a recent review of the historiography of the entities 'considered as the basic unit of the structure and extension of order' see von Bogdandy and Dellavalle, 'Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms' 10 *German LJ* (2009) 5. The review (at 17) also contains a very brief reference to the economic-legal positivists, but without describing them as such.

Certainly, the 'economic' component in the foundation of international law was not invented during the late 19th century. Arguably, it was Grotius and possibly, during an earlier period, the Spanish Scholastics of the 16th century who started to develop a feasible law for the economy of the Spanish Empire, thus laying the foundations for an economic international law.³³ Grotius's purification of the notion of *jus*, which had the result of concentrating on *jus* as 'right' – more specifically, as 'my right' – produced international law with a strong bias towards individualist morality.³⁴ Continuing these traditions, authors like Lassa Oppenheim concentrated on introducing innovations in international law grounded on economic theory, this time highlighting the value of the unifying power of interests to enhance the universal aspirations of positivist international law.

Oppenheim's importance in shaping the history of international law during the 20th century lies in the fact that through his new positivist theory he successfully articulated a normative vision of international law in which law merely *reports* on the apolitical reality of the world. The marked ideological bias of positivist international law in favour of economic interests emerged beyond that modest statement of principles, as did its historical reaction to the colonial question – which, for the most part, amounted to ignorance of the problem. The new legal science successfully *contained* that political core and Oppenheim's work was instrumental in bringing about its theoretical development in an erudite and enduring manner. From that point on and according to Oppenheim, states were bound by common interests, and the new foundations of international positivist law were thus laid down.

But what kinds of interests united Oppenheim's international community, which he called the 'Family of Nations'? There were religious ideas that wound 'a band' around the civilized states, which were for the most part Christian states. Science and art were also by their nature international and could, to a great extent, 'create a constant exchange of ideas and opinions between the subjects'. But, since not even the most powerful empire could produce everything its subjects needed, the output of agriculture and industry called for exchange. That is why international trade constituted an 'unequalled factor' that promoted intercourse between states. International trade was the basis for navigation on the high seas and on the rivers. Trade, as a *creator*, would 'call into existence' the nets of railways covering the continents, and the international means of communication. Those 'manifold interests', which caused constant intercourse between states were the reason for the existence of ambassadors and consuls. Despite the fact that individual states enjoyed sovereignty and independence, there was something stronger than all the powerful factors causing disunity: 'namely, the common interests'. Thus, 'without the pressure

³³ Haggemacher, 'Droits subjectifs et système juridique chez Grotius', in L. Foisneau (ed.), *Politique, droit et théologie chez Bodin, Grotius et Hobbes* (1997), at 73; Tuck, *supra* note 12, at 58; Koskenniemi, *supra* note 12; Koskenniemi 'Empire and International Law: The Real Spanish Contribution', 61 *U Toronto LJ* (2011) 1.

³⁴ Koskenniemi, *supra* note 12.

exercised upon the States by their interests' legally binding rules would never have come into existence.³⁵

In each of his texts Oppenheim made it clear that it was by 'the growth, the strengthening and the deepening of international economic and other interests, and of international morality'³⁶ that the Family of Nations and international law would progress.³⁷ After all, there were 'eternal and economic factors working in its favour'. No doubt 'the economic and other interests of states' had promoted arbitration among states and were succeeding in the setting up of international courts.³⁸

But the interests binding modern states together were 'primarily' of an economic nature.³⁹ The more spiritual notions of art, science, and religion were international ideas, but he made no use of them in the development of his theory. For instance, in describing the range of dominion of the Law of Nations, he considers how the Law of Nations was a product of Christian civilization, pointing out that formerly no intercourse existed between Christian states on one side and Mohammedan and Buddhist states on the other. But since the beginning of the 19th century matters had started to change. Economic interests had emerged in relationships between people of different religions. Although there was still 'a deep gulf between Christian civilisation and others, *many interests*, which knit Christian States together knit likewise some non-Christian and Christian States'.⁴⁰

The nub of the issue here is not that his openness towards non-Christian states was wrong or misplaced. Never, after all, had Europe avoided intercourse with those capable of helping it to prosperity.⁴¹ From the outset, designing an international legal order grounded in economic interests could be thought of as economistic but unproblematic: simply a timely choice. The questionable aspect, however, arises when things other than interests are at stake. There were pressing non-economic international issues to be settled in Oppenheim's time, just as there are today. Ethical problems in the colonization enterprise and the hostility developing between European industrial countries called for a legal perspective, but crucially *not* an economic one. This economic law was of necessity blind to those questions and problems. It was in this manner that the focus on economic interest was an important step in foreclosing further discussion on the theory of international law, which during this period focused mainly

³⁵ Oppenheim, *supra* note 15, at 10, 11, 12, 17.

³⁶ Oppenheim's fluid understanding of morality can be grasped in L. Oppenheim, *Das Gewissen* (1898).

³⁷ He never specifies what the other interests are, but rather refers to the growth of means of communication like the telegraph, railway, and so on: Oppenheim, *supra* note 15, at 33.

³⁸ *Ibid.*, at 5.

³⁹ 'Economic interests, primarily, but many others also, prevent individual states from allowing the international community of states to remain unorganized any longer': L. Oppenheim, *The Future of International Law* (trans. J.P. Bate, 1921), at 66.

⁴⁰ Oppenheim, *supra* note 15, at 31 (emphasis mine).

⁴¹ See the portrait of the 16th century city-state of Venice as a worldly place, in which the foreign (Turkish, Greek, Jewish, and Germanic communities) was, ambiguously, both welcomed and segregated: Johns, 'Global Governance: An Heretical History Play', 4 *Global Jurist Advances* (2004) 1.

on commercial exchange and various forms of economic exploitation.⁴² 'Interests', oddly, claimed monopoly over normativity, being at the centre of the theory and becoming the measure of the ethical value of the legal enterprise. Interests built the firm foundation to which the rules of law could be referred, providing for the objectivity of law. In Oppenheim's legal discourse devoted to interests we do not find any social, cultural, or ethical enterprise of value to law beyond the consideration of interests.

Arguably, his adoption of the notion of 'common interests' as the central theoretical tool for the *International Law* is the main novelty of Oppenheim's positivism.⁴³ International law, he affirmed, ought to comprise only positive law: rules with no mingling with moral or religious categories beyond the facts of the rules themselves which were thought to originate from convention among the states. But Oppenheim considered that due to the 'common interests' international law tended to universality.

Much of 19th century positivist international law had been based on distinctions between civilized and uncivilized peoples – or, as the German put it, between those who deserved to be part of the international legal community and those who could count only on being protected on the basis of principles of humanity.⁴⁴ The critical step prompted by the new form of pragmatism, which founded the international community essentially on 'common interests', was putting an end to the moral discussion carried on by earlier positivists. Therefore, the novel priorities of the 'politics of interest' of international law are revealed by observing how legal positivists applied their theories to non-Europeans. Certainly legal positivism followed the power-politics of

⁴² The Hague Conferences of 1899 and 1907, which can stand for another type of humanitarian law, were two events immersed in the political complexity of a time of internal and external hegemonic shifts, and as such very difficult to interpret. Whether the powers were preparing for an impending war or whether they were committed to international peace and had a wish to organize the world, the truth is that the conferences served as experiments for the feasibility of 'universal' conferences. In The Hague, the spirit of the Chevaliers in a duel, of the 'civilized fight', went hand in hand with securing the routes and means for neutral trade despite aggression and with initiating an international means for the settlement of disputes. In view of technical developments, the anxiety of the powers about modern techniques of warfare was evidently justified, although the commitments expressed in the negotiations as to the reduction of the more obnoxious forms of armament were often watered down. The Russian circular note proposing the first conference declared that 'the maintenance of general peace and a possible reduction of the excessive armaments ... is in conformity with the most essential interests and the legitimate aspirations of all Power'. See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907*, (1915), at xiv; W.I. Hull, *The Two Hague Conferences and their Contributions to International Law* (1908). For a good summary of the conventions see Scott, 'The Work of the Second Hague Peace Conference', 2 *AJIL* (1908) 1; W. Schücking, *Der Staatenverband der Haager Konferenzen* (1912); J.H. Choate, *The Two Hague Conferences* (1913); Y. Daudet (ed.), *Topicality of the 1907 Hague Conference, the Second Peace Conference/Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la paix* (2008).

⁴³ Oppenheim, *supra* note 15, at 12.

⁴⁴ J. Westlake, *The Collected Papers of John Westlake on Public International Law* (ed. L. Oppenheim, 1914); the Germans, for instance, P. Heilborn, *Das völkerechtliche Protektorat* (1891); F. von Liszt, *supra* note 23. The classic study on this question from the perspective of the history of international law showing that the 19th century rhetoric of civilized versus uncivilized and enlightened versus ignorant ultimately served the purpose of demonstrating Western superiority over other peoples and thus of justifying the civilizing mission, is M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002).

the day when adopting its normative stands.⁴⁵ The new theories of the legal positivists, who can rightly be called the successors of the *Gentle Civilizers*,⁴⁶ accommodated the practice of the European powers and of the US and reflect an era of optimistic pragmatism.⁴⁷ With regard to the colonies, this found expression in increasing matter-of-fact policies in the acquisition of populated territories overseas. By describing colonization single-mindedly as ‘interests’, the responsibilities of the colonial powers were abolished. The question was stated clearly in German colonial policy directives:

It does not fall within the programme of German colonial policy to enter into the construction of state institutions among the barbaric tribal peoples, and to establish there a similar order of administration and justice, according to our conceptions: *Reasoning of the draft law on the ‘Fight against the Slave Trade and Protection of the German Interests in West Africa’*.⁴⁸

Albert Hänel (1833–1919), a leading constitutional law professor, commented, with regard to this policy statement that that was an obvious position where the Reich had no effective control (*effektive Herrschaft*) over the territories. But even where there was that effective control, the colonial power did *not* guarantee the native population the minimum condition that would permit one to speak of a state-community (*staatliche Gemeinschaft*).⁴⁹

How then did the new pragmatic turn in international law come about? If we take the case of Oppenheim’s epoch-making treatise of international law, quite simply, *realities* that fell outside the category of ‘common interests’ disappeared from the list of issues dealt with in the book. Specifically, native populations were in a position that made them ineligible to share the ‘common interests’ of the Family of Nations; thus they were excluded from the discussion. This is evident both in Oppenheim’s and in others’ discussion of the treaties signed with the indigenous populations of potential colonies, who appear, not as the *Other*, but rather as non-existent partners:

The growing desire to acquire vast territories as colonies on the part of States unable to occupy effectively such territories at once has, in the second half of the nineteenth century, led to the contracting of agreements with the chiefs of natives inhabiting unoccupied territories, by

⁴⁵ See recently Fitzmaurice, who on the one hand describes the resistance of some liberals to continue the practices of empire, but on the other ascertains that ‘the assurances made at Berlin regarding the property rights of native peoples were ignored by most colonial states in Africa, which deprived the native farmers and pastoralists of their land’: Fitzmaurice, ‘Liberalism and Empire in Nineteenth-Century International Law’, 117 *Am Hist Rev* (2012) 122. On the normativity behind the legal technique, when it evaluates that a behaviour is contrary or according to law see O. Corten, *Méthodologie du droit international public* (2009), at 34–35.

⁴⁶ For these figures in the history of international law see Koskenniemi, *supra* note 44.

⁴⁷ On the era of optimistic pragmatism see Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’, 65 *Nordic J Int’l L* (1996) 385.

⁴⁸ Drucks. d. Reichstages 1888/89, No. 71, quoted in A. Hänel, *Deutsches Staatsrecht. Erster Band: Die Grundlagen des deutschen Staates und die Reichsgewalt* (1892), at 846.

⁴⁹ That condition was: ‘the security of a legal order. Rather colonial power amounts here to nothing else than the adoption of law; to adopt those norms and measures, which according to the state of affairs are necessary and proportionate to put the native population at the service of the colonial purposes of the Reich and its citizens’ (*um die eingeborene Bevölkerung den kolonialen Zwecken des Reiches und seiner Angehörigen dienstbar zu machen*): *ibid.*, at 846–847.

which these chiefs commit themselves to the 'protectorate' of States that are members of the Family of Nations. ... Such agreements, although they are named 'Protectorates', are nothing else than steps taken to exclude other Powers from occupying the respective territories.⁵⁰

As far as treaties with indigenous peoples were concerned, Oppenheim was stating an unfortunate fact. One example of this is the treaty concluded between Britain and the Kings and Chiefs of Old Calabar (Nigeria), in 1884, in which, as Craven⁵¹ explains, the intention was precisely to demonstrate to other European powers that the territory was no longer open to annexation.

Oppenheim's abandonment of the 19th century moralist rhetoric of statesmen and lawyers alike with regard to the indigenous populations of Africa could be termed 'pragmatic', but not scientifically progressive. When one compares his and others' position on this issue with previous investigations on the topic of the relationship between tribes and their territories, one finds elaborate discussions on what was indeed a complex question. In the discussion which took place around the middle of the 19th century with regard to the status of nomadic tribes within the state, far more complexity was conveyed and much more accuracy as to the practices of land tenure actually in use in Africa⁵² and as to the political organization of the tribes, for instance by Carl Viktor Fricker (1830–1907), a German legal philosopher and constitutional lawyer, author of the influential booklet, 'On the State Territory':

Do the nomad states have no territory? And if this is the case, does this mean that they are not states? Or does this rather mean that the state does not need a territory? We reply to this: The state cannot be thought without territory, the nomad states are real states and they have a state territory. ... The state does not possess constitutional elements in its concept that only a highly developed people could be able to accomplish. The state appears wherever human beings are bound by a legal order. ... And it is certain that where the nomad tribe pitches its tents that is its territory, at that place no other state can perform its activity at the same time.⁵³

⁵⁰ Oppenheim, *supra* note 15, at 280–281; for this so-called 'pre-emption' doctrine in earlier colonial contexts see Walters, 'Mohegans Indians v. Connecticut (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America', 33 *Osgoode Hall LJ* (1995) 785.

⁵¹ Craven, 'Introduction: International Law and its Histories', in Craven *et al.* (eds), *supra* note 21

⁵² On the system of land tenure of the Kikuyu in Africa see M.P.K. Sorrenson, *Origins of European Settlement in Kenya* (1968), at 176–189. The encouragement of European settlement in Kenya is considered today to have been irrationally done due to the systematic deprivation of indigenous populations of land that followed. Sorrenson demonstrated the British Empire's refusal to take responsibility for the indigenous populations in that process through a review of the legal opinions of the Colonial Office that advised against the sale of land. The Colonial Office affirmed that it effectively went against the law because the Crown could not occupy uninhabited land outside the protectorate, and thus could give no land away to the settlers. However, soon the Government agreed to deal with unoccupied land: *ibid.*, at 44–58; see also the much more elaborate argument in previous centuries on the constitutional and political status of the Mohegans surrounding the dispute over land between them and the Colony of Connecticut: '[t]he Indians though Living amongst the Kings Subjects in these Countries, are a Separate and Distinct People from them, they are treated with as Such, they have a Polity of their own, they make Peace and War with any Nation of Indians when they think fit, without controul from the English'; quoted in Walters, *supra* note 50, at 820.

⁵³ C.V. Fricker, *Vom Staatsgebiet* (1867), at 24. Due to its sophistication and the broad range of issues it covers, Fricker's study has stood the test of time, as recent historical research on the Mari kingdom – a state with nomad tribes – shows: Fleming, 'Kingship of City and Tribe Conjoined: Zimri-Lim at Mari', in J. Szuchman (ed.), *Nomads, Tribes, and the State in the Ancient Near East. Cross Disciplinary Perspectives* (2009), at 227.

Clearly, Fricker and Oppenheim presented two very different ways of thinking about the world and the way in which it is organized. The observations by the former of the ‘reality of human societies’ and by the latter of ‘common interests’ produce two types of law, in terms both of substance and of form. In the context of the colonization and economic conquest of the world in the late 19th and early 20th centuries the complexity of reality was drastically mitigated by sharp strikes on legal theory adapting to the demands of action.⁵⁴

Further, the new concerns expressed by international legal positivism, revolved round how to continue to empower private capital without transferring onto it and the state the burden of the political administration of new territories and peoples located geographically apart.⁵⁵ Proposals abound and they can be divided into three groups.

One possibility was to back the private entrepreneurs by public law. We might recall that British international lawyer Travers Twiss (1809–1897) argued against the anarchic principles of neutrality and put forward the principle that only under the protection of sovereignty could commerce truly prosper. And his argument for ‘free trade only under sovereignty’, as Fitzmaurice explains, prevailed in Berlin: Leopold II’s Congo Free State was established.⁵⁶ Fully and uncompromisingly supported by the first serious international legal-positivists, Oppenheim included, the creation of artificial states was utopian. One could not create entities similar to the Congo Free States around the globe, and the Congo Free State itself came to a dramatic and disastrous end.⁵⁷

Another possibility was to allow the creation of spheres of influence with equal commercial and investments opportunities, for which efficiently operating international law was a vital prerequisite. The American international lawyers who worked in connection with Oppenheim – particularly Elihu Root (1845–1937) and James Brown Scott (1866–1943) – developed this type of legalist-formalist style focused on the movement from arbitration to court, the codification of rules, the rules of the law of the sea, of warfare, and of the collection of debts. Rather than advocating a *realpolitik* paradigm in international law, these international lawyers contributed to a legalist foreign policy that would prove instrumental in assisting American business development overseas. This legalist style was to influence American international law until the 1930s⁵⁸ and

⁵⁴ The needs of action were, for instance, described with regard to the East African Protectorate in Eliot’s statement. Eliot was the former Commissioner of British East Africa (1900–1904): ‘[t]o say that European interests must be paramount does not mean that any violence or hostility should be shown to natives; but it does mean that we must assist Europeans to develop the fine land which the Protectorate contains, and must not allow nomadic tribes to monopolise huge areas of which they can make no real use’: Sir Charles Eliot, *The East African Protectorate* (1905), at 103.

⁵⁵ On the fact that by this time the legal structure of the empire was considered outdated and unprofitable see Sorrenson, *supra* note 52; T.J. McCormick, *China Market; America’s Quest for Informal Empire, 1893–1901* (1967).

⁵⁶ Twiss, ‘An International Protectorate in the Congo River’, 9 *The L Magazine and Rev* (1883–1884) 1. See Twiss’s influential role in Berlin in Fitzmaurice, ‘The Justification of King Leopold II’s Congo Enterprise by Sir Travers Twiss’, in I. Hunter and S. Dorsett (eds), *Law and Politics in British Colonial Thought* (2010).

⁵⁷ See Koskenniemi, *supra* note 44, at 144–165.

⁵⁸ For the interaction of policymakers, particularly Root, with ‘corporations and individuals, joining together to promote their common interests’, in the case of China at the turn of the century see Lorence, ‘Organized Business and the Myth of the China Market: The American Asiatic Association, 1898–1937’.

was an early illustration of the importance for a powerful state of securing respect for international law in order to protect its entrepreneurs far from home.⁵⁹ In the case of the US, it coincided with the conviction, after its economic stagnation of the 1890s, that a renewed commitment to the pursuit of overseas markets was central to the intellectual and economic recovery of the nation.⁶⁰

In a more innovative stroke, Oppenheim declared that in the international sphere private subjects could act *beyond the law*. Thus, he claimed that not essentially different to the acquisition of a territory by a state:

is the case in which a private individual or a corporation acquires land (together with sovereignty over it) in countries which are not under the territorial supremacy of a member of the Family of Nations. In all such cases acquisition is in practice made either by occupation of hitherto uninhabited land, for instance an island, or by cession from a native tribe living on the land. Acquisition of territory and sovereignty thereon in such cases takes place outside the dominion of the Law of Nations, and the rules of this law, therefore, cannot be applied.⁶¹

But generalizing that in the international order the activity of private individuals and corporations acquiring sovereignty over territories was outside the law, as Oppenheim suggests in his *International Law*, was more a circumvention of the problem than a solution. In fact it involved making an exception both of companies and of native tribes, so that the rules of international law could not be applied to them. However, Oppenheim's position in respect of this issue is illuminating in terms of its reference to the universalist ambitions of the new pragmatic positivist law based on common interest. What ought to unite the states in the Family of Nations was, as we saw before, their common 'economic interests, primarily'. Groups and peoples that did not participate in this common economic practice and, indeed, ideology appeared to contemporary observers, like Oppenheim, to be *backward*. Luigi Nuzzo has recently argued that the 19th century colonial powers encountered serious difficulties in developing their

71 *Transactions of the Am Phil Soc*, New Series (1981) 1. According to Zasloff, 'The legalistic argument was more than a cover for American interests. Legal ideology operated to integrate perceived American self-interest with broader and supposedly neutral principles': Zasloff, 'Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era', 78 *NYU L Rev* (2003) 239, at 319. For works by Brown Scott and Root dealing with these issues see Scott, 'The Proposed Court of Arbitral Justice', 2 *AJIL* (1908) 772; Scott, 'The Work of the Second Hague Peace Conference', 2 *AJIL* (1908) 1; Scott, 'The Codification of International Law', 18 *AJIL* (1924) 260; Root, 'The Constitution of a Permanent Court of Justice', 15 *AJIL* (1921) 1; Root, 'The Codification of International Law' (Report submitted to the 23rd Conference of the Interparliamentary Union, Washington DC, 3 Oct. 1925), 19 *AJIL* (1925) 675.

⁵⁹ See the account of Root's activities in which he backed his strategic moves in favour of equal opportunity for American entrepreneurs in Manchuria with a call to respect law: Zasloff, *supra* note 58; see Esthus, establishing the distinction between commercial equal opportunity and investment equal opportunity: Esthus, 'The Changing Concept of the Open Door, 1899–1910', 46 *Mississippi Valley Hist Rev* (1959) 435, at 448. For the repetition of the pattern of 'equal opportunity' in the 1970s termed 'fair trade' in US politics see A. Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (2011), at 226–227.

⁶⁰ See Lorence, *supra* note 58.

⁶¹ For the novelty of Oppenheim's approach compare with K. Heimburger, *Der Erwerb der Gebietshoheit* (1888).

constitutional legal theory for the purposes of empire.⁶² Crucially, the problems were caused by what they perceived as an experience of ‘detemporalization’ – that is, by the fact that what happened in the space of the colonies was temporally incompatible with what was experienced in the mother country.⁶³ The sense that Italian, and more generally European, public lawyers had of the peoples in the colonies was that they belonged to a previous era. This made attempting to apply the same public law to the mother country and to the colonies an impossible undertaking. At the same time, explaining this issue on the basis that a different place or space was *in reality living in a different time* enabled lawyers, who were advocates of the rule of law at home, to become absolutists in the colonies. The text by Hänel on imperial law mentioned above is a clear example of this phenomenon.⁶⁴ Therefore, Nuzzo argues, European public lawyers resolved their difficulties regarding difference of public institutions, for instance, by applying different types of law to different physical spaces.

Observing Oppenheim’s position through the perspective offered by Nuzzo’s argument that European public lawyers dealing with imperial territories positioned themselves, not only in different geographical spaces, but also in different epochs, helps one to understand Oppenheim’s shift in theory. Oppenheim’s disregard of the moral question of the uncivilized peoples, his localization of the matter outside the concerns and jurisdiction of international law, and his granting of ‘permission’ to private companies to acquire territories and sovereignty ‘outside the dominion of the law of Nations’ reveals his theory as an extreme example of the problem that public lawyers encountered when dealing with the legal and political reality of the colonies. While Oppenheim himself – and eventually many others in the years to come – viewed his own work, with its new foundation on the common economic interests of states, as being at the cutting edge of the science of international law, native peoples in the newly colonized territories appeared radically cut off from this reality. Arguably, Oppenheim’s theoretical move was to look back, not to the Ancien Régime as imperial public lawyers did, but even further back. Oppenheim’s solution seems to contemplate the state of nature, in which no positive laws applied. There were then two temporal levels. The first covered those who could participate, through law, in the community of states founded on common interests, which were described as part of the new universal international law; the second those who, as a matter of fact, lived in another era, which was not economic. In any event, Oppenheim’s solution was not altogether different from offering native peoples a guarantee of the principles of humanity, but not of law. However, when Oppenheim attributed rights of sovereignty to companies outside the dominion

⁶² See L. Nuzzo, *Origini di una Scienza Diritto internazionale e colonialismo nel XIX secolo* (2012), especially at 265–286.

⁶³ Describing the position of the public lawyer Santi Romano Nuzzo states, ‘Per il giurista siciliano la colonia viveva in un tempo differente da quello della madre patria, in un tempo che sembrava essere quello vissuto dall’Europa nell’Antico Regime’ (‘For the Italian jurist the colony lived in a different time from the mother country, in a time that appeared to be the one lived in the Europe of the Ancien Régime’): Nuzzo, *supra* note 62, at 270.

⁶⁴ For Albert Hänel as a defender of the parliamentary constitutional state see M. Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland* (1992), ii, at 356–358.

of international law, he arguably did so as a consequence of viewing the international law of the beginning of the 20th century as being confronted by two unbridgeable stages: one of law for those who shared common economic interests; and the other without law for territories, 'where no covenant hath preceded, there hath no right been transferred, and every man has right to everything'.⁶⁵

3 The Struggle of Interests

As was suggested in the previous section, Oppenheim's turn to common interests in legal science originated in the rise of economy as politics, which came together with the sense of a fated economic interdependence between states and the subsequent schemes for a global economic order. In order to explain and prove the claim that interests were the foundation of Kelsen's positivism as well, and following the advice of Jestaedt and Lepsius on how to engage with Kelsen's legal theory, a great deal of evidence from Kelsen's own writings is presented in this section.⁶⁶

Kelsen's legal science was, like Oppenheim's, founded on a philosophy of interests. Nevertheless, within the context of the ideology of interests an important change of scenery occurs with the positivism inaugurated by Kelsen. Interests are no longer a friendly expression of a common family, but the articulation of an existential struggle. Therefore, open scepticism replaces the optimism of early 20th century legal positivism. Law's main task is now to secure both interests and the process of a struggle due to the fact that the former and the latter are accepted as innate to human beings. The Marxist critique of the classic individualist economists to the effect that the legal order did not produce a consistent individualist philosophy, but only concrete individualist economic interests in ridiculous (legal) garments, had been a powerful blow to individualists' attempts to conquer the legal order.⁶⁷ By adopting the notion of Darwinist struggle, economic legal-positivism in its second wave appears to be closer to reality, and not simply an apology for certain powerful economic interests. It is in this manner that economic-legal positivism incorporates the Marxist critique and designs its theory precisely as an answer to the Marxists.

In particular, the political aspect in Kelsen's (international) legal theory is revealed in the way he seeks a method for pursuing the evolution of law. Kelsen's method seeks to de-substantialize *law*; it is thus against a normative approach to law. For him, '[I]aw is the form in which economic and political life happens, or ought to happen'.⁶⁸

⁶⁵ T. Hobbes, *Leviathan* (ed. E. Curley, 1994), ch. XIII.

⁶⁶ Jestaedt and Lepsius rightly affirm that while it cannot be said that Kelsen's theory lies beyond criticism, in his case critique can only be accomplished within the framework of a serious engagement with the foundations of his work, and not 'by means of a jurisprudence of slogans (*Schlagwortjurisprudenz*): Jestaedt und Lepsius, 'Eine Einführung', in H. Kelsen, *Verteidigung der Demokratie* (ed. M. Jestaedt und O. Lepsius, 2006), at xvii.

⁶⁷ K. Marx, *Capital* (trans. S. Moore and E. Aveling, 1906), at 81–96. I borrow the point of Marx's critique of the classical economists from Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harvard L Rev* (1976) 1685, at 1749.

⁶⁸ Kelsen, 'Eine Grundlegung der Rechtssoziologie', 39 *Archiv für Sozialwissenschaft und Sozialpolitik* (1915) 839. See also H. Kelsen, *Hauptprobleme der Staatsrechtslehre* (1911), at 542.

In order for this to work, Kelsen also strips the form of law of values, going far beyond the legal realist distinction of fact and value.⁶⁹ In effect values are only formal values for Kelsen:

In the field of values, ultimately nothing else can be said with absolute and objective validity save that at the highest point of the pyramid there is nothing else but pure *Sollen*, free of any content, the abstract form of the values as such form. Despite apparent substantiation, nothing else states the categorical imperative: you ought to do, what you ought to do!⁷⁰

In the positivistic social sciences, values are only relative, only a means to an end, which can evaluate a social institution conditionally, in the sense of whether it functions or not. Any other standpoint is an absolutist pretension.⁷¹

Moreover, Kelsen's epistemological method also de-substantializes *reality*. In the world of 'what is', in reality there is no 'substance' or principles able to claim scientific or ontological authority over others. 'Substance' is merely a mask for 'interests' and therefore subjective. In this manner, Kelsen imbues the empty form of law with a new foundation: the reality of interests of the world of 'what is'. In this respect, his method is the outcome of a sceptical type of pragmatic realism. The truth is that he followed the type of analytical philosophy employed by Hume and other empiricists.⁷² As he correctly assessed, the final product was a genuine analytical jurisprudence.⁷³

⁶⁹ Compare with Kennedy: '[a] major realist complaint against sociological jurisprudence was its blurring of the fact/value distinction. The European analogue, paradoxically, was Kelsen's version of legal positivism, which had the identical motive of rigidly segregating fact and value, but pursued it through legal neoformalism rather than through a move to empirically-based social science': Kennedy, 'From the Will Theory to the Principle of Private Autonomy', 100 *Columbia L Rev* (2000) 94, at 121.

⁷⁰ Kelsen, 'Die Rechtswissenschaft als Norm oder als Kulturwissenschaft. Eine methodenkritische Untersuchung', *Schmollers Jahrbuch für Gesetzgebung- Verwaltung und Volkswirtschaft im Deutschen Reiche* (1916) 95, at 136.

⁷¹ H. Kelsen, *A New Science of Politics. Hans Kelsen's Reply to Eric Voegelin's 'New Science of Politics'. A Contribution to the Critique of Ideology* (2004), at 11.

⁷² 'The metaphysical-religious dualism of heaven and earth, of God and world, is overcome when man, especially through the advance of empirical science, finds the courage to discard the realm of the transcendence, which is beyond his experience, because it is an unknowable, uncontrollable and therefore scientifically useless hypothesis': Kelsen, 'Natural Law Doctrine and Legal Positivism' (trans. Kraus), reproduced in H. Kelsen, *General Theory of Law and State* (trans. A. Wedberg, 2009), at 391, 433.

⁷³ 'Since the Pure Theory of law limits itself to cognition of positive law, and excludes from this cognition the philosophy of justice as well as the sociology of law, its orientation is much the same as that of so-called analytical jurisprudence, which found its classical Anglo-American presentation in the work of John Austin. Each seeks to attain its results exclusively by analysis of positive law. While the Pure Theory arose independently of Austin's famous *Lectures on General Jurisprudence*, it corresponds in important points with Austin's doctrine. It is submitted that where they differ the Pure Theory of law has carried out the method of analytical jurisprudence more consistently than Austin and his followers have succeeded in doing': Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', in H. Kelsen, *What is Justice? Justice Law and Politics in the Mirror of Science: Collected Essays* (1957), at 266, 271. The Pure Theory 'is a radically realistic legal theory. It refuses to evaluate the positive law': H. Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the *Reine Rechtslehre* or Pure Theory* (trans. B.L. Paulson and S.L. Paulson with an Introduction by S.L. Paulson, 1992), at para. 9, at 18.

Recent scholarship has indeed noted that there is a large degree of myth in the idea that Kelsen was a (Neo)Kantian.⁷⁴

Observed from a broader perspective, Kelsen attempted to construct a legal theory that reflected the world of the 20th century. A disenchanted inheritance of the 19th century captured the globe as a realm of interests and business, in which the political had retreated in the face of economics because science was now that which provided answers to the existential questions. Certainty on natural sciences but scepticism on everything else brought one to discover ‘interests’ in what had been previously manifestations of religious, cultural, and political life. In a similar way to ‘modern science’ that sought ‘everywhere to dissolve substance into function’ and had ‘long since thrown the concept of the soul overboard, along with that of force’, Kelsen argued that ‘the reduction of the supralegal concept of the state to the concept of law is the indispensable precondition for development of a genuine science of law’. And the reason for that was that the ‘state’, when conceived more than merely as a legal order, was ‘intended only to facilitate the satisfaction of political desires, of interests’ that were contrary to the positive legal order.⁷⁵

These were the raw materials for Kelsen to start anew on the concept of law and its science. Certainly one of Kelsen’s main achievements was that he forged a highly speculative enterprise, so agreeable to non-common-law lawyers, on the basis of hard-core empiricism. Due to the exceptionalist character of international law – its primitive stage of evolution as he would describe it – Kelsen had to yield to the empirical results of states insisting on acting politically in the international realm. This is reflected in the way in which Kelsen, the scientist, adopted a changing appraisal – trial and error – of method in international law.⁷⁶

As a rule, it is only when a phenomenon is considered to be universal and in need of protection that legal theorists feel compelled to develop a theory of law with universal scope. This was the case, for instance, of the Spanish scholastics, who believed in God the creator as the foundation of law.⁷⁷ It was also true of Hugo Grotius, the

⁷⁴ C. Schönberger, ‘Hans Kelsen’s “Main Problems in the Theory of Public Law”’ (trans. Litschewski and S.L. Paulson), in *Hans Kelsen Werke* (2008), ii, at 36–48; Paulson, ‘The Neo-Kantian Dimension of Kelsen’s Pure Theory of Law’, 12 *OJLS* (1992) 311; Kletzer, ‘Fritz Sander’, in Kletzer, *Der Kreis um Hans Kelsen Die Anfangsjahre der reinen Rechtslehre* (ed. R. Walter, C. Jabloner, and K. Zeleny, 2008), at 445. Kelsen himself delimited the question of his affiliation with Neo-Kantians to the use of the epistemological principle of the Neo-Kantian philosophy, which is that the method of cognition determines the object of cognition: H. Kelsen, *Rechtsgeschichte gegen Rechtsphilosophie? Eine Erwiderung* (1928), at 2. More in accordance with Kelsen’s general atomist epistemology is his characterization of the identification of the state with the legal order as ‘purely epistemic anarchism’: Kelsen, ‘God and the State’, in Kelsen, *supra* note 74, at 61, 81.

⁷⁵ *Ibid.*, at 77, 82.

⁷⁶ It is beyond the scope of this article to discuss these points further. However, it might be said that the constant in his international legal theory, the principle of compulsory adjudication, reflects at once his aspiration for universality and the insurmountable figure of the arbitrator among states. For a discussion of Kelsen’s methodological development see Garcia-Salmones, *supra* note 2, for a study of the principle of adjudication as the centre of Kelsen’s legal theory see von Bernstorff, *supra* note 22.

⁷⁷ According to Koskenniemi, another reason for the universalistic thinking of Spanish theologians like Vitoria or Suarez was that they started to envisage the future global market: Koskenniemi, ‘Empire and International Law’, *supra* note 33.

inaugurator of modern international law, who discovered a replacement for divine wisdom in the combination of self-interest, sociability, and reason.⁷⁸ The key to understanding Kelsen's universalist thinking is to interpret it as an outcome of his economic view of political life. Conversely, the foundation of that economic politics lies in his philosophical formation. In both cases it is a consequence of totalizing the experience of interests. From the juridical perspective this means that interests and little more are taken to be the object of justice:

Seen from the standpoint of rational cognition, there are only interests and thus conflicts of interests, which are resolved by way of an ordering of interests that either satisfies the one at the expense of the other, or establishes a balance, a compromise between the opposing interests. That only one ordering of interests has absolute value (which really means "is just") cannot be accounted for by way of rational cognition.⁷⁹

This statement of Kelsen's, which, seen from a particular perspective could be accurate, loses its value if it becomes a totalizing one. This occurs when the task of law and justice is reduced to being the mere settling of conflicts of interests and the political relations between human beings as a source of those conflicts. Kelsen's much-criticized idea that there cannot be justice among human beings is implied in that reduction:

When already the single human being experiences his particular interest naively as 'right' (*Recht*), with how much more impetus does every interest-group want to be able to call on 'justice' in order to impose its demands.⁸⁰

Crucially, to undermine the work of law so as to make it incapable of justice and to transform that law into an arbiter between interests negates the possibility that among human beings there might be injustice. This last feature is the most conservative aspect of economic-legal positivism.

Kelsen's starting-point for constructing the legal theory founded on interests was his extreme individualism. Evidently in an era when the worst totalitarianisms of history were ripening, that standpoint was not devoid of intrinsic value; although individualism ultimately can be also linked to totalitarian positions.⁸¹ But Kelsen's individualism is complex because it lies in the realm of the normative sciences, and not in nature:

The living together of individuals, in itself a biological phenomenon, becomes a social phenomenon by the fact of being regulated.⁸²

⁷⁸ Grotius, *supra* note 11.

⁷⁹ Kelsen, *Introduction*, *supra* note 73, at para. 8, at 17. The same thought appears in other texts: '[f]rom the point of view of rational cognition, there are only interests of human beings and hence conflict of interests. The solution of these conflicts can be brought about either by satisfying one interest at the expense of the other, or by a compromise between the conflicting interests. It is not possible to prove that only the one or the other solution is just': Kelsen, 'What is Justice?', in Kelsen, *What is Justice?*, *supra* note 73, at 1, 21–22.

⁸⁰ Kelsen, *supra* note 27, at 77.

⁸¹ H. Arendt, *The Origins of Totalitarianism* (1962), arguing on the one hand that the totalitarian processes originated in the 19th century and on the other that radical individualism and the subsequent isolation of individuals influenced their formation.

⁸² Kelsen, *supra* note 24, at 231.

He parallels the 'social problem', as he calls it, with the religious one. In fact his conception is not very different from the manner in which he understands morality.⁸³ His analysis views the sociability of men as an expression of an individual's will to subject other individuals and as the creation of something objective from what is subjective, merely a psychological experience. The 'social problem' reveals itself primarily as a psychological experience in individuals' consciousness. In a second stage 'one feels entangled and trapped in this network of ties, enlaced in this structure of relationships, as the dependent part of a whole'. This is the moment in which authority in the form of obligation or social bond takes roots in individual consciousness. The psychology of the social man is nevertheless 'self-subjection under the authority of the group, so that others may be also equally subjected to it'. In a few words, sociability is a means to 'master indirectly' other men.⁸⁴ When Kelsen terms law 'a specific social technique' he is not referring to a form of functionalism in which certain social aims are achieved through legislation.⁸⁵ There is a much more profound conception in his argument in which the specificity of law *crafts* society, and it does so through coercion. This is clearly crucial in the international realm, and to a significant extent also explains Kelsen's insistence on security through sanctions and individual criminal responsibility in international law.⁸⁶ Social orders (moral, religious, legal) regulating society provide for sanctions, 'advantages or disadvantages' for individuals. But for Kelsen only law is a coercive order. It enacts sanctions that 'are only coercive measures in the sense that certain possessions are taken from the individuals in question against their will.'⁸⁷

⁸³ See *supra* note 2.

⁸⁴ Kelsen, *supra* note 75, at 61; 66.

⁸⁵ Loughlin, 'The Functionalist Style in Public Law', 55 *U Toronto LJ* (2005) 361.

⁸⁶ Kelsen's definitions of sanctions, reprisals, and war are grounded on interests as well: 'sanctions are forcible interference in the sphere of interests normally protected by the law'; reprisals and war 'are coercive acts, the former a limited, the latter an unlimited interference in the sphere of interests of a state', and see generally his discussion in Kelsen, 'Sanctions in International Law Under the Charter of the United Nations', 31 *Iowa L Rev* (1945–1946) 499, at 500 and 501; Kelsen, 'Collective Security and Collective Self-Defense Under the Charter of the United Nations', 42 *AJIL* (1948) 783. With reference to individual criminal responsibility (also discussed in the article in the *Iowa L Rev*), von Bernstorff traces Kelsen's writings of the 1940s promoting criminal individual responsibility back to one article of 1920 defending the legality of Art. 228(2) of the Versailles pact for the punishment of the German Kaiser, and on the whole to his 'monistisch konzipierten Rechtskosmos': von Bernstorff, *supra* note 22, at 128; but compare Gattini, 'Kelsen's Contribution to International Criminal Law', 2 *J Int'l Criminal Justice* (2004) 795, at 798. Kelsen, understandably, participated in the world campaign to establish individual responsibility for World War II crimes. Given his intellectual authority, this included teaching public opinion that good law required an international treaty dealing with the issue. These points are plain in Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', 31 *California L Rev* (1942–1943) 530. This article sketches what ought to be done as a matter of legal technique, which resembles closely what later was in fact done, with the important exception of his plea to avoid victor's justice. See also Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', 1 *Int'l L Q* (1947) 153. For a historical overview on the question of the debate on the punishment of war crimes mentioning the active role of Hans Kelsen, in consonance with the activities of the pacifist Viscount Robert Cecil see Segesser and Gessler, 'Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919–1948)', 7 *J Genocide Research* (2005) 453, at 459.

⁸⁷ Kelsen, *supra* note 24, at 235.

But despite his sceptical position about politics occurring essentially on the platform of a struggle of interests, Kelsen thought that democracy was still up to its *promise* of atomization in the sense of satisfying singularly each individual's yearning for freedom. Democracy, as it were,

even in its denaturalisation through the majority principle as self-determination retains still the idea of liberty, something from its original anarchical tendency of dissolving the social totality in individual atoms.⁸⁸

Therefore legal order is essential for Kelsen to allow the political struggle of interests' groups and to pursue the promise of democracy of absolute atomistic freedom. The latter is achieved ideally through formal law. The (international) legal theory is aimed at the ideal, at the illusion of grasping legally the individual interest:

The rights and obligations of a juridical person are always rights and obligation of individuals; it is that which a realist theory has to restore.⁸⁹

Individualism is articulated on economic terms, for instance in the positive light with which he observed "the anarchy" of production' occurring within the capitalist system.⁹⁰

From this individualistic purview the most authentic experience that Kelsen observed, in political, economic, and sociological life, was that individuals or states were constantly struggling for their interests. The characterization of individuals as *competitors* is also the result of theorizing sociology and politics using an apparatus of philosophical categories reduced to economic concepts:

Hence relativism is the world outlook presupposed in the democratic idea. Democracy assigns equal value to the political will of everyone, just as it has equal respect for every political belief and opinion. It therefore gives every political conviction an equal chance to express itself and gain a hearing in *free competition* for the minds of men.⁹¹

The label of international or national was of no use to distinguish the struggle of interests in society, in the sense that the international society would be of Hobbesian type and the national society one which produced human social relations.⁹² No, for Kelsen the social and the political was *always* a struggle.⁹³ Thus the definition of common interest:

⁸⁸ Kelsen, *Vom Wesen*, *supra* note 17, at 72.

⁸⁹ Kelsen, 'Théorie Générale du Droit International Public, Problèmes Choisis', IV *Recueil des Cours* (1932) 121, at 144.

⁹⁰ He was comparing it with other autocratic forms, like socialism: Kelsen, *supra* note 24, at 242.

⁹¹ Kelsen, 'State-Form and World-Outlook', in Kelsen, *supra* note 74, at 95, 111 (emphasis mine). The most troublesome aspect of Kelsen's relativism lies in its strange consistency that goes even against democracy itself: '[t]hat a state-form, by its very own methods of decision-making, should legally, therefore, be able to abolish itself, is the paradoxical privilege which democracy has over autocracy': at 106.

⁹² For Hobbes on international relations see T. Hobbes, *On the Citizen* (ed. R. Tuck and M. Silverthorne, 2007).

⁹³ See, for instance, Kelsen, *Vom Wesen*, *supra* note 17; Kelsen, *supra* note 27; Kelsen, 'Wer soll der Hüter der Verfassung sein?', 6 *Die Justiz* (1930/1931) 576.

The common interest is a verifiable fiction, in as much as what we understand by common interest is a compromise between opposed interests.⁹⁴

The function of law was to channel that struggle by an activity of balancing the different interests:

Every legal order, with its necessary level of efficiency bound to its condition of positivity (...) represents a balance of groups of interests opposed among themselves, which strive to attain power; that is to say, to achieve the inner configuration of the social order. These social forces appear in their struggle for power always behind the mask of *justice* and avail themselves always of the ideology of *natural law*. They act by no means as what they really are, as mere factional interests (*Gruppeninteressen*), but pretend to represent the *truth*, which if not recognised actually by everyone as such, it is nevertheless *elegantly understood*, as *common interest*.⁹⁵

This view of reality was by no means an intellectual attitude exclusively present in the continental legal positivist theory. Rather it originated in British Enlightenment,⁹⁶ and ostensibly in addition to that the Darwinist notion of 'struggle'. Occasionally Kelsen articulated his Darwinist belief expressly:

Man's external behaviour is not very different from that of animals. The big fish swallow the small ones, in the kingdom of animals as well as in that of men. But if a human fish, driven by his instincts, behaves in this way, he wishes to justify his behaviour before himself as well as before society, to appease his conscience by the idea that his behaviour in relation to his fellow man is right.⁹⁷

From the foundation of this economic and economic-biological notion of man (which he also took pains to theorize in sociological and political terms)⁹⁸ Kelsen developed a theory of law that appeared free of economic intrusions and therefore emerged as an autonomous science. However, devoid of a measure of the *good life*, Kelsen's

⁹⁴ Kelsen, 'Was ist die reine Rechtslehre?', in *Demokratie und Staatsrecht. Festgabe zum 60. Geburtstag von Zaccaria Giacometti* (1953), at 143, 155. In his examination of Kelsen's defence of democracy during the 5th Deutschen Soziologentage (Vienna, 26–29 Sept. 1926), Dahms concludes by stating that Kelsen wishes to introduce 'realism' into the theory of democracy. Further, he doubts whether Kelsen's principle of the balance of interests reflects the true advantages of democracy. Sometimes the attitude in favour of a balance of interests is helpful, but sometimes 'the rational superiority of one position over the other is evident': Dahms, 'Die Philosophen und der Demokratie in den 20er Jahren des 20. Jahrhunderts: Hans Kelsen, Leonard Nelson und Karl Popper', in C. Jabloner and F. Stadler (eds), *Logischer Empirismus und Reine Rechtslehre. Beziehungen zwischen dem Wiener Kreis und der Hans Kelsen-Schule* (2001), at 209, 215.

⁹⁵ Kelsen, *supra* note 27, at 67–68 (emphasis by Kelsen).

⁹⁶ De Souza e Brito, 'Hume's Law and Legal Positivism', *Filosofía del Derecho y Filosofía de la Cultura*, Memoria del X Congreso Mundial ordinario de Filosofía del Derecho y Filosofía Social, VIII, México, Universidad Nacional Autónoma de México (1982) 245, at 245; Baldwin, 'Hume's Knave and the Interests of Justice', 42 *J History of Philosophy* (2004) 277, at 278; S.L. Darwall, *The British Moralists and the Internal 'Ought'*, 1640–1740 (1995); see, generally, D. Hume, *A Treatise of Human Nature* (2012).

⁹⁷ Kelsen, 'What is Justice?', *supra* note 79, at 8.

⁹⁸ See, for instance, H. Kelsen, *Society and Nature. A Sociological Inquiry* (1946); an elaboration of this question is in García-Salmones, 'On Kelsen's Sein: an Approach to Kelsenian Sociological Themes', 8 *No Foundations: J Extreme Legal Positivism* (2011) 41.

combination of individualism and evolutionism and the protection of the struggle of interests becomes a universal legal protection of the ‘fittest’, to paraphrase Herbert Spencer.⁹⁹ After all, Kelsen was observing nature.

Eventually, the notion of struggle and competition required a counter-notion that in this context was ‘peace’. Probably for this reason, the cause of peace became an integral part of the main political projects thriving at the first half of the 20th century, and particularly in Kelsen’s.¹⁰⁰ To that extent it might be suggested that international law in the last century has the distinguishing feature of pacifism at the service of either the struggle between or the solidarity of interests.¹⁰¹ More inclined to the former than to the latter, Kelsen stated that:

‘Peace’ need not mean ‘justice’, not even in the sense of a solidarity of interests. Only one group may be interested in ‘peace’, namely the one whose interests are better preserved by this order than those of other groups.¹⁰²

To be sure, at the beginning of the century many were theorizing about ‘interests’ and depicting the state by reference to evolutionary theories.¹⁰³ The fact that Kelsen was a deep theorist or, more correctly, an epistemologist, in a deeply theoretical academic environment, is what marked the difference between him and jurists of the preceding generation or of other schools.¹⁰⁴ Moreover, as mentioned before, he put similar effort into his philosophical and sociological studies as he did into legal science, which explains why the Pure Theory functions so admirably: it evidently has a strong theoretical foundation. However, his work becomes the target of a simple but important critique: if one does not accept his political, ontological, and epistemological premises in the observation of reality – that it was constituted by a struggle of interests – the normative side of the theory does not make sense.¹⁰⁵ Furthermore, Kelsen himself appraised as *political* neither his atomistic view of society nor his description of the political sphere as a struggle of opposed interests. Rather he took that to be a scientific premise, a ‘given’. It is therefore through the concept of science that he defended his

⁹⁹ For a discussion of the expression ‘survival of the fittest’ used by Herbert Spencer in the Oct. 1864 instalment of *Principles of Biology*, but which seems to originate in Charles Darwin’s ‘natural selection’, see Darwin Correspondence Project Database (letter no. 5140), available at: www.darwinproject.ac.uk/entry-5140/ (last visited, 12 Jun. 2014).

¹⁰⁰ H. Kelsen, *Peace through Law* (1944); H. Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940–41* (1948).

¹⁰¹ García-Salmones, ‘Walther Schücking and the Pacifist Traditions of International Law’, 22 *EJIL* (2011) 755.

¹⁰² Kelsen, *supra* note 72, at 441.

¹⁰³ See *supra* note 22.

¹⁰⁴ Although he later follows a different path of argument, see a similar point on Kelsen as an epistemologist in Neil McCormick’s recollection: ‘I do believe that there are important epistemological and ontological issues with which the philosophy of law does have to deal. I remember reading an article by Richard Tur, now in Oxford, then in Glasgow, in which he said, many years ago, that, to understand Kelsen, you must realise that what he was doing was writing a theory of knowledge for legal science’: McCormick, ‘McCormick on McCormick’, in A.J. Menéndez and J.E. Fossum (eds), *Law and Democracy in Neil McCormick’s Legal and Political Theory* (2011), at 17, 18.

¹⁰⁵ The Pure Theory starts with the deconstruction of the theory of the state carried on in his *Hauptprobleme*.

particular politics. From this it followed that atomism of interests was his most important tool for theorizing.

The weakest side of the theory lay in the way that power was thought to be organized at what Kelsen would call the *Sein* level; that is to say, the level of reality. While Kelsen's sphere of normativity might carry a valid claim about its neutrality, the organization of power within the sphere in which the natural and political struggle of interests takes place is never neutral, and much less so in the international realm. Kelsen never addressed theoretically, in a direct manner, the question of power in the political struggle. As Kennedy suggests, power served him as the silent 'other' that was able to fulfil its function only by remaining unaddressed.¹⁰⁶ For a long period, the solution 'to power' in his exposition of the pure theory lay more than anywhere else in science as the impartial arbiter.¹⁰⁷ However, to use scientific argument was, in his case, to enter on a circular path, because to be scientific was, for Kelsen, to accept as a premise that the world was made up of individuals as competitors who needed a universal law (cosmopolitanism) to serve as a channel to resolve their conflicts and, for the most part, to do that using a technical method. Therefore, scientific argument did not genuinely serve the purpose of shedding light onto the identity of the power structures of the world and how to challenge them; it only served as a justification for legitimizing the universal struggle.

Nevertheless Kelsen critically challenged the legal normative structure – the 'classical' legal powers – of his times from his very first works on legal theory.¹⁰⁸ While he denied as a postulate that there was any power in the normative order other than legal power – thus his famous dictum that the state and other organizations are legal orders¹⁰⁹ – he repeated with equal constancy that political life was a struggle of interests, and he did this usually in order to dispel any illusions about justice, community, and so on. The purity of law was not supposed to have an impact on the political struggle of interests – however, law appeared to be an outcome of that struggle for power:

The problem of natural law is the eternal problem of what lies behind positive law. And whoever seeks the answer will find, I fear, neither the absolute truth of metaphysics nor the absolute

¹⁰⁶ Kennedy, 'Kelsen als Pragmatist des Völkerrechts', in A. Carrino and G. Winkler (eds), *Rechtserfahrung und Reine Rechtslehre* (1995), at 95, 125.

¹⁰⁷ "This is the Kelsenian philosophy of history: a faith, with certain mythological aspects in the progressively liberating value of science. And only in this way can we understand the change, close to the very last Kelsen in *Allgemeine Theorie der Normen*, theoretically disenchanting with the possibility of a "logic" of law, surrendered now to the will of the *imperator*': Carrino, 'Introduzione', in A. Carrino (ed.), *Kelsen e il Problema della Sovranità* (1990), at 7, 15.

¹⁰⁸ *Hauptprobleme der Staatsrechtslehre* and *Das Problem der Souveränität* are the main instances of this attitude. For Lachmayer, '[t]he hidden traditional ideology is the actual enemy of Kelsen in his scientific-political endeavours; against it is directed the radical anti-ideology tendency': Lachmayer, 'Die wissenschaftspolitische Rhetorik Hans Kelsens in der ersten Auflage seiner Reinen Rechtslehre', in U. Kangas (ed.), *Essays in Legal Theory in Honor of Kaarle Makkonen*, 16 *Oikeustiede* (1983), at 113, 120.

¹⁰⁹ See Bobbio, stating that 'power and norm are two sides of the same coin' and criticizing Kelsen because, after stating that the sovereign is the basic norm, he requires the law to be efficient, thus making it indistinguishable from power: Bobbio, 'Kelsen and Legal Power', in S.L. Paulson and B.L. Paulson (eds), *Normativity and Norms, Critical Perspectives on Kelsenian Themes* (1998), at 435, 448.

justice of natural law. Whoever lifts the veil without closing his eyes will confront the gaping stare of the *Gorgon's naked power*.¹¹⁰

The fact that law derived from the authority of power was for Kelsen unquestionable.¹¹¹ This had the significance of transforming ‘the nature of law’ into the organization of pure facticity and pure power. ‘Law is ... a specific order or organisation of power.’¹¹² This entailed the abolition of law as an aspiration of justice – not, however, that Kelsen would have made a secret out of that.¹¹³

But when Kelsen defined political life as a struggle of interests, without argumentation over right, good, just, and so on, he was stopping short of saying that if the one who was more powerful determined the struggle, then law was the outcome of the victory in that struggle.¹¹⁴ However, in opposition to the law of the strongest, that he defined as ‘merely the articulation in normative terminology of the reality of “what is” (*Seinswirklichkeit*)’,¹¹⁵ Kelsen thought that formal law was the guarantor of objectivity in the struggle. Ultimately, law must control the struggle and bring it to a certain gathering-point to which the whole dynamic structure of positivist law leads.

To sum up, Kelsen saw interests as the expression of an atomized society, and he thought that in order to cope with this tension a formal legal theory was needed.

4 Opening the Way to New Foundations of Politics, Society, and Law

The analysis set out above aims to show that, in the legal theory of economic legal positivism the formality of law is tainted with the particular manner in which politics are

¹¹⁰ Kelsen, ‘Ansprache’ (contribution to the discussion of Erich Kaufmann’s lecture *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung*), 3 *Veröffentlichung der Vereinigung der Deutschen Staatsrechtler* (1927) 53, at 55 (emphasis by Kelsen); see also Paulson, ‘Some Issues in the Exchange between Kelsen and Kaufmann’, in 48 *Scandinavian Studies in L* (2005) 269, at 279. The two definitions of Gorgon by Kottke: ‘[o]ne of three fabled sisters, Stheno, Euryale, and Medusa, with snaky hair and of terrific aspect, the sight of whom turned the beholder to stone. The name is particularly given to Medusa. Anything very ugly or horrid’: A. Kottke, *The Gorgons, in Images of Women in the Ancient World: Issues of Interpretation and Identity*, Spring 1998, available at: <http://archive.today/larm> (last visited 12 June 2014).

¹¹¹ Thus the problem he saw in 1927 with the turn to metaphysics and natural law was that ‘the clear tendency emerges [with them] of undermining the authority of the positive legislator’: Kelsen, *supra* note 110, at 54.

¹¹² ‘The efficacy of law belongs to the realm of reality and is often called the power of law. If for efficacy we substitute power, then the problem of validity and efficacy is transformed into the more common problem of “right and might”. And then the solution here presented is merely the precise statement of the old truth that though law cannot exist without power, still law and power, right and might, are not the same. Law is, according to the theory here presented, a specific order or organization of power’: Kelsen, *General Theory of Law and State* (2009), at 121.

¹¹³ See in the following instance, ‘[s]ince the Pure Theory of law limits itself to cognition of positive law, and excludes from this cognition the philosophy of justice’: Kelsen, ‘The Pure Theory’, *supra* note 73, at 271.

¹¹⁴ On the law of the strongest see the article by the supervisor of Kelsen’s dissertation: Menzel, ‘Kallikles. Eine Studie zur Geschichte der Lehre vom Recht des Stärkeren’, III *Zeitschrift für öffentliches Recht* (1922/1923) 1.

¹¹⁵ Kelsen ‘Die Idee des Naturrechts’ in H. Kelsen, *Aufsätze zur Ideologiekritik mit einer Einleitung herausgegeben von E. Topitsch* (1964), at 73, 83–84.

understood. The problematic aspect of these doctrines is that they reduce the notion of (international) politics to an ideology of 'common interests', and in the course of the 20th century, increasingly, to that of a struggle over interests, and in this way they invert the potential social character of law. From serving sociability and enabling politics, law is turned into a channel for the expression of conflicts of interest and their resolution. Since the concepts of 'politics' and 'society' are defined in a very particular manner on the basis of the 'conflicts of interests', neither of these two principles can be defended as being at the service of 'neutrality'. Indeed, neither 'society' nor 'political demos' can be defined by its conflicts, much less by its 'conflicts about interests'. Not even the arch-Hobbesist, Thomas Hobbes himself, attempted that definition.¹¹⁶ For Hobbes, society reflected the willingness of individuals to unite to secure their safety.¹¹⁷ Similarly, the norm is not exhaustively or even properly defined as a means to resolve conflicts about interests, but rather through the ensuing social organization.

The type of thinking of economic legal positivism was kept by no means confined to an antique treatise of international law or a sophisticated Kelsenian legal theory, but was transposed to the theory of international law during the 20th century, as is apparent, for instance, in the work of American author Philip C. Jessup (1897–1986). In his *A Modern Law of Nations* he provides a textbook example of the type of international legal reasoning founded on conflicts of interests which the empty normativity of law helps to channel. Jessup was a leading figure of 20th century US international law, whose impressive professional life included being the assistant to and biographer of Elihu Root, assistant secretary-general of the UN Monetary and Financial Conference (the Bretton Woods conference), and Judge of the International Court of Justice (1961–1970).

In *A Modern Law of Nations* he located the history of the development of the international law on state responsibility for injury to aliens within the broader context of 'the history of "imperialism" or "dollar diplomacy"'. The American international lawyer understood the scramble for markets and raw materials, and governments' desire for political influence in certain countries, as representing a search, on the part of the developed countries, for outlets for the investment of surplus funds and for human energies. As a consequence, law was required to protect those enterprising individuals. State responsibility for injury to individuals was first articulated through claims made by the home state of the injured individual in arbitral commissions and tribunals, but increasingly through the individual's or corporation's right of direct access to international tribunals.¹¹⁸ After having correctly noted the imperialist aspect of the

¹¹⁶ Kelsen viewed his theory as superseding any social contract theory: '[t]he supposition maintained by the natural law doctrine of the seventeenth and eighteenth centuries that the State originates in a social contract concluded by sovereign individuals in a state of nature long since has been abandoned and replaced by another hypothesis according to which the State comes into existence through hostile conflicts between social groups of different economic structure.' Later he conceded that the 'optimistic' theory of the social doctrine was not 'entirely false', and that the 'pessimist' theory of the forcible subjugation' could not be taken as 'entirely correct': H. Kelsen, *Peace through Law*, *supra* note 100, at 6–7.

¹¹⁷ Hobbes, *supra* note 65.

¹¹⁸ P.C. Jessup, *A Modern Law of Nations* (1958), at 94–111, quotation at 96.

20th century economic conquest. Jessup highlighted in unmistakably Kelsenian style the beneficial contribution of law to that conquest:

It is remarkable that in this struggle which so generally involved the relations between the strong and the weak, international law for all its primitiveness, developed as a balance of conflicting interests.¹¹⁹

On the one hand, Jessup saw fit to protect the existential struggle for interests as an expression of the individual. On the other hand, he regarded law as the right means to calm the struggle by balancing the conflicting interests. Both positions follow the theory of interests. Jessup's combination of a tough approach to international politics with a benevolent analysis of the role played by international law¹²⁰ omits, once again, the personality of those who were conquered 'economically'. In his narrative, the argument that the legal form ('balance of interests') and the content of the law ('the responsibility for injury to individuals') cemented the very imperial history he criticized seemed to be out of the question.

What makes new elements of law, such as for instance 'the responsibility of empires and imperialist individuals for injury to peoples and states', unthinkable to Jessup and others?¹²¹ Arguably it is the focus on 'interests' in the legal and political theory, combined with the argument that in reality no position has a better right than another which precludes progress in this direction. Indeed, when 'interests' are used in absolutistic terms they neutralize the political nature of reality.

Legal positivists failed to see that, in the framework of conflicting interests in which universalist law ought to promote the free and equal movement of 'interests', legal protection can never possess those characteristics of 'freedom' and 'equality'. The reason for this is that the realities behind law are neither equal nor always free. Behind the law there are not simply 'interests', but realities of very uneven access to knowledge and power. Surely, a legal science founded on interests is unable to assess (complex) realities, and labelling the human situation as 'interests' leads to the evasion of responsibility, not in a very different manner from that which occurred in respect of the policies formulated for the old empires. As Jessup saw it, international law, though 'primitive', was reaching its ontological limits.

To conclude, the most important novelty of international economic-legal positivism is the re-conceptualization of politics that it embodies. Politics is no longer about pursuing a common political project. Its focus is now on the establishment of a legal framework in which first the state, and then the individual, can pursue their own interests.¹²² In turn this implies the abandonment of a normative project for international

¹¹⁹ *Ibid.*, at 96.

¹²⁰ Lorite refers to a 'Jessupian approach' as one which in the context of American politics stood firm in support of the inescapable 'reality of international law against the skeptics of all times': Lorite Escorihuela, 'Cultural Relativism the American Way: The Nationalist School of International Law in the United States', 5 *Global Jurist* (2005) 1, at 137.

¹²¹ But see *South West Africa Cases* (Second Phase), Judge Jessup's dissenting opinion [1966] ICJ Rep. 6, at 429.

¹²² Lang describes the politics promoting the pursuit of individuals' goals as 'the most significant feature of neoliberal thought': Lang, *supra* note 59, at 6.

public law.¹²³ In the light of the challenges that lie ahead for international lawyers in the 21st century, now may be an auspicious moment to propose revision of the politics of interests of international law.

Many would agree that the pattern of interests forming a foundation of law has not exhausted and cannot exhaust lawyers' imagination, especially if they are interested in grasping international law as 'part of the glue that holds people, positions, and places in dynamic relations one another, the sinews that link centres and peripheries, and the cloak that obscures the dynamic operations of hierarchy'.¹²⁴ A brief look at reality helps one to see that that is real. However, it may not always be quite so self-evident as it may appear that there are different – sometimes competing, sometimes compatible – philosophies or anti-philosophies on which international law may be grounded. The reason for this is that international legal theory has relied for too long a period on the received traditions of our international lawyer ancestors. I hope I have demonstrated that Lassa Oppenheim and Hans Kelsen were both political lawyers and profound thinkers who sought to respond to what they perceived as the demands of their times. This article is an invitation to follow their path.

¹²³ Walters, 'Is Public Law Ordinary? Review article: Martin Loughlin, *Foundations of Public Law*', 75 *MLR* (2012) 894.

¹²⁴ Kennedy, 'Law and the Political Economy of the World', 26 *Leiden J Int'l L* (2013) 7, at 47.