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Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law

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Abstract

Because mainstream international law positivism in the tradition of Lassa Oppenheim (1858–1919) has sought to separate law from morals and from politics, many critics have dismissed this positivism as amoral, apolitical, and atheoretical. This article offers a reading of Lassa Oppenheim that challenges this view. Drawing on the jurisprudential theory articulated in Oppenheim's non-international law writings about conscience and justice, the author reads Oppenheim's adoption of an austere positivism in international law as a theoretically-grounded normative choice of a concept of law best suited to advance his moral and political values. The author thus treats Oppenheim's normative positivism as political, and considers it together with Oppenheim's advocacy of international society and balance of power as a statement of political conditions for international law. While concluding that the extent to which Oppenheim consciously accepted such a political and jurisprudential understanding of international law remains speculative, the author contends that mainstream positivism has had more enduring appeal because it has been at least sub-consciously open to such readings.

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Is there a normative (ethical) case for positivism in international law? This paper argues that there is, and that the vitality of mainstream positivist traditions in international law has been sustained by a deeply felt commitment to the ethical view that legal positivism provides the best means for international lawyers to promote realization of fundamental political and moral values. The paper will make this argument with particular reference to the positivist tradition associated with Lassa Oppenheim and embraced by many of his successors in the field. It will offer a reading of Oppenheim's writings that is consistent with this interpretation. This reading is proposed as one way to understand Oppenheim, but the aim is not to show that Oppenheim would necessarily have articulated his positions in the manner proposed here. The aim is instead to show that this positivist tradition is grounded in a normative justificatory claim that engages it with political questions, to suggest that the appeal and influence of this tradition has depended on it making such a claim, and to speculate that the implicit sense of making such a claim has been a reason for the appeal of Oppenheim's writings to subsequent generations of readers.

Lassa Oppenheim (1858–1919) is a perplexing figure in the history of modern international law. He was respected by his contemporaries for his contributions as professor, jurisconsult and prudent scholar, and above all for his two-volume *International Law* (1905/1906).¹ This work was immensely well received. The lasting qualities of its format and approach have led a series of eminent British international lawyers to keep it updated, so that its first volume in particular has enjoyed authoritative status over a full century.² Yet his writings on international law strike many modern readers as theoretically shallow, and naively positivistic in placing great emphasis on the will of states and in seeking to exclude from international law not only the rights of all individuals and the rights of peoples outside the Euro-American system, but also most considerations of morality, policy and politics. The present paper argues that Oppenheim's separation of law and politics can be read as being embedded in a more fundamental view of international law that is premised on his central political ideas, and that one of the most important of his political ideas is that legal positivism is normatively justified as being the best conception of law for the realization of higher normative goals relating to peace, order, certain forms of justice,

¹ Cited in this paper as Oppenheim, *International Law*, with particular edition and volume specified.

² Aspects of the work's evolution are considered in Janis, 'The New Oppenheim and Its Theory of International Law', 16 *Oxford Journal of Legal Studies* (1996) 329; and Reisman, 'Lassa Oppenheim's Nine Lives', 19 *Yale Journal of International Law* (1994) 255. See also Greig, 'Oppenheim Revisited: An Australian Perspective', 14 *Australian Year Book of International Law* (1993) 227. James Fawcett commented, in relation to the successive posthumous editions of Oppenheim, upon 'that combination of ancestor-worship and love of repair rather than replacement, which can turn English law books, endlessly re-edited, into a heap of many strata, in which curious fossils are to be found'. Fawcett, 'Review of International Law by DP O'Connell', 82 *Law Quarterly Review* (1966) 134. See generally Warbrick, 'Brownlie's Principles of Public International Law: An Assessment', 11 *European Journal of International Law* (2000) 621.

and the legal control of violence.³ This paper considers just a sample of Oppenheim's political ideas in arguing that his international law *œuvre* should be read as advocating three political ideas which he believed were essential for international law: (1) an international society of states as a necessary condition for the existence of international law; (2) a balance of power between states as a requirement for durable international law; and (3) a commitment to legal positivism as a requisite for viable international law. Although Oppenheim's espousal of these ideas is embedded in a textbook that reads as a work of descriptive or analytic legal positivism, it will be argued that Oppenheim's advocacy of these ideas was normative. He did not regard international society, balance of power and positive international law simply as facts to be described and accommodated; he wished readers to embrace his understanding of these as political conditions for effective international law, and to join him in promoting the social and political acceptance — and thus the realization — of these ideas in order that international law could flourish and humanity might advance.

The present paper thus seeks to lay a foundation for a modest contribution to the perennial problems of understanding international law as a distinct discipline and practice embedded in a particular politics, the background conditions and social interpretations of which are continuously changing. This foundation rests upon the simple paradox that the positivist separation of law from moral argument and from politics is itself a moral and political position. This point receives less consideration than it warrants within the Oppenheim tradition partly because major works in this tradition have been cautious about legal theory and about moral and political engagement, often confining such matters to short and stylized preliminaries. The result has been a widely held opinion that this positivist tradition neither makes nor could make a claim to ethical justification. It will be argued that the Oppenheim tradition can be better appreciated as one that makes significant political claims, and does so for normative reasons. Whether or not the particular reading of Oppenheim's own works proposed here is one he would have endorsed, it is suggested that some such understanding of them has implicitly informed and sustained this influential tradition. With this understanding of Oppenheim's project, it will be possible to assess more clearly the normative case for basing international law on political propositions

³ 'The science of international law ... is merely a means to certain ends outside itself.' Oppenheim, 'The Science of International Law: Its Task and Method', 2 *American Journal of International Law* (1908) 313, at 314. The term 'positivist' usually requires further specification to be useful in discussions of international law, because of the vast range of approaches it covers. Ulrich Fastenrath, for example, develops a typology of positivism in international law that covers empirical positivism, with its recognitional, sociological and psychological branches (the last of which he divides into voluntarist and convictionist subbranches), and *Gesetzespositivism*, which he divides into logical positivism (Kelsen, Anzilotti and Verdross) and the approach to rules represented by Hart's rule of recognition. Ulrich Fastenrath, *Lücken im Völkerrecht* (1991). See also Kinji Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law* (1998), finding it necessary simply to stipulate a definition of positivism in order to answer the question of whether Bynkershoek was a positivist. Oppenheim's explanation of his own variety of international law positivism will be discussed later in this paper, as will his own normative commitments.

of this sort, and to weigh this case against competing modern approaches that emphatically reject the positions ascribed here to Oppenheim. While few modern professional expositors of international law are content to base themselves on the set of basic positions here associated with Oppenheim, it will be suggested that the case for Oppenheim's apparently outmoded approach is more robust than it appears.

This paper is not intended as an historical study of Oppenheim or of the intellectual sources of Oppenheim's ideas, matters analyzed in the learned and lucid work of the legal historian Mathias Schmoeckel.⁴ Nevertheless, a short biographical sketch provides useful background for the arguments developed here.⁵ Born at Windeken, near Frankfurt am Main, in 1858, he was the youngest of seven children in a family which, on his father's side, was long-established in the Jewish community in the area. His father's horse-trading business apparently achieved considerable prosperity, and from 1869 the family lived in Frankfurt, where Lassa completed his schooling. He studied at Göttingen (to where he later returned and where, in 1881, he completed a doctoral dissertation dealing with bills of exchange), Berlin, Heidelberg (where he followed a course of J.C. Bluntschli, and later a course by the psychologist Wilhelm Wundt) and Leipzig, where he worked on his habilitation dissertation on criminal perversion of justice under Karl Binding. For unknown reasons, his habilitation took place in the law faculty at Freiburg im Breisgau, in 1885, where he thereafter taught criminal law, serving as Professor Extraordinarius from 1889 to 1892. He then moved to Basel, becoming Professor Ordinarius in 1893, but apparently suffered there from some kind of ill-health. In a decision seemingly made possible by substantial independent means derived from his family, he moved in 1895 to London, became a British citizen in 1900 (at which time he seems formally to have adopted his English middle names, Francis Lawrence), and married Elizabeth Alexandra Cowan, a British woman, in 1902. Although he had paid some attention to international law while in Basel, he took up the subject as his full-time activity in London, teaching for some years on a contract basis at the London School of Economics. The publication of his *International Law* in 1905 and 1906 brought him to prominence. He succeeded John

⁴ Schmoeckel, 'The Story of a Success: Lassa Oppenheim and His "International Law"', in Michael Stollie and Masaharu Yanagihara (eds), *The Acceptance of Modern International Law in East Asia* (2002 forthcoming). See also Schmoeckel, 'The Internationalist as a Scientist and Herald: Lassa Oppenheim', 11 *European Journal of International Law* (2000) 699.

⁵ Schmoeckel, 'The Story of a Success', *supra* note 4, provides the most thorough account available, and is followed closely in this paragraph. The published notices in the form of obituaries, personal reminiscences, and entries in bibliographical dictionaries, are all relatively brief. Much valuable material is included in Monica Kingreen, *Jüdisches Landleben in Windeken, Ostheim und Heldenbergen* (1994). Partly because of the disappearance of many of Oppenheim's personal papers (letters in the papers of his correspondents, and materials in official collections, have yet to be consulted), little is at present reliably known about such matters as the extent to which his personal outlook and career choices were affected by anti-semitism, the reasons for his decision to leave Basel and especially his choice to emigrate permanently to England, and the extent to which his German or German-Jewish identity affected his position in the British establishment. Schmoeckel speculates that anti-Jewish prejudices and policies may have affected his discontinuance of the *Referendariat* he had begun with a view to becoming a judge in 1882, his decision to present his habilitation not in Leipzig but in the relatively tolerant environment of Freiburg, and his lack of success in efforts to become Professor Ordinarius in Freiburg.

Westlake as Whewell Professor at Cambridge in 1908, where he remained in post until his death in October 1919. The second edition of his textbook appeared in 1912, and he had done much of the work on a third edition by 1919, although this edition was completed under the editorship of Ronald Roxburgh and published in 1921. He advised the British Foreign Office, was active in the *Institute de Droit International*, was a member of the American Institute of International Law, contributed to the *American Journal of International Law* in 1908, was involved in preliminary planning leading to the posthumous founding of the *British Yearbook of International Law*, and co-edited with Josef Kohler the *Zeitschrift für Völkerrecht* (founded 1907) from 1909 until the outbreak of the First World War. The war years seem to have imposed a terrible strain. Beyond the massive human suffering, and the assault on many rules and values of international law, as a public figure of German origin in Britain he felt obliged to make a public declaration of loyalty in a letter to *The Times* in 1915, denouncing Germany's attack on Belgium as 'the greatest international crime since Napoleon I', as well as deploring the attack on the *Lusitania* and other German conduct.⁶ For his partiality to Britain he was criticized by some German colleagues — including an apparent if indirect denunciation by his erstwhile collaborator Josef Kohler⁷ — with whom the war had anyhow brought an end to contact. The final breakdown of his health in 1919 seems to have been influenced by overwork trying to cope with international legal material resulting from the war and its aftermath. Karl Strupp's obituary, in which is cited a letter from Oppenheim in 1912 expressing his anguish over the suffering in the Balkan war, put it poignantly: 'Like Fusinato, like our Kohler [who died just a few weeks earlier], Lassa Oppenheim is a victim of the War. Full of deep sorrow, we bow to this great scholar and humane person.'⁸

In the remainder of this introduction, brief mention will be made of the relationship of the present project to recent assessments of Oppenheim's *œuvre*.

Oppenheim described his *International Law* as 'an elementary book for those beginning to study the subject',⁹ and 'elementary' is also a reasonable description of the style of the best-known of Oppenheim's other books on general international law,

⁶ *The Times*, 19 May 1915, at 10.

⁷ Josef Kohler (1849–1919); Schmoeckel, 'The Story of a Success', *supra* note 4, cites Josef Kohler, *Grundlagen des Völkerrechts* (1918) iii–iv, who concludes a discussion of the advantages of German historical-dogmatic jurisprudential method as against English and French methods with the remark: 'Der Deutsche, der sich unter das Diktat der Engländer stellt, verleugnet damit sich selbst.' The other text cited by Schmoeckel, the introduction signed jointly by Kohler and Max Fleischmann in 9 *Zeitschrift für Völkerrecht* (1916) 1–4, emphasizes the German character of the journal and German perspectives on various doctrinal issues relating to the conduct of the war, but is not so clearly read as a personal indictment of Oppenheim.

⁸ Karl Strupp, 'Lassa Francis Oppenheim', 11 *Zeitschrift für Völkerrecht* (1918–1920) 645, at 646. 'Gleich Fusinato, gleich unserem Kohler ist Lassa Oppenheim ein Opfer des Krieges geworden. Voll tiefer Trauer neigen wir uns in Gedanken vor dem grossen Gelehrten und dem menschlichen Menschen.'

⁹ Oppenheim, *International Law*, vol. 1 (1st ed., 1905) vii; repeated in Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) viii. Carty reinforces this characterization by pointing out that the view of general customary law in Oppenheim's textbook is 'cryptic', and that his metaphor of streams of water emanating from a subterranean source is decidedly unclear as an illumination of customary international law. Anthony Carty, *The Decay of International Law* (1986) 34. On this specific point, it

The Future of International Law (1911)¹⁰ and *The League of Nations and Its Problems* (1919).¹¹ Anthony Carty, a leading critical historian of international law, concludes that Oppenheim 'was not a theoretician but merely the humblest scribbler of student manuals'.¹² Carty's baleful view of Oppenheim's impact on the English international law tradition is that Oppenheim imported into English thought an exotic, German-inspired statist-institutionalism that took root so well that it smothered earlier English traditions embodied in the work of Robert Phillimore (1810–1885) and especially John Westlake (1828–1913), until these traditions were revitalized in the 1990s by Philip Allott. Carty's thesis is that Oppenheim placed 'the state' and its acts of willing (its consent) at the centre of international law — despite the previous absence of any general theory of the state in English academic thought — and, reinforced by Brierley, McNair and Lauterpacht, prompted international lawyers to focus their efforts on the sifting and analysis of source material for customary and treaty rules, leading later to the transformation of the field into one preoccupied with what is done by courts and by advocates appearing in courts.

Carty's assessment is not implausible. An implication of the interpretations offered in the present paper, however, is that, despite his elementary style and the sparsity of the explicit theorizing in his international law works, Oppenheim must be regarded as a more sophisticated theorist than Carty's appraisal suggests. Carty's specific argument that there exists a major break between Westlake and Oppenheim is fully justified with regard to each of the three issues discussed in this paper. The paper thus offers some support to Carty's suggestion that Oppenheim's work marked a normative significant discontinuity in the English international law tradition, but this matter, and the question of Oppenheim's long-term impact, cannot be considered directly here.

Mathias Schmoeckel explains Oppenheim's own reasons for the simplicity of style and eschewal of explicit theory in his textbook:

The elementary nature of the main text helps to inform the public and to spread the knowledge of international law. It lessens doctrinal differences and contributes to the dissemination of the idea of a peaceful international society where disputes are solved by law and not by wars. In

should be noted that a more thorough and intelligible account of Oppenheim's views on custom, including a more comprehensible presentation of the same metaphor, is to be found in Oppenheim, 'Zur Lehre vom internationalen Gewohnheitsrecht', 25 *Niemeyers Zeitschrift für internationales Recht* (1915) 1.

¹⁰ The 1911 German work, *Die Zukunft des Völkerrechts*, was translated (with minor revisions) by 1914, although only published in English posthumously in 1921 as Lassa Oppenheim, *The Future of International Law* (trans. John Pawley Bate, 1921). The translation is not as felicitous as Oppenheim's own English prose, but it was approved by Oppenheim. For convenience, citations in this paper are to the edition in English.

¹¹ Lassa Oppenheim, *The League of Nations and Its Problems* (1919), comprised three lectures delivered during the war.

¹² Carty, 'Why Theory?: The Implications for International Law Teaching', in Colin Warbrick (ed.), *Theory and International Law: An Introduction* (1991) 75, at 80.

this respect, Oppenheim's *International Law* is thoroughly based on his legal theory, applies his convictions, and serves as an example of the effectiveness of his belief.¹³

This cogent summary is endorsed in the present paper, but the argument to be made here focuses not on the internal legal coherence of Oppenheim's project, but on the normative significance of Oppenheim's integration of politics into this project.

Much of the appeal of Oppenheim's *International Law* comes from his treatment of politics: the foundational concepts of a society of states and a balance of power, and a set of doctrinal views that allow some moderate scope for prevalent liberal values and the role of public opinion, while leaving considerable scope for power and power-politics. Conversely, other potentially relevant political considerations were deliberately played down: nationalism; human rights; socialism; anti-colonialism; mercantilism. Oppenheim embraced a minimal architecture necessary to an international order, in which essentially political institutions such as war, diplomacy and the balance of power were given some legal shape, and legal institutions such as treaties, claims and protests were functional to the requirements of politics. His list of 'morals' 'for the future ... deduced from the history of the development of the Law of Nations' is to some extent indicative of his political ideas. The five morals set forth in the first edition of his textbook related to the necessity for international law of a balance of power, the importance of states basing their military interventions and political behaviour only on real state interests (as opposed to dynastic interests), the inevitability of nationalist state formation and the need for minority rights, the prudential counsel to make haste slowly, and the interdependence between international law, international economic interests and public morality.¹⁴ He added to the second edition (1912) a sixth moral, asserting 'that the progress of International Law depends to a great extent upon whether the legal school of International Jurists prevails over the diplomatic school'.¹⁵ To the third edition, published posthumously in 1921, was added a seventh moral, concerning the importance for international law of the triumph of constitutional government over autocracy.¹⁶ It is tempting to treat these five or six or seven morals as a precise statement of Oppenheim's credo, but this is misleading, for some of these morals are fundamental to his thought, while others appear (on present interpretations) to have little impact in his writing. In particular, he did not say a great deal about nationalism and minority rights, and he showed almost no interest in exploring the causal relations between economic interests and international law. His demand that states act only on the basis of real interests was an expression of his general theory of the state and of his commitment to rationality in inter-state politics,¹⁷ but the specific rejection of dynastic wars and of intervention

¹³ Schmoeckel, 'The Story of a Success', *supra* note 4. See also Mathias Schmoeckel, 'The Internationalist as a Scientist and Herald: Lassa Oppenheim', 11 *European Journal of International Law* (2000) 699.

¹⁴ Oppenheim, *International Law*, vol. 1 (1st ed., 1905) 73–75.

¹⁵ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 82.

¹⁶ Oppenheim, *International Law*, vol. 1 (3rd ed., ed. Ronald Roxburgh, 1921) 100.

¹⁷ Cf. Charles de Secondat Montesquieu, *The Spirit of the Laws* (1748, trans. Anne Cohler et al., 1989) 7: 'the [law] of nations is by nature founded on the principle that the various nations should do to one another in times of peace the most good possible, and in times of war the least ill possible, without harming their true interests'.

under the principle of monarchical legitimacy echoed a sentiment widely shared among international law writers at the time, including Westlake,¹⁸ and was not much pursued in his work. By contrast, others of the morals represent recurrent themes. Schmoekkel assesses the *festina lente* motto in this way;¹⁹ and it will be argued that the emphasis on the struggle of the legal school for supremacy over the diplomatic school was fundamental to Oppenheim's entire project.

Schmoekkel concludes that Oppenheim's *International Law* 'sums up the classical international law and inspires the modern ... [T]his ambivalence is the mark of a truly timeless text ... to be compared with the writings of Grotius and Vattel.' The characterization of 'ambivalence' can be applied to almost every body of thought that employs open structures and does not occupy a polar position on dichotomized modern questions.²⁰ The present paper aims to disentangle the impression of ambivalence in Oppenheim's view of the relations of law and politics, and to argue that his work embodies a clear if subtle position on these issues. More generally, it may be observed that the suggestion of a unity-in-ambivalence among Grotius, Vattel and Oppenheim occludes consideration of the particular significance of different ideas advanced by each of these writers. Hersch Lauterpacht and others argued passionately that the line of development from Vattel to Oppenheim was a negation of the greater possibilities of international law, possibilities which must be reopened by revitalizing a Grotian tradition integrating law and ethics, and rejecting political realism and *raison d'état*.²¹ Early in his career Hedley Bull drew a similar distinction in order to defend pluralist positions taken by Oppenheim (and, Bull argued, Vattel) against what Bull regarded as the excessive solidarism of neo-Grotians such as Lauterpacht.²² The present paper focuses instead on distinctive ideas associated with Oppenheim's modern Anglophone positivist tradition.

The next three sections of this paper consider three of Oppenheim's political ideas which were, in his view, essential conditions for the existence, durability and progress of international law: international society, a balance of power and legal positivism. It is not suggested that these form a credo, but they are at the core of Oppenheim's ideas

¹⁸ John Westlake, *Collected Papers* (1914) 59.

¹⁹ Schmoekkel, 'The Story of a Success', *supra* note 4.

²⁰ This argument is developed more fully in Kingsbury, 'Grotius, Law, and Moral Scepticism: Theory and Practice in the Thought of Hedley Bull', in Ian Clark and Iver Neumann (eds), *Classical Theories of International Relations* (1996) 42, at 49.

²¹ Hersch Lauterpacht, 'The Grotian Tradition in International Law', 23 *British Yearbook of International Law* (1946) 1, especially at 37 and 51–52. See also Charles Rousseau, *Principes Généraux du Droit International Public*, vol. 1 (1944) 22; and Louis Le Fur, 'La doctrine du droit naturel depuis le XVIII^{ème} siècle et la doctrine moderne', 18 *RdC* (1928–III) 73. These are mild statements of the case compared to the vituperation heaped on Vattel in Cornelis van Vollenhoven, *Les Trois Phases de Droit des Gens* (1919). For a thoughtful overview and extensive discussion of different assessments of Vattel and his relationship to earlier writers, see Emmanuelle Jouannet, *Emer de Vattel et l'Émergence Doctrinale du Droit International Classique* (1998); also Andrew Hurrell, 'Vattel: Pluralism and its Limits', in Ian Clark and Iver Neumann (eds), *Classical Theories of International Relations* (1996) 233.

²² Hedley Bull, 'The Grotian Conception of International Society', in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations* (1966) 51.

about the political conditions for international law. The study of their advocacy illuminates Oppenheim's normative commitments, and helps cast his positivist understanding of the relations between international law and politics in normative terms.

1 International Society

Oppenheim's most basic idea was that international law is the law of an international society of mutually recognized states, which he called the Family of Nations. This was not, of course, an original idea. It was almost a necessity for any account of international law not premised on a command theory or on contract. But Oppenheim took the concept of a Family of Nations in a direction that proved influential as an idea of international politics. His conception may be described as: narrowly statist with regard to the composition of international society and agency within it; broadly pluralist with regard to the pursuit of diverging state interests and values; and geographically limited but potentially universalizable. His exposition and development of the idea was not simply a description of a concept that everyone agreed upon, nor was it merely the postulating of a logical necessity for international law. He believed, it is suggested, that, in the circumstances then existing, this particular conception of international society was required for the effective development of international law.

Oppenheim believed that community was a requisite for law, but he did not believe that an international community of individuals was a viable hypothesis: he regarded the *civitas gentium maxima* as a strained (by which he apparently meant untenable) conception.²³ The international community (in German he uses the term *Völkerrechtsgemeinschaft*) is 'the Family of Nations',²⁴ which in his view (at least until the founding of the League of Nations²⁵) consisted exclusively of states. There is in Oppenheim little trace of Westlake's idea that, while states are the immediate members of international society, human beings are the ultimate members, and that the 'duties and rights of states are only the duties and rights of the men who compose them'.²⁶

Perhaps Oppenheim's most enduring impact on international law was his construction of a rigorously statist conception of international society. Statism is a precondition — or even an axiom — for his version of international law positivism. For international law purposes, Oppenheim held, the state meant the government. Parliaments 'do not belong to the agents which represent the States in their

²³ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 93.

²⁴ The term is used by Travers Twiss and other text writers. One of many examples of its use in advocacy is in the proceedings in Her Majesty's Supreme Court in Shanghai in 1893 concerning the sinking of the Japanese warship *Chishima-Kan* by a British merchant vessel. Mr Francis QC of Hong Kong referred to British extraterritorial jurisdiction over counterclaims as a term under which Japan was 'admitted to the great family of nations'. Marston, 'British Extra-Territorial Jurisdiction in Japan: The Case of the Ravenna and the Chishima', 67 *BYbIL* (1997) 219, at 243.

²⁵ Commenting on the League of Nations Covenant, Oppenheim regarded the League as a *sui generis* subject of international law, with international personality. He thought it was intended, when fully realized, to take the place of the Family of Nations. Oppenheim, *International Law*, vol. 1 (3rd ed., 1921) 269.

²⁶ John Westlake, *Collected Papers* (1914) 78.

international relations with other States'.²⁷ Hence state responsibility for injurious acts by a parliament is merely vicarious, and the government has the duty to provide reparation no matter that its position as a representative government answerable to parliament may be difficult.²⁸ Similarly, 'in case of such denial or undue delay of justice as is internationally injurious, a State must find means to exercise compulsion against [its] Courts', notwithstanding that 'in modern civilized States these functionaries are to a great extent independent of their Government'.²⁹ Oppenheim's statism was grounded in this narrow view of agency between 'the state' and a coterie headed by the head of state and/or the head of government along with the foreign minister at the head of the ministry of foreign affairs. He did not have much conception of an agency relationship between government and people. The state (not the people) was the source of sovereignty (thus even a monarch is not a subject of international law, and has international law immunities only derivatively through the state). Westlake, in contrast, had held that it is the consent of the people who are the ultimate members of international society — with the caveat that for the most part he counted for this purpose only people within the zone of shared Euro-American civilization — that determines whether a valid legal rule exists; if there is a general consensus of opinion on such a rule, it may be invoked against a state even if the authorities of the state never assented to the rule.³⁰

Westlake's liberal political theory corresponded to his liberal emphasis on the role of public opinion and his belief in the commonality of education, literature, ideas, law, social mores and identity in the Euro-American world so that a common opinion was possible. Oppenheim was much less enthusiastic than Westlake about public opinion in relation to international law — Oppenheim's statist view of international society favoured firm control of international law matters by ministries of foreign affairs, at least until the lights went out in the chancelleries of Europe.³¹ For example, although the pressure of international public opinion was widely thought to have influenced

²⁷ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 216. Cf. Stephen Krasner's defence of the assertion that states can be treated as unified rational actors in the international political system by focusing on 'some element of the domestic political structure that could engage in such systems-oriented and responsive behavior ... [namely] those components of the government which ... are relatively independent of particularistic political pressures and are charged with pursuing the general interest of the society as a whole rather than the particular interests of one of its component parts. For the United States, the most obvious components of the state are the White House, the State Department, and elements of the Departments of Defense and Treasury ... [T]he contention that the state is a distinct part of the polity that could be distinguished from civil society and pursue its own agenda has been labeled statism'. Krasner, 'Realism, Imperialism, and Democracy: A Response to Gilbert', 20 *Political Theory* (1992) 38.

²⁸ Following a connected pattern, Oppenheim holds that, if members of the armed forces commit violations by order of their government, they are not war criminals and cannot be punished by the enemy. Oppenheim, *International Law*, vol. 2 (1st ed., 1905) 264. Similarly, a diplomat bears no personal responsibility for acts commanded or authorized by the sending state. Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 216. The state itself bears responsibility for all such acts of diplomats, and (under Article 3 of the 1907 Hague Convention) all acts of its armed forces.

²⁹ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 217.

³⁰ John Westlake, *Collected Papers* (1914) 78 *et seq.*

³¹ Diplomacy's felicitous imagery for the failure of diplomacy to avert the First World War.

Germany to attenuate its opposition to any international adjudicatory mechanisms and accept the modest innovations achieved at the two Hague Peace Conferences,³² Oppenheim characteristically rested his hopes for the development of international adjudication at the Third Hague Peace Conference, scheduled for 1915, not on public opinion and the peace-through-law movement, but on state interests, especially states' economic interests.³³ He nevertheless recognized that public opinion had some role. In *Das Gewissen*, he sketched a process whereby anti-war movements might bring about first a change in the conscience of peoples, then a change in moral attitudes to war, and finally a change in law.³⁴ In *Gerechtigkeit und Gesetz*, he noted the powerful role of feelings (*Gemüt*) in concepts of justice, with examples that include European reaction against the inhumanity of the slave trade, and reactions of the Christian world to oppression of Christians in Muslim states.³⁵ In his *International Law*, he referred, with more understanding than enthusiasm, to the power of public opinion in precipitating episodic military interventions on grounds of humanity, and envisaged that the result of such practice eventually might be that these interventions become lawful, provided they are undertaken collectively.³⁶ Elsewhere he suggested that, if there existed a practice of conquering states assuming the public debts of the conquered, it would be relevant to the international legal status of this practice 'that public opinion of the world at large approved of and expected this attitude'.³⁷ In sum, Oppenheim's view of the role of public opinion in international law matters was at the cautious end of the spectrum prevalent in late-Victorian and early Edwardian England: a liberal disposition to regard it as part of achieving progress in law and public policy, epitomized by Dicey's *Law and Public Opinion in England*,³⁸ but a lack of conviction that a truly international public opinion was really possible.³⁹

Exactly who Oppenheim meant by the 'public' in relation to international law is nowhere quite clear. His early work on the engagement of law with national issues of law and justice suggests that he recognized that it was not sufficient to construct public opinion simply as the elite in their clubs or common rooms, to confine it to the world of readers of *The Times* and *Le Temps* that constituted establishment internationalism.⁴⁰ He had considerable misgivings about public opinion organized

³² David Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference', 94 *American Journal of International Law* (2000) 4, at 16. See generally Arthur Eyffinger, *The 1899 Hague Peace Conference: 'The Parliament of Man, the Federation of the World'* (1999).

³³ Oppenheim, *The Future of International Law*, *supra* note 10, at 55.

³⁴ Oppenheim, *Das Gewissen* (1898) 48–50.

³⁵ Oppenheim, *Gerechtigkeit und Gesetz* (1895) 18.

³⁶ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 194. The same issue had been explored by Oppenheim much earlier, in Oppenheim, *Gerechtigkeit und Gesetz* (1895) 18. The argument for collective but not unilateral intervention was taken up thoughtfully in Karl Loewenstein, *Political Reconstruction* (1946).

³⁷ Oppenheim, 'The Science of International Law', *supra* note 3, at 338.

³⁸ Albert Venn Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (2nd ed., 1920).

³⁹ Carty, *supra* note 12, at 90.

⁴⁰ This world is evocatively sketched, with a perceptive distance crafted on the Estonian F.F. Martens' position as a slight outsider in the Russian establishment and in that of the Western internationalists, in Jaan Kross, *Professor Martens' Departure* (trans. Anselm Hollo, 1994).

through mass movements, exemplified by the cordial scepticism about peace movements expressed in his early international law writing. As mass movements of public engagement intensified with the massive suffering and democratizing effects of the First World War, however, Oppenheim took more conciliatory positions towards advocates of peace through law and international organization — it is difficult to determine whether these concessions represent a combination of exhaustion and despair with his own pre-war system, as Schmoeckel suggests,⁴¹ or the beginnings of a genuine and well-considered revision of his thought that was cut short by his death.

Oppenheim's account of international society, like that of most authors in Europe and the Americas in this period, was tied to a conception of what it meant to be 'civilized' that was exclusionary and legitimated much violence and dispossession. His division of the world into 'civilized' and various categories of others who were largely outside the scope of international law buttressed the sense of community — of international society — he was anxious to see grow among the 'civilized'.⁴² How far the framing concepts and construction of this architecture, or the modes of practice within it, were in fact influenced by those marginalized within or outside his system has not yet been sufficiently studied.⁴³ He understood international society as comprised principally of states in Europe and the Americas, plus a few others deemed by these to meet the requisite standard of civilization, with a further group of members of the Family of Nations for some parts of international law only, and not usually protected by (or subject to) the laws of war. He held the chilling view that the treatment of states outside the Family of Nations by states members of the Family of Nations was a matter of discretion.⁴⁴ He did not believe that native tribes were legally capable of any transactions governed by the law of nations.⁴⁵ In his view, international law did not impose many constraints except upon the member states of international society *inter se*. Peoples outside recognized states were not protected or constrained by international law. Like most English liberals, including Macaulay and J.S. Mill,⁴⁶ Oppenheim seems to have had little difficulty reconciling his enthusiasm for democratic government with the maintenance of colonial rule. A contrast may be drawn, however, between the quietude of Oppenheim's liberal acquiescence in colonial arrangements and the work of his two immediate predecessors in the Whewell Chair. The more anthropologically engaged Henry Sumner Maine (who held

⁴¹ Schmoeckel, 'The Story of a Success', *supra* note 4.

⁴² See e.g. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999) 1; and (on Thomas Lawrence), Riles, 'Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture', 106 *Harvard Law Review* (1993) 723.

⁴³ Onuma, 'When Was the Law of International Society Born?: An Inquiry of the History of International Law from an Intercivilizational Perspective', 2 *Journal of the History of International Law* (2000) 1.

⁴⁴ Oppenheim, *International Law*, vol. 1 (1st ed., 1905) 34.

⁴⁵ *Ibid.*, at 269.

⁴⁶ See Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth Century British Liberal Thought* (1999). Mehta (*ibid.*, at 5) quotes Lord Curzon: 'Imperialism is becoming everyday less and less the creed of a party and more and more the faith of a nation.'

the Whewell Chair for only a few months before his death, to be succeeded by Westlake) acknowledged that great empires 'were a result rather of man's rapacity than of his humanity', but nevertheless argued for the virtues of the peace established by the Roman empire,⁴⁷ and opined that were the British empire in India to be dissolved, 'the territories which make it up would be deluged with blood from end to end'.⁴⁸ Westlake too addressed questions of imperialism directly, noting in liberal fashion the honourable line of argument in support of aboriginal interests running from Vitoria and Covarruvias to contemporary European supporters of aboriginal peoples (he presumably had in mind groups such as the Aborigines Protection Society), and endeavouring in his legal analysis to give some limited significance to particular agreements made between indigenous rulers and European states or adventurers. Westlake's conclusion, that international law 'regulates, for the mutual benefit of civilized states, the claims which they make to sovereignty over the region, and leaves the treatment of the natives to the conscience of the state to which the sovereignty is awarded',⁴⁹ was broadly the same as Oppenheim's, but Westlake explained and justified this position with a sustained set of liberal rationalist arguments that Oppenheim deemed irrelevant to a blunt exposition of the legal position. Oppenheim may well have shared such views, but for normatively grounded theoretical reasons his more austere account of international law did not explicitly invoke them. He envisaged the gradual expansion of the international society of states, driven by the continued progress of civilization in which he believed passionately;⁵⁰ thus he lauded Japan for its remarkable efforts in becoming a civilized nation and a great power.⁵¹ His exclusionary conception of international society was politically palatable to the class of decision-makers whom Oppenheim sought to influence in his attempt to promote construction of an effective system of international law. But it also offered a blueprint for its own eventual geographical universalization that has been tremendously influential in international politics.⁵² A concept of international society that was contingent on power and on then-dominant social mores proved durable because it was capable of supporting political and social change in a way that its underpinning concept of 'civilization' was not.

The political vitality of Oppenheim's conception of international society was greatly enhanced by its modular structure. Oppenheim's 'Family of Nations' was comprised of

⁴⁷ 'During the long Roman peace not only did bloodshed practically cease, but the equality of the sexes, the mitigation of slavery, and the organization of Christianity made their appearance in the world.' Henry Sumner Maine, *International Law* (1888) 10.

⁴⁸ *Ibid.*, at 11.

⁴⁹ John Westlake, *Collected Papers* (1914) 145.

⁵⁰ Oppenheim, 'The Science of International Law', *supra* note 3, at 355–356; Oppenheim, *The Future of International Law*, *supra* note 10, at 66–68.

⁵¹ Owada, 'Japan, International Law and the International Community', in Nisuke Ando (ed.), *Japan and International Law: Past, Present and Future* (1999) 347, suggests that the kind of analytical positivism Oppenheim's work is usually taken to embody, and the kind of power-political appreciation of the manipulability and limits of international law and institutions, were absorbed into Japanese thought and practice during this period. The sense he gives of Japan's engagement with international law but wariness about it after the *Yokohama House Tax* case is a little less ebullient than Oppenheim's picture.

⁵² Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (1984).

largely undifferentiated units, 'sovereign states'. The understanding of state sovereignty that is a foundation of his international legal doctrine is in significant measure an outcome of specific historical features of post-Reformation political development in parts of western Europe. At least since Hobbes it has been recognized that the rise of the modern concept of the state as sovereign was in part a product of struggles in western Europe, especially England, France and the Netherlands, to establish a strong central authority within the state (more or less Erastian) to overcome the terrible impact of religious conflict — to subdue fanaticism.⁵³ The need for such supreme central authority within states was precipitated or intensified by the decline of effective and accepted universalist claims of Pope and Emperor, and such central state authority was made starker by the gradual erosion of mainly feudal systems of personal obligation that had cut across the borders of realms. As states became free-standing units with a political theory of sovereignty (sovereignty of rulers, or of state institutions, or even of 'the people'), the most obvious possible logics of international relations became anarchy and hierarchy. Thus sovereignty in this form was a local and historically contingent idea. But Oppenheim made sovereignty a foundation for a universal theory of international law that presupposed both anarchy and society. Sovereignty may yet prove less durable as a universal, and less important as a basis of international law, than the concept of international society.

Although he wrote relatively little about this in relation to colonialism, Oppenheim in other contexts recognized the tension between his statist theory and the normative value of liberal democracy, most evidently in the third edition of his *International Law*, where he introduced the argument that 'the progress of International Law is intimately connected with the victory everywhere of constitutional government over autocratic government, or ... democracy over autocracy'.⁵⁴ In answering the objection that the League of Nations is just a league of states, he commented, rather futuristically, that some or all of each state's three representatives to the League could potentially be chosen by the parliament or by direct election.⁵⁵ He argued strongly

⁵³ Richard Tuck, *Philosophy and Government 1552–1651* (1993).

⁵⁴ Oppenheim, *International Law*, vol. 1 (3rd ed., 1921) 100. In his stimulating review of the ninth edition, Reisman suggests that the moral concerning the importance to international law of democratic government within states was introduced by McNair in the fourth edition (see Reisman, 'Lassa Oppenheim's Nine Lives', 19 *Yale Journal of International Law* (1994) 255, at 266–270) but it in fact appears in the third edition. Although it is not certain that it was added by Oppenheim rather than Roxburgh, collateral evidence suggests Oppenheim's authorship, a view shared by Schmoeckel (Schmoeckel, 'The Story of a Success', *supra* note 4, at n. 221), who has had the benefit of examining unpublished notes for lectures Oppenheim delivered at Cambridge during the war. Oppenheim argued 'unless Germany be utterly defeated, the spirit of militarism, which is not compatible with a League of Nations, will remain a menace to the world ... A military state submits to International Law only so long as it serves its interests, but violates International Law, and particularly International Law concerning war, wherever and whenever this law stands in the way of its military aims.' Oppenheim, *The League of Nations and Its Problems*, *supra* note 11, at 15–16.

⁵⁵ The same argument is made in 'Le caractère essentiel de la Société des Nations', 24 *Revue Générale de Droit International Public* (1919) 234, at 243. Schmoeckel, 'The Story of a Success', *supra* note 4, suggests that this passage in the latter work expresses a Kantian view that democracies are less prone to aggrandizement and war, but it is difficult to see a strong basis for this interpretation.

that, in case of clear conflict with international law, national courts have no choice but to apply national law. On this ground he defended the decision in *Mortensen v. Peters*, in which an Edinburgh court upheld the conviction of the Danish captain of a Norwegian vessel trawling in the Moray Firth, a stretch of water which under international law should probably have been regarded as outside UK fisheries jurisdiction.⁵⁶ This dualism can be interpreted as respecting the democratic freedom of people in each state to decide what the national law should be, even if the state's elite have taken a different view in making international law.

Oppenheim's statist premises seem in general to be incompatible with an international democratic politics, and with an international community that is obviously not comprised simply of states in the way he asserted. Not many international lawyers would contemplate defending them in unadulterated form now. Yet Oppenheim's approach is still prevalent in a strong realist strand of international relations theory.⁵⁷ Kenneth Waltz, for example, whose *Theory of International Politics* (1979) is a leading example of works of this genre, earlier asserted: 'In studying international politics it is convenient to think of states as the acting units.' Waltz went on, however, to observe: 'At the same time, it does violence to one's common sense to speak of the state, which is after all an abstraction and consequently inanimate, as acting.'⁵⁸ Oppenheim's statist account of international society need not be read as a myopic description of what is, nor even as a convenient simplification to make analysis manageable. It can instead be read normatively, as stating an assumption which he believed was necessary as a condition for a real and workable international law. This judgment is of course open to attack. As Allott argues: 'States are not moral agents, so states are not morally responsible. States do evil, but they do not sin. States act shamefully, but they do not know shame.'⁵⁹ Although Allott focuses his attack on Vattel, he can be taken as denouncing Oppenheim as well as Vattel in condemning the tradition in which international society is rendered as a statist sovereignty-fixated inter-statal unsociety, unconstitutionalized, undemocratized, and unsocialized.⁶⁰ It is the institutional manifestations of this Vattel–Oppenheim construction of international unsociety that he excoriates in describing the European Community as a 'cynical perversion of a wonderful idea ... of European-wide society', and the various

⁵⁶ (1906) 14 *Scots Law Times Reports* 227. See Oppenheim, 'Zur Lehre von den territorialen Meerbusen', 1 *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1906) 579, at 583–587. The subsequent parliamentary proceedings are reported *in extenso* in Oppenheim, 'Die Fischerel in der Moray Firth', 5 *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1911) 74. This full report gives a sense of the complex economic and political context, involving ownership by British subjects of Norwegian-registered vessels, which by no means simply pitted Norwegian interests against British in the way suggested by the abstracted international law point for which the case is usually cited.

⁵⁷ Kenneth Waltz, *Theory of International Politics* (1979).

⁵⁸ Kenneth Waltz, *Man, The State, and War* (1959) 175.

⁵⁹ Allott, 'Kant or Won't: Theory and Moral Responsibility', 23 *Review of International Studies* (1997) 339, at 344. Statist anthropomorphism contributes to the grievously false consciousness that causes the 'amorallization of interstatal unsociety'. See e.g. Philip Allott, *Eunomia* (2nd ed., 2001) 248.

⁶⁰ *Ibid.*, at 243–248.

international institutions of the global public realm as 'a Leviathan of Leviathans'.⁶¹ Much of the effort of international lawyers in the century since Oppenheim wrote has gone into broadening the functioning legal conception of international society from the narrowly statist one of Oppenheim's 'Family of Nations'. But it is difficult to argue that a robust theory of international law has as yet accompanied these newer accounts of more and more inclusive and complex international society, with disaggregated states, an infinite diversity of non-state actors, private or hybrid rule-making, and an ever expanding range of topics covered by competing systems or fragments of norms. The extensive cognitive and material reconstruction required to actualize emancipatory projects such as that of Philip Allott is indicative of the scale of the challenge. However unappealing Oppenheim's approach has seemed, its coherence and manageability are normative attractions that make its continuing political influence intelligible.

2 Balance of Power

Oppenheim regarded the balance of politico-military power as a fundamental structural condition for durable international law. 'The first and principal moral is that a Law of Nations can exist only if there be an equilibrium, a balance of power, between the members of the Family of Nations.'⁶² Oppenheim was unswerving in this view. Even as balance of power politics was being vituperated as a contributor to the outbreak of the First World War, he argued that 'within a League of Nations some kind of Balance of Powers only can guarantee the independence and equality of the smaller States'.⁶³

In arguing for the balance of power, Oppenheim specifically rejected hegemony as an attractive basis for political, and legal, order. This is a concomitant of his rejection of any ideal that international law eventually become the command of a superior. He expressed grave misgivings about a 'super-state' as an aspiration for international organization.⁶⁴ He highlighted the dangers that arose previously when the balance was overturned, citing the expansionist aggression of Louis XIV and Napoleon I. In this respect, he echoed Gentili's earlier calls for other states to balance to prevent the emerging preponderance of the Ottoman Empire or Spain.⁶⁵ By implication he perhaps shared the view, widely held in England, that maintaining a balance of power against aspiring hegemons such as Napoleon was a protection against another Roman Empire. 'They realized, what the twentieth century forgot sometimes, that there are

⁶¹ Allott, 'Kant or Won't', *supra* note 59, at 354. Cf. Jean-Jacques Rousseau: 'There are today no longer Frenchmen, Germans, Spaniards, Englishmen ... there are only Europeans.' 'Considerations sur le Gouvernement de Pologne', in C.E. Vaughan (ed.), *The Political Writings of Jean Jacques Rousseau*, vol. 2 (1915) 432.

⁶² Oppenheim, *International Law*, vol. 1 (1st ed., 1905) 73; and Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 80.

⁶³ Oppenheim, *The League of Nations and Its Problems*, *supra* note 11, at 21.

⁶⁴ Oppenheim, *International Law*, vol. 1 (3rd ed., 1921) 294.

⁶⁵ Alberico Gentili, *De Jure Belli* (1598) I.14.

only two alternatives: either a distribution of power to produce equilibrium or surrender to a single universal empire like that of ancient Rome.⁶⁶

Oppenheim argued that balance of power 'is a political principle indispensable to the existence of International Law in its present condition'.⁶⁷ Like Kaltenborn von Stachau,⁶⁸ he rejected the view that the balance of power is a principle of international law.⁶⁹ Oppenheim's point was that features of the structure of international politics, in particular the configuration of the distribution of power, are fundamental conditions for international law. But the transition between law and what he regarded as political norms was almost seamless. His view, much criticized by Westlake and others,⁷⁰ that 'intervention is *de facto* a matter of policy' rather than law, he combined with an argument that intervention in the interest of the balance of power must be excused, and that it is a matter of appreciation for every state whether or not it considers the balance of power endangered and intervention necessary. In a similar way he argued that, even in situations where third states do not have a legal right to veto transfers of territory, 'there is no duty on the part of third states to acquiesce in such cessions of territory as endanger the balance of power'.⁷¹ These political norms are implicated in the legal structure by Oppenheim's argument that they are indispensable to a working system of international law. Following Oppenheim's logic, positive law could not proscribe third states from preventing certain cessions of territory, because for the law to do so would entail the demise of law. The balance of power principle is thus determinative of law.

Given his view that the balance of power is essential to international law, it is not surprising that Oppenheim's international law in turn functioned to uphold a balance of power. In broad terms, Oppenheim's legal technique favoured a dominant *status quo* power against a rising revisionist power. He applied his methodology for identifying rules of international law to the law of naval warfare in ways which many commentators regarded as upholding British interests with regard to attacks on foreign merchant shipping in wartime.⁷² Oppenheim would presumably have replied that his methodology was a general one that kept law in line with power-political concerns and the structure of the prevailing balance of power, not a matter of special

⁶⁶ Butterfield, 'The Balance of Power', in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations* (1966).

⁶⁷ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 193.

⁶⁸ Kaltenborn is not cited by Oppenheim on this point, but his views are discussed in the review of the literature undertaken in August Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (1874), chapter 2, a work Oppenheim does refer to.

⁶⁹ He differs on this issue from earlier English writers such as Robert Phillimore and Travers Twiss.

⁷⁰ Westlake, 'Review of International Law, vol. 1', 21 *Law Quarterly Review* (1905) 432, at 434.

⁷¹ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 193, 195 and 289.

⁷² Mathias Schmoeckel makes an argument to this effect in 'The Story of a Success', *supra* note 4. Bluntschli had asserted that only the English were obstructing general acceptance of a doctrine protecting commercial shipping of one belligerent from the ravages of the other. 'Cet obstacle disparaîtra, lorsque l'Angleterre aura fait la douloureuse expérience que son commerce et sa richesse sont sérieusement exposés par le maintien de l'ancienne règle, et que sa marine militaire est hors d'état de les protéger.' Bluntschli, 'Du droit de butin en général et spécialement du droit de prise maritime', 5 *Revue de Droit International et de Législation Comparée* (1877) 557. This passage is quoted in Stefano Mannoni, *Potenza e*

pleading for Britain. Other of his arguments served the group of states that dominated the international system, including for example his polemical assertion that when the remnants of a defeated army carry on the fighting by guerrilla tactics 'it is obvious that in strict law the victor need no longer treat the guerrilla bands as a belligerent Power and the captured members of those bands as soldiers'.⁷³ Similarly, Oppenheim believed that international legal institutions could only be effective if developed in tandem with evolving political structures, including the balance of power.⁷⁴ Thus he conceded a role for arbitration based on compromise and the priority of dispute settlement over positive law, even while advocating a permanent judicial body which would make law-governed decisions with the advantage of legal certainty.⁷⁵ In his proposals for a League of Nations Oppenheim expressed a strong preference that challenges to the continued applicability of treaties under the *rebus sic stantibus* doctrine (i.e. arguments that circumstances had changed) be addressed by a political Council of Conciliation or, absent that, the League Council,⁷⁶ although he also urged that any state be able to refer a *rebus sic stantibus* argument to the International Court of Justice for its opinion.⁷⁷

Although he attached great importance to the balance of power, Oppenheim failed to engage with some of the most serious problems concerning the scope and consequences of the 'balance of power' system. Oppenheim did not really enter into

Ragione (1999) 179. Mannoni makes a case, however, that, from the beginning of the 1890s, particularly after the intervention of Admiral Mahan, other publicists were increasingly rallying to the argument that effective war at sea involved attacking the enemy's resources and means of supply as well as the enemy's armed forces, so that Oppenheim's views would not by that time have been incongruous for a continental jurist. Stefano Mannoni, *Potenza e Ragione* (1999) 183–187. British politico-legal practice explicitly connected British political interests with the development of particular doctrines. To give one of numerous illustrations, the (UK) Attorney-General's concession in the *Fagernes* case (1927) that the Bristol Channel was not within British territorial waters was explained by Hugh Bellot in the *British Yearbook of International Law* (1928): 'I understand that the motive of the Admiralty for abandoning the claim to the Bristol Channel and other inland waters is that the nation which possesses the command of the sea is in a more favourable position if territorial waters are restricted as much as possible.' This was quoted, with the aim of undermining the weight of the actual decision in the *Fagernes* case as evidence of international law, in Norway's Counter-Memorial in the *Fisheries Case* (UK v. Norway), ICJ Pleadings, Oral Arguments, Documents, vol. 1 (1951) 443.

⁷³ Oppenheim, *International Law*, vol. 2 (1st ed., 1905) 68. This argument is made simply by reasoning from broad principle, with no supporting state practice or citation of treaties or other normative texts. It is, however, closely reminiscent of what seems a politically driven position he had taken in a letter to *The Times* in November 1900 asserting that the grim and hotly controversial campaign by the British against the Boers need no longer be regarded as regular war, Britain having already won the substantial victory.

⁷⁴ E.H. Carr, *The Twenty Years' Crisis* (1939) 245, commented: 'Respect for law and treaties will be maintained only in so far as the law recognizes effective political machinery through which it can itself be modified and superseded. There must be a clear recognition of that play of political forces which is antecedent to all law.' Carr was preoccupied with the problem of peaceful change that played so large a part in the politics of the 1919–1939 Twenty-Years Crisis, and it may be noted that Oppenheim saw this as an issue and criticized the League of Nations Covenant for its allocation of the issue to the Assembly and the requirement of unanimity.

⁷⁵ Oppenheim, *The Future of International Law*, *supra* note 10, at 46–50.

⁷⁶ Oppenheim, *The League of Nations and Its Problems*, *supra* note 11, at 69.

⁷⁷ Oppenheim, *International Law*, vol. 1 (3rd ed., 1921) 299.

the question, one of heated Anglo-German contention in this period,⁷⁸ whether the balance was confined to Europe, as the British urged, or should be understood globally, as urged by German politicians who thought Germany entitled to compensation *vis-à-vis* the imperialist powers for her paucity of colonial possessions.⁷⁹ Oppenheim utterly failed to advert to a tension between his advocacy of the balance of power and his recognition that nationalism (the principle of nationality) 'is of such force that it is fruitless to try to stop its victory'.⁸⁰ Indeed, the dynamic of nationalism made little impression anywhere in his text beyond his discussion of morals derived from history.⁸¹ The suspicion of some unevenness in Oppenheim's balance of power doctrine is reinforced by his position on the Monroe Doctrine — he not only accepted it as lawful, but seemed quite supportive of it, confining himself to observing that a balance of power will emerge in the Americas only if another great power grows up there.⁸² Although in its origins the Monroe Doctrine facilitated the European balance of power, why by the era of Theodore Roosevelt Oppenheim thought it not necessary for international law in the Americas to advocate a balance of power there is not clear.⁸³ His acceptance of US preponderance may parallel his silence on what now seems an unavoidable tension between British advocacy of balance of power and hegemonic arguments for the Pax Britannica.

Perhaps because he did not discuss the grounding of balance of power ideas in political theory, in the work of David Hume for example,⁸⁴ he did not address critiques of this theory. Ernst Kaeber, for example, in his 1907 doctoral thesis, identified two different starting points in arguments that intervention or war could be justified in the interests of maintaining the balance of power.⁸⁵ First, if the state of nature is the prevailing condition, self-preservation might justify acting to meet an imminent threat from a rising power, although the natural lawyers Grotius and Pufendorf denied that a *nimia potentia* did in fact justify war, and Kaeber did not argue that adding the maintenance of the balance of power to the list of approved *causa belli* was necessary to meet such situations. Secondly, if (as Kaeber thought) a community of states and a general community interest both exist, the institution of the balance of power provides a benefit for all that can be realized by articulating specific rules to promote its operation.⁸⁶ But this does not solve the problems that: the balance of

⁷⁸ A descriptive overview is given in Michael Sheehan, *Balance of Power: History and Theory* (1996) 137–142.

⁷⁹ He does refer to the 'balance of power in the world', but this is not dispositive. Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 198.

⁸⁰ *Ibid.*, at 81.

⁸¹ See generally Carty, *supra* note 9.

⁸² Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 196–199.

⁸³ He expressed admiration for the contributions of the US to international law, and was perhaps swayed in his acceptance of the American imbalance by the legalism which formed part of US discourse and diplomacy towards the Americas at the turn of the century.

⁸⁴ Hume, 'Of the Balance of Power', in David Hume, *Political Essays* (ed. Knud Haakonsen, 1994) 154.

⁸⁵ Ernst Kaeber, *Die Idee des europäischen Gleichgewichts in der publizistischen Literatur vom 16. Bis zur Mitte des 18. Jahrhunderts* (1907) Annex. (The edition used here is that of Gerstenberg, 1971.) This work is referred to, but not discussed, in the third edition of Oppenheim's textbook.

⁸⁶ Kaeber, *supra* note 85, at 149–150.

power has no fixed meaning; its usual justification by reference to history involves very subjective assessments; it entails self-judging that is largely a cloak for the interests of the powerful;⁸⁷ it operates on the premise of a war of all against all; and it has caused at least as many wars as it was supposed to prevent.⁸⁸ Failure to address these critiques weakened Oppenheim's case for the balance of power as a basis for international law, although it did not disturb the enthusiastic assessment of Oppenheim's view by theorists of international politics who independently believe the balance of power principle is correct. Hans Morgenthau, for example, departed only moderately from Oppenheim in arguing that the rules of neutrality varied with technology and the circumstances of warfare, and that neutrality depends in the final analysis on the 'ever vacillating and unstable foundation' of 'the opposition of various almost equally strong groups of powers which, by checking the power of each other, prevent any from violating the fundamental principles on which the politico-legal order is based'.⁸⁹

McNair, as editor of the fourth edition, continued to include Oppenheim's moral on the necessity for international law of a balance of power, but Lauterpacht in 1935 did not, and ever since the notion that balance of power principles might be relevant to international law has been virtually unutterable among members of the 'invisible college of international lawyers'. It is a concept, however, that is only just beneath the surface in the shoals where international law formally engages with international politics. It is implicated on the liberal left by post-Cold War claims that 'capitalism needs an enemy', on the right by schemes such as Carl Schmitt's *Grossraum* theory, in politico-religious debates by proposals for rough spheres of influence in which particular religions are established or privileged in specified parts of the world, in institutional politics by proposals to extend or not extend the veto to new permanent members in the Security Council. As these examples suggest, notions of a balance of power now usually enter legal debates not as formulations of positive legal norms, but as an element of the set of political and ethical norms that enable international society to function, and that inform the values and operation of international legal rules and institutions. This provides an illuminating contemporary illustration of the complex interrelationship between legal normativity and other normative structures. The too frequent neglect by international lawyers of such interrelationships between international law and non-legal international normative structures is in part the result of positivist conceptions of law as a specialized and pure field of inquiry which Oppenheim helped to foster. This is ironic, for Oppenheim himself saw the intimate connection between balance of power as a norm (or principle) of international politics

⁸⁷ See the discussion of the work of Ganesco and Mamiani, in Bulmerincq, *supra* note 68, at chapter 2.

⁸⁸ Heinrich Bernhard Oppenheim, discussed in Bulmerincq, *supra* note 68.

⁸⁹ Hans Morgenthau, 'The Problem of Neutrality', 7 *University of Kansas City Law Review* (1939) 109, at 116. Noting that the permanent neutralization of states such as Belgium, Luxembourg and Switzerland was a nineteenth-century phenomenon, in 1905 Oppenheim presciently expressed doubt about whether such neutralization could 'stand the test of history'. Oppenheim, *International Law*, vol. 1 (1st ed., 1905) 144.

and the structure of international law, while being careful to keep these formally distinct.⁹⁰

The reductionist focus on balance of power in the work of some realist theorists of international relations misses the complexity of the interplay between balanced, hierarchical and hegemonic distributions of power. Oppenheim too eclipsed this interplay in his stark advocacy of a balance as against the risks of hegemony. The historically grounded work of theorists of international society captures this interplay better. Understanding this interplay is essential to understanding the conditions of international law in the contemporary period, in which there does not exist a structural enmity, an even balance, or the affirmative power of a single hegemon to reconstruct international law. In so far as there exists US dominance and a Western hegemony for certain purposes, some of the concerns Oppenheim voiced are realized: the struggle or counterpoint that could in other circumstances buttress legitimacy is at risk of being so one-sided that the strategy on the non-Western side may move away from negotiation of liberal-capitalist Western values and towards their rejection; and there is too little incentive for the hegemon itself to be sufficiently respectful of other interests. The legitimacy of international law thus rests more and more on the hope that Western values command enough legitimacy in themselves; but at the same time basic inequalities and perceptions of unfairness threaten to put this legitimacy into question.

In Oppenheim's own thinking, a balance of power among states is necessary to achieve and maintain respect for international legal rules: it is a condition for 'formalism' in law.⁹¹ If no balance exists, and one state becomes preponderant, that state will pursue 'anti-formalist' approaches where these suit it better. Thus, after the decline and collapse of the USSR, a US scholarly focus on 'governance', 'regimes', 'managerial compliance', 'decision process' and the like, and a US tendency to negotiate detailed multilateral rule-making treaties which it does not then ratify, may reflect in some areas of international law a US preference for anti-formal malleability that is influenced by the aura of preponderant power.⁹² A mistrust of anti-formalism is evident in Oppenheim's strong argument in favour of the 'legal school' as against the 'diplomatic school' of international jurists.⁹³ This underpins his positivism, and provides one of the strongest normative arguments for this positivism. The normative case for Oppenheim's positivism must now be considered more fully.

⁹⁰ Oppenheim added to the second edition of his textbook: 'It is necessary to emphasize that the principle of the balance of power is not a legal principle and therefore not one of International Law, but one of International policy.' Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 193.

⁹¹ For a defence of formality in law, see P.S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987). See also Neil MacCormick et al. (eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert S. Summers* (1994).

⁹² Koskeniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations', in Michael Byers (ed.), *The Role of Law in International Politics* (2000) 17, at 29.

⁹³ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 82. The connection between his commitment to formalism and his view of social change is discussed below.

3 The Normative Basis of Oppenheim's Positivism

Oppenheim asserted that the principal task of the jurist is 'the exposition of the existing recognized rules of international law',⁹⁴ and he was proud to claim that his *International Law* presented international law 'as it is, not as it ought to be'.⁹⁵ He regarded himself as applying a positivist method: 'The positive method is that applied by the science of law in general, and it demands that whatever the aims and ends of a worker and researcher may be, he must start from the existing recognized rules of international law as they are to be found in the customary practice of the states or in law-making conventions.'⁹⁶ In this section of the paper, it will be argued that, notwithstanding the paucity of jurisprudential argument in his international law writings, Oppenheim's international law positivism was jurisprudentially grounded, and that his commitment to his positivist approach had a normative basis.

From one perspective the claim that Oppenheim's positivism was normatively grounded seems trite, for many agree with Ronald Dworkin's sweeping comment that 'any theory of law, including positivism, is based in the end on some particular normative theory'.⁹⁷ The claim made in this paper about Oppenheim, however, is more specific. He was engaged, as he saw it, in a project to build a desperately needed working system of international law for the future, which could only be a robust structure if based firmly on positivist foundations. This meant a struggle over the concept of international law against those who based the subject on natural law, and against those legal positivists for whom international law was just positive morality.⁹⁸ His rejection of natural law and of Austinianism was not dependent on any deep structure of political theory: it was a first-order dispute as to which concept of international law should be accepted. He believed that the best means to advance the substantive normative values to which he was committed was to adopt and propagate his particular positivist conception of law. For the development of an effective international law, he saw numerous advantages in features associated with positivism in law: the distinctive formulation and interpretation of legal rules as a basis for clarity and stability; their reduction to writing to increase certainty and predictability; the elaboration of distinct legal institutions; the development of ethically autonomous professional roles, such as that of international judge; and the separation of legal argument from moral arguments as a means to overcome disagreement.⁹⁹

⁹⁴ Oppenheim, 'The Science of International Law', *supra* note 3, at 314.

⁹⁵ Oppenheim, *International Law*, vol. 1 (1st ed., 1905) ix.

⁹⁶ Oppenheim, 'The Science of International Law', *supra* note 3, at 333.

⁹⁷ Dworkin, 'A Reply', in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (1984) 254.

⁹⁸ Oppenheim refers to 'method' in a way which to some extent includes 'concept', but he does not use the terms 'concept' or 'conception' in relation to international law, so these terms are used only as very imprecise markers in this paper, without entering into the nuances of *Begriffsjurisprudenz* or the sorts of problems canvassed in, e.g. Bix, 'Conceptual Questions and Jurisprudence', 1 *Legal Theory* (1995) 465.

⁹⁹ For this list, and the argument for mapping between analytical and normative concerns in positivist legal theory, the writer is much indebted to Waldron, 'Normative (or Ethical) Positivism', in Jules Coleman (ed.), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (2001) 411, at 432–433.

Oppenheim's positivist insistence that international law rules be based on consent is interpreted by Mathias Schmoeckel as a device to maintain the contact between consensual law and general morality, and Oppenheim's understanding of this contact is interpreted as being predicated on Oppenheim's acceptance in part of an identity between the *volonté de tous* and the *volonté générale*. Thus Oppenheim's positivism might be understood, paradoxically, as a normative project to maintain the connection between law and morality by separating them. Oppenheim could thus be read as cleverly eliding, or less charitably as overlooking, the distinction between the will of all and the general will.¹⁰⁰ This account is plausible if Oppenheim is read simply as struggling with the problem of how to ground positivist international law in morality. But it does not offer a very full or compelling normative explanation for Oppenheim's advocacy of international law positivism.¹⁰¹ It is more illuminating for appraising the normative arguments for such positivist projects, and perhaps fairer to Oppenheim (although possibly attributing too much to him), to read Oppenheim in the way that Jeremy Waldron reads Kant. He shares:

In the classic, but honest predicament of the true legal positivist. He has set out the advantages of positive law, and given an indication of what we stand to lose if we abandon it. He does not deny that the contents of legislation may be judged wanting from the transcendent perspective of justice and right. He recognizes ... the modes of thought ... that one deploys when one makes moral criticisms of existing law. But in the transition from moral philosophy to political philosophy, Kant insists that we now take account of the fact that there are others in the world besides ourselves. And he insists that we are to see others not just as objects of moral concern or respect, but as *other minds, other intellects, other agents of moral thought, coordinate and competitive with our own*. When I think about justice, I must recognize that others are thinking about justice, and that my confidence in the objective quality of my conclusions is matched by their confidence in the objective quality of theirs. The circumstance of law and politics is that this symmetry of self-righteousness is not matched by any convergence of substance, that each of two *opponents* may believe that they are right. If nevertheless there are reasons for thinking that society needs just *one* view on some particular matter, to which all its members must defer at least so far as their external interactions are concerned, then there must be a way of identifying a view as the community view and a ground for one's allegiance to it, which is not predicated on any judgment one would have to make concerning its rectitude.¹⁰²

Like many German and Austrian legal scholars at the end of the nineteenth century and the early twentieth century, Oppenheim was influenced by Kantian thinking,¹⁰³ but the question of whether this particular set of views was associated by Oppenheim specifically with Kant is not answerable from the materials presently available. It is not essential to the present argument, which is that Oppenheim consciously embraced the kind of normative positivism sketched here.

¹⁰⁰ Schmoeckel, 'The Story of a Success', *supra* note 4, convincingly argues that this aspect of Oppenheim's international law was connected with his early studies of group psychology under Wilhelm Wundt.

¹⁰¹ Schmoeckel, 'The Story of a Success', *supra* note 4, cites in this respect Kelsen's disparaging comments on Oppenheim: Hans Kelsen, *Théorie du droit international coutumier* (1939) 19–21.

¹⁰² Jeremy Waldron, *The Dignity of Legislation* (1999) 61–62. This is a contested reading of Kant, but that dispute need not be considered here.

¹⁰³ A point noted by Schmoeckel in relation to Oppenheim's recognition that all law is subject to human reason and thus imperfect: Schmoeckel, 'The Story of a Success', *supra* note 4, at nn. 216–217.

Oppenheim's primary first order concern was with the construction of a system in which international law could make a colourable claim to authority. As Joseph Raz has argued, 'every legal system claims that it possesses legitimate authority ... whatever else the law is, it must be capable of possessing authority'.¹⁰⁴ Although Oppenheim did not articulate the claim of international law this way, the idea that to be law international law must be able to make a claim to authority is inchoate in his thought, and led him, as it has led Raz, to a 'hard' sources-based legal positivism. The need for authoritative articulation of international legal rules necessitated building institutions capable of determining a legal rule even where there existed disagreement about the relevant principles of justice.¹⁰⁵ These are some of Oppenheim's first-order concerns. The second order values animating his commitment to these first order priorities will be considered later in this section.

Because of the sparseness of the discussion of jurisprudential theory in Oppenheim's international law works, and because of his hesitancy in those works in discussing second order values, demonstrating the normativity of Oppenheim's positivism by reference to his international law works alone is difficult. But Oppenheim's personal approach to jurisprudence is much more amply indicated in works written shortly before he turned full-time to international law, most notably *Gerechtigkeit und Gesetz* (1895) and *Das Gewissen* (1898). It will be argued that the jurisprudential foundations visible in these works also underlie his international law, although they are more difficult to discern there. Some of Oppenheim's ideas, formulated in these early works, are as follows. He builds on the notion that each individual has a conscience which develops through interaction in society, and develops differently depending on predisposition, milieu, intelligence, etc. The conscience is restrained by reason — the conscience is the highest authority, but only after reason is convinced that the conscience is right. Conscience changes, through the actions of the individual and through society's morals, religion and law. Mass changes in conscience can occur, sometimes disastrously.¹⁰⁶ Most human beings are strongly animated by a sense of justice, which has its origins in psychology. The views of individuals and groups as to what is just or unjust are shaped by feelings (*Gemüt*) and by interests, resulting in a continuous change in perceptions of justice. Justice involves a value factor (the *Wertmoment*), so that each is judged according to individual deserts, not simply according to social appropriateness. But, because deep disagreement about justice is almost inevitable in most societies, and judgmental decisions made simply on the ground of justice would be subject to the ebb and flow of social struggles and would often be unacceptable to those who lose a particular struggle, laws are enacted to replace the sense of justice as the basis for authoritative decisions. Laws, as abstractions that are the result of legislative compromises and imperfections,

¹⁰⁴ Raz, 'Authority, Law, and Morality', in Joseph Raz, *Ethics in the Public Domain* (1994) 194, at 199.

¹⁰⁵ Ronald Dworkin asserts that positivists in general endorse what he calls the model of rules because they adhere to a political theory that the function of law is 'to provide a settled public and dependable set of standards for private and official conduct, standards whose force cannot be called into question by some individual official's conception of policy or morality'. Ronald Dworkin, *Taking Rights Seriously* (1977) 347. Joseph Raz accepts such a characterization of his own argument in, e.g. Raz, *supra* note 104, at 219.

¹⁰⁶ Oppenheim, *Das Gewissen* (1898).

inevitably diverge from justice in particular cases. Lawyers and judges have some possibilities to bridge this gap, but ultimately for the judge the laws must be sacrosanct and unimpeachable. But this formal theory has sometimes been departed from, as in the case of the 1532 criminal code and code of criminal procedure (the Carolina), which from the eighteenth century was in effect modified by the judges and legal scholars while the legislature failed to enact any formal amendment. History teaches that such events occur because they are necessary, and the fact of such extra-legal alterations in the law must be accepted.¹⁰⁷ Jurists should pay attention to public opinion where it criticizes law in the name of justice, by instituting law reform and by the use of customary law which evolves with the life and views of the people. Law is in the end based upon public opinion, but judges and jurists should in general adhere to law; a triumph of justice over law is often an injustice for those (and they may be many) whose particular conception of justice was not victorious. The disruption of law has costs that endure for a long time.¹⁰⁸ Commenting in the *Deutsche Revue* on public perceptions that the criminal justice system was being misused against social democrats, Oppenheim noted that a previous wave of public demands to use the criminal law to deal with problems to which it was not ideally suited had precipitated the judicial excesses in these cases, and that the solution must now involve not only judges adopting less extensive interpretations, but the German people recognizing that the criminal law is not always the right answer to problems.¹⁰⁹ The pattern in his early works is thus to regard public opinion as sometimes well-founded on particular issues while also irresponsible and inexperienced, to defend law and the role and independence of judges,¹¹⁰ but to recognize the practicalities that jurisprudence and justice are not pure and independent but operate in society and involve public opinion.

Oppenheim thus offered in his earlier works a rich and carefully balanced account of the various normative systems that govern human behaviour, and of the particular functions of law in the face of disagreement in other systems. He grounded his understanding of these systems in individual psychology and the interests and feelings of individuals and social, economic and political groups. He saw all of these normative systems as dynamic, and acknowledged that law must adjust to changes in the other systems, even *in extremis* by means that are extra-legal.

Glimmers of these jurisprudential ideas from his early works reappear in his discussions of international law. A fully articulated construction of his international law on the basis of his earlier jurisprudence could have been an edifying project had he decided to attempt it. But the methodology Oppenheim adopted when he wrote systematically about international law did not include many of the fundamentals of this relatively sophisticated jurisprudential system. A few of the contrasts may be reiterated. His international law abandoned individuals as the starting point, and indeed purported largely to exclude them from the system. His richly variegated

¹⁰⁷ Oppenheim, *Gerechtigkeit und Gesetz* (1895).

¹⁰⁸ *Ibid.*, at 28–34.

¹⁰⁹ 'Die öffentliche Meinung und die Rechtsprechung', 23 *Deutsche Revue* (January–March 1898) 328–339.

¹¹⁰ In *ibid.*, at 339, Oppenheim is very anxious to establish that the judges remain independent and proper judges: 'Es gibt noch Richter in Berlin.'

national community, with reference to social classes, political party affiliations, etc., was discarded for an international community confined exclusively to states. Conscience and feelings largely disappeared from the analysis, because he did not attribute these to states,¹¹¹ although he retained some role for mass conscience. The role of justice *vis-à-vis* law was diminished, being confined in his international law writing mainly to procedural issues connected with legal security and certain rule-of-law values. He aimed in his international law method to adhere more strictly to an approach to law based only on its positive sources, without envisaging judges and jurists bringing about the kind of change that happened to the Carolina code.¹¹² In international law even more than national law he believed judges must decide according to law, not on extraneous moral or political grounds; arbitrators whose job it is simply to resolve the dispute he viewed with toleration but some misgivings, much as he viewed German or Swiss juries and lay judges, who he believed were apt to decide on grounds of justice rather than law. He sought to limit the significance for international law of national legislative or judicial action, in which considerations extraneous to international law may appear.

This has led many readers to doubt that Oppenheim's positivism is normatively motivated. Textual support for the argument that Oppenheim's international law positivism was part of a normative project may be derived from the significance Oppenheim attached to the juristic task of critiquing the existing rules and present scope of international law. 'This task of the science of international law is very important and must not be neglected, if we want international law to develop progressively and to bring more and more matters under its sway Nothing prevents us from applying the sharp knife of criticism, from distinguishing between what is good and bad according to our individual ideas, and from proposing improvements.'¹¹³

But while Oppenheim invested much effort specifying in detail how jurists should pursue the task of identifying existing rules of international law and distinguishing them from mere 'usages' and from rules *de lege ferenda*, he wrote much less about how the task of critique should be accomplished. Although his writings offer some indications of what values or criteria he himself would choose to use in the process of critique, he wrote little about what justified the choice, or about the relevance of other

¹¹¹ Oppenheim did not attempt the potentially manageable task (given his narrow view of the state) of developing microfoundations, which would show how the feelings, interests or values of key decision-making individuals or groups shape the state's international legal policy.

¹¹² Oppenheim recognized that, in a novel situation, the choice from among the various legal rules and principles that could conceivably apply involves rejection of some on grounds of their incompatibility with justice, necessity, or good sense. He understood that anyone applying law to a specific new situation cannot be oblivious of political aspects, even while the task of the lawyer is to apply suitable legal principles. But even in such novel cases he was hesitant to go beyond the forms of legal reasoning minimally necessary to sustain a working legal system capable of addressing such new problems by framing rules of positive law. This is exemplified by Oppenheim's legal analysis of the proposed Channel Tunnel in 'Der Tunnel unter dem Ärmelkanal und das Völkerrecht', 2 *Zeitschrift für Völkerrecht* (1907) 1, discussed by Mathias Schmoeckel from this perspective in Schmoeckel, 'The Story of a Success', *supra* note 4, at n. 202.

¹¹³ Oppenheim, 'The Science of International Law', *supra* note 3, at 313 and 355.

disciplines to the task. Nor did he say much about the qualifications that international lawyers might have for this task, the limits of any special competence they might have, or the restraints they should observe in engaging in such critique in order to maintain their professional stature and effectiveness as expositors, counsel and judges.

Why did Oppenheim endorse the task of critique so prominently but write so little about how to accomplish it? His methodological austerity in the critique and development of law produced results that do not differ greatly in practice from the positivist international lawyers whose fall into mere description prompted Hersch Lauterpacht's attack on their normative failings: 'the desire of generations of international lawyers to confine their activity to a registration of the practice of States has discouraged any determined attempt at relating it to higher legal principle, or to the conception of international law as a whole. The latter function can ... be performed by means of the legitimate methods of juridical criticism and analysis.'¹¹⁴ But Oppenheim was not oblivious of these issues, as his writing on non-international law subjects makes clear. His abstention from discussion of political ideas was for normative reasons. Seeing himself as a member of a specialist professional cadre,¹¹⁵ rather than a representative of a state or political grouping, he did not believe that reliance by him on contested political positions to frame legal rules or even to provide critiques of legal rules would advance the normative goals to which he was professionally committed.¹¹⁶ As he put it, 'our science will not succeed ... unless all authors ... make an effort to keep in the background their individual ideas concerning politics, morality, humanity, and justice'.¹¹⁷

Two factors contributing to Oppenheim's circumspection call for some explanation here. First, he harboured some hesitations about the sufficiency of the basis on which effective critique could be grounded. Mathias Schmoeckel suggests that Oppenheim 'presupposed a common worldwide civilization with the same ideas and ideals',¹¹⁸ and that he believed that international law must remain in touch with this common ethical background in order to derive essential support from it. But Oppenheim also embraced an international political pluralism: 'variety brings life, but unity brings death. Just as the freedom and competition of individuals is needed for the healthy progress of mankind, so also is the independence and rivalry of the various nations.'¹¹⁹ Oppenheim thus confronted a tension between political pluralism and value-universalism for international law purposes. In *Das Gewissen* he provided an evolutionary account of international law: it began with a growing realization (at least in the Christian world) of common humanity, that was gradually absorbed into

¹¹⁴ Hersch Lauterpacht, *The Function of Law in the International Community* (1933) 438.

¹¹⁵ See for example his references to a collectivity of 'Professional International lawyers', for whom he speaks in the liturgical form 'we believe ...', in Oppenheim, *The League of Nations and Its Problems*, *supra* note 11, at v-vi.

¹¹⁶ Oppenheim, 'The Science of International Law', *supra* note 3, at 355.

¹¹⁷ *Ibid.*, at 355.

¹¹⁸ Schmoeckel, 'The Story of a Success', *supra* note 4, text before n. 248.

¹¹⁹ Oppenheim, *The Future of International Law*, *supra* note 10, at 13.

conscience, then became a morality between peoples, and finally (with Grotius) international law.¹²⁰ He envisaged the continuing extension of this process. But he was not convinced to the same degree as were Westlake and others of the depth of commonality of civilization and values within the Family of Nations, and his optimism about the eventual progress of a universal civilization was tempered by concern about how far a universal system based on the familiar European order was really possible.¹²¹ His sense of an uneasy balance between progress and pluralism underpins his combination of a morality based on a general will and a pluralistic international law based on consent rather than commonality. Oppenheim's task of critique of international law could only be performed in this space between morality and law, between the omnilateral and the plurilateral. Oppenheim shared the widely held view that an international law expressive of general morality could help to construct that morality and shore up its generality. But he did not think that international law was strong enough to play this role very boldly, nor that the corpus of general morality was extensive or deep enough to propel rapid development of new legal rules.

Secondly, Oppenheim was gravely concerned with the problem of how to ground and sustain authority in international law. Because of the peculiar importance of scholarly writings in international law — an importance Oppenheim hoped would recede — those engaged in this scholarship must adhere to relatively detached positivist legal method, or the already precarious authority of international law would be further undermined.

What were the values that animated Oppenheim's thought? His basic personal-political liberalism was intimated repeatedly in his works over the course of his career. In his study of the human conscience, for example, he gave as his four examples of wrong conscience: religious fanaticism, racial hatred, throwing bombs in the interests of political ideas, and duels.¹²² Oppenheim's commercial liberalism is evident in his lauding the legal rights of legation, the protection of nationals, the freedom of the high seas, innocent passage in the territorial sea, and free navigation of certain rivers, as provisions in the interests of international commerce.¹²³ He was careful, however, to subordinate commercial interests to higher state interests with regard to wartime commerce, and to reject the old natural law claim that there exists a general legal right of international commercial dealing. Nor did he even explore, let alone embrace, the liberal hypothesis that growing economic interdependence may reduce the risk of war. Although he refused to treat individuals in any way as subjects of international law, and argued that international law left to individuals' states of nationality a general power to treat them at their discretion, some of his commitment to individual

¹²⁰ Oppenheim, *Das Gewissen* (1898) 48.

¹²¹ Oppenheim, *The Future of International Law*, *supra* note 10, at 67–68, lists 'the opposition between West and East' in the category of 'influences and circumstances opposed to progress', 'although the glorious example of Japan shows that the nations of the East are indeed capable of putting themselves on the plane of Western civilization, and of taking a place in the sun in the international community of states'.

¹²² Oppenheim, *Das Gewissen* (1898) Part vi. See also the variety of justice claims canvassed in Oppenheim, *Gerechtigkeit und Gesetz* (1895) 18–19.

¹²³ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 201.

liberty also flowed through into his international law. His discussion of the development and defence of the principle of non-extradition of political offenders was cast as a struggle between countries such as Great Britain, Switzerland, Belgium, France and the United States, 'in which individual liberty is the very basis of all political life, and constitutional government a political dogma of the nation' and governments (above all Czarist Russia) which 'were more or less absolute and despotic'.¹²⁴ His arguments in favour of the recent Swiss statute rather than the Belgian or Russian approach to extradition for political crimes, and his general condemnation of assassinations of heads of state, all seem to flow from ruminations in his earlier studies of justice.¹²⁵ While agreeing that political crimes by reactionaries were also and equally covered by the principle of non-extradition, he drew the line at anarchistic crimes, whose perpetrators he thought ought to be surrendered. The wishes of the individual were given surprising legal significance by Oppenheim in one context: he held that the power of states to naturalize foreign subjects without the consent of their state could arise from, but was conditional upon, the consent of the individuals concerned.¹²⁶ Elsewhere he followed a liberal sentiment — strong at the time, particularly in France — in commenting that taking part in a levy *en masse* in resistance to a belligerent occupation could be a highly praiseworthy patriotic act, although he held it nevertheless to be punishable as a war crime.¹²⁷

In sum, Oppenheim was committed to some basic tenets of political liberalism, was clearly hostile to anarchism, was apparently hostile to socialism (which by 1915 if not earlier had visibly lost mass momentum as a language for transnational politics in western Europe),¹²⁸ was not demonstrably an enthusiast for social-democratic political activism (his treatment of social-democratic issues in the 1890s was much more circumspect than Philipp Lotmar's¹²⁹), and regarded nationalism as something to be accommodated with resignation rather than a doctrine of liberation and

¹²⁴ *Ibid.*, at 414. Note that F.F. Martens, who elsewhere argued for a human rights principle as part of international law, defended Switzerland's earlier controversial extradition of a regicide plotter to Russia, along with other aspects of Russian policy in negotiating extradition treaties.

¹²⁵ Oppenheim, *Das Gewissen* (1898) Part vi: 'Every political assassination is the expression of a wrong conscience which does not find its justification, but its explanation in the preceding general circumstances of society.'

¹²⁶ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 179.

¹²⁷ Oppenheim, *International Law*, vol. 2 (1st ed., 1905) 264. See generally Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (1999).

¹²⁸ Interesting comparisons might be drawn on these points between Oppenheim and F.F. Martens (1845–1909), who followed English politics quite closely from St Petersburg, and wrote to *The Times* advocating dissolution of the Russian Duma as a failed experiment. A descriptive study is Vladimir Vasilievich Pustogarov, *Our Martens: F.F. Martens, International Lawyer and Architect of Peace* (trans. W.E. Butler, 2000).

¹²⁹ The clear social-democratic commitments contained in the two lectures in Philipp Lotmar, *Vom Rechte das mit uns geboren ist — Die Gerechtigkeit* (1893), may be contrasted with the more detached approach taken in Oppenheim's comparable, Lotmar-influenced lecture of the same period, *Gerechtigkeit und Gesetz* (1895). See generally Rückert, 'Philipp Lotmar's Konzeption von Freiheit und Wohlfahrt durch "soziales" recht', in Philipp Lotmar, *Schriften zu Arbeitsrecht, Zivilrecht und Rechtsphilosophie* (ed. Joachim Rückert, 1992).

self-realization. With a few exceptions, Oppenheim seems to have been careful as an international lawyer to avoid taking positions on many of the specific public causes of the day. At least until the carnage of the First World War, Oppenheim's own 'legalism' was quite different from that of the public-campaigning jurists of the peace-through-law movement, or from humanitarian-internationalist jurists such as Laveleye, Bluntschli or James Brown Scott. He showed no sign of the kind of committed engagement to different public causes that characterized the lifelong liberal John Westlake, who worked tirelessly on campaigns ranging from proportional representation through to the freedom of Finland from Russian domination.¹³⁰ He would have been dismissive of anything in the style of James Lorimer, who used his Edinburgh chair as a pulpit, fulminating on topics ranging from proportional representation through the desirability of the forcible installation of international government in Constantinople to his belief in the incompatibility of Koranic principles with an effective system of international law.¹³¹

Oppenheim's international law positivism was probably not connected with struggles of day-to-day politics, but instead with a broader set of normative commitments. Jeremy Waldron, writing with the jurisprudence of municipal law in mind, lists among values that have animated legal positivists: peace; predictability; utilitarian prosperity; Hayekian autonomy; the control of power; democracy; political obligation; legitimacy; and social coordination.¹³² Oppenheim was influenced in his own municipal jurisprudence by several of these considerations. In his thinking about international law, however, it will be suggested that such values play a more diffuse function. He asserted that the ends served by international law are: 'primarily, peace ... and ... what makes for order and is right and just; secondarily, the peaceable settlement of international disputes; lastly, the establishment of legal rules for the conduct of war and for relations between belligerents and neutrals.'¹³³ Thus, while peace was important to Oppenheim,¹³⁴ peace was not for him the overwhelming value

¹³⁰ See *Memories of John Westlake* (1914), which contains chapters by co-workers on his roles in the British proportional representation movement, the Balkan Committee (a group in England critical of Turkish rule in the Balkans), public campaigns against excesses of Russian rule in Finland, and the Working Men's College.

¹³¹ See James Lorimer, *Studies National and International: Being Occasional Lectures Delivered in the University of Edinburgh 1864–1889* (1890). Oppenheim did occasionally take public positions on contemporary controversies, as with his letter to *The Times* on the war in South Africa in 1900, and he regularly addressed such controversies in lectures at Cambridge, especially after the outbreak of the First World War.

¹³² Waldron, *supra* note 99, at 433.

¹³³ Oppenheim, 'The Science of International Law', *supra* note 3, at 314.

¹³⁴ He emphasized that international lawyers must have 'a deep-rooted faith in the progress of the nations towards peace and civilization'. Oppenheim, 'The Science of International Law', *supra* note 3, at 355. Oppenheim concluded his discussion of the future work of international law with the biblical prophecy that 'they shall beat their swords into ploughshares ... and nation shall not lift up sword against nation'. Isaiah, II:4. Quoted in Oppenheim, 'The Science of International Law', *supra* note 3, at 356; and in Oppenheim, *International Law*, vol. 1 (1st ed., 1905) 48.

it was later to become in international law writing.¹³⁵ (In this respect, Oppenheim's position that international law does not purport to regulate all organized violence qualifies slightly the widely held view that the central concern of most theories of law, and certainly of positivist legal theories connected in any way with Hobbes, is with the organization and control of violence.¹³⁶) It is suggested that he regarded the immediate normative priorities in international affairs as order,¹³⁷ the maintenance of the basic structure of the international system upon which order depends, the legal regulation of war, and the settlement of disputes without war. Many of these improved the prospects for peace, but Oppenheim was cautious about the possibilities of law exceeding its capacities through efforts to secure or guarantee peace.

The argument of this section has been that Oppenheim's commitment to a positivist approach to international law was not simply an assertion that a positivist concept of law was the only coherent one, but also embodied a normative or ethical view that a positivist understanding of international law was best able to advance the realization in international society of a higher set of values to which Oppenheim adhered. That is, Oppenheim was engaged in normative jurisprudence.

It remains to substantiate the assertion made earlier in this paper that Oppenheim's normatively grounded advocacy of positivism can also be considered to be a political position. It cannot be claimed that Oppenheim himself necessarily thought of this as political. Whereas his advocacy of balance of power expressly represented it as a political idea, and his advocacy of an international society of states obviously embraced a political position as against extreme realists on one side and cosmopolitanists on the other, Oppenheim's main express argument for his positivist conception of law was simply that such a conception was the true concept of law.¹³⁸ The

¹³⁵ Cf. M. Howard, *The Invention of Peace* (2000); and Raymond Aron, *Peace and War* (1962, trans. Richard Howard and Annette Baker Fox, 1966) 703–705.

¹³⁶ Ronald Dworkin, for example, proposes as a general feature of the concept of law: 'Law insists that force not be used or withheld ... except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.' Ronald Dworkin, *Law's Empire* (1986) 93 (Dworkin does concede that not all theories of law fit this pattern; *ibid.*, at 94). Hersch Lauterpacht is representative of a group of post-First World War international lawyers who came much closer to the tenor of Dworkin's image. He suggested that 'pacifism is identical with the insistence on the reign of law in international relations', and argued that peace is not only a moral idea, but a legal postulate. 'Juridically it is a metaphor for the postulate of the unity of the legal system. Juridical logic inevitably leads to condemnation, as a matter of law, of anarchy and private force.' Lauterpacht attached great normative importance to peace in the international legal system, conceding that peace 'may involve the sacrifice of justice on the altar of stability and security'. Lauterpacht, *The Function of Law in the International Community* (1933) 438. Raymond Aron endorsed Lauterpacht's view that peace is a legal postulate, but only en route to his conclusion that 'no theory of international law has ever been satisfactory, either in itself or in relation to reality'. Aron, *supra* note 135.

¹³⁷ A discussion of the relations of order to law begins his consideration of the organization of the society of states in Oppenheim, *The Future of International Law*, *supra* note 10, at 9 *et seq.*

¹³⁸ Oppenheim, 'The Science of International Law', *supra* note 3, at 326–336. Oppenheim argued (*ibid.*, at 327) that, despite the plurality of accepted methods, 'it is nevertheless necessary to inquire into the question. Which method is the right one? For the right method secures the best results.' His answer was emphatically that the positivist method was the only right one. By 'methods', Oppenheim seems also to encompass conceptions of what international law is.

argument that the struggle to articulate the best concept of law is an intellectual search for truth¹³⁹ — or, in a modern variant, a search for the most intellectually valuable concept for the purposes of social science inquiry¹⁴⁰ — continues to attract considerable support in positivist jurisprudence.¹⁴¹ Against this position, it may be argued that the concept of international law is essentially contested, that the contestation is fundamental and enduring, and that the choice among the contending positions has political ramifications.¹⁴² For, although there was already a corpus of social practice that in Oppenheim's day provided a referent for a descriptive account of what international law was, the diversity among influential textbooks of the period demonstrated, as Oppenheim himself noted, that no single understanding of the concept of international law was overwhelmingly shared by writers. Establishing a concept of international law was a theoretical project, shaped by theoretical concerns, but preferences as between theoretical positions had implications for matters of enduring political importance.

Oppenheim saw the contested terrain in this way. He acknowledged that a positivist conception (or method, in his terminology) of international law was not generally accepted. He emphasized that much was at stake in the struggle to define the concept of international law. Thus one of his objections to natural law approaches was that their practitioners could not agree among themselves on the most basic questions about international law, let alone convince others, and that they offer 'a breach through which the deniers of the law of nations can easily come in and attack the very existence of an international law'.¹⁴³ He saw perhaps a more serious threat in efforts to make international law a body of elastic principles rather than firm rules, and to exclude binding adjudication in favour of diplomatic negotiation or arbitration. Hence his view that 'the progress of International Law depends to a great extent upon whether the legal school of International Jurists prevails over the diplomatic school'.¹⁴⁴ He asserted that judges should not assume a wide power to depart from rules without the express consent of the state involved, not only for the pragmatic reason that such a power would place an unsustainable responsibility on a weak system of international adjudication, but also because Oppenheim held the political

¹³⁹ See, e.g. W.J. Waluchow, *Inclusive Legal Positivism* (1994); and the 'methodological positivism' identified (and criticized) by Perry, 'The Varieties of Positivism', 9 *Canadian Journal of Law and Jurisprudence* (1996) 361. Jules Coleman, *The Practice of Principle* (2001), acknowledges that choices among differing plausible theories of law are made on moral and political grounds, but defends the possibility and necessity of descriptive jurisprudence. Coleman argues, for example, that 'the project of exploring the ways in which law is similar to or different from various other social and normative systems... is regulated by epistemic and theoretical norms, not moral or political ones'. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis', in Coleman, *supra* note 99, at 112.

¹⁴⁰ See, e.g. Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis', in Coleman, *supra* note 99, at 355.

¹⁴¹ Among the most appealing of these arguments are those developed in the work of Joseph Raz. See, for instance, Raz, *supra* note 104; and Raz, 'Legal Positivism and the Sources of Law', in Joseph Raz, *The Authority of Law* (1979), chapter 3.

¹⁴² Murphy, 'The Political Question of the Concept of Law', in Coleman, *supra* note 99, at 371.

¹⁴³ Oppenheim, 'The Science of International Law', *supra* note 3, at 329.

¹⁴⁴ Oppenheim, *International Law*, vol. 1 (2nd ed., 1911) 82.

view that a concept of law allowing for expansive judicial law-making was less desirable than a concept of law in which law-making was a separate institutional activity from adjudicatory law-applying.

Oppenheim adopted a positivist sources-based approach to the question of the validity of rules of international law. Thus if Rule X met a relatively stringent sources test — it satisfied the requirements for custom binding the states concerned, or was embodied in a binding and applicable treaty — it was a rule of international law, and if it did not meet these requirements, it was not. The duty of the international judge was to apply these tests of pedigree to determine which were the relevant and applicable rules of international law, and then to apply the rules to the case. Oppenheim thereby rejected alternative positions. For example, he rejected the proposition that if Rule X was a rule that any person endowed with reason would hold to be the most appropriate for application in these circumstances, it was therefore binding law that a judge should apply. He likewise rejected the proposition that if Rule X was an otherwise valid rule but was wicked, it was not a rule of international law and no judge should apply it.

The aggregate of such choices — the rejection of natural law in favour of a sources-based consent theory of law, the view of law as rules and not loose principles alone, the aspiration for rule-governed adjudication rather than extra-legal disposition of disputes, and so forth — is Oppenheim's positivist view of what international law meant. This view was dependent on his view about what the functions of international law were and should be. A normative theory of the proper functions of international law cannot be fully defended without reference to political considerations,¹⁴⁵ and such considerations are implicated by Oppenheim's argument.

For these reasons, it is argued that Oppenheim's normatively grounded commitment to international law positivism involved him taking, and defending, a position about international politics.

4 Conclusion

Lassa Oppenheim's positivist account of international law was predicated on a particular set of views about the structure of international politics. He believed that international politics could best be understood, and organized, through an international society of states. He believed that only through a balance of power in the international political system could that system be one in which law was significant. He believed that international law could play a useful role in international politics only if international law was understood in positivist terms as deriving exclusively from the consent of states expressed through treaty or custom. Such propositions amounted to a series of theses about the political conditions necessary for effective

¹⁴⁵ A parallel argument is developed with regard to the differences between H.L.A. Hart and Oliver Wendell Holmes. In Perry, 'Holmes Versus Hart: The Bad Man in Legal Theory', in Stephen Burton (ed.), *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr* (2000) 158.

international law. This series of theses was not merely descriptive, but normative. Oppenheim believed that an international society of states, a balance of power and a positivist conception of international law should all be pursued because they represented the best feasible means to attain the higher normative goals to which he subscribed.

This is not to say that Oppenheim had worked out or articulated the relationships implied between law and politics with great clarity. As John Westlake observed in his review of the first edition of *International Law*: 'Dr Oppenheim has evidently perceived the truth that any teaching of international law which aspires to be useful must not ignore international politics. But we could wish that he had brought what he has to say on politics into better connection with what he has to say on law.'¹⁴⁶ Oppenheim said little about many important dimensions of the relations between law and politics. He showed little interest in positive political theory explanations of particular legal rules and institutions. He seldom traced the relations between evolving international politics and the adumbration of particular rules (his discussion of extradition for political offences is an unusual exception in this regard). His account of the family of nations involved gross inequality between peoples and between people, and sought to shore up a state of affairs that was (at least in hindsight) crumbling as he wrote.¹⁴⁷ His reverence for the balance of power was not matched by any depth of analysis of its problems and implications. His positive international law was exasperating in its formal political disengagement, and in its apparent amorality, all the more so because of his express commitment to critique and law reform. His argument that law is distinguished from non-law by the presence of the possibility of external compulsion was not followed up with any consideration of the idea that, because the organization of sanctions can at best be erratic in international law, it is necessary to understand international law rules as guiding by reasons, not merely as compelling by sanctions. He made no reference to the kind of cultural theory of social and organizational change found in the work of his contemporary Max Weber,¹⁴⁸ even though he apparently saw rule-structured rationalization in an elite framework as a core element in the construction of a workable international law, and he perhaps saw a connection between this and rationalization in the development of 'civilized' states,

¹⁴⁶ Westlake, *supra* note 70, at 434. Schmoeckel, 'The Story of a Success', *supra* note 4, interprets Westlake as opposing Oppenheim's incorporation of politics into his discussion of international law, but it is suggested instead that Westlake was sympathetic to the integration of law and politics, while unconvinced that Oppenheim's device of separating law and politics while at the same time incorporating a discussion of politics into his textbook was a coherent or sustainable approach.

¹⁴⁷ E.H. Carr describes this with characteristic pungency: 'the golden age of continuously expanding territories and markets, of a world policed by the self-assured and not too onerous British hegemony, of a coherent "Western" civilization whose conflicts could be harmonized by a progressive extension of the area of common development and exploitation, of the easy assumptions that what was good for one was good for all and that what was economically right could not be morally wrong.' Carr, *supra* note 74, at chapter 14.

¹⁴⁸ The present writer has found no reference to Weber in Oppenheim's publications, but parallels are not surprising in view of the overlap in their intellectual formations.

including highly organized bureaucracies capable of evaluating and responding to the requirements of international rules.

Yet, despite these limitations, Oppenheim had a significant political theory of international law. For the overriding purpose of protecting and advancing the basis of international order, as well as for other second-order normative reasons, Oppenheim felt constrained to dispense with the view of society and its normative systems that had animated his earlier non-international jurisprudence. He feared, as did other lawyers of his generation but generally not with such sharpness, that to make the globalizing international legal order dependent for its present content and future construction upon such a rich conception of international society was untenable. To achieve even his minimal normative objectives, he believed it necessary to define the structure of a state-centric, North-dominated, liberal international political system of order, which law could help define and promote, and in which law could function. To achieve the normative possibilities of a positivist conception of law, he believed that positive international law must be quite closely aligned with, but distinct from, the precepts and patterns of international politics. International law must have a political foundation, but it must not be simply politics. Oppenheim's attempt to steer such a course had the result that the structure of international law correlated closely with the distribution of power: thus the balance of power was a central concern of his, but to maintain law's separation from politics, it was treated as a political rather than a legal principle. Liberal values and moral justice received some weight, but not where these threatened the basic system, including the political conditions for the stability of positive law. This is the kind of combination that appealed to E.H. Carr: 'Law, like politics, is a meeting place for ethics and power.'¹⁴⁹ It coincides with the temper of Oppenheim's understanding of himself as an idealist who believed that only through realism could progress towards ideals be made.¹⁵⁰

It is thus not surprising that Oppenheim's general approach to the political foundations of international law, and many of his arguments about specific rules and institutions, have helped sustain a broader pattern of thought about the relations of international law and politics propounded by a line of influential political scholars running from E.H. Carr (1892–1982) to Hans Morgenthau (1904–1980), Raymond Aron (1905–1983), Hedley Bull (1932–1985) and the modern English School.¹⁵¹ The

¹⁴⁹ Carr, *supra* note 74, at chapter 10. Carr argued that a modest but significant role is played by basic morality in shaping how people think and act on international issues, even within a structure dominated by power politics.

¹⁵⁰ 'But we must not confound the facts of life as they are with what they ought to be, and we must not mix up the rules of international law which are really in force with those rules which we would wish to be in force. There is no better and quicker way to the realization of international ideals than to present the facts of international life and the rules of international law as they really are. For the knowledge of the realities enables the construction of realizable truths, in contradistinction to hopeless dreams.' Oppenheim, 'The Science of International Law', *supra* note 3, at 355.

¹⁵¹ See, e.g. Carr, *supra* note 74, including the passages quoted in this paper; Hans Morgenthau, *Politics Among Nations* (1948) 209–263 and 341–349, the chapters on 'the main problems of international law', sovereignty and judicial settlement; Aron, *supra* note 135; Kenneth Waltz, *Man, The State, and War* (1959); and Stephen Krasner, *Sovereignty: Organized Hypocrisy* (1999).

most substantial direct engagement with Oppenheim among this group of thinkers was in the work of Hedley Bull, who wrote at length about Oppenheim's contribution to the analysis of international order.¹⁵² As Bull summarized his project: 'I want to try and rehabilitate the nineteenth-century positivists and the view particularly of Oppenheim, who, given that he had the limitations of a lawyer thinking about international politics, seems to me to have written more sensibly about international relations than certainly many other international lawyers and many other thinkers.'¹⁵³

Oppenheim's political ideas about international law, even as carried forward in the work of many of these influential political thinkers, scarcely figure in newer trends in the contemporary literature of international law. Emancipatory English theories of international community,¹⁵⁴ *Rechtsstaat*-inspired German theories of international constitutionalism,¹⁵⁵ and functionalist American theories of an international liberal order,¹⁵⁶ all owe something to Oppenheim's foundations, but define themselves in large measure by what they reject and transcend in the old order Oppenheim is seen to embody. Yet there may be a case for brushing off and updating some of Oppenheim's fundamentals, rather than consigning them to dusty shelves as these recent theoretical trends implicitly urge. If Oppenheim's Family of Nations seems unconscionably narrow, the notion of the state as a global universal with a vital mediating role between the citizen and the overwhelming forces of cross-national power and global markets has renewed appeal.¹⁵⁷ If Oppenheim's balance of power harbours dangers he scarcely imagined, the perceived inequities and consequent risks of a world without such a balance are increasingly of concern to international lawyers. If Oppenheim's positivism entrenches the *status quo* and disempowers visionaries, a formal international law based on consent has an increasing hold on the democratic imagination and on the growing number for whom anti-formalism is a specific or systemic threat. As this paper has endeavoured to show, the normative case for the politics of Oppenheim's positive international law merits a more sympathetic hearing.

¹⁵² Bull, 'The Grotian Conception of International Society', in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations* (1966). See also Hedley Bull, *The Anarchical Society* (1979), which has many parallels with Oppenheim's thought.

¹⁵³ Bull, 'Presentation to the British Committee on the Theory of International Politics', 15 April 1962, in Kai Alderson and Andrew Hurrell (eds), *Hedley Bull on International Society* (2000) 119.

¹⁵⁴ Philip Allott, *Eunomia* (2nd ed., 2001); Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (1998).

¹⁵⁵ Frowein, 'Konstitutionalisierung des Völkerrechts', in *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (2000) 427; Fassbender, 'The United Nations Charter as Constitution of the International Legal Community', 36 *Columbia Journal of Transnational Law* (1998) 529.

¹⁵⁶ Some relevant works are cited in Alvarez, 'Do Liberal States Behave Better: A Critique of Slaughter's Liberal Theory', 12 *European Journal of International Law* (2001) 183.

¹⁵⁷ Cf. Kingsbury, 'Sovereignty and Inequality', 9 *European Journal of International Law* (1998) 599.