For a Neo-Legitimist International Law

by

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So far, the 2020s haven't been particularly good for the vindication of legal principles in the global arena, either from the perspective of national sovereignty or from that of international legal rules more broadly. On the one hand, many multilateral or transnational institutions in which countries come together for diplomatic engagement, cooperation, and various forms of collective endeavor are under increasing strain and face growing criticism. Some face discredit for simple ineffectiveness (*e.g.*, the United Nations as a whole), some for having become a clique of unworthy hypocrites who embody the antithesis of the values they are supposed to advance (*e.g.*, the U.N. Human Rights Council), some for having allowed a particular political ideology to hijack their original humanitarian purposes (*e.g.*, the U.N. Relief and Works Agency for Palestine), some for allegedly usurping and undermining national sovereignty while suffering the institutional illegitimacy of a "democracy deficit" on account of the institutional power they give to unelected bureaucrats (*e.g.*, the European Union), and some for a paralysis brought on by the conflicting agendas of nation-states within them (*e.g.*, the U.N. Security Council).

On the other hand, the very principle of national sovereignty itself – an idea that has been said to be part of "the basic constitutional doctrine of the law of nations," such that "the whole of the law could be expressed in terms of the coexistence of sovereignties,"[1] and in the name of which some of the aforementioned criticism of international institutions is made – seems also to be under stress. Some entities that meet the standard of Article 1 of the Montevideo Convention of having "(a) a permanent population; (b) a defined territory; (c) government;

and (d) the capacity to enter into relations with … other states" – a standard, after all, that is explicitly "independent of recognition by … other states" – are (as with Taiwan) refused the status of being a "real" country simply because other states don't like them, and face the explicit threat of erasure by military force. Others, despite widespread recognition, face the immediate danger of such extinction in a very active and brutal form, as with the ongoing war of territorial aggression by which Russia has declared Ukraine to be "not even a state" and sought to erase that country from the map.

Bizarrely, at the same time, other entities are given widespread official recognition as being "states" for entirely political reasons despite not actually possessing *any* of the Montevideo characteristics. "Palestine," for instance, is presently recognized by some 156 countries without clearly having either a defined territory or population, and certainly without Palestinians having anything remotely like an effective *de facto* sovereign government.

Meanwhile, the leaders of the U.S. superpower that once saw itself as the champion and protector of the "rules-based international order" now call that order merely a "cloud-castle abstraction" and dismiss questions of international legality with a sneer, scoffing at the relevance of such "international niceties" in a world "governed by force" and declaring that they "don't need international law" and should be restrained only by their "own morality." Today, they openly declare their intention to "run" other countries and seize their resources, or even to demand that Washington be given "complete and total control" of parts of their territory. (With respect to Cuba, in fact, the U.S. president has declared that he anticipated "having the honor of taking Cuba." "I think I can do whatever I want with it," he explained, because "[t]hey're a very weakened nation right now." As for Iran, he seems to have reserved himself the right to kill it *as a "whole civilization"* if it does not meet his unclear and shifting demands in the ostensibly preventative war he chose to wage against it.) At the same time, some organizations through which sovereign states come together for collective security precisely in order to *protect* their national sovereignties from threats of aggression – most of all the

multilateral alliance of the North Atlantic Treaty Organization (NATO) – face internal crises caused by just such coercive sovereignty-erosive self-aggrandizement.

In an extraordinary January 2026 speech at Davos, in fact, Canadian Prime Minister Mark Carney pronounced what on its own terms amounted to almost an obituary for international legality as traditionally understood:

> We knew the story of the international rules-based order was partially false that the strongest would exempt themselves when convenient, that trade rules were enforced asymmetrically. And we knew that international law applied with varying rigour depending on the identity of the accused or the victim. This fiction was useful, and … [w]e largely avoided calling out the gaps between rhetoric and reality. This bargain no longer works. … We are in the midst of a rupture, not a transition.

The broad attenuation and erosion of traditional international norms and principles of legal restraint and understandings of state sovereignty occurring today – including now in the views of the United States, which, as I have observed elsewhere, was traditionally so focused upon scrupulous legal compliance that its spies once insisted upon getting formal legal guidance from the U.S. Department of Justice before harshly interrogating *Al-Qaeda* terrorist operatives who had helped mastermind the September 2001 attacks – no doubt has a great many causes, most of which are beyond the scope of this essay. It may be, however, that one contributing cause is a growing perception of the intellectual frailty and hence "legitimacy deficit" suffered by some of the most basic foundational concepts of international law as interpreted and applied since the mid-20th Century. A legal system that cannot give a coherent and compelling account of its own origins and legitimacy, after all, is unlikely to prove very resilient in the face of power-political self-aggrandizement by various stakeholders. I fear that modern international law has in some respects indeed lost its way in being able to provide a foundational

narrative that is persuasive to present-day leaders and ordinary citizens.

And indeed, if international legality is to have real meaning and effectiveness as a legitimate constraint upon arbitrary power, some legal scholars have begun to suggest the need for a fundamental rethinking. According to John Yoo, a law professor at the University of California, Berkeley, for instance, international law has forfeited its legitimacy by serving – in practice – to impede the efforts of law-abiding democracies to take steps in the international arena that are necessary to promote international peace and security, while conspicuously *failing* to restrain disruptive and predatory authoritarians. In response, he contends, the United States should lead an effort to reform international law to make it fit for purpose in today's world of great power competition.

In particular, Yoo has in mind new legal norms that would be "more flexible, specifically by shifting it away from the criminalization of preventive action" in favor of "a cost-benefit approach to interventions" in order to facilitate preventing "human-rights catastrophes, severe political and economic oppression by authoritarian regimes, the spread of weapons of mass destruction, and the operations of international terrorist groups." One need not necessarily agree with his specific recipe for reforming international law, however, in order to see that the international legal order today faces a crisis of intellectual and moral legitimacy.

Nor is Yoo alone. In a an article published in March 2026, for instance, Hofstra law professor Julian Ku essentially accused modern international law of a degree of illegitimacy born of moral obtuseness. The law, he wrote,

> should be capable of articulating [moral] differences rather than pretending they do not matter. That requires international lawyers to move beyond a mechanical lawful-unlawful calculus and to develop a more openly normative framework – one that assesses the gravity (and

> not just the imminence) of the threat, the necessity and proportionality of the response in light of the speed and complexity of modern warfare, the risks to civilians, and the systemic consequences for international order. … International law's authority ultimately depends on its ability to align legal judgment with widely shared moral intuitions about war and peace. If it cannot do that – if it insists on treating profoundly different conflicts as doctrinally interchangeable – it will not meaningfully constrain powerful states. Nor will it command the moral clarity needed to condemn genuine aggression when it occurs.

Nor has such a point eluded David Wolfson, a notable commercial lawyer and Britain's former Parliamentary Under-Secretary of State for Justice. In a social media posting of March 1, 2026, Lord Wolfson similarly declared – also, as with Ku, in the context of the U.S. war with Iran[2] – that

> International law ought to provide a mechanism to restrain and, if necessary, end despotic and tyrannical regimes such as that in Iran. If the doctrines of international law prove unable to restrain Iranian terrorism and mass murder, and tie the hands of democracies while forcing them to stand and watch Iranian atrocities, international law will have failed. It will have become a fundamentally immoral system of law, and one which is worse than worthless in the modern world.

To my eye, there is much in such critiques, though my focus is less upon the legitimacy of what the law *permits or prohibits* – the primary focus of Yoo, Ku, and Wolfson – than it is upon the process by which such rules of law emerge in the first place. In the following pages, I will argue that the legitimacy crisis of modern international law is related to what I term the "*origins problem* of conventional internationalism,"[3] but that with changes in its grounding legal theory it may yet be able to offer a more coherent doctrinal response to this

challenge and hence recover some of the persuasive power without which – in a fundamentally anarchic environment – the law cannot intelligibly function *as law* in any effective sense. Specifically, I will suggest a possible alternative approach to placing international law, and indeed the principle of national sovereignty itself, upon which that law depends, on a more solid foundation.

Conceptual Challenges of Modern International Law

Most international legal scholarship, it seems to me, tends to focus either upon how the law *works* within the conceptual and procedural constraints set by the interplay of received doctrines and articulations of "black-letter" rules, or upon what the law *should be* if it were better to address and help international society cope with some specified set of real-world problems. Much less time is generally spent on really fundamental questions of where international law comes from in the first place, and what its fundamental basis is.[4] From the perspective of the overall persuasiveness of the international legal order as a legitimate system that deserves the support and adherence of real-world leaders and publics, however, conceptual elegance and internal consistency are not enough if one cannot tell a compelling story of *why and how* these particular rules came to be: one that is able to persuade stakeholders that this order has an adequate moral and intellectual foundation.

In domestic law, it usually suffices to show a rule legitimate by pointing to the "genealogy" of its derivation. To discern the legitimacy of a law, for instance, one might assess whether it was enacted and officially recorded according to the proper procedures by a legislature which possessed a quorum at the time and was acting within its appropriate sphere of competence, whether that law contains any provisions contravening constitutional rights, and whether or not any relevant interpretative issues have been settled by properly-seated judges in a legal cases brought pursuant to procedures that *themselves* have an appropriate derivative genealogy. By the same token, at least in democracies – and here I am somewhat foreshadowing a point upon which I will enlarge later – modern domestic legal systems also

provide a narrative of legitimacy for their *rule-makers* by pointing to things such as the periodic conduct of elections in conformity with applicable constitutional provisions and statutory requirements.

To be sure, in theoretical terms, such genealogies of internal consistency may not quite be enough, for all those constitutional rules and procedural proprieties *themselves* have to come from somewhere. Discerning a rule's "source," "pedigree," or "chain of normative validity"[5] has thus long been an important focus of legal thinking, and it is a key question related to the validity or legitimacy of any given piece of any given legal order. The Austrian legal philosopher Hans Kelsen (1881-1973), for instance, saw systems of legal norms as all ultimately being traceable back to a *Grundnorm* (basic norm) or an *Ursprungsnorm* (originary norm). This was his answer to the genealogical problem of legal legitimacy, for as the Stanford Encyclopedia of Philosophy summarized Kelsen's complex thought,

> an act or an event gains its legal-normative meaning by another legal norm that confers this normative meaning on it. An act can create or modify the law if it is created in accordance with another, "higher" legal norm that authorizes its creation in that way. And the "higher" legal norm, in turn, is legally valid if and only if it has been created in accord with yet another, "higher" norm that authorizes its enactment in that way.

For Kelsen, the *Grundnorm* was the apex of this chain of normative derivation: a "foundational norm that carries no further justification, other than its 'acceptance.'"[6] Yet from the perspective of trying to provide *perceived* legitimacy to a system – and in the manner of Aristotle's concept of a "Unmoved Mover," a notion about which a child might respond "OK, but where did *it* come from?" – the question this approach raised was also obvious. Since whatever grounded each level of normative legitimization must also *itself* come from somewhere, we thus risk facing a "turtles all the way down" problem of infinite regression. To anyone who cares about foundational doctrinal legitimacy, and who wishes to persuade others of such

legitimacy in ways that go beyond merely demanding a leap of faith, this represents something of a challenge.

By way of a loose analogy, it might here be recalled that in the realm of mathematics, Kurt Gödel's incompleteness theorems demonstrate that there are inherent limits to "provability" in formal logic, such that in any consistent formal language system, there are statements in that language that cannot be either proved or disproved. At the same time, no such formal system can be shown to be entirely consistent. To the degree that one wants a *legal* system to be both complete and consistent – that is, to be able to demonstrate that its provisions fit coherently together and all of its rules have a sound foundation in legitimate rule-making – a sort of quasi-Gödelian insight might thus suggest that this is impossible: no legal order can fully ground its legitimacy *wholly within that order itself*, as some reference to exogenous legitimacy is always eventually required.

International law is surely no different in this respect than any other kind of law, inasmuch as it has a hard time answering foundational questions about itself. Yet since international law is so comparatively underdeveloped in comparison to domestic systems – that is, because it lacks so much of the elaborate superstructure of centralized legislative enactment, authoritative interpretation, and bureaucratized enforcement that most people instinctively associate with "real" legality – the Gödelian legitimacy problem may confront us more boldly and embarrassingly in the international arena than it does at home.

To the degree that such questions have arisen over the years, the answers legal thinkers have tried to provide about the "origins doctrine" of international law have generally fallen into three basic categories: religious, naturalist, and positivist. Let us briefly unpack each in turn.

Religious and Naturalist Accounts

The most traditional approach – and the one that, in a sense, is the most bald-facedly honest about its reliance upon a system-exogenous legitimacy construct – is that of assuming the law to lie upon a religious foundation in which key aspects of what is deemed to be prohibited, permitted, required, or encouraged are simply *given* to us by some form of divine commandment or revelation. It is in some sense certainly the simplest and perhaps the *easiest* answer to the legitimacy problem of law, for it posits that some deity has merely *dictated* terms to us – perhaps written into stone tablets upon a prophet's return from Mt. Sinai,[7] or copied down from revelations given by an angel in a cave[8] – in some basic form that permits us as a society thereafter to append "secondary" human enactments and interpretations onto, and within parameters set by, the "primary" divinely-decreed substructure.

A second category of answer – natural law theory – also seeks its grounding legitimacy in some exogenous *diktat* of value, but it tries to do this in a more secularized form. The seminal 17th Century Dutch legal thinker Hugo Grotius (1583-1645), for example, ventured down this path, though he tried to some extent to split the difference between a secular naturalism that owed much to ancient Stoic philosophy and the predominant Christian faith of his era by conceptualizing Christian virtues along clearly Stoic lines.[9] The Grotian legal schema claimed to be based upon the "dictate of right reason," which was valid for all humans precisely because they *were* rational humans, and that any sensible person could discern for himself. According to Grotius, this natural law theory was still *consistent* with faith, for in fact it had been God Himself who created nature and endowed us with the reason whose light reveals to us the contours of the law:

> Natural right is the dictate of right reason, shewing the moral turpitude, or moral necessity, of any act from its agreement or disagreement with a rational nature, and consequently that such an act is either forbidden or commanded by God, the author of nature. The actions,

> upon which such a dictate is given, are either binding or unlawful in themselves, and therefore necessarily understood to be commanded or forbidden by God.[10]

Nevertheless, in the end he plumped for a secularized naturalism that did *not* hang everything upon Christian faith. In fact, in the prologue to his great work *The Law of War and Peace*, Grotius declared quite explicitly that this naturalistic framework did not actually require any support from religion at all:

> What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of man are of no Concern to Him.[11]

Indeed, he wrote,

> the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things, to which it does not extend. Because the things so expressed would have no true meaning, but imply a contradiction. Thus two and two must make four, nor is it possible to be otherwise; nor, again, can what is really evil not be evil.[12]

Grotius is only one example of naturalistic legal grounding, of course. Natural law thinking can in some sense be traced as far back as Aristotle, who distinguished between the sort of *justice* that lies in observance of laws as "defined by the legislative power" and the greater sort of *justice* that is coextensive with Virtue.[13] There have been many natural law thinkers over the years, and many variations on such thought, from St. Thomas Aquinas – who saw law as "a dictate of practical reason emanating from the ruler who governs a perfect community" in a universe which is "governed by Divine Reason"[14] – to the present day.

In its more extreme forms, natural law thinking might agree with the great 18th Century English legal commentator William Blackstone that "no human laws are of any validity, if [they are] contrary" to the laws of nature.[15] More moderate voices might simply *discount* the legitimacy of legal rules to some extent, according to the degree which they do not conform to what reason and morality would demand.[16] At the very least, however, naturalism might be said to see legal order as a system pendant upon and deriving its legitimacy from whatever the antecedent moral values of society happen to be, but the classic naturalist answer to our "turtles problem" is to posit that law has grounding propositions that are entailed simply by the nature of reality, and which are objectively discernable through the exercise of reason.

The International Legal Positivist Alternative

The third broad category of answer to questions about the grounding of law is positivism: a conception of *created* law that relies upon mechanisms of voluntaristic agreement by and among the constituent units of the system.[17] For international law, this is classically taken to mean agreement by *states*, which – as the phrase itself suggests – are the primary (or, for some, perhaps the *only*) subjects of international law.[18] For a traditional positivist, international law *is* a certain way simply because that is how states have made it, and *unless* states have voluntarily taken obligations upon themselves through some mechanism of international law creation, they are not bound by any restrictions at all.[19]

As for the mechanisms of law creation, international legal positivism primarily involves only two – customary law creation and treaty formation – and both are fundamentally voluntarist. The international community lacks a legislature analogous to those that commonly pass laws in domestic society, so "legislative" enactment plays little role in positivist thinking.[20] Positivism thus traditionally sees the entire corpus of modern international law as having arisen from the chosen interaction of sovereign states, hence deriving its legitimacy from their *choosing* to be bound by legal rules.

Customary law is said to arise – to crystallize, if you will – when the accumulation of state practice (*e.g.*, "both physical and verbal acts," and sometimes even "inaction") consistent with a behavioral rule, coupled with the element of *opinio juris sive necessitatis*, the conviction that one is acting in this respect as law requires, and not (for instance) simply out of convenience or as a mere policy choice. As summarized by the draft conclusions of the International Law Commission (ILC) in 2018, "[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)"[21]

When such practice, with its accompanying legal intentionality ("the 'subjective' or 'psychological' element"), becomes well-enough established, conformity to the rule in question will be deemed to be legally obligatory for all states as customary international law except vis-à-vis a state that has acquired the status of a "persistent objector" by rejecting – in a way that is "clearly expressed, made known to other states, and maintained persistently" – its specifically *legal* character throughout the entire period of that law's formation.[22]

One of the classic articulations of the concept of customary international law creation was given by the International Court of Justice in its *Asylum Case* of 1950. It ruled[23] in that case that

> … [t]he party which relies on a custom … must prove that this custom is established in such a manner that it has become binding on the other party … that the rule invoked … is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right …. and a duty.[24]

As for *how* "constant and uniform" that state practice needs to be, the Court elaborated in its *North Sea Continental Shelf Cases* of 1969 that

> … [s]tate practice, including that of States whose interests are specially affected, should have been both extensive and

> virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[25]

The mechanism whereby customary law crystallizes is a form of law formation that lies at the doctrinal core of the international legal system.

That this is the case can be seen with what is perhaps the most fundamental customary rule: that of *pacta sunt servanda* – the principle that agreements made must be carried out in good faith – upon which essentially all law creation in the positivist world depends.[26] The positivist schema, however, also depends fundamentally upon the idea that states have sovereignty in the first place, and that however much they may in fact differ in terms of size, power, and circumstances, all states are fundamentally equal in that they *do* enjoy such sovereignty. (With sovereignty, moreover, come the presumptions that unless a legal norm has emerged providing to the contrary, states have no right to interfere in each other's "internal affairs" and each enjoy the freedom to act as they see fit in their *external* relations.) All this, positivists tend to assume or to assert, relies in the last resort upon customary law formation.

The other mechanism of international law formation in the positivist scheme is treaty law. This mechanism, however, requires less explanation, for its contractarian nature is generally quite self-explanatory: under the general *aegis* of the principle of *pacta sunt servanda*, states can create legal obligations for themselves by express agreement through instruments loosely analogous to domestic legal contracts, which acquire binding legal force through their formal articulation and a sort of "meeting of minds" among the contracting parties. This is the means by which the entire international corpus of treaty law has come to exist, including the United Nations Charter itself.

Most of today's architecture of international law can be attributed to essentially positivist sources. To be sure, it would probably be wrong to describe the entire modern international legal order as being positivist. Legal scholars have spilt much ink, for instance, on what precisely are the "general principles of law recognized by civilized nations" referred to in Article 38 of the Statute of the International Court of Justice (ICJ) as one of the types of law to be consulted by the Court in its deliberations. (According to the Special Rapporteur of the International Law Commission, such general principles need to be "recognized by the community of nations" – meaning primarily states, but perhaps also including recognition by international organizations – and that are either "derived from national legal systems" or "formed within the international legal system" itself. A key question, apparently, is whether "a principle common to the various legal systems of the world" in a "wide and representative" way, can be shown to be coherently "transpos[ed] to the international legal system."[27]) To the degree that such "general principles of law" – whatever specifically they may be – derive from the *nature* of legal reasoning rather than states' explicit or tacit agreement, they would seem in their nature to be somewhat more naturalist than positivist.[28]

Similarly, the doctrine of *jus cogens* written into Article 53 of the Vienna Convention on the Law of Treaties – which posits the existence of "peremptory norms" of international law that are "accepted and recognized by the international community of States as a whole" as a rules from which "no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" – seems somewhat of an awkward and ambiguous compromise between positivism and naturalism. In debates at the ILC in 2016, in fact, it was expressly observed that he theoretical basis of *jus cogens* was not necessarily to be found in any one particular school of thought (naturalist or positivist). Nor was it necessarily based on consent."[29] In theory, *jus cogens* rules can change over time as the *mores* of the international community evolve, but their primary purpose and effect is to prohibit certain things *even where freely-consenting state sovereigns* have agreed thereupon; they are said

to be binding on individual states notwithstanding the existence of widespread contrary practice or any kind of "persistent objector" status. (One might thus be forgiven for thinking that *jus cogens* theorists are quietly trying to smuggle natural law back into a fundamentally positivist schema through a side door.[30])

The Law's Legitimacy Challenges

In any event, from the perspective of our "turtles problem," all three of these approaches to grounding international legal order face legitimacy challenges. Let's look at some of them.

Religious and Naturalist Problems

The category of religiously-grounded legal order might be said to have the most compelling legitimacy framework of the three *provided that* one accepts the particular narrative foundation of divine ordination upon which it is built – for there are surely few grounds for legitimate disagreement about a rule if one truly believes that God has specifically decreed it – but this category certainly has the *least* legitimacy *unless* one does so. (In fact, this approach offers or invites, in effect, no actual legitimacy discourse at all. This answer only makes sense if one has already accepted its premises, and these premises are primarily a matter of faith rather than debate, evidence, or reason; they tend to represent pure *assertion*.) In practice, therefore, while in principle this approach might coherently support the legal system of a highly religiously homogenous society, this category of grounding would seem quite unsuitable as a legitimate foundation for *international* law in a global human community composed, as it is, of populations adhering to a great many varieties (and sub-varieties) of religious faith.[31]

For its part, naturalism also struggles with foundational legitimacy. If indeed the dictates of right reason – as Grotius contended, for instance – inarguably made clear to all thinking persons what the basic rules of international law should be, this would of course this would be a powerful legitimacy narrative; nor, by

definition, would any thinking person disagree. The problem, of course, is that this narrative is empirically very hard to sustain, as there is little evidence that all thinking persons in fact *do* thus agree; it would seem untrue either that they would spontaneously articulate our current rules of international law if asked what they should look like, or even that they would invariably concur if these rules were actually explained to them. The fact that apparently reasonable and thoughtful people – including legions of well-studied legal scholars! – *don't* actually agree about the law is surely a damning indictment of any strong version of the naturalist hypothesis.

The naturalist conception may have seemed plausible in Grotius' time, in and among the states of a Europe ruled by a small and homogeneous elite of aristocratic princes, all of whom – despite the confessional divisions that had already emerged between the Catholic Church and Protestantism – came out of a strongly Christian milieu, and whose intellects had been powerfully influenced by the classicized currents of Renaissance humanism. In that context, it may have felt reasonable to assume that "anyone" asking themselves the questions thinkers like Grotius asked would come to conclusions similar to his own.

Despite its claim to objective truth based in reason, however, traditional naturalism has always struggled with the empirical challenge presented by the actual diversity of thinking and feeling in the human world, and this problem became only more acute as the geographic and civilizational scope of international society has expanded. Modern international legal scholars, after all, have struggled mightily to come up with clear and generally agreed-upon accounts of the substantive content even of comparatively narrow categories of law such as the peremptory norms of *jus cogens* or the "general principles of law recognized by civilized nations." Yet they have remarkably little to show for their efforts[32] – so much less than traditional naturalism would lead one to expect, in fact, that this cannot but raise troubling questions about the soundness of natural law theory. How plausible is it that the entire *corpus* of international

law is self-evidently clear and compelling to every thinking person? If only it were.

Positivism's Modern Legitimacy Crisis

And yet the fundamentally positivist system of modern international law, too, struggles to provide a solid grounding narrative of legitimacy, in a variety of ways. For one thing, positivism has difficulty in defining and defending the coherence and legitimacy of its foundational units: the states themselves.

As indicated earlier, the classically positivist approach to deciding who or what gets the privilege of being deemed a foundationally constituent member of the international system – empowered to assert the privileges of sovereignty by demanding non-interference from others and being free lawfully to act however it wishes *unless* it has in some way consented to accept legal restraint, as well as to participate in the law-creation mechanisms of customary and treaty law – can be found in Article 1 of the Montevideo Convention, which defines statehood as consisting of having a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.[33]

Whether and how this works in practice, however, is rather murkier. In theory, statehood is simply a question of objective fact rather than of whether or not other states *accept* one as a fellow state. This is made clear, for example, in Article 13 of the Charter of the Organization of American States (OAS), which states, *inter alia*, that

> The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts.

Nevertheless, in the fundamentally anarchic international system there is, of course, "no centralized organ" for determining "whether or not the conditions of statehood are fulfilled in a specific case," and hence "every state is to decide for itself whether a new state has come into existence."[34] As noted, this has left states free to make such decisions on quite baldly political grounds – such as in recognizing as "states" some entities that clearly *don't* meet the Montevideo standard (*e.g.*, Palestine) and as non-states some states that clearly *do* (*e.g.*, Taiwan).[35]

Moreover, legal scholars have not traditionally agreed even upon the theory of state recognition in the first place.[36] Some, for instance, hold that that an entity's recognition as a state by *other* states is merely *declaratory* of the existing fact of its statehood – which is what one would expect from the Montevideo Convention and the OAS Charter. Others, however, contend that such recognition is actually *constitutive* of statehood, and hence that a state not formally recognized as such by other states isn't *really* a state at all.[37]

All this does not precisely conduce to making positivist theory feel compelling and legitimate in the eyes of real-world stakeholders whose *acceptance* of such legal norms, in an anarchic system, is essential to their actual *observance*. Fundamentally, one might say, positivism simply treats states as *objets trouvés*. It assumes and structurally relies upon their existence, but cannot provide a coherent account of their arising, having no strong answer to questions either about why the *particular* states held to exist should be privileged as the global legal system's rights-holders and law-creators, or even about why this particular *type* of entity (a "state") deserves that status in the first place.

Simply presuming one's conclusions about states may perhaps have seemed a plausible legitimacy narrative in the 19th Century heyday of international legal positivism – which was itself a major conceptual step forward in comparison to previously prevailing ideas of *dynastic* legitimism.[38] The 19th Century was, after all, an era in which

the romanticized ideals of European ethno-nationalism posited the inherent existence of a kaleidoscope of national "peoples" – at least in Europe, at any rate, for Europeans were notoriously slow to extend such principles to the non-Western world – that had "always" existed, and that now merely *recognized themselves* sufficiently to make either *centrifugal* claims of *separate* sovereignty against imperial power aggregations such as the ethnic crazy-quilt of the Austrian empire, or *centripetal* claims of *common* sovereignty upon the fragmented political geographies that predated German and Italian unification.

Historically, of course, the idea of nations existing "since time immemorial" was a fiction – the creation and political tool of ethno-nationalist entrepreneurs of that period, a romantic gloss applied to the politics of that era and projected ahistorically backwards into the mists of time. In reality, as Benedict Anderson so memorably phrased it, nations are "imagined communities,"[39] and although the "imagining" involved can itself be quite real – that is, intense and earnestly felt, and of tremendous political and social salience – any given nation's existence is inescapably historically contingent, and impliedly also changeable and impermanent. (What can be imagined into existence, after all, can presumably also be imagined *out* of it, or at least altered, perhaps beyond recognition.)

Anthropologists and historians who study *ethnic* identity, for instance, today clearly understand that such groupings are not

> "an objective, static, 'primordial' *condition*," or … "immutable givens." Rather, an ethnic group … [is] "a group conscious of its own solidarity," a consensus resulting from dynamic *processes* over time, where the group constructs its identity through social and cultural transactions, relationships, and contingencies, thereby negotiating its own cultural identities.[40]

And so also, in their own way, are "nations." Nevertheless, positivist international legal theory has been structurally beholden to such historically contingent "imaginings" in ways that it can neither really

explain nor defend on theoretical grounds. This has presented the positivist schema with significant legitimacy challenges.

A further legitimacy challenge for the generally positivist schema of modern international law was its logical circularity. As we have seen, the law-creating mechanisms of customary law and treaty-law depend upon the pre-existence of customary legal rules such as *pacta sunt servanda* and the idea that sovereign states both exist and enjoy a fundamental juridical equality with each other. Without these foundations, it is hard to see how international law creation could work, or how it could have begun. Yet precisely because even grounding rules such as *pacta sunt* are said to be the creation of customary law, they could not have been created if states did not *already* exist and enjoy equality, and if the solemn making of agreements did not *already* create legal obligation.

Positivism, therefore, found itself stuck in a "chicken-and-egg" problem, depending for the creation of its rules upon the existence of entities and the operation of processes that themselves depended upon the *pre-existence* of those same entities and processes. This is indeed an example of the challenge of Gödelian logic we have already mentioned – our "turtles problem" – and positivism seems firmly stuck in this rut.

Part of the great conceptual strength of international legal positivism had been the fact that once one is already "inside" the system of legal order, law-creation proceeds in an eminently logical fashion through the accumulation of layers, all of which are ultimately traceable in some form or another back to state sovereign consent to be bound. And, in historical terms, this may indeed have been an advance over reliance upon all those conceptually arbitrary – or at least patently *exogenous* – assumptions that were needed to ground a system of religious or naturalist order.

When it comes to the perceived legitimacy of a legal order, after all, I would argue that a kind of "Occam's Razor" principle should apply: one has a stronger claim upon legitimacy the *less* recourse one is forced to make to systemically-ungrounded assumptions. An

elaborate architecture "makes more sense" intellectually when built up systematically from a smaller number of less elaborate elements, rather than assumed *ex nihilo* as a sprawling Rube Goldberg contraption of exogenous inputs. Simpler is thus generally better – that is, more intellectually legitimate, more easily operationalized without precedentially confusing *ad hoc* improvision over time, and more understandable and compelling to the civilizationally and culturally diverse range of stakeholders to whom one would need to explain why the rules of a *global* legal system actually make sense and have enough of a claim upon us to deserve to be followed.

But after inviting the observer to prize its commendably logical approach to genealogical legal legitimacy, classical international legal positivism falters by resting so clearly upon the arbitrary grounding unit of the state itself, and upon legal rules derived from state practice, neither of which it can explain. There may indeed be no way for a system to be *wholly* internally consistent and free of exogenous inputs, but it has remained problematic for positivist theory to valorize and to draw legitimacy vis-à-vis its religious and naturalist rivals from a "building-blocks" approach while simultaneously hanging everything so *obviously* upon an arbitrary foundational state-national "block."

By the early 20th Century, some thinkers had begun trying to provide a more solid backing for international legal theory by leaning into the notion of "self-determination" – a legitimacy theory for state sovereignty pursuant to which each individual national "people" deserved and had the right to statehood as the natural expression of their self-identity in self-government. As Ian Brownlie put it, the principle of self-determination refers to

> the right of cohesive national groups ("peoples") to choose for themselves a form of political organization and their relation to other groups.[41]

Self-determination theory assumed the existence of such peoples no less than classical positivism assumed that of states themselves. Nevertheless, self-determination provided at least a slightly more

recessed origin story for statehood by positing that it depended upon a sovereign people having *exercised* its sovereignty in order to bring a state into existence – an idea that tended to suggest the need for a (more or less) one-to-one correspondence between "peoples" and "nations."

Notions of this sort date back as least as far as the Mayflower Compact of November 1620, which is generally credited as having been drafted aboard the famous vessel *Mayflower* by William Brewster, who was the only person aboard to have attended university – in fact, he had also worked in diplomacy for the English ambassador to the Netherlands – and from whom the author of this essay happens to be descended. In that seminal document, separatist Puritan refugees from England bound for the Americas drew up an explicit social contract for the foundation of a new colony. Specifically, the Pilgrims solemnly undertook to

> covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and … by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good ….

These ideas also were perhaps most famously articulated in the U.S. Declaration of Independence, which famously declared that under certain circumstances, it was essential for a people

> to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them.

Some such thinking about self-determination, for instance, also lay behind some of the provisions of U.S. President Woodrow Wilson's "Fourteen Points" of 1918 – which among other things called for "the peoples of Austria-Hungary" to be given "the freest opportunity to

autonomous development," for adjusting Italy's borders "along clearly recognizable lines of nationality," and for "the Turkish portion of the Ottoman Empire" (but not other portions!) to be "assured a secure sovereignty." Wilson himself provided no clear explanation of what "self-determination" actually meant or entailed, but "the principle of equal rights and self-determination of peoples" put in an appearance in the Atlantic Charter in 1941, and is today expressly enshrined in Article 1(2) of the United Nations Charter.

The issue and details of self-determination were also topics of much diplomatic debate during the 1970s, with Third World majorities at the U.N. General Assembly adopting strongly-worded resolutions – including Resolution 2621 (1970) and Resolution 3070 (1973) – declaring that "all peoples have the right to self- determination and independence" and affirming "the legitimacy of the peoples' struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle." Some legal scholars have even claimed self-determination to be a principle of *jus cogens*: a peremptory norm of international law from which no derogation is possible.[42]

Given expression in various such pronouncements – including the U.N. General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960, which declared that "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory" and "the right to self-determination" as they "freely determine their political status and freely pursue their economic, social and cultural development"– self-determination would be the theory lying behind the extraordinary explosion of statehood during the mid-20th Century, as European colonialism receded and a huge number of new states joined the United Nations. The number of States Party to the U.N. Charter, in fact, rose from 55 upon the United Nations' founding in 1946 to over a hundred by 1961, and to 159 by 1990 – and that was even *before* the collapse of the Soviet Union resulted in the creation of a number of additional states out of some of its former

constituent parts. (By 2011, with the addition of South Sudan, the United Nations membership had reached 193.)

The idea of self-determination was at least a *partial* answer to the legitimacy challenge created by the conceptually exogenous assumption of "the state" upon which international legal positivism was built. In the self-determinism construct, however, the fundamental grounding unit of international legality was not the state *per se*, but rather the inherently sovereign – and impliedly pre-existing – national people whose exercise of their sovereignty gave rise to and legitimized that state. Yet precisely because this people was *itself* conceptually exogenous, this merely relocated the question instead of answering it.

The International Court of Justice effectively conceded in litigation over Kosovo in 2010, for instance, that "outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation" – a context in which anti-imperialist politics apparently make answers at least *seem* obvious – international law basically has no coherent way to determine exactly *who* has the right to "self-determine" *when*:

> Whether … the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is … a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of "remedial secession" were actually present in Kosovo.[43]

Legal theory thus remained in "turtles" territory, with no clear stopping point in sight.

Moreover, self-determination theory – in practice – tended to give rise to *additional* legitimacy challenges, in the form of the problem of what to think about states that weren't obviously the result of meaningful "self-determination" at all, or of some governments that claimed to speak for sovereign national peoples but which were in no defensible way ones actually chosen by those peoples. These problems, if anything, intensified during the middle years of the 20th Century.

While the era of European imperial decolonization was suffused with the moral logic of self-determination, it could still provide no coherent account of why *some* particular "selves" deserved the right to self-determination while others did not. Rather infamously, decolonization did not, in fact, give rise to a world of discrete homogenous national sovereign states corresponding to the "obvious" ethno-nationalist entities that made up each of them. Instead, it produced what was in many ways an unstable mess of *claimant*-nations, many of which spent years desperately (and with only partial success) trying to *build* some kind of popularly internalized "national" self-identity only *after* having already been declared a "sovereign people" through decolonization. That so many post-colonial states had to attempt this within haphazard and often entirely arbitrary territorial frontiers – ones in many cases derived much more from prior jockeying among rivalrous colonial conquerors and the caprice of European mapmakers than from any actual self-"imagining" by the populations involved or any correspondence between those boundaries and some "ground-truth" of ethno-cultural reality – only added to the theoretical difficulty.

Nor were these problems ones recognized only in hindsight, for they were all too painfully visible quite early in the decolonization era. The political struggles over and vast human cost of the partition of British India into the separate states of Hindu-majority India and Muslim-majority Pakistan in 1947, for instance, made quite clear that the question of what "self" deserved "self-determination" was by no means obvious and inarguable, and that disagreement and

contestation over such selfhood could be a source of appalling suffering and subsequent, continuing inter-state conflict. The brutality of the Biafran war in the late 1960s – in which the Igbo people of West Africa attempted to form their own separate sovereign state out of the ethnic *pot pourri* that had been declared a sovereign state as post-independence Nigeria – was another terrible illustration, but in fact greater or lesser variations on this problem emerged across the decolonizing world.

Enormous amounts of multilateral diplomatic energy, moreover, were expended at the United Nations and in other *fora* as members of the "Group of 77" in the late 1960s and 1970s, attempted to win acceptance for their preferences as to *which* "national liberation movements" deserved recognition as the "legitimate representatives" of their respective national peoples, and which should thus be supported in their insurgencies against various colonial or post-colonial regimes. All these various 20th Century dramas served to highlight the way in which self-determination theory did not really *answer* the foundational legitimacy problem of international legal positivism as much as it merely *relocated* it into politicized realms of ongoing contestation over which "self" should be given special privileges by the global legal order and allowed to lock itself in place as the thereafter-unquestionable locus of sovereignty.

Furthermore, even setting aside the issue of who the relevant "self" should be for purposes of self-determination, there was the further problem of whether or not any such "self" *has*, in fact, actually *self-determined* in a way that would permit any particular claimant regime to exercise national power in the name and on behalf of the national people upon whose sovereignty the legitimacy of such power depends.[44] Through its struggles with issues of recognition and effective statehood, as we have seen, traditional positivism has engaged to some extent – if not necessarily terribly well – with questions of whether or not a state exists. It still cares remarkably little and can say less, however, about the *nature* of the regime in power in any given state. This has led to a problem, inasmuch as within the context of a theory that roots the existence and sovereignty of states in

actual self-determination by actual national peoples, the law-creation mechanisms of traditional international law face legitimacy challenges because from a "self-determination" perspective there cannot but be a "qualitative gulf between things done by or agreed among genuinely democratic polities, and the decisions, for example, of a congress of tyrants."[45]

In particular, self-determination theory would seem to all but *invite* scrutiny into – and to be *obliged* to ascribe relevance to – whether or not those who purport to speak on behalf of "the people" in fact do so. Yet international legal positivism is traditionally perfectly content to allow customary and treaty-based law creation to proceed on the basis of decisions made on behalf of states represented only by

> functionaries many of whom lack any right to speak for such purposes on behalf of the sovereign populations whose will and consent necessarily represent the fundamental source of legitimacy for *anything* done in the international arena.[46]

An additional, if perhaps ironic, challenge for international legal positivism may be found in the eagerness of so many legal scholars to try to *solve* perceived challenges to positivist legal legitimacy by leaning over-eagerly into trying to fill in embarrassing gaps in the international legal fabric in doctrinally unsupportable and hence delegitimizing ways. As I have pointed out elsewhere, there is a pronounced tendency in international legal scholarship to try to "improve" international law by gradually adding to it whatever it is felt previously to have lacked. Such addition is not *intrinsically* problematic, of course, but it becomes so where scholars do this not by encouraging and thereafter memorializing state practice in ways that create new law in ways consistent with positivist theory, but rather do so simply by *declaring* or *deeming* the law to include what one wishes it did. And indeed such doctrinal entrepreneurship would appear to be distressingly common.

> International law has long had a flavor to it of both aspiration and improvisation. Many of its proponents, in fact, often seem to feel themselves part of a great teleological movement of law-creation and law-improvement – a world-historical progression that will in time end international law's inferiority complex vis-à-vis domestic jurisprudence by closing the gap between the "thickness" and detail of domestic legal rule-sets and the (so far) still much sparser landscape of international jurisprudence.
>
> The Finnish legal scholar Martti Koskenniemi … [has noted] the "persistence of teleology" in international legal thinking ever since the field of international law was first established as a distinct professional practice in European law schools in the early nineteenth century. In his characterization, international law was from the outset infused with "the idea of progressive history" and retains this flavor even in today's more cynical postmodern era, with international lawyers these days being about the only group of human beings who still use the vocabulary of progress."
>
> The spirit of the international bar, as it were, is thus suffused with deep assumptions of progress in an "intrinsic teleology expressed by and accomplished through international law," and in which legal practice "possesses an inbuilt moral direction to make human rights, justice and peace universal." To "do" international law, Koskenniemi contends, is often assumed to mean that one "operate[s] with a teleology that points from humankind's separation to unity."[47]

In Koskenniemi's words,

> international lawyers . . . tend to be united in our understanding that legal modernity is moving towards

> what an influential Latin American jurist labelled in 2005 a new *jus gentium* uniting individuals (and not states) across the globe, giving expression to "the needs and aspirations of humankind" … [and in which] territorial systems are being replaced by intrinsically global, functional ones.[48]

While it is no doubt an understandable and in some ways quite commendable impulse to wish that more bad things were prohibited by the international legal order and more good things required,[49] an assumption of inexorable teleological movement is not doctrinally supportable in a system based upon sovereign state consent unless such movement occurs as a result of *actual* state consent. In what still remains a fundamentally positivist international legal system – one which, at the very least, has still not been willing openly to embrace either religious or naturalist sources of systemically exogenous value – the views of legal scholars or even international judges themselves are emphatically not, in themselves, *sources* of law. Such teleological overreaching by ambitious legal scholars may thus also have contributed to the legitimacy crisis of positivist international law, for as I have contended,

> … [t]he *lex ferenda* of what it is felt the law should be in the future, in other words, is [often] pervasively mistaken for the *lex lata* of what the law actually is. … [I]t is [thus] … difficult not to be struck by the degree to which a remarkable amount of international legal thinking appears to be little more than bootstrapping of a sort that its proponents defend as creativity in service of the noblest of ends but that critics would also not be too far wrong to characterize as "making up the rules you want."[50]

This cannot but have detrimental effects upon the overall legitimacy of the international legal order as perceived by major stakeholders. As Devika Hovell has noted, we

> deceive ourselves if we fail to comprehend that we have a choice between ways of understanding what we have and what is yet to be in filling out law's incomplete canvas.[51]

Morally congenial expedients of progressive law creation undertaken in order to help international law be "better" law, but that are not themselves supported by state practice in ways cognizable to positivist theory, may make indeed the law *look* or *feel* more legitimate on its face – more fair and more just, perhaps, or at least less "thin" and with fewer *lacunae* – but they ultimately create challenges for the legitimacy of the international legal order. Legal reasoning encodes a powerful sort of process-based, almost *genealogical* legitimacy, and this legitimacy is damaged if one cannot offer cogent doctrinal explanations of how the law got to be the way one describes it as being – and there is something fundamentally not very *law-like* about a system whose practitioners can adjust the rules on the fly as they see fit. One of the crowning virtues of law, as such, is its degree of fixity – the systematic and regularized ways in which changes in the rules occur when they do – in comparison to the ephemeral contingencies of mere "policy" choice; a legal order that starts to feel improvisational, even in a good cause, will tend to undermine itself.[52]

All in all, one might therefore be forgiven for thinking that one contributing reason for international law's contemporary crisis is that all these challenges have made of international legal theory a conceptual mess that *doesn't* seem particularly compelling to many of the real-world stakeholders who it most needs to convince of its rectitude. (Nor can such a conceptual *potpourri* offer participants in the legal system any assurance that it will interpret their behavior in coherent and consistent ways.) Even broad-minded legal scholars, when pressed, sometimes seem painfully aware of the jerry-rigged conceptual *mélange* with which we have saddled ourselves:

> The positivist method that we deploy in our everyday practice as international lawyers is described by legal theorists as, at best, a "pseudo-positivist self-understanding" or mere "emanations" from the positivist

creed that "are mostly unsupported by a theoretical superstructure."[53]

All this, in turn, must surely lead us to ask ourselves whether it might be possible to articulate a more coherent and persuasive theoretical grounding for international legal order. I would submit that the answer is "yes."

Toward A New Framework?

Were one to try to devise a sounder grounding for international legal order, what characteristics would it need in order to maximize its ability to weather some of the legitimacy challenges we have seen afflict religious, naturalist, and traditional positivist accounts? I would suggest six principles of international legal legitimacy:

1) First, though we must remain mindful of the likely impossibility of avoiding *all* reference to foundational inputs from "outside" (and hence not explainable by) the system, the "Occam's Razor" approach to legitimacy discussed earlier would suggest that a sound approach should rely upon *as few such exogenous factors as possible*. (One should, in other words, rely upon as few "turtles" as one can.)

2) Moreover, given the aspiration to articulate a basis for an *international* legal order – or perhaps one should say a *global* one, for under the circumstances it may be rash to follow traditional positivism's error in simply *assuming* the existence of nations – a sounder system should also seek to limit its reliance upon exogenous inputs to "turtles" that are as inarguable, persuasive, and compelling as possible to as many stakeholders as possible across a civilizationally and culturally diverse human community. (For a truly global order, in other words, cultural particularism can be delegitimizing.)

3) A sounder system should also at least permit – though presumably not *require* – the construction of an indefinitely expansive system of legal order starting from whatever its grounding premises are. A "thick" system of order analogous to domestic law may not emerge immediately from first principles like Athena from the head of Zeus – and probably *should not*, given how hard it would be to justify the legitimacy of many of the details of such a "thick" system to a highly diverse community of global stakeholders. Nevertheless, given the obvious desire of so many thinkers to see the legal order somehow come to cover as much territory as possible in order to minimize the brutality and anarchy of international life, an order perceived to be legitimate should not *preclude* the progressive elaboration of rules over time,[54] provided that such elaboration can be justified as being doctrinally valid within the system's rules, either systemically (among all states) or locally (in or through regional or functional sub-orders). Using a generally positivist "building blocks" approach can permit order to be built gradually outward from foundational premises. (By analogy, in a domestic legal system, if you can justify the existence and operation of a legislative body in some grounding constitutional framework, you have provided a source of legitimacy for follow-on secondary rules without having to presume them from the outset.)

4) Precisely *because* the world is a place of notable civilizational and cultural diversity, however, a sound approach to international legal order should also not presume *too much* when it comes to positing foundational rules that must apply to *everyone* in the global system. It would be necessary to provide enough foundational rules to permit a basic degree of

international legal order, but it would also be important to avoid *over-prescribing* constraints and obligations to people (and peoples) who may approach these issues from very different conceptual starting points. Within whatever the systemic parameters may be, human groups should retain as much leeway as possible to formulate the sub-rules and establish for themselves the lifeways *they* feel necessary to have within their own sub-communities. While ensuring that the international system provides enough of a basic framework of non-derogable rules that it can preserve the existence and legitimacy of legal order, it would be important to keep that order from feeling "imperialist" – in terms of values and morals – from the perspective of the diverse groups of the global human community it would govern.

5) A more clearly legitimate system of international law would surely also seek to minimize the degree to which it presumes to dictate to the world's diverse human sub-communities exactly *which* entities are the most salient constituent units of the global system – that is, which "selves" are the most relevant ones and should be the primary locus of agency for systemic law-creation. (One should, as a rule, get to do one's own "imagining" when it comes to state formation: any other rule would be, quite literally, imperialistic.)

6) Finally, a sounder international system of legal order would be able to answer the abovementioned "congress-of tyrants" problem by being able clearly to ground all decisions made at the *systemic* level in some kind of freely-chosen voluntarist agency by whatever *unit*-level constituent stakeholders the system has delineated through the actions of *people* in "self-determining" themselves into *peoples*, thereby taking

> upon themselves *and actually exercising* the rights and responsibilities of self-government.

So is it possible to imagine a system of legal order resting upon a foundation more conceptually and morally defensible – and hence more legitimate, especially from the perspective of the major stakeholders who will need to find that order persuasive and compelling if it is to succeed – than what we have seen the international legal community produce to date? I believe so.

Some of the potential outlines of such an approach have been suggested in three papers I have previously published, one as a chapter in an edited volume on human rights more than a decade ago[55] and two in this journal.[56] This approach begins by positing its starting point in the most fundamental of constituent units: individual human beings. Starting with *people*, in the personal sense, avoids having to posit "imagined" and historically contingent aggregations or abstractions such as "peoples" or "states," which themselves would require antecedent explanation and legitimate derivation. Being rooted in raw facts of biological existence, the individual human seems a sensible reductionist stopping point, and it is an entity that surely needs no explication to other such humans, making it all but inarguable as a foundational element – and one maximally likely to survive cross-cultural scrutiny.

Yet because humans are social animals rather than solitary ones and have (as far as one can tell) always existed in groupings such as families, clans, villages, and tribes, and because we are also *reasoning* creatures possessing a significant degree of behavioral agency – both assumptions that would have to be defended on a cross-cultural basis, of course, but which surely can be – a legitimate system of legal order should also give such humans the ability to determine for themselves *which* communal aggregations have the most salience to them. This human-level voluntarism, in turn, can provide a means by which to legitimize the creation of whatever collective units (*e.g.*, states) are to be accorded "sovereignty" in the global legal system, thereby becoming privileged to exercise law-creation functions with regard

both to *internal* self-government and to *inter-unit* law-creation at the systemic level.

In principle, I suppose, the system could turn to individual humans to make system-wide law directly, through some kind of vast global referendum. One suspects, however, that for practical purposes some intermediating level of organization is needed: a type of entity that would speak and act for groups of individuals vis-à-vis other groups in an essentially representative capacity. This is the role that *states* have long played in positivist theory, of course, but in my conception the unit of the "state" would have a more solid grounding than positivism usually accords it, because a sovereign state would be deemed to exist only where individual humans had, through fundamentally contractarian mechanisms, determined that *this* entity in fact was the primary one by and through which they wished collectively to exercise their agency vis-à-vis other human collectivities. This would draw upon the idea of self-determination, but leave both the identification of the *relevant* collective self, as well as the identification of *which* governing regime may speak for it, to voluntarist mechanisms of individual human choice within, and hence by, each such group. (In practice, this presumably means democratic elections, but positivist ideas of tacit consent could also be usefully adapted to this scheme, especially in legitimizing why later-born individuals can be bound, as a default state at least, by rules created by their forefathers.)

The system would, in this way, be able to accommodate historical contingency in the emergence of sovereign units better than does traditional international legal positivism. At the same time, it would remain alive to the possibility of change over time,[57] for a collective unit that came to be collectively *disimagined*, if you will, could forfeit its legitimacy and sovereignty without such dissolution calling into question the fundamental legitimacy of the legal system itself. (One need not imagine such dis-establishments to be simple or orderly – for they might well not be! – in order to admit that their occurrence would not be *doctrinally* destabilizing, and this would be an advance over traditional positivism.)

I recognize that even this minimalist conception of the constitution of governance would require some antecedent ideal of sanctity of contract – *pacta sunt servanda*, if you will – which would be needed to ground any strong conception of law-creation, not merely *between* the intermediating sovereign units, but also in the exercise of voluntaristically-grounded governance *within* each unit and in the fundamental constitution of these units by individual persons in the first place. Contrary to the tenets of traditional positivism, however, I would not ask that the derivation of *pacta sunt* be circularly justified by some antecedent state-based customary law creation. Rather, *pacta sunt* would in effect be a foundational principle derived – almost *naturalistically*, if you will[58] – simply from the need for humans to live together in *some* kind of society, and from the fact that doing so requires at least *some* form of binding reciprocal obligation. (This idea is naturalistic in the same sense that Mark Murphy has suggested that the natural law thesis can be supported by an argument based on *function*, whereunder one might consider "realizing social order" to be "a good [that is] distinctively served by law, and that law can serve … only if those under that law are practically required to comply with it."[59])

It is an important point, however, that this schema *would* posit the existence of certain fundamental legal rules that could not be transgressed by any component of the system. This is necessary in order to protect the integrity of the process by which individuals come together to exercise choice in self-determination and self-government as a sovereign people. At the same time, mindful of the importance of allowing such peoples the agency to determine most of their own lifeways for themselves, this package of core protections would be a *minimalist* one – which Nigel Biggar and I have termed a "Minimum Package of Rights" (MPR). These essentially *constitutional* rules for international legal order would be – and perforce *only* be – those needed for

> protecting the integrity of choice-making in both the individualist *and* the sovereigntist paradigms – and … [in

order to] require[] the ruler to pay attention to and be accountable to the ruled. The key here [is] … that protecting the right of any sovereign national people to act *as* a collective sovereign "self" requires that the process of identifying that "self" and articulating its interests be protected against usurpation or coercion.

If one takes sovereignty seriously, in other words, one needs a way of knowing that *this* particular collectivity is indeed a genuine national "self," and that whomever claims to speak on its behalf actually does so. (A mere aggregation of prisoners acting under duress and dancing to the command of their jailer, for instance, cannot count.) In order to know this, even the sovereigntist discourse thus requires some recourse to … free and fair individual involvement in collective political choice- making. And this, in turn, requires some concept of protected individual rights – and on a universal basis, no less, not subject to abridgement even *by* collective choice. Simply put, the imperative of protecting the rights of national sovereignty requires that individual humans have enough enforceable rights claims *against* the collective that they are capable of constituting that collective in the first place.

…

For sovereignty to be meaningful, the sovereign entity must be able to decide significant things for itself *as a self*, not merely perform ministerial functions on behalf of a crowd. This suggests the need to restrict the inalienable "core" of protections to what is minimally necessary in order for humans to constitute and participate as citizens in a sovereign polity – that is, a bundle of rights not reaching much (if at all) beyond universal adult suffrage with the secret ballot, coupled with freedom of speech, expression, and belief, and freedom from arbitrary arrest, detention, and coercion by the government.[60]

As Biggar and I point out, of course, this approach would not preclude giving citizens of the resulting state *further* rights under domestic law – just as it would not preclude the sovereign state entities that such choice-making *constitutes* from contracting among themselves to create a positivist international legal order. These additional rights, however,

> would not be "core" rights that should be protected even against collective sovereign choice-making itself, but rather – in effect – "statutory" rights, created by and protected within a framework of law authored by and subject to adjustment by the community acting *as* sovereign. These additional rights could be as extensive (or as narrow) as the community wishes, but the structural core of rules needed to protect the integrity of sovereign constitution would have a special, privileged status within the overall framework.[61]

This "MPR" approach, it seems to me, has its virtue in the degree to which it could offer a grounding for international legal order that goes a long way to meeting the six principles outlined above. Specifically, while it cannot entirely avoid relying upon some kind of systemically-exogenous "turtle," it requires few and limits them to those that are likely to be compelling to most if not all of the diverse civilizational and cultural stakeholders upon whom a genuinely global community depends (*e.g.*, starting with nothing more controversial than individual humans and the rootedness of human communities in such individuals' *choices*).

At the same time, the MPR approach gives ample scope for such "imagined" communities to interact *as such*, and through positivist contractarian means to build a legal order for themselves in any way they see fit consistent with their own particular social mores, provided merely that they do not traduce the minimalist core protections that gave them the right to self-constitute as a sovereign community in the first place. This helps the system accommodate the values-diversity of

a global community without sacrificing perceived systemic legitimacy in the ways that international law surely would were it to ground itself in the values of one particular society.

The MPR approach also helps bridge the gap between domestic law and international law, for it seeks to privilege and protect the sort of individual choice-making that provides a legitimating foundation for both. It also helps answer international law's "congress-of tyrants" legitimacy problem by grounding the rules of the system in genuine choice. (We'll come back to this shortly, however, for there is some quiet radicalism hidden here.) It also valorizes and provides a reason to care about and protect national sovereignty, by grounding that sovereignty not in ahistorical romantic projections but rather in real human agency, while nonetheless protecting the theoretical possibility of *change* over time in the contours of the human communities that actual people deem most salient.

To be sure, I would not wish to overstate the novelty of this vision of a more solidly grounded and more demonstrably legitimate international legal order rooted in individual human agency and voluntaristic self-identity, and protected by a commitment to the inviolability of a core package of individual rights. The basic idea is not really new, of course, but in fact quite classically *Liberal* in its scope – in the right-centrist European sense, with a capital "L," rather than in the American one in leftist lowercase – and many of its inspirations can be seen in Western political philosophy going back at least to John Locke's *Second Treatise of Government*.

If this approach has any novelty, or even radicalism, however, it is in the way that this vision of international legal order draws out the logical *implications* of its grounding vision of governance and international law-creation. Specifically, this schema says powerful *delegitimizing* things about much of the corpus of international law that we in the 21st Century have inherited from those who came before us, because it is far from clear – to put it charitably – that all the rules of the present international legal order in fact *were* agreed by and between states ruled by regimes that were themselves genuinely the

result of feely chosen self-government by the sovereign peoples for whom their leaders purported to speak when engaging in state practice of international law creation. Hence the quiet radicalism, for this means we may need to

> reconceptualize [generations of] norm-creation and institutional operations in international society, by giving some kind of privileged status to the choices made by democratic polities and devaluing (or at least sharply bounding) the legitimacy of those made by processes involving other types of states [than democracies].[62]

Not Without Precedent

Interestingly, an international legal doctrine that takes into consideration and depends upon the domestic political legitimacy of the constituent units of the system might not represent a radical departure from legal traditions as much as it might a *return* to their origins. There is a very old concept that goes back as far as Grotius – one of the founding fathers of international law – that cared very much about the legitimacy of the actors representing nations in their dealings with each other.

Grotius' scheme did not second-guess the internal constitutional order of sovereign states, and it did not particularly privilege *popular* sovereignty, nor generally accord a population the right to choose or rebel against a particular ruler.[63] Nevertheless, as we have seen, the naturalist Grotian conception was anti-voluntarist (or anti-positivist) to the extent that it drew upon the Neo-Stoic traditions of Renaissance "Mirror of Princes" writings to articulate for the modern international community "a Ciceronian natural law deriving from the dictates of right reason and discernable *a priori* by all thinking beings" and that provided a framework of moral conduct that should restrain the conduct of princes.[64]

Significantly, however, as he articulated his conception of sovereignty, Grotius also believed it important "to ascertain correctly

the person to whom sovereign power, in every state, of right belongs."[65] It was, for him, critical to establish the basic legitimacy of the system by establishing *to whom* – by "election," meaning not modern democratic elections, of course, but instead a more figurative and historically fictive concept of popular consent upon the establishment of a political order, and which could not really be rescinded thereafter – the prerogative of sovereign action had been conveyed.

> Now as there are different ways of, living, some of a worse, and some of a better kind, left to the choice of every individual; so a nation, "under certain circumstances, *when* for instance, the succession to the throne is extinct, or the throne has by any other means become vacant," may chuse what form of government she pleases. Nor is this right to be measured by the excellence of this or that form of government, on which there may be varieties of opinion, but by the will of the people.[66]

In this sense, at least, a key foundation of Grotian legal thinking was to ensure the constitutional legitimacy of those purporting to act on behalf of the state.

At least for a while, therefore, this concept of constitutional legitimacy retained some currency in international legal theory. As Nkambo Mugewa once pointed out,

> … [a]ccording to the so-called "doctrine of legitimacy" every government which comes to power in a country depends for its legality not upon mere *de facto* control, but upon compliance with the stablished legal order of that state. Early writers, including Grotius, adhered to this doctrine and it was not until [Emmerich de] Vattel [(1714-67)] that the contrary *de facto* doctrine was established. On the American continent this doctrine took the form of constitutionalism. In 1907, [Carlos R.] Tobar, a former Foreign Minister of Ecuador, advanced the doctrine that

> governments which had risen to power through extra-constitutional means should not be recognized.[67]

This so-called "Tobar Doctrine" was actually incorporated into several international agreements between Central American countries in the early 20th Century. At the Central American Peace Conference of 1907, for instance, Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador signed a package of agreements between them that included a General Treaty of Peace and Amity. Article II of that instrument, in turn, expressly declared and sought to protect the internal constitutional legitimacy of the contracting parties:

> Desiring to secure in the Republics of Central America the benefits which are derived from the maintenance of their institutions, and to contribute at the same time in strengthening their stability and the prestige with which they ought to be surrounded, it is declared that every disposition or measure which may tend to alter the constitutional organization in any of them is to be deemed a menace to the peace of said Republics.[68]

In Article I of a separate Additional Convention signed as part of this package, those same five countries also agreed that

> … [t]he Governments of the High Contracting Parties shall not recognize any other Government which may come into power in any of the five Republics as a consequence of a *coup d'etat*, or of a revolution against the recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country.[69]

Similar provisions were also incorporated into Article II of the further General Treaty of Peace and Amity subsequently entered into by those Central American countries at a conference held in Washington in 1923, with the additional wrinkle that it was specified there that the purpose of these rules was to preserve the "free

institutions" of these states' governmental systems.[70] The 1907 and 1932 Central American treaties thus rested in important ways upon a deep conception of democratic and constitutional legitimacy that would – at least within the scope of the regional legal and political relationships that these instruments regulated – deny state-sovereign prerogatives to rulers who could not demonstrate their right to represent the national peoples of these countries in the international arena.

These conferences, moreover, had been hosted and encouraged by the United States, which was closely involved in their negotiation. U.S. officials clearly understood these legitimacy-focused recognition rules to be "unusual obligations"[71] that stood as "an exception to [the United States'] traditional practice of recognition of new Governments."[72] As Secretary of State Charles Evans Hughes recounted in a telegram to the American minister in Honduras at the time, however, the U.S. Government was nonetheless in "the most hearty accord" with these principles. As Hughes described these non-recognition rules with which the United States was thus in agreement, the contracting parties to the 1923 accord

> will not recognize any other Government which may come into power in any of the five Republics through a *coup d'état* or a revolution against a recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country. And even in such a case they obligate themselves not to acknowledge the recognition if any of the persons elected as President, Vice-President or Chief of State designate should fall under any of the following heads: (1) If he should be the leader or one of the leaders of a *coup d'état* or revolution, or through blood relationship or marriage, be an ascendant or descendant or brother of such leader or leaders. (2) If he should have been a Secretary of State or should have held some high military command during the accomplishment of the *coup d'état*, the revolution, or while the election was being carried on, or if he should have held

> this office or command within the six months preceding the *coup d'état*, revolution, or the election.[73]

Nor is such thinking purely a matter for legal antiquarians for the idea of democratic legitimacy remains, in principle, a key element in some modern international institutionalism. Specifically, the Charter of the Organization of American States explicitly enshrines this concept as a threshold question for permitting States Party to participate as members of the organization. According to Article 9 of that charter,

> … [a] Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

These provisions do not, of course, guarantee that such a de-legitimized government *will*, in fact, be thus suspended. Nevertheless, it cannot be said that insisting upon democratic legitimacy is an outlandish and importunate idea with no place or precedent in modern international law.[74]

To be sure, the Tobar Doctrine rested more upon the internal constitutional genealogy of each ruling regime – that is, the degree to which it had come to power pursuant to pre-existing procedures established by the legal systems of each country – than specifically upon whether or not that regime had in fact been freely chosen by that population constituting the sovereign national people. This was, in other words, more a *formal* notion of legitimacy than a *substantive* one, and it would seem to require non-recognition of a government deriving from a genuinely popular uprising against a "properly" elected ruler who had become tyrannical.[75]

Tobar's idea was also fiercely controversial. Mexican Foreign Minister H.E. Genaro Estrada, for instance, articulated a contrary position in 1930 that rejected the idea that other governments should be permitted

> to pass upon the legitimacy or illegitimacy of the regime existing in another country, with the result that situations arise in which the legal qualifications or national status of governments or authorities are apparently made subject to the opinion of foreigners.[76]

Under what came to be known as the "Estrada Doctrine," it was said to be "an insulting practice that offends the sovereignty of other nations" for governments to issue "declarations or grants of recognition" on the basis of such legitimacy criteria.[77]

Nevertheless, the Tobor Doctrine would seem clearly to point the conceptual way toward a *neo-legitimist* approach that looks beyond mere consonance with the formalities of the constitutional orders prevailing within states to more foundational questions about the democratic legitimacy of each order itself. Some such re-conception of international legality might do much to restore the moral and intellectual legitimacy of the framework of positivist rules that derive – through the operation of customary law formation and treaty instruments – from the interaction and choices of sovereign states.

Conclusion

Despite the conceptual appeal of this vision of grounding legitimacy – at least to this author, at any rate – none of this necessarily means that it would be easy to implement such an approach to international legal order, much less to move *to* such a system from the one we presently have. A particular challenge, for instance, would be to identify how much relative weight to give – and how to manage conflicts between – customary legal norms or treaties created by and among democratic states enjoying the kind of legal legitimacy we have been discussing and those resulting from the practices of states who

do not have such legitimacy, or by bodies partly constituted by illegitimate states. Nor would it surely be a simple matter even to identify which states qualify as legitimate in the first place, or to manage change in the roster of such states if over time some improve their status through congenial reforms or others regress toward tyranny.[78]

Yet while the difficulty of handling such challenges should not be minimized, these problems should be evaluated not against those of some idealized system of legal order but rather against the notably imperfect one we currently have, and in the context of the crisis it seems today to face. Rather than continue with a conceptual framework that grounds law-governed international pluralism in a society of states taken simply *as they come*, without any consideration of *how* it is that particular loci of territorial control came to assert for themselves the privileges of sovereignty – as indeed the Western international system has done ever since the Treaty of Westphalia, back in an era when questions of the legitimate existence of states revolved merely around claims of possession noble families had established at spearpoint and periodically contested on those same terms – why not aspire to one that can actually defend itself with a straight face?

Challenging though it would be, I submit that an MPR-grounded legal order might – in comparison to today's system, and shorn of its conceptual confusions, doctrinal contradictions, and disregard for the legitimating bases upon which governance and law must surely at some point be based – have the advantage at least of providing more stakeholders a more clear *reason* to support it. In a still-anarchic global system, after all, effectiveness and perceived legitimacy are intimately related. It would surely represent an important step forward were we better able to provide international law with a foundation and internal doctrinal coherence that could be explained to and gain support not merely from legal scholars, but from real-world leaders and publics.

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About the Author

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Notes

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1 Ian Brownlie, *Principles of Public International Law* (4th ed.) (Oxford University Press, 1990), 287-88.

2 By contrast, Yoo was writing in the context of the U.S. operation to capture and prosecute Nicolàs Maduro of Venezuela.

3 *See* Christopher A. Ford, "Democratic Legitimacy and International Society: Debating a 'League of Democracies,'" in *Human Rights, Human Security, and State Security, Volume 3* (Saul Takahashi, ed.) (Praeger, 2014), at 1, 27.

4 In his account of the sources of international law, for instance, Michel Virally essentially *refuses* to address such foundational questions. He ably discusses various doctrinal questions, including ongoing debates thereabout. When it comes to "the problem of the basis of international law," however – a matter which he says "poses largely theoretical questions affecting all legal systems" – he simply declares that the issue has been "much coloured by ideological considerations" and "[b]ecause of this we will not stop to consider it." Michel Virally, "The Sources of International Law," in *Manual of Public International Law* (Max Sørensen, ed.) (St. Martin's Press, 1968), 116, 118-19; *see also ibid*., 135 & 167 (referring to the problem of the basis of international law, the examination of which we have discarded" and "the question of the basis of international law, which we have avoided").

5 The last phrasing is that of Brian Bix. *See, e.g.*, Brian H. Bix, "Legal Positivism," in *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Martin P. Golding & William A. Edmundson, eds.) (Blackwell, 2005), 35.

6 Bix, "Legal Positivism," 35. Kelsen also had a somewhat idiosyncratic interpretation of the notion of a "state" in international law, *see, e.g.*, Grant, "Defining Statehood: The Montevideo Convention and its Discontents," but that need not much concern us here.

7 *Holy Bible* (King James translation) Exodus 24: 3-14 ("And Moses came and told the people all the words of the Lord, and all the judgments …. And Moses wrote all the words of the Lord."), Deuteronomy 6:1 ("Now these are the commandments, the statutes, and the judgments, which the Lord your God commanded to teach you …."), & Exodus 31:18 "And he gave unto Moses, when he had made an end of communing with him upon Mount Sinai, two tables of testimony, tables of stone, written with the finger of God.").

8 *Holy Quran*, Surah An-Najm 53: 4-10 ("It is … a revelation sent down to him. He has been taught by one angel of mighty power and great perfection, who … approached the Prophet … [t]hen Allah revealed to His servant what He revealed through [the Angel] Gabriel ….").

9 *See, e.g.,* Christopher A. Ford, "Preaching Propriety to Princes: Grotius, Lipsius, and Neo-Stoic International Law," *Case Western Reserve Journal of International Law*, vol. 28 (1996), 313, 346.

[10] Hugo Grotius, *On the Law of War and Peace (De Jure Belli ac Pacis)* (1625), Book I, Chapter 1, § X, 3, https://www.files.ethz.ch/isn/125492/5004_Law of War and Peace.pdf.

[11] Hugo Grotius, *Prologue to the three books On the Law of War and Peace* (1625), https://assets.cambridge.org/97805211/97786/excerpt/9780521197786_excerpt.pdf.

[12] Grotius, *On the Law of War and Peace*, Book I, Chapter 1, § X, 4.

[13] *See, e.g.*, Aristotle, *Nicomachean Ethics*, Book V, Chapters II & IV, https://www.gutenberg.org/files/8438/8438-h/8438-h.htm#chap05.

[14] Thomas Aquinas, *Summa Theologiae*, Part IIa, Question 91, Art. 1 ("… [A] law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community. Now it is evident, granted that the world is ruled by Divine Providence … that the whole community of the universe is governed by Divine Reason. Wherefore the very Idea of the government of things in God the Ruler of the universe, has the nature of a law. And since the Divine Reason's conception of things is not subject to time but is eternal according to Proverbs 8:23 therefore it is that this kind of law must be called eternal.") https://sacred-texts.com/chr/aquinas/summa/sum229.htm; *see also* ibid., Question 94, Art. 2 ("whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided" and "the precepts of the natural law are to the practical reason, what the first principles of demonstrations are to the speculative reason; because both are self-evident principles."). As Mark Murphy has observed, "Aquinas accepts as a matter of Christian moral orthodoxy, and later argues in philosophical/theological terms, that there are some moral absolutes, norms that it is unreasonable for one ever to violate." Mark C. Murphy, "Natural Law Theory," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, 18.

[15] William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, 1979), vol. 1, 41.

[16] Brian Bix, for instance, argues that most naturalist thinkers today believe that "immoral laws are not 'laws in their fullest sense' (in that they do not create *prima facie* moral obligations), but that is quite different from saying that they are 'not "law" at all." They see law as "a purposive activity, and an account of the nature of law that can take into account the views of participants is thereby a better theory than one that doe not do so." Bix, "Legal Positivism," 39. For his part, Mark Murphy distinguishes between a "Strong Reading" of natural law and a "Weak Reading." Under the former, "a rule that is not a rational standard for conduct is no law at all." The latter, however, "affirms that *necessarily, law is a rational standard* while holding that it is not of the same form as *necessarily, squares have four and only four sides*; rather, it is of the same form as *necessarily, cheetahs are fast runners*." Murphy, "Natural Law Theory," 19 & 21.

[17] Legal positivism is a broad current in legal theory, which can be traced back at least to John Austin (1790-1859), who was chair of law at University College London, and which over the years has tended to be concerned more with the institutional legitimacy of legal rules than their conformity with reason of morality. (According to Austin, for instance, "[t]he existence of law is one thing; its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation." John Austin, *The Province of Jurisprudence Determined* (W.E. Rumble, ed.) (Cambridge University Press, 1994), 157. My concern in this essay, however, is not the realm of legal positivism broadly, but rather the pronounced positivist elements in international law, which have tended – through that focus upon institutional legitimacy – to privilege legal genealogies legitimized in state-sovereign consent rather than the merits of their substantive content.

[18] As Nkambo Mugerwa has recounted, "according to the classical definition of international law as the body of rule which govern the conduct of states in their relations with one another, states are the only subjects of international law," but more modern interpretations also treat international institutions and individuals as being of concern as well. Nevertheless, *states* are still of *primary* concern "because international law owes its origin to the existence of the state and because the state is the only unit capable of possessing all the characteristics which derive from being a subject of international law." (Mugerwa also notes that jurists in the

former Soviet Union persisted in the view that states were the *only* subjects of international law.) Nkambo Mugerwa, "Subjects of International Law," in *Manual of Public International Law*, at 247, 249.

19 *See, e.g.*, *Case of the S.S. "Lotus,"* Permanent Court of International Justice (ser. A) No. 10, at 18–19 (September 7, 127).

20 Formally speaking, the U.N. Security Council *acts* like a global legislature in the sense that pursuant to its powers under Chapter VII of the United Nations Charter it can vote into place legal obligations binding upon all Member States. (By contrast, the United Nations General Assembly does not have a formal, legislative, law-creating function at all. *See, e.g.*, Brownlie, *Principles of Public International Law*, 14 ("In general these resolutions [of the U.N. General Assembly] are not binding on member states, but, when they are concerned with general norms of international law, then acceptance by a majority vote constitutes *evidence* of the opinions of governments in the widest forum for the expression of such opinions.") The Security Council cannot, however, enact *general* laws binding upon those who have not signed the Charter, and its authority and procedures depend for their own validity upon having been set forth in that document – which itself was negotiated and agreed upon (or has been acceded to) by the sovereign states that are its States Party. The Council's "legislative" functions, therefore, are derivative of states' treaty-making powers rather than an independent source of law.

21 The relevant state practice and intentionality, moreover, is "not only … those taking part in the practice but also … those in a position to react to it." International Law Commission, "Draft conclusions on identification of customary international law, with commentaries," report of ILC session A/73/10 (2018), Conclusion 3, commentary, ¶ 7, 129, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.

22 It is felt necessary for a state to *clearly* and *persistently* object; failing that, in the face of widespread practice-plus-*opinio-juris* by many other states, it may be deemed to have *tacitly* agreed with the new rule. As Virally has noted, the idea of customary law formation as a kind of "tacit convention" is admittedly something of a "fiction," but he views it as nonetheless a useful one, and one which generally tracks how states have actually approached customary international law issues. *See* Virally, "The Sources of International Law," 136. As for *new* states – *i.e.*, those that came into being during the mid-20th Century's period of European decolonization, or upon the collapse of the Soviet Union – it is generally felt that once "a new state embarks without any reservation upon normal relations with others, it must be taken to accept the rules of international law which are in force and which constitute the basis of such relations." *Ibid.*, 138. Scholars may have debated, furthermore, whether international institutions – rather than just states themselves – can participate in customary law formation, *see, e.g.*, *ibid.*, 139-40, but since such organizations are themselves created by, populated by representatives of, and are ultimately responsible to, their sovereign States Party membership, this may be a distinction without a difference.

23 It is an important point, by the way, that such international judicial rulings are not felt to *create* law, for that can be done only voluntaristically by sovereign states themselves; nor do judicial decisions function in ways analogous to the way Common Law jurisdictions permit the rulings of higher courts to constitute binding precedent for lower courts. In principle, at most, an international court *discerns* what rules states have created by their various forms of practice, and its decisions bind states only to the extent that they have chosen to submit themselves to its jurisdiction.

24 International Court of Justice, *Asylum Case* (Colombia/Peru), Judgment of November 20, 1950, 276-77, https://icj-web.leman.un-icc.cloud/sites/default/files/case-related/7/007-19501120-JUD-01-00-EN.pdf.

25 International Court of Justice, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*, Judgment of 20 February 1969, 43, ¶ 74, https://www.icj-cij.org/sites/default/files/case-related/52/052-19690220-JUD-01-00-EN.pdf.

26 *See, e.g.*, Brownlie, *Principles of Public International Law* 287 ("The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major

aspect a relation to other states (and to organizations of states) defined by law. The principal corollaries of the sovereignty and equality of state are: (1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.").

27 Special Rapporteur Marcelo Vázquez-Bermúdez, "Fourth report on general principles of law," International Law Commission, A/CN.4/785 (February 18, 2025), 15, 21, & 45, https://documents.un.org/doc/undoc/gen/g25/025/00/pdf/g2502500.pdf.

28 As Brownlie recounts, this provision in the ICJ Statute was not just *figuratively* but *literally* the result of a negotiated compromise between naturalist and more positivist thinkers: "In the committee of jurists which prepared the Statue there was no definite consensus on the precise significance of the phrase. The Belgian jurist, Baron Descamps, had natural law concepts in mind, and his draft referred to 'the rules of international law recognized by the legal conscience of civilized peoples.' [Elihu] Root considered that governments would mistrust a court which relied on the subjective concept of principles of justice. However, the committee realized that the Court must be given a certain power to develop and refine the principles of international jurisprudence. In the result a joint proposal by Root and Phillimore was accepted and this is the text we now have." Ibid., 15-16 (citing *Procés-verbaux* (1920), 316, 335, & 344).

29 International Law Commission, "Report of the International Law Commission," 68th Session (2 May-10 June and 4 July-12 August 2016), United Nations General Assembly Official Records, 71st Session, Supplement No. 10, A/71/10, ¶ 114, 300, https://legal.un.org/ilc/reports/2016/english/a_71_10.pdf.

30 For more discussion of this awkwardness, *see* Christopher A. Ford, "Adjudicating Jus Cogens," *Wisconsin International Law Journal*, vol.13, no.1 (Fall 1994), 146-49; Christopher A. Ford, "Law and its Limits 'Left of Launch,'" *Military Law Review*, vol. 229, no. 4 (2021), 467-68, https://irp.cdn-website.com/ce29b4c3/files/uploaded/Law_and_its_Limits_Left_of_Launch.pdf.

31 I recognize, of course, that this may not *seem* to be a valid objection for those firmly committed to the value systems of any given faith, who may not particularly *care* that the "false gods" of other traditions have decreed rules different from their own. Nonetheless, in civilizationally plural world, religious groundings for legal order seem likely to lead to a kind of baldly imperialist ethos in which faith-specific value structures are imposed on those of other views simply through coercion. This, it seems to me, does not represent a particularly compelling answer to the "turtles problem" of moral and intellectual legitimacy we are considering.

32 A recent report of the ILC, for instance, was unable to reach agreement on even *trying* to enumerate a list of principles that constituted *jus cogens* norms. *See* International Law Commission, "Report of the International Law Commission," ¶¶ 103 & 116, 297-98 & 301; *see also, e.g.*, Brownlie, *Principles of Public International Law*, 514-15 ("more authority exists for the category of *jus cogens* than exists for its particular content"); Ford, "Adjudicating Jus Cogens," 164 ("Many … candidates for peremptory norm status have been propounded by jurists and publicists alike, with varying degrees of acceptance."); Virally, "The Sources of International Law," 143 ("There is no agreement upon 'the general principles of law recognised by civilised nations'" referred to in Article 38 of Statute of the International Court of Justice).

33 *See, e.g.*, Brownlie, *Principles of Public International Law* 72-74 (discussing Montevideo standards).

34 Mugerwa, "Subjects of International Law," 268. As my colleague Thomas Grant has observed, in the absence of an authoritative finder of fact, the *declaratory* theory of state recognition implies the existence of a decentralized process through which states eventually reach a more or less shared appreciation of the fact that a state has (or has not) emerged. *See* Thomas D. Grant, *Sovereignty disputes and the United Nations Convention on the Law of the Sea. A public order perspective* (Manchester University Press, 2026), 249-51.

35 As Brownlie has noted, for instance, "it may be observed that protest and recognition may be pure acts of policy not purporting to be legal characterizations of acts of other states, and, whether having this purport or

not, the protest or recognition, if unfounded in law and backed by state activity, may be simply a declaration of intent to commit a delict or, otherwise, to act *ultra vires*. … "An absence of recognition may not rest on any legal basis at all, there being no attempt to pass on the legal question of statehood as such. Non-recognition may simply be part of a general policy of disapproval and boycott. Again, recognition may be part of a policy of aggression and the creation of puppet states: the legal consequences will here stem from the breaches of international law involved." Brownlie, *Principles of Public International Law*, 88 & 91**.** No follower of contemporary events, after all, will be unfamiliar with how policies of state recognition have been weaponized – *e.g.*, by Russia vis-à-vis its neighbors (seeking to carve first "Abkhazia" and "South Ossetia" out of the country of Georgia, and then "Donetsk" and "Luhansk" out of Ukraine), China vis-à-vis Taiwan (seeking to ensure *denial* of any foreign diplomatic representation to that island), and even many countries of the European Union (recognizing "Palestine" as a way of expressing disapproval of Israel's campaign against Hamas terrorists after October 2023). The Russians, in particular, were enthusiastic orchestrators of a pantomime of "self-determination" in their seizure of Crimea. *See, e.g.*, Thomas D. Grant, *Aggression Against Ukraine. Territory, Responsibility, and International Law* (Palgrave Macmillan, 2015), 17-18 & 79-80.

[36] *See, e.g.*, Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger, 1999) 1-18.

[37] *See generally* Brownlie, *Principles of Public International Law*, 275-76. He, for one, fell firmly on the side of the declaratory theory, arguing that the constitutive view presents "a matter of principle impossible to accept: it is clearly established that states cannot by their independent judgment establish any competence of other states which is established by international law and does not depend on agreement or concession." Ibid., 90.

[38] For more on that previous paradigm, *see* Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents," *Columbia Journal of Transnational Law*, vol. 37, 403, 418-20 (1999).

[39] *See generally* Benedict Anderson, *Imagined Communities* (Verso, 1991).

[40] R. Keith Schoppa, *Revolution and Its Past: Identities and Change in Modern Chinese History* (4th ed.) (Routledge, 2020), 25 (quoting and citing Mark C. Elliott, "Ethnicity in the Qing Eight Banners," in *Empire at the Margins: Culture, Ethnicity, and Frontier in Early Modern China* (Pamela Kyle Crossley, Helen F. Siu, & Donald Sutton, eds.) (University of California Press, 2006), 34-35).

[41] Brownlie, *Principles of Public International Law*, 595. According to Brownlie, "[u]ntil recently, the majority of Western jurists assumed or asserted that the principle had no legal content, being an ill-defined concept of policy and morality. Since 1945 developments in the United Nations have changed the position, and Western jurists now generally admit that self-determination is a legal principle." Ibid., 595-96.

[42] *See, e.g.*, Ibid., 79-80.

[43] International Court of Justice, "Advisory opinion of the International Court of Justice on the accordance with international law of the unilateral declaration of independence in respect of Kosovo" (July 22, 2010), ¶ 83, 34, https://digitallibrary.un.org/record/688916?ln=en&v=pdf.

[44] Among other things, this problem bedeviled the decolonization movement of the 20th Century, which too often merely produced regimes hardly less authoritarian and unrepresentative than the European colonial empires they had succeeded – and whose tyrannical rulers had the dubious virtue, if any, of merely being *of the same hue* as their oppressed subjects. It was far from obvious how "self-determination" made a nonwhite brute at the head of an unrepresentative and repressive regime preferable to a white one.

[45] Ford, "Democratic Legitimacy and International Society," 25. This is an international version of the problem noted by H.L.A. Hart in criticizing John Austin's theory of law as the authoritative command of a sovereign, a critique which pointed out – in Brian Bix's words – that Austin's schema was "unable to distinguish between a legal system and a gunman's threats, writ large." Bix, "Legal Positivism," 39 (citing H.L.A. Hart, The Concept of Law (2nd ed.) (Oxford: Clarendon Press, 1994), 20-25).

[46] Ford, "Democratic Legitimacy and International Society," 27.

[47] Ford, "Law and its Limits 'Left of Launch,'" 464-65 (citing and quoting Martti Koskenniemi, "Law, Teleology and International Relations: An Essay in Counterdisciplinarity," *International Relations*, vol. 26, no.1 (2011), 3-4).

[48] Koskenniemi, "Law, Teleology and International Relations," 4-5 (internal citations omitted).

[49] The eagerness of legal scholars to focus more upon *lex ferenda* than *lex lata* has been recognized for some time. *See, e.g.*, Brownlie, *Principles of Public International Law*, 25 (noting that "some publicists see themselves as propagating new and better views rather than providing a passive appraisal of the law").

[50] Ford, "Law and its Limits 'Left of Launch,'" 471. The International Law Commission phrases this thought more delicately: "[t]here is a need for caution in drawing upon writings [of legal scholars], since their value for determining the existence of a rule of customary law[, for example,] varies …. First, writers sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). In doing so, they do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual viewpoints of their authors. Third, they differ greatly in quality." International Law Commission, "Draft conclusions on identification of customary international law, with commentaries," Conclusion 14, Commentary, ¶ 3, 151.

[51] Devika Hovell, "The Elements of International Legal Positivism," *Current Legal Problems*, Volume 75, Issue 1, 2022, 71–109, https://academic.oup.com/clp/article/75/1/71/6775923.

[52] As the comments recounted above from John Yoo, Julian Ku, and David Wolfson suggest, however, it can also present legitimacy challenges when the law is *too* rigid – that is, when it refuses to recognize distinctions that ordinary people find meaningful and compelling.

[53] Hovell, "The Elements of International Legal Positivism" (quoting F. Hoffmann, 'Teaching General Public International Law," *International Legal Positivism in a Post-Modern World* (J. Kammerhofer & J. d'Aspremont, eds) (Cambridge University Press, 2014) 349, 361 (n. 42); J. Kammerhofer, "International Legal Positivism," in *Oxford Handbook of the Theory of International Law* (A. Orford & F. Hoffmann, eds) (Oxford University Press, 2016), 407-408, n6).

[54] Such progressive development is hardly a new thought, for the Statue of the ILC expressly envisioned that one of the core functions of the Commission would be to consider proposals from the United Nations General Assembly "for the progressive development of international law," and upon being tasked with such work thereupon prepare "draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States." Statute of the International Law Commission (1947), Arts. 15-16, https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf. Whereas the ILC is made up of members elected by the General Assembly from slates of candidates put forward by regional groups of states which have the right to make such nominations simply by virtue of *being* U.N. member states, however, I suggest herein the need for further vetting on the basis of the *legitimacy* of the ruling regime in each nominating state.

[55] Ford, "Democratic Legitimacy and International Society."

[56] Christopher Ford & Nigel Biggar, "Rebutting Sino-Russian Political Discourse and Getting Rights Right" (with Lord Nigel Biggar), *Defense & Strategic Studies Online*, vol. 1, no. 2 (Winter 2025), 2-27, https://dss.missouristate.edu/_Files/MSU-DASSO-2025-Vol_1-No_2-FordBiggar.pdf; Christopher Ford, "Marxing America Great Again: Marxist Discourse in Right-Wing Populism and the Future of Geopolitics," *Defense & Strategic Studies Online*, vol. 2, no. 2 (Winter 2026), 1-78, https://dss.missouristate.edu/_Files/MSU-DASSO-2026-Vol_2-No_2-Ford.pdf.

[57] As Joseph Raz has noted, "because legal theory attempts to capture the essential features of law, as encapsulated in the self-understanding of a culture, it has a built-in obsolescence, since the self-

understanding of cultures is forever changing." Joseph Raz, "On the nature of law," *Archiv für Rechtsund Sozialphilosophie*, no. 82, 6. I would submit that a legal order is – and will be perceived to be – more legitimate the less its central tenets tend to "age out" as social mores evolve.

58 Perhaps it will not be too philosophically offensive to incorporate both naturalist and positivist elements into one's system of law. As Brian Bix has noted, invoking the work of Roger Shiner, it may be that "the weak points in legal positivism could lead one towards a natural law approach, but that the weak points in natural law theories would lead one back to legal positivism." According to Bix, "[i]t may be that law's double nature – as a social institution and as a reason-giving practice – makes it impossible to capture the nature of law fully through any one approach, with a more 'neutral' approach (like legal positivism) [being] required to understand its institutional side, and a more evaluative approach (like natural law theory) required to understand its reason-giving side." Bix, "Legal Positivism," 41 & 45 (citing Roger Shiner, *Norm and nature: The Movements of Legal Thought* (Clarendon Press, 1992).

59 Murphy, "Natural Law Theory," 25-26.

60 Ford & Biggar, "Rebutting Sino-Russian Political Discourse and Getting Rights Right, " 17-18.

61 Ibid., 19.

62 Ford, "Democratic Legitimacy and International Society," 27; *see also ibid.*, 25 (suggesting that "decisions made by a league [of democracies] – or indeed the customary practices of democratic states within the global community – have more legal legitimacy, and should thus be given more legal weight, than those made by mixed bodies such as those of the traditional United Nations system").

63 Ford, "Preaching Propriety to Princes," 350-55.

64 Ibid., 364-65.

65 Grotius, *On the Law of War and Peace*, Book I, Chapter 3, § X, 31.

66 Ibid., § VIII, 28.

67 Mugerwa, "Subjects of International Law," 271.

68 General Treaty of Peace and Amity (September 17, 1907), *reproduced in* Report of Mr. William I. Buchanan, Representing the United States of America, on the Central American Peace Conference held at Washington, D. C., November 13 to December 20, 1907, https://history.state.gov/historicaldocuments/frus1907p2/d148.

69 Report of Mr. William I. Buchanan, Representing the United States of America, on the Central American Peace Conference held at Washington, D. C., November 13 to December 20, 1907, https://history.state.gov/historicaldocuments/frus1907p2/d148. Apparently fearing the tyranny of elected rulers who thereafter might refuse to relinquish power, they even wrote into Article II of the Additional Convention the stipulation that all States Party must implement a domestic political "constitutional reform" that would provide constitutional term limits for their presidents: "The Governments of Central America, in the first place, are recommended to endeavor to bring about, by the means at their command, a constitutional reform in the sense of prohibiting the reelection of the President of a Republic, where such prohibition does not exist, secondly to adopt all measures necessary to effect a complete guarantee of the principle of alternation in power."

70 *See* Note, *American Journal of International Law*, vol. 19, no. 1 (January 2025), 164-66, https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/central-american-policy-of-nonrecognition/46A8D7F36C66985A1933F099C22B88E1.

71 Buchanan, Report on the Central American Peace Conference.

72 Telegram from the Secretary of State to the Minister in Guatemala (Whitehouse), Washington, November 22, 1932—7 p.m., https://history.state.gov/historicaldocuments/frus1932v05/d355.

[73] Telegram from the Secretary of State to the Minister in Honduras (Morales), Washington, June 30, 1923—3 p.m., https://history.state.gov/historicaldocuments/frus1923v02/d345.

[74] it seems unlikely, however, that the recent U.S. move to seize and prosecute Venezuelan president Nicolás Maduro represents a continuation of such legitimist thinking in the Americas – that is, a blow struck in favor of democratic legitimacy by removing a dictator in favor of those who were actually elected by the Venezuelan people – rather than simply a crassly self-aggrandizing move to go into business with the remnants of Maduro's regime after intimidating them into compliance. Though U.S. officials had previously made clear that Marina Corina Machado had in fact won Venezuela's last presidential elections – and though over the years there has developed "a remarkable coalescence of opinion from the leading democracies, the United States' leading allies, and the countries directly affected by the Maduro regime, those of Latin America" that the members of Maduro's regime were *not* the legitimate rulers of Venezuela, *see, e.g.*, Thomas D. Grant, "The U.S. and Nicolàs Maduro's Removal: Some reflections on international law," *Politeia* (2026), 2-3, https://www.politeia.co.uk/wp-content/uploads/2026/02/Nicolas-Maduros-Removal.pdf – U.S. President Trump has chosen to bypass Machado and "run" Venezuela (potentially for years) through deals cut with the former vice president of Maduro's repressive regime, Delcy Rodríguez.

[75] This, indeed, is a criticism that Mkambo Mugerwa levies against legitimist conceptions of sovereignty such as the Tobar Doctrine. According to him, the ideas behind the Tobar approach to genealogical constitutional legitimacy are not consistent with those aspects of international law that "recognize[] the right of a people to alter by any means, including force, the form of government under which they live." Mugerwa, "Subjects of International Law," 271. A deeper Tobar-like doctrine that looked instead to the foundation of *any* claim to sovereign prerogatives in genuine democratic consent, however, would seem to meet Mugerwa's objection in this respect. Nor would it be confounded by his complaint that "[t]o examine the constitutional legality of the government of another state constitutes and intervention in the domestic affairs of that state," ibid., because under the *deeper* sort of legitimism I suggest, claims by the government of a state to have the right to "non-interference" are insupportable unless that regime in fact represents the choice of its sovereign people. A government that was genuinely representative would have valid claims against outside intervention in its internal affairs, but an unrepresentative one would not; for this distinction to matter, it is perforce legitimate to inquire into its basis.

[76] Boletin Oficial de la Secretaria de Relaciones Exteriores, Estados Unidos Mexicanos (September 1930), vol. LV, no. 9, 9 (as translated in *American Journal of International Law* Supplement 203 (1931)).

[77] C.L. Cochran, "The Estrada Doctrine and United States Policy," *University of Miami Inter-Americal Law Review*, vol. 5, no. 27, (1973), 28, https://repository.law.miami.edu/cgi/viewcontent.cgi?article=2239&context=umialr.

[78] These challenges are described in at least somewhat more detail in Ford, "Democratic Legitimacy and International Society," 19-21.