On the Foundations of Legal Reasoning in International Law

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Abstract

Issues pertaining to the "foundations" of legal reasoning in international law break down into several discrete questions: what do statements about law mean; how do they get their meaning; to what do legal terms refer; in what does knowledge of law consist; how do we reason with legal concepts; what constitutes a criterion for argumentative success; how do bodies of legal concepts combine to form systems; is the conceptual organisation of different types of legal system, such as municipal law and international law, necessarily (or even factually) the same at some fundamental level? ...

This thesis is concerned in some measure with all of these questions, but the focus throughout is on those of the meaning of what we say about law, of legal knowledge, and of topological issues regarding legal systems (that is, how various types of legal system stand, conceptually, to one another).

The thesis falls into two parts. The first, which is critical in nature, looks at some of the ways in which modern legal positivism has attempted to supply answers to these questions. It shall be argued that underlying those attempts is a particular view about the foundations of legal reasoning which has remained fairly constant in modern legal theory, not only among the positivists but also commonly among their sceptic rivals. Several difficulties with this view are raised and explored, all of which have contributed to the notion that international law is, when viewed through the spectacles of a municipal lawyer, at best a primitive system of law.

The heart of Part I is a discussion of the character of legal knowledge. This takes place in the context of an account of the "Institutional Theory of Law" (ITL), as propounded by Neil MacCormick and Ota Weinberger. The argument that emerges is one broadly in favour of ITL, though critical of the methodological and philosophical assumptions on the basis of which the main edifice of the theory rests. It is submitted that such assumptions are the result of misplaced views about semantics and the nature of reference. Part I ends with the suggestion of an alternative, and hopefully more stable, strategy for generating the account of legal knowledge for which ITL strove.

Part II comprises a positive thesis about the foundations of legal reasoning in international law, developed on the back of the strategy outlined in Part I. It embodies a form of platonism about law, which is explained and elaborated in detail in the first half of Part II. The remainder of Part II is concerned with the ramifications of such a view for international law, and with an alternative way of looking at international law and its relationship with municipal legal orders. It is argued that the positivist view of the conceptual structure of legal systems does not transfer to the case of

international law as smoothly as is generally assumed, and that other models of legal systems are possible. A case study is used to illustrate the viability of this view, whether or not the particular alternative model presented in this thesis is accepted.

The thesis ends by briefly considering, in an appendix, some of the issues raised, but not explored, in the body of the thesis about the relationship between formal logic and reasoning about norms.

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Contents

Prologue

Is international law really "law", and if it is, on what basis do we regard it as being so? These questions have given rise, especially during international law's modern period, to a rather sterile debate in legal theory which has tended to centre round concepts of municipal law and notions of "family resemblance". Defenders of international law point to the structural similarities and analogies with concepts of private law, whereas *realpolitik* realists have argued that deep structural differences outweigh surface similarities with other, more established, legal systems. In this thesis, my aim is to show that the questions are of genuine importance, and that the debate which has surrounded them exposes some problems with the underlying assumptions of (in particular) legal positivism on the subjects of legal systems and legal knowledge. In order to see this, and in order properly to account for the nature of international law, a different approach to the questions is required, via foundational questions about legal reasoning:

(1) To what kind of thing do legal propositions refer, and when is what is said by them judgeably true?

(2) What kind of reasoning underlies legal argumentation, i.e. what are the justificationary structures which tell us how or when certain propositions about the law follow from other such statements?

I have called the first of these a question about the foundations of legal reasoning "externally speaking", since it is asking upon what ground statements about the law are built, and the elements out of which they are constructed; and the second I have called a foundational question "internally speaking", since it is directed at the internal semantic structure of legal argument-chains, i.e. at the question, how are propositions about the law bolted together to form justifying-arguments? Although they are highly interlinked, this thesis concentrates almost exclusively upon (1), and relates it to both sceptical claims about the nature of international law (ch. 1) and positivist views on the topology of legal systems (i.e. whereabouts international law stands in relation to municipal law) (chs. 1 & 5). Issues arising from question (1) are also used to build up a picture of legal knowledge (chs. 2-4), roughly in line with the aspirations of the Institutional Theory of Law, as a means by which to understand more deeply both what is required of a putative

account of international law, and how such an account which is more in-keeping with the particular conceptual organisation of international law, should proceed (ch. 5).

Issues and problems associated with question (2) have, for reasons of space, been left largely out of account. They tie up with questions in fields such as the theory of practical reasoning, formal logic, legal doctrine and the "logic of norms". I shall confine myself here to stating that I think properly *doctrinal* reasoning about law, though it may ultimately be relative to what may be called "ways of understanding" (i.e. to conceptions of how a given area of law works), is nevertheless a form of speculative reasoning (even if constructive) rather than purely practical reasoning. I do not offer a justification for this in the present thesis, but I do indicate, at various points, why I think it is so. Such a view is in any case encouraged (though not, perhaps, entailed) by the account I offer, in the body of the thesis, of legal doctrine in response to question (1). In lieu of a proper treatment, I explore the issue briefly at the end of chapter 4, and comment upon one recent strategy for dealing with some of the problems raised in a final Appendix.

PART I

Positivism and the foundations of legal reasoning

1

Identifying Criteria For Legal Concepts

0.1. Opening Remarks

Between 1983 and 1996 a small number of writers from various theoretical backgrounds and traditions began attacking the foundations of international law in a radically new way. On the surface, the attacks of Carty, Kratochwil, Koskenniemi and D'Amato were merely a reformulation of long-standing difficulties regarding the nature of international law *vis a vis* the constitution of municipal legal orders, and did not appear to raise fundamental issues. Beneath the surface, however, matters stood differently.

On the face of it, the charges thus levelled were new versions of the old claim that international law is, strictly speaking, not "law" at all. Their novelty over traditional versions of the claim (such as that of Glanville Williams[1]) consisted in their being laid at the door of *legal reasoning*. This plays on an important and complex link between a system of law and the legal reasoning which takes place within it, which shall be explored in due course. The important thing, however, is not the scepticism itself but the issues it raises concerning legal reasoning. Accordingly, this thesis is not, at least not directly, a response to the sceptics as much as an argument to show that the debate between the sceptics and their positivist opponents concerning the status of international law is spurious and misconceived. The debate rests on mistakes, on both sides, arising from shared misconceptions about the foundations of legal reasoning. In effect, which view about international law's claim to law-likeness one adopts will depend upon the inference one is prepared to make from these common assumptions: positivists (typically) by modus ponens, and sceptics by modus tollens.

These fundamental assumptions embody foundational claims concerning three main areas:

(i) the basis of our knowledge of law;

(ii) the exact nature of the relationship between a legal system and the legal reasoning associated with it; and

(iii) the way in which "non-standard" systems of law, such as international law, must be conceived.

For reasons which will emerge (see e.g. § 0.2, pp. 4-5), much of the next four chapters is spent exploring the second of this trio. In fact, attitudes to (i) depend intimately upon the way in which the relationship captured in (ii) is perceived. In this chapter, it is nonetheless (iii) which shall be the focus of attention. Among the issues upon which this bears is the sceptics' insistence against the very possibility that the reasoning that international lawyers engage in can be given a distinctively "legal" sense.

0.2. The Route to Foundations

The usual path for a sceptic about international law to take had always been to doubt the international lawyer's claim to be employing specifically legal methods in contexts of conflict or regulation, rather than merely political ones. This denial that the system of norms from which international lawyers drew their arguments was properly classifiable as legal was usually advanced on the ground of some practical failing, such as the absence of a legislative organ, the need for consensus or lack of an effective regime of sanctions. The reservoir of concepts on which the sceptics drew was, more often than not, rooted in Hobbesian or Kantian views on the nature of law and state. One of the guiding principles of later twentieth century theorising about international law has been the rejection of simplistically taken Hobbesian and Kantian theories about the "international arena" – which in most cases sought to derive the character of International law from politics, or the domestic analogy – in favour of methods distinctive of a strictly *legal* positivism.

Part of the problem with Kantianism had been its tendency to make the derivation of international law look like a conjuring trick done with discrete a priori principles, while the Hobbesian theorists had failed, on various counts, to establish sufficient motivation on the part of states to act *legally* as the model requires.[2] Contemporary positivism proved attractive not only in its ability seemingly to replace implausible assumptions about conceptual structures to which we had no obvious epistemic access (like Grundnorms and norm-hierarchies) with somewhat more plausible ones concerning knowable criteria of recognition (such as Hart's Rule of Recognition), but also by succeeding in making international law *look* like law without having to swallow the domestic analogy whole.[3] If the positivist approach to international law commands a good deal less respect that it did a few years ago

this is not, or is not felt to be, due to any inherent implausibility, as much as to recent doubt that the positivist criteria for legal knowledge really are within our epistemic reach.[4]

The centrepiece of the positivist conception of law is its representation of law as a system of interconnecting rules and standards to which legal personnel appeal in reaching decisions and making choices. Because the standards involved are *positive* standards, one natural reading of the positivist conception is as a set of criteria for organising legal reasoning – in other words, explaining what the system is made up of and how its various elements are interconnected.

The distinctive idea behind modern sceptical arguments is that, in its defence of the standard conception of law as a system of norms, positivism is fundamentally wrong over the foundations of the legal reasoning that is carried on in practice and that, in addition, it is impossible to supply legal reasoning on that kind of account with any coherent semantic theory. The first of these arguments is primarily concerned with what legal reasoning is said to be *about*, that is, with our cognitive access to the sort of thing positivism requires us to have some epistemic relation with, in order to associate and manipulate the corresponding concepts in a meaningful way. Such things are usually assumed to include the norms of the system, the actions governed by them as well as the system itself. In requiring positivism to fulfil its promissory notes, the sceptic intends to show the epistemological bankruptcy of the positivist position. The second argument is an attack on the notion that there is any coherence to the idea of argumentative *justification* in law – that legal argumentation can be systemised in such a way that it produces arguments that are more objectively correct (less arbitrary) than, say, merely political justifications for state action in a conflict situation.

There are, correspondingly, three questions which can be asked about international legal argumentation: Is argumentation about international law properly identifiable as a species of legal reasoning? Can coherent sense even be made of the notion of *legal* reasoning and, if so, what are its foundations? These questions may at first appear deserving of a rather facile answer (affirmative in the first two cases and in terms of some kind of logic and/or rhetoric in the third). But as a matter of fact, supplying answers to them is not only a complex problem; it is the most pressing task for anybody who believes in the established positivist conception of law as a system of rules and principles of various types.[5] Briefly, the sceptic thesis resolves into two lines of argument, as follows:

I. Reasoning procedures in international legal argumentation cannot be coherently distinguished from those in other spheres of normative argumentation, such as political, ethical or practical argumentation.

II. The notion of legal reasoning, applied to international law, is inherently conceptually unstable because it cannot consistently serve state interests and abstract conceptions of "justice" (etc.) at the same time.

The difference between these positions does not correspond to the venerable distinction epicyclically made between the "surface features" and "deep structure" of legal argumentation. Rather, both positions are, in different ways, inseparable from questions in the philosophies of language and mathematics. (I) and (II) run parallel to more generalised versions of themselves:

(I*) Exactly what is it that legal discourse refers to, and when is what it says true?

(II*) How or when do certain propositions of law follow from others, and how do we know?

I shall argue that answers to (I) and (II) are dependent upon clear accounts of (I*) and (II*). Though it is (I*) and (II*) which shall, as a result, be the focus of coming chapters, it is with (I) that this chapter is most concerned. Supplying an answer to it, involves going back to the very root of the positivist conception of legal orders and attendant conception of legal reasoning.

The crucial difference between claims (I) and (II) and older forms of scepticism is that the former approach the problem via the analysis of legal *argumentation* rather than by an abstract study of supposed normative "types". This has two distinct advantages.

1. Most obviously, talk about legal argumentation is, intuitively anyway, more accessible to our intellectual faculties. It is reasonable by any standards to suppose that we know what arguments *are,* in the uncontroversial sense that we know one when we hear one, so that their existence, in that sense, is not in question. Moreover we can, on the face of it, distinguish between various kinds of argument according to suitably established criteria (for

instance by making a comparison of techniques or, occasionally, looking to the contexts in which they are made), even if sometimes the choice of category is not obvious.

By contrast, our knowledge of norms, so it would seem, is derivative: we can only know about them when we are convinced by an argument to the effect that such and such a norm exists. Similarly, any knowledge we may be said to have of normative *types* (what it is that makes a norm one of politics, or of law, or . . . .), can only be settled on the basis of argument about the nature of norms. In this sense, argument is primary and remains so even if it were assumed that norms exist independently of any argument concerning them, since the issue concerns our access to them. Accordingly, international lawyers would be right to make the character of legal argumentation, rather than of norms outright, the proper focus of theoretical inquiries into the nature of their subject.

2. The second, and perhaps more important, advantage in concentrating on uses of argument is that it provides hard data from which to launch theoretical accounts of international law, instead of abstract conjecture. A sceptic about international law, at any rate, stands to be impressed more by concrete evidence of distinctions in argumentative structure that demarcate distinctively *legal* uses of argument from merely political ones (and which thereby demand a corresponding distinction between law and politics in her favourite game theory, regime- or systems analysis, or whatever), than by an abstract and highly speculative discussion of normative types. There are detailed reasons behind this which will not be wholly clear at this stage; but the general motivation for the concentration on legal argumentation should be fairly clear. (The necessity of thus conducting the discussion will emerge fully only after the later extended discussion of realism and anti-realism in chapter 4.)

Clearly, any disenchantment that the sceptics may harbour towards the "standard" account of international law (viz. as propounded in any elementary textbook on the subject, such as Brownlie, Shaw, or Grieg) which, as I suggested, is, in an informal sense, broadly positivist in outlook, is not merely a result of the sceptics' insistence on the analysis of legal argumentation instead of rules and principles of international law as the correct focus of debate. Despite the tendency of legal positivists, in this broad sense, to present their theories in terms of inter-relations of rules, normative systems and so on, it is not difficult to restate them in terms of a commitment to some or other model of legal reasoning. Nor is there, from

the international lawyer's point of view, any harm in so doing. Aside from philosophical concerns, it is in any case hard to see how a sensible debate about international legal rules, principles and doctrines can move beyond the realms of abstract theory until the question of their role in actual legal contexts of argumentation is confronted – that is, how they figure in lawyers' actual thought and talk of them, whether before a court or in the course of, say, a treaty negotiation.

Indeed, in so far as a model of legal reasoning is, in effect, a set of statements about how lawyers are to interpret (given parts of) some legal system, and manipulate its concepts in order to form or instil conclusions about its content and inter-relations, it is hard to see how any theory prone to presenting international law as a system of rules, principles and so on could describe it as such yet deny that it could *in principle* be presented as a (suitably extended) model of legal reasoning for that system. Roughly speaking, a model of legal reasoning for some system and the standard description given by theorists of that system will be two sides of the same theoretical coin.

What the sceptical arguments claim is that the model of legal reasoning that international legal positivists commit themselves to is, simply, untenable.[6] Theorists who argue for position I above[7] are not, of course, all of a mind as to what is wrong with the positivist account of legal reasoning. At a fairly shallow level, it is possible to identify two separate claims (at least), within position I, about where exactly the problems lie. The first directly arises out of the deconstructive methodology employed by both Carty and Koskenniemi. They argue, on the basis of the indeterminacy that is said, on the deconstructionist outlook, to afflict language generally, that discourse that pretends to concern specifically "legal" terms is in reality "about" nothing at all. Instead, lawyers can only interpret principles that are 'themselves [the] subject of political dispute' (Koskenniemi, *From Apology to Utopia,* p. 477) and so cannot, *contra* positivism, be delimited from any other political concepts. The result is that international legal argumentation and political rhetoric are not essentially different. Kratochwil, by contrast, grounds his claim by convicting positivism of naivety over the social function and rule-governed nature of discourse. It is, he says, simply a crude error within the standard account to suppose there to be any epistemological means by which we can pick out specifically "legal" characteristics of norms.[8] Since the typical positivist criteria, such as "cognitive recognition" of norms or "system membership" for identifying legal normhood are unfulfillable, international law can be no more than merely a style of reasoning about norms in general, without a clearly circumscribed subject-matter of its own.

In this chapter, it is principally this second position I claim which, in general terms, requires investigation. In a sense, what remains of the first claim, once the deconstructionist subframe is removed, is a claim which approximates, in effect, to the second; viz, that by engaging in (international) legal reasoning, there is nothing in virtue of which we could *mean* something different in the case of talk about legal norms than when we address, e.g., political ones. From this point of view, the second claim is merely the more appropriate way of formulating the sceptical case under position I.[9] It is true that, with deconstruction still in place, the first claim makes a different point; it is, however, the second claim in which most interest lies, and which falls now to be examined in some detail.

I: Theories of legal concepts

1.1. Criteria and Concepts

The point of the position I sceptical claim, once additional conceptual baggage has been removed, is straightforward. The issue is, in essence, whether any sense can be given to the proposition that legal reasoning addresses distinctively "legal" concepts; in other words, whether concepts used in legal discourse can be said to form an intuitable semantic kind. Whether or not they can will raise a parallel issue for the notion of legal reasoning: namely, whether coherent sense can be made of the assertion that "legal" reasoning forms an identifiable kind of reasoning, distinct from other sorts of normative reasoning, in that its targets are concepts of law, and its procedures, (patterns of inference and so on) are distinctive in terms of the manipulation of those concepts. Because, as will be seen, the relations which hold between such concepts depend upon the semantic structure of those concepts, it is imperative for a theorist who believes that talk and reasoning about international law differs from that concerning diplomacy, politics or ethics, to establish that "legal" concepts can, in some manner, be identified as such.

What Position I sceptic is really denying is that there is any recognisable feature or set of features that could be used to mark off legal norms from other normative kinds or, at a wider level, legal systems from any other framework that is the object of practical discourse. Because our cognitive access to norms (assuming we have one) is mediated through language-use (there being no good sense in which we could conceive of a norm – assuming there are such things – without the conception being framed in words), any such features will

be semantic ones, that is, features of the semantic behaviour of normative expressions and concepts, and the way they are manipulated in the course of argumentation.

Nothing in this should be taken as especially controversial. Even one who believes in the existence of (abstract) normative entities outside the context of language could hardly expect to convince anyone about any characteristic possessed by such entities that he could not in principle *describe*. Even a platonist about mathematics, though she will differ with anti-realists over the correct interpretation of, say, the quantifiers used in elementary number theory, will insist that our access to actual mathematical structures and totalities is through language (see ch 4, §1). What *is* controversial is the assertion that there is nothing in our legal argumentative practice that could, in principle, be used to distinguish legal- from other argumentation; i.e. that there is no semantic feature of normative concepts that could show a disanalogy between legal and merely political (or indeed any kind of) norms, and correspondingly that where international lawyers thought there was a distinctive subject-matter, there is in fact none.

The basic point is usually, if never explicitly, put the other way round. If one is working with legal systems then one must suppose the concept of a "legal system" to be somehow delimited from systems of arbitrary character. Though the criteria used in the specification of the legal concept arguably need not be completely precise, they must at least operate at the conceptual level, since the distinction between systems that are legal and those which are not could hardly be said to be *empirical*.[10] The very notion of "positive" law in any case seems to demand *conceptual* recognition as a separate category. On anybody's account, there is no way in which the legal system of the United Kingdom, say, could be held not to be a (real) legal system, or that a system for assessing probabilities, or predicting election results, or for "solving" Euler's Problem *is*. What is needed, then, is a means of making explicit the intuitive processes by which we are able to distinguish between these different cases; that is, a method for showing which among arbitrary systems are legal ones.

If these were precise concepts, the way would be straightforward. We would either directly formalise the methods of choice (i.e. stating "rules of use") or, alternatively, provide an axiomatic specification of the concept of a "legal system". But because, according to positivism, the concept of law is itself vague or at least theoretically unsettled, the best we could hope for in this direction is a semi-iterative approach to the characterisation of the legal concept; that is, a loose characterisation with an iterative *element* only. The Positivist

approach to legal systems which uses an argument from paradigm cases is, in effect, an attempt to carry through this kind of procedure (cf. §§ 2 & 3).

Though it is in-built in the notion of "positive" law, the idea that legal concepts are marked off from others by the semi-iterative application of identifying criteria is not just a surface feature of the positivists' on-going rivalry with natural lawyers. Such a view would make it difficult to explain the prominent place Hart assigned to his Rule of Recognition in the *Concept of Law*. With similar motivation, Waluchow reminded the legal realists that anyone wanting to avoid the Dworkinian confusion of what law is with any reasons we have for obeying it, must recognise some kind of "master criterion" for identifying law (Waluchow, *Inclusive Legal Positivism*). The point is that the epistemological structure of the positivists' case forced rules of recognition to the heart of their account of the concepts of law and legal system.

The idea that it is possible in some sense to identify legal concepts is also an underlying feature of Scobbie's rejection of Koskenniemi's and Kratochwil's 'elimination' of international law as a conceptual category as 'wildly reductive' ('Radical Scepticism', p. 361). In the course of his comment on Kratochwil's thesis (which contends that there is nothing to separate legal- from other concepts except for the decision-making procedures in which they figure), Scobbie remarked that:

> in rejecting Hart's argument for system membership [. . . .]as the delimitation criterion, Kratochwil would appear to have made a significant conceptual error which undermines his thesis. If legal norms are not different from other norms by some intrinsic characteristic but only become so through the process of their application, and this process is rhetorical reasoning dependent on topics, then how can Kratochwil identify the topics proper for legal reasoning (the 'topoi that are *specific to legal orders*')? (pp. 357-359)

In other words, the reality of the legal order — in the sense of the meaningfulness of talk about *legal* norms and *legal* systems such as international law — depends on there being more to legal discourse than mere argumentative style: it depends on there being recognisable *legal* concepts that are the subject of legal statements whatever the argumentative context.

The reality of the legal order, or more precisely the grounds on which it can be legitimately denied, was similarly the main issue between Scobbie and Koskenniemi. Just how this issue is resolved depends on what it is that legal orders *are* and, crucially, on the

sort of concepts we employ, and how they are manipulated. Whether there is any gap between the concepts and the legal orders themselves is a question resting on complex issues in semantics,[11] but there is a sense in which this question is of marginal importance to debates over the status of international law. The tendency for those debates to proceed in terms of normative orders and legal rules sometimes makes it appear as if it is the ontological status of the rules and orders that is the primary factor. But the reality is that Position I sceptic can uphold the existence of normative orders (whilst denying they are legal), and a defender of international legal orthodoxy can deny that there is anything to law except the concepts. What is essential is that one can point to *a* subject-matter, and it should be borne in mind that, though they argue from different positions, both Koskenniemi and Scobbie agreed on the need for a distinctive subject-matter for legal arguments to address if international law is to remain as a category in its own right (Scobbie, 'Radical Scepticism', pp. 347-348).[12]

Faced with the task of clarifying our knowledge of the legal order, a theorist has two choices. The first is to fix the content of international law and trace back the epistemic commitments of the corresponding concepts to a theory of knowledge adequate to the purpose. The second is to fix knowledge and then see what remains of international law, once all the elements that do not fit the epistemic base are removed. The first way is roughly the one taken by the institutional theorists (see chapter 2); the second way is Carty's and Koskenniemi's.

In one of his meditations on the verification principle in the *Philosophische Bemerkungen*, Wittgenstein said 'Tell me *how* you are searching, and I will tell you *what* you are searching for' (*Philosophical Remarks,* p. 67). Stripped of any lingering Tractarian solipsism, this merely reflects the immediate link between the type of concepts used in analysis and the theoretical shape of the analysandum. Interestingly, both Carty and Koskenniemi argue for the thesis that international law is, really speaking, an augmentation of liberal political theory dressed up as a discourse on legal norms. Just why the heart of the matter should be a liberal theory is not made especially clear by either theorist, but the fact that (their respective interpretations of) that position seems most comfortably to square with their deconstructionist view of language (because of its alleged 'subjectivity' (Koskenniemi, *From Apology to Utopia*, pp. 6, 52, 475; Carty, 'Critical International law: Recent Trends in the Theory of International law', 1991 *EJIL* p. 66, pp. 66-67, 80)) probably marks the beginnings of an answer. Though they are both committed to international law's not really

being law and, prima facie for the same (broadly linguistic) reasons, there is a subtle difference between their two accounts in terms of where they locate the foundations of what lawyers took to be legal reasoning. For, whilst Koskenniemi is genuinely interested in the structure of international legal argumentation — and hence places the foundations of 'legal' discourse firmly among the concepts used in that process itself, Carty is much more interested in the role of *consent* in alleged acts of law-creation. Thus, while Koskenniemi used the indeterminacy argument to conclude that it is impossible to identify anything that could be taken for properly legal knowledge, Carty's strategy was to deny that the putative legal concepts at the heart of Koskenniemi's analysis can *refer* to anything that may be taken as legal.[13]

In view of the reasonable observation that legal practice would be nonsense if legal argumentation were over *nothing*, or would entail philosophical and professional dishonesty if it concerned any standards whatever, a subject-matter particular to law seems essential. If so, then an obvious task for any theorist is to identify it. Just what intellectual operations are involved in the identification will be a contentious issue for anyone trying to square a reasonable-looking epistemology with a reasonable-looking international law, given Position I sceptic's conviction that one can only be made out at the expense of the other. But if Wittgenstein's remark is basically correct, an account of how legal concepts are formed (which is just another way of asking what the foundations of legal reasoning are) is the most fundamental question anybody could ask a lawyer.

Since we cannot imagine law without conceptualising it, our picture of law will be totally determined by the concepts we use when thinking about it. It is important to stress that the concepts will exhaust our knowledge of the legal order even if we believe that legal orders have an ontological status beyond their linguistic manifestation. Were we to posit some amazing faculty of direct intuition to legal entities (or facts) not expressible through language, the resulting "knowledge" would consist only of standards that do not matter to legal theory and legal practice.[14]

The need to specify, to some reasonable degree, the intellectual operations involved in determining legal concepts is paramount if our target is the characterisation of an appropriate subject-matter for international law. The problem is that the linkage between the foundations of legal reasoning and standard legal practice (in international law in particular) has never really received proper attention. At one point in *From Apology to Utopia* Koskenniemi complained that 'few lawyers have taken the trouble to look onto [sic.] the assumed process

of determination — presumably because there exists no specifically juristic way of doing this' (p. 2, n. 1). He then went on to expose as superficial the attempts made by some theorists, such as Henkin, Stone and MacDougal, to dispose of the problems of conceptual analysis within the confines of 'legal formalism' (black-letter law) itself, by such diverse means as functional analysis, sociological jurisprudence, Kelsenian pure theory or the policy-school approach — whose respective pitfalls Koskenniemi certainly avoided. But the ruling assumption behind most attempts to clarify the status of legal concepts — Koskenniemi prominently included — is that what is needed is some means of identifying the unique characteristics that make legal concepts *legal*. If we are in possession of such criteria (the assumption says), then by isolating them, we shall have all we need in terms of concept-forming machinery for international legal discourse, and can delimit a relevant subject-matter accordingly.

As noted earlier, the semi-iterative conception of legal concepts forms the basis in general of both scepticism and orthodoxy about international law and international legal reasoning. Both sets of theorists have tended to assume that semi-iterative uses of identifying criteria exhaust the concept-forming operations open to us in establishing certain concepts as legal, so that the power-house behind any decent account of international law is a solid theory of identifying knowledge for legal concepts. Viewed this way the sceptic case under position I is a denial that international lawyers can supply meaningful identifying criteria for legal concepts sufficient to ensure the existence of international law. Koskenniemi's assault on orthodoxy apparently begins with a demand for such criteria fully in mind:

> [. . .] while law emerges from politics and diplomacy, it is assumed to remain separable from them. It is assumed to be binding regardless of the interests or opinions of the State against which it is involved. If such separation were not maintained, then we could only concede the critic's point and admit the law's political nature. (*From Apology to Utopia*, pp. 2-3)

The basis of Koskenniemi's argument in *From Apology to Utopia* is that the identifying criteria for international law are inconsistent. Early on in that book he placed the foundations of international legal argumentation in the liberal theory of politics, itself identified by two basic ideas: (i) the idea that law is not a natural normative order but that legal standards emerge from the legal subjects themselves; (ii) that, once set up, the order will become binding on those individual subjects without possibility of subjective opt-out (p. 6). He then lost no time in joining the endless ranks of theorists lining up to tell us that there is a tension

in the heart of Liberalism. Corresponding to the two elements in Liberalism, Koskenniemi identified two criteria for identifying legal concepts:

> To prevent international law from losing its independence *vis-a-vis* international politics the legal mind fights a battle on two fronts. On the one hand, it attempts to ensure the *normativity* of law by creating distance between it and State behaviour, will and interest. On the other hand, it attempts to ensure the law's *concreteness* by distancing it from natural morality [. . . .] To show that an international law exists, with some degree of reality, the modern lawyer needs to show that the law is simultaneously normative and concrete — that it binds a State regardless of that State's behaviour, will or interest but that its content can nevertheless be verified by reference to actual State behaviour, will or interest. (p. 2)

Scobbie saw Koskenniemi's conception of the legal order as arising out of his 'critical' thesis rather than his deconstructionist one ('Radical Scepticism', pp. 343-344). That is reasonable as long as it is remembered that, for Koskenniemi, international law is a project and deconstruction a fact. One of the most important characteristics of legal discourse on the traditional account is the rather vague appeal to the Rule of Law. Sooner or later any theorist addressing the foundations of legal reasoning will have to explain the involvement of that concept in the mechanics of legal argumentation, especially when it is used as an identifying criterion for (at least some) legal concepts. As far as Koskenniemi's critical thesis could tell, the Rule of Law is exactly what political apologies and normative utopias of natural justice are not (*From Apology to Utopia*, pp. 116-117). Earlier, he had stated his project in terms of his intention to question 'the assumption that there is a distinct discourse called "international law" which is situated somewhere between politics and natural morality (justice) without being either' (p. 8). The image is vitiated by the role spatial metaphors play within it, but the intended point is that, however the scale (assuming it *is* a scale) is conceived, the intellectual operations involved in establishing legal concepts must be substantively different from (perhaps by being stronger than) those involved in political discourse and yet must be divorced from (possibly by being weaker than) those governing moral investigations.[15] If this is conceived as a search for identifying criteria for unique legal concepts then, notwithstanding the untenability of Koskenniemi's method (see Scobbie, 'Radical Scepticism', passim), the complaint that the search is in vain is largely justified (though not on any grounds Koskenniemi might have produced).

Part of the argument in ensuing chapters is given over to showing that whatever merit there may be in the negative theses of this type of sceptical argument (namely that a search for specific *criteria* for identifying some norms as legal and others not is a hopeless one), the conclusions that typically get drawn are unwarranted. The reason for the negative theses — as they occur in Carty and Kratochwil — is a broad dissatisfaction with legal positivism of the Hartian school, at least as a template for theory about international law, and that dissatisfaction is shared here. Kratochwil, in particular, is right in the main to point out that standard positivist accounts of international law, in certain cases anyway, have led to embarrassment over their lack of congruity with the actual dynamics of legal practice, or their tendency generally toward straw-man status when it comes to explanatory value.

The reason for positivist discomfort in the face of international law is usually put down to the nature of recalcitrant concepts indigenous to international practice (the ICJ's lack of compulsory jurisdiction, the level of politicisation and so on), but there is good reason to suppose that it goes deeper than that. What is actually at issue is the whole foundation of the positivist account of legal systems. But it is important to stress that *all* sides to the debate (with the possible exception of Kratochwil) promoted that foundation, in one way or another, as the right one for a theoretical account of law. It is necessary to look, then, at the general shape of Hart's theory of the nature of legal systems, and some of its off-shoots, in some detail.

II: The road to institutionalism

2.1. Hart's Concept of Law

Early on in *The Concept of Law*, Hart recalled the scepticism traditionally felt towards "non-standard" systems of law such as international law:

> [. . .] it is quite obvious why hesitation is felt in those cases. International law lacks a legislature, states cannot be brought before international courts without their prior consent, and there is no centrally organised effective system of sanctions [. . .] and it is perfectly clear to everyone that it is their deviation in these respects from the standard case which makes their classification appear questionable. There is no mystery about this. (Hart, *The Concept of Law*, pp. 3-4)

In spite of the arguments raised against definitional criteria in the *Concept of Law*, Hart seems never to have doubted that that concept is one arrived at by some kind of classification process.[16] The three 'recurrent issues' by which the concept of law was supposed to be illuminated, *in lieu* of an effective definition, in fact look rather like requests for identifying criteria. Those issues were (pp. 6-13):

(1) how does law differ from orders backed by threats?
(2) how does law differ from morality?
(3) what are rules and to what extent is law an affair of rules?

Hart thought it clear from (1)-(3) that 'nothing concise enough to be recognised as a definition could provide a satisfactory answer to it' (p. 16), but went on: '[. . . .] it is possible to isolate and characterise a central set of elements which form a common part of the answer to all three'. These will be the 'central elements in the concept of law and of prime importance in its elucidation' (p. 17).

It is not difficult to see what was going on here. Having (rightly) criticised existing theories for offering too narrow a definition of law, and thus being powerless to account for systems of law such as international law that do not fit the mould but which intuitively demand recognition as legal systems, his response was to relax the boundaries between standard and non-standard cases so that any pretence of "defining" law as such vanished. This move was at once radical, in that it modified perceptions of what a *concept* of law should look like (if it looks like anything concrete at all) and admitted "non-standard" systems on a more-or-less equal footing with developed systems of municipal law so far as their title to law was concerned, but also conservative, in that it preserved the past practice of taking developed municipal legal structures as the paradigm case of law. It may not be too crude an oversimplification to suggest, therefore, that the Hartian identifying criteria for law as they are usually stated — primary and secondary rules, rules of recognition and so on — are just the most general features of a structure of developed *municipal* law as Hart conceived it. On the face of it, certainly, the general notion of law as a system of rules and principles sits better within a framework of municipal private law than it does a framework (if one may call it that) of Aboriginal law or the law of maritime delimitation.

Though the argument from paradigm cases strongly suggests it, there is no need to see an inherent municipal law bias in positivistic legal theory on the subject of legal systems. As

a matter of *fact* however, this sort of positivism does seem to have worked against international law, first in preventing the growth of an indigenous theory for international law (i.e. one conceptually free from municipal orderings and structure-types), and secondly in the sense that attempts to synthesise "non-standard" features of international law into a single theoretical framework have often resulted in the charge that they are too Realist by half.[17] (Ironically, Koskenniemi's book may, with hindsight, be read as an assertion of these two points — a reading that Koskenniemi himself would, no doubt, have detested.)

Though Hart's weakening of the boundaries of the concept of law was an advance over the theories he had criticised, essentially in removing the idea of "conceptual purity" as a semantic requirement, his underlying semantic framework may not have conceded to international law as much as is often supposed. For whilst Hart's concept of law in good measure ended the fruitless search for "actual" systems of law from amid the numerous swindlers that tried to pass themselves off as legal (basically by extending the title to any system that wanted it), his conception still remained very narrow at crucial points (too narrow, at any rate, for Kratochwil, MacDougal and others), resulting in various "boundary problems" where the legal process looks least "standard". (This is the essence of Kratochwil's complaint in *Rules, Norms and Decisions*, p. 2.)

There is a tendency within the positivist tradition to see Hart as having intended a kind of legal systems democracy, according to whose liberal principles all legal systems are created equal though some are more equal than others. Just because there is no easy single definition of law, the recognition of legal systems as "legal" must proceed on the basis of conformity to certain widely formulated criteria which represent the rather vague and intuitive conception of what a legal system is. For those tempted to think this way, the recognition of legal systems will look rather like an instance of Sorites reasoning.[18] This will be based on the belief, that the concept of *law* behaves, semantically, in a similar way to concepts like "bald", "heap" and so on. Those concepts, when functioning as predicates, nouns, or adjectives, are held to have unambiguous sense only in those cases which constitute the limit cases of the concept. In the case of baldness, this would mean a completely hairless head (in which case the predicate applies); or, alternatively, a full head of hair (which would indicate that the concept "bald" would not apply). In between, however, a certain type of vagueness arises, in which, one might say, it is uncertain whether the predicate applies or not; or alternatively, that it is equally reasonable to apply or withhold the predicate, in relation, say, to a head possessed of only a few tufts of hair. Likewise, for the case of law, one may think

that whether or not that concept describes a given system will depend upon how closely its features resemble those of systems approximating to either extreme.

If that is so, then the unspecific standard set of criteria we hold in mind when thinking about law-like systems may be used as the basis of comparison with systems more or less like the intuitive one. Identification of those other systems as "legal" is then a matter of recognising that enough features of some regime are in enough conformity (within an imprecise range) to broad features regarded as constitutive of legal systemhood, give or take the odd anomaly. Accordingly, the job of the theorist confronted with a non-standard system is to highlight the "legal" features of the system and find some appropriate way to explain away or accommodate the problem elements that resist a legal interpretation.

The problem with this way of looking at things is that it makes international law look rather like a meagre system of (legal) norms and institutions that have been grafted untidily onto a much larger and wilder political process, and with little in the way of explanation why certain criteria should be taken as primary. More significantly though, if one probes deeper the problem begins not to look like an instance of Sorites reasoning at all. The idea that it was came about first and foremost because of the lack of a sufficiently precise set of criteria for specifying what is legal and what is not; *therefore* [sic.] any categorisation must proceed in terms of an argument from paradigm cases — a loose comparison of various systems with a vague intuitive model we have of the "standard" legal system (normally, a municipal one). The problem is that, vague though the common notion is, it is hardly theoretically settled enough to be the analogue of Sorites concepts like the heap or the bald head. In the Sorites examples, the limit cases — a large pile of straws or a completely hairless man — are uncontroversially recognisable as paradigms for their respective Sorites predicates. But in the legal case, an uncontroversial theoretical characterisation of a (municipal) legal system is precisely what we still do not have: Raz's momentary orders, Hart's union of primary and secondary rules and MacCormick's institutional facts, are all attempts to bring a single theoretical framework to bear upon the intuitive conception we have of law that can at once explain how that notion is vague yet also how we can know a system of law when we see one. What none of this offers is justification for assuming that a *single* theoretical framework is what is required for the analysis of systems of law as diverse as municipal private law and the laws of guerilla warfare or the regime for lifting manganese nodules off the deep seabed — at least, when that framework is supposed to be built out of *criteria* of recognition.

Presented with these considerations, a more thoroughgoing constructivist (than Hart) will long ago have begun to scratch his head and wonder what on earth the problem is anyway. Surely the issue is not one of getting a sufficient match between some or other system and a paradigm case that is fairly vaguely conceived itself. Rather, it is of recognising that any system worthy of the name "law" is not (or does not have to be) recognised so in virtue of its similarity with municipal law, but because its method of erecting standards and rules and its method of dispute settlement are best *explained* as legal in character rather than anything else. If that is so, the obvious task for a defender of international law is to produce a reasonable explanation of the kinds of thing an international lawyer will take as a good (or a bad) justification on the basis of law, and why they ought to be recognised as *legal* rather than, say, political or diplomatic. What is important for position I issues is the latter part of the task (the former falls mostly under II), and it involves a close look at the foundations of the reasoning processes characteristic of standard legal dogmatics. The most detailed and well-grounded account positivism has to offer with regard to such foundational issues is the Institutional Theory of Law.

2.2. Raz and the Birth of Institutional Positivism

One of the first things Position I sceptic must do in order to establish the thesis that there is no such thing as a specifically international legal norm about which we can argue, is disestablish institutional positivism.[19] The necessity of this, prior to any positive thesis Position I sceptic may have, is that on the face of it "institutional" theories of law offer the most viable account of legal reasoning generally, backed up by a reasonable-looking legal epistemology. No matter what the original motive for doubting the existence of criteria of recognition for distinguishing legal norms is, there is a real sense in which no position I thesis can get off the ground unless it has something to say about the Institutional Theory of Law (ITL). For this and other reasons, I shall be concerned with various aspects of this theory throughout the rest of Part I. During the rest of the present chapter, it is therefore necessary to navigate the philosophical currents, latent within the Positivist school, which gave rise to it.

The choice of ITL (or ITL-like theories) as the focus of dissatisfaction is not especially controversial. Though the institutional approach is seldom, if ever, mentioned by international lawyers,[20] there is a real sense in which it represents what most mainstream lawyers believe pre-theoretically anyway: that legal regimes, systems and bodies of rules

exist as a matter of a certain type of "fact" (in the sense that, as a matter of fact, international law recognises in some form a right of self-determination of peoples) to which lawyers appeal in argument, and to which all subjects of law are ostensibly bound. It is fair to say, in turn, that some form of institutionalism has been at the heart of every positivist response to the problem of identifying criteria for law developed this century. Hart, in the course of his most celebrated works, never mentioned the notion of institutions, but that is the right word for his rules of recognition, secondary rules and other background assumptions about the nature of law. In fact, the only real difference between Hart and later theorists lies in the order of construction: Hart characterised the concept of law and, in doing so, effectively defined, in broad outline, an *institutional system*. Subsequent efforts began with a generalised conception of institutionalised systems and worked toward a narrowing of the concept for specifically legal systems. The latter is essentially Raz's approach in *Practical Reason and Norms*.

With the need for identifying criteria clearly in mind, Raz pointed out that 'The aim [. . . .] is to point to the unique features of law' (*Practical Reason and Norms*, p. 149) which, once the institutionalised nature of legal systems is established, is basically a process of delimitation:

> [It is necessary to] show in what respects legal systems differ from other institutionalised systems. Those features [i.e. uniquely legal institutional ones] also account for the fact that legal systems are the most important of all institutionalised systems and this is so as a matter of logic. It is also a direct result of the defining features of law. (*Practical Reason and Norms*, p. 49)

The 'as a matter of logic' in that passage may equally have been written 'as a matter of semantics', as the remark following it makes clear. The semantic dimension to Raz's views is also fairly explicit in his method of defining institutionalised systems generally. This proceeds by an appeal to something that looks very like internal logic. 'Institutional systems', he said, 'in general are characterised by their *structural properties*' (id., emph. added). It follows almost immediately from this that the particular institutional concepts (legal ones in this case) will be identified through system-membership — since a change in the way those concepts are classified as falling under a particular category (i.e. within a particular framework) will effect a change in the way they fit into the system, and hence the structural properties of the system.

Though he did go as far as mentioning a few general headings, Raz did not believe that 'The attempt to characterise legal systems [. . . .]' can 'be a very precise one' (p. 150). But he *did* state more precisely the grounds of Hart's identification of legal systems:

> The general traits which mark a system as a legal one are several and each of them admits, in principle, of various degrees. In typical instances of legal systems all these traits are manifested to a very high degree. But it is possible to find systems in which all or some are present only to a lesser degree or in which one or two are absent altogether. It would be arbitrary and pointless to try and fix a precise borderline between normative systems which are legal systems and those which are not. When faced with borderline cases it is best to admit their problematic credentials, to enumerate their similarities and dissimilarities to typical cases, and leave it at that. (p. 150)[21]

In fact, we cannot leave it at that. Though this tells us something about the application of identifying criteria, it still leaves the criteria themselves rather vague. But this vagueness is not the (in this context) relatively harmless Sorites vagueness that most positivists arguably think it to be; rather it concerns, not mere wideness of formulation, but the whole notion of identifying criteria as a useful instrument in legal theory. The issue may be put this way:

> Suppose that the standard, broadly formulated identifying criteria for legal systems (or concepts) form a loose group D_1 ,. . ., D_n , on which we may presume there to be general agreement. Then the problem is that, for any "non-standard" system *S*, the fact that *S* may "hit" only *one* standard characteristic, D_3 say, and has disjoint features f_1 ,. . ., f_m not among the D_i, may be taken either as a justification for excluding *S* from being a legal system or, equally, for admitting *S* and adding f_1 ,. . ., f_m to the *D*'s. This is so until we can prove that the paradigm identifying criteria do their job in identifying *legal* concepts and excluding others — that the D_i are, in a sense, semantically significant in that they can perform their role for legal concepts whilst other criteria cannot (though they may do other things). In other words, for the notion of identifying criteria to be significant, it must not be the case that just *any* concepts can be used as identifying criteria for legal concepts — or that not just any set of them, arbitrarily selected, or extended without rhyme or reason, will do. An example of this difficulty may be the classification of Aboriginal "law" as law, which on the one hand seems to beg for recognition, at the intuitive level, as some kind of legal system, but on the other hand defies classification as such according to any given measure, since any attempt so to classify it looks immediately like a crude western institutionalisation of a radically different type of system (if it can even be called a system: cf. Edwards, 'Australia:

Accommodating Multiculturalism in Law', *Studies in Legal Systems: Mixed and Mixing*, p. 53).

Not just any arbitrary collection will do, then, as a set of identifying criteria for legal concepts. If we use the word "talented" to describe the elusive notion we are after, it is obvious that the requirement for identifying criteria to be talented concepts is not an extra constraint on those concepts themselves; it is just the opposite side of the demand that legal concepts be identifiable as such in terms of some (semantic) property or characteristic they possess that other concepts do not. Identifying criteria merely serve to make explicit just in what this semantic "uniqueness" consists.

Five years earlier, Raz had attempted to do just this in a theory that was basically, though fairly un-self-consciously, an institutional theory of law. Again, his basic answer to the question of identification was to side with what had become Hartian orthodoxy, and insist that system-membership is the crucial notion in any theory of law. In the introduction to the *Concept of a Legal System* (1970/1980) he explained that 'This work is an introduction to the general study of legal systems, that is to the study of the systematic nature of law, and the examination of the presuppositions and implications underlying the fact that every law necessarily belongs to a legal system [. . . .]' (p. 1). The insistence on this necessity is a reasonable summary of the Hartian school's approach to the nature of legal systems. Raz went on to explain that 'a complete theory of legal system consists of the solutions to the following four problems' (id.), namely: *existence, identity, structure* and *content* (pp. 1-2). According to Raz it is the first and second of these that are crucial to the theory, 'since existence and identity criteria are a necessary part of any adequate definition of a legal system' (p. 2).

From a conceptual point of view however, it is the second and third of the four – identity and structure – that are crucial. In fact, what I have been calling "identifying criteria" have more in common with structure than with identity, and even as Raz stated them, the two are clearly more linked than he indicated:

> (2) The problem of identity (and the related problem of membership): What are the criteria which determine the system to which a given law belongs? These are the criteria of membership, and from them can be derived the criteria of identity, answering the question: which laws form a given system?

(3) The problem of structure: Is there a structure common to all legal systems, or to certain types of legal system? Are there any patterns of relations among laws belonging to the same system which recur in all legal systems, or which mark the difference between important types of system? (*Concept of a Legal System*, pp. 1-2)

(Had Raz been in a more constructivistic mood, he might have noted that any distinctions in types of system could only *derive* from differences in patterns of relations within them.) Those questions are closely linked in the sense that from (2) and the statement that 'every law necessarily belongs to a legal system' (p. 1), it follows that the structural orderings in (3) *are* (or at the very least form part of) the criteria of membership/identity. How?

As Raz defined it, 'The problem of identity' is 'the problem of finding a criterion determining whether a given set of normative statements is a complete description of a legal system' (*Concept of a Legal System*, p. 187). But with minimal sharpening, this leads to the same basic conception of identification as I have been using, i.e. the need for *contextual* definition or characterisation of legal concepts through *system-membership*.[22] The particular way in which Raz tried to solve this problem (that is, through individuation and momentary legal orders) is largely irrelevant for present purposes, and in any case it does not loom large in mainstream positivist thinking on the subject of legal systems. But the general shape of his theory, insofar as it is "Hartian", is of importance.

Raz's criteria of membership rested on the idea that a given normative system *describes* part of some momentary legal order *M* (though the fact that it is momentary is not significant here). He formulated the general idea thus: 'A set of normative statements is a complete description of a momentary legal system if, and only if, (1) every one of the statements in it describes (part of) the same momentary system as all the others, and (2) every normative statement which describes (part of) the same momentary system is entailed by that set' (*Concept of a Legal System*, p. 189). Given that this identifies a momentary system, one of the criteria of *membership* must be that 'if a normative statement is entailed by a set of normative statements, then it describes the same system as is described by the set' (id.). This forms the "iterative" component of the criteria for membership, and if the chain of thought is reversed, yields up component (2) of Raz's criteria for identity of the momentary order. But Raz went on:

The difficulty in finding a [master] criterion of membership is in discovering a condition for a given normative statement partly describing the same system as a given set of normative statements, even though it is not entailed by it. (pp. 189-190)[23]

There, one may say, is the rub. No one had done more than the Hartian school to show the untenability of Kelsen's project of building a legal system wholesale from nothing but 'principles of origin'; Raz had done enough in pages 93-185 of *Concept of a Legal System* to satisfy himself that all such approaches end in blind alleys. Therefore, Raz concluded, displaying one of the more unfortunate tendencies in the positivist school, the non-iterative component must correspond to something *empirical* — such as a principle of 'authoritative recognition' (p. 190). Some ten years earlier Hart had promoted something similar in Chapter VI of the *Concept of Law*; MacCormick also was later to take a similar view. This empirical component, of course, is just the "hidden" element of the identifying criteria above (i.e. the means of selecting non-entailed laws under (1)), with its emphasis on *description* of the contents of the momentary order. This means that the membership-, and hence identifying, criteria for legal systems will be at most semi-iterative.

The fact that the positivists retreated at this point in the direction of empirical reports (e.g. of what an authoritative person has enacted) is significant. Their view of legal systems, it will be remembered, was premised on the idea that one must identify them by virtue of certain properties or characteristics they possess, in various degrees, that other systems do not, or not sufficiently. Raz had realised quickly that this would always amount to some form of restriction on membership of those systems, and so the weight of the positivist account rested on the ability to come up with suitable criteria for membership, and hence, identification. But it is worth emphasising that the appeal at the crucial point to factual grounds (of membership) undermines this.

The fundamental point is that what was needed was some *conceptual* means of identifying legal concepts, as it happens via legal systems. The positivists knew better than anyone that this need not be recursive, but it does need to be semantic, since in basing the notion of legal concepts on the general notion of legal systems, they were effectively stating that it is the (semantic) performance of a concept — the role it plays in reaching decisions — that marks it off from the rest of the non-legal universe, just as the systems themselves are marked off in virtue of the way they are structured for use. Legal concepts are therefore a particular type of institutional concept. The emptiness of the appeal to authoritative pronouncement is evident from the fact that it does nothing to discriminate between the case where the

"authority" in question introduces e.g. a new asylum law, or amends the Roads Act, and the case where the authority enacts a new "law" to the effect that 'Cleanliness is next to Godliness'. In other words, the empirical ground cannot prevent the influx of provisions that *are* normative but are certainly odd candidates for *laws*, in the form 'It is hereby enacted that — ' followed by any generally stated *normative* phrase you please, such as 'Lying is wrong; it is almost as bad as cheating', or whatever. Law, as Raz well knew, is not merely institutionalised morality. (cf. his 'society of angels' example at pp. 159-60). Nothing in the above account gives us the elusive *conceptual* means we are after of distinguishing legal concepts from other normative- or institutional concepts, such as those of ethics or politics. (This refers back of course to Position I sceptic's point for a borderline case like international law.) Why do such counter instances arise?

They arise because there is nothing in the positivist criteria to prevent us from picking out *any* category of normative concepts, suitably rephrased, to take the place of laws. The reason is obvious enough: Raz's painstaking analysis of normative uses of language in *Practical Reason and Norms* had emphasised the fact that there is nothing present at the syntactic level to separate legal rules from rules of chess, etiquette or whatever: all statements of this kind share essentially the same syntactic forms, so the only thing that differentiates them is their respective *settings*. At the beginning of his book, Raz had asked himself what it is that makes a rule one of English law but not e.g. of French law. His response was not, revealingly, anything to do with epistemic conditions or grounds of belief; it was given purely in terms of semantic criteria:

> Such statements testify to a conception by which certain groups of norms are more than haphazard assemblages of norms. Normative systems are understood to have some kind of unity. I shall explore a few kinds of normative system and show how their unity consists in certain patterns of logical relations among their norms. (*Practical Reason and Norms*, p. 9)

Raz's "key concept" for the analysis of rules was, famously, the notion of 'reasons for action' (*Practical Reason and Norms*, p. 12). But at every stage he was keen to point out that what was important from the point of view of analysis was the semantic structure of the corresponding concepts, not any mere arbitrary 'practical' grounds. ('Reasons, on this view, are relations between facts and persons. In other words, expressions of the form '. . . is a reason for . . . to φ' are sentence-forming operators on ordered pairs of fact-designators and

singular expressions designating persons' (p. 19).)[24] At the same time, 'Rules [. . . .] are of a variety of logical types' (p. 9).

The 'logical types' in question are just the various syntactic categories — duty-statements, permissions, empowerment norms etc. — to which normative statements correspond. As Raz was well aware, no amount of tinkering with the syntactic categories could produce grounds from which *systems* could be characterised, or their membership-conditions altered: rules of chess 'are rules in the same sense as any other rules' (p. 113) — whether of morality, law or whatever. There had in any case always been a reasonable degree of catholicity within the positivist school as to what constitutes the forms of legal expressions. Though the emphasis had been on rules that impose obligations, Paulson later reiterated Kelsen's arguments for the existence within legal systems even of non-deontic norms, viz. empowerment norms ('An Empowerment Theory of Legal Norms', 1988 *Ratio Juris*, p. 61). Given this populous democracy of candidates for legitimate forms of legal expressions, it would be useless to try to draw a non-arbitrary line between forms which could, and forms which could not, be used to represent legal expressions.

Because we cannot use semantics to drive out the syntactic categories, Raz's inclinations led him back to the (semantic) notion of system *structure* to explain the distinction between legal systems and games:

> My main purpose in discussing games is [. . . .] to show *in what way the rules of a game form a normative system* and to contrast this with a different type of normative system to be discussed in the next section [. . . .] The point to bear in mind throughout this discussion is that to explain the nature of games one must go beyond the rules of the game to their underlying reasons. (*Practical Reason and Norms*, p. 113, emph. added)

Raz's perfectly correct intuition was that it has to be *semantics*, in the form of criteria for system-membership (or internal ordering-relations), that distinguishes legal concepts from other sorts of concepts, and nothing in their syntactic form.[25] The reason for the counter-instances is therefore plain: Because system-membership criteria must bear the full weight of the identification of legal concepts, to import an empirical ground, in the form of a source of law based on authoritative pronouncement, is to open the flood-gates to *any* category of statement that the authority allows. In other words, in asking an *empirical* ground to function as a *conceptual* one (i.e. as part of the identifying process), there is nothing left within the semantic resources of the system to distinguish between regular examples such as the roads

acts and nonsense ones like 'When the traffic lights are green, think of Vienna' (as an example of a conditional order) or 'Government officials may regard Monet as a great painter' (as an example of an empowerment).

A natural reaction would be to suppose that if restrictions were placed on the empirical element — that is, on the sorts of normative concepts that are open for use — this would do enough to rule out recalcitrant examples. This could be achieved by tightening up the requirements on recognition, via form and characteristics, of which normative expressions are admissible as legal concepts, perhaps in terms of their institutional- or practical consequences. But this just reiterates the essential point that any modifications on entry criteria will be *conceptual* in nature, and it still wants demonstrating (or at least arguing), in view of the above considerations, that the right amount of deontic subtlety will furnish the distinction we are after. Even supposing it could, perhaps by expanding syntax into the area of institutional consequences, the apparent complexity with which the relevant standard would have to be formulated, for each category of expression, would suggest that any such criterion would be of too recondite a character for the ordinary speaker to comprehend it.[26]

The argument is anyway in trouble because, even supposing such a criterion could be provided (i.e. one that derived principally from classes of expressions themselves rather than the systems of which they form part), as soon as restrictions are placed on the candidate expressions in this way, one begins to lose systems, such as international law, which lack "crucial" features such as sanction-clauses or any properly worked out institutional consequences in the face of non-compliance, whose title to be called "legal" systems it was the positivists' original intention to uphold. What, exactly, is happening?

What is happening is that the approach to legal systems that understands them as constructed out of identifying criteria appropriate to the construction of legal concepts, has just reduced itself to absurdity.[27] The need for such criteria arose because of the reasonable-looking conviction that legal statements must address a particular subject-matter if their content is to be held apart from merely political or ethical standards, which may themselves be rule-governed. More than that, the idea that the teaching of law is not just about teaching a style of reasoning with normative and factual standards, but is about instilling a knowledge of *the law* (in the same sense as one *learns* mathematics, not just how to prove theorems), has a grip on the mind that requires considerable argument to remove. As Scobbie put it for the case of international law:

It is perhaps an oddity that [Koskenniemi and Kratochwil] maintain that international law somehow isn't: Mr. Koskenniemi eliminates it as a category whereas Professor Kratochwil reduces it to a style of argument. Both of these conclusions would appear to be wildly reductive [. . .] If international law is eliminated then international disputes can only be settled by 'the *ipse dixit* of an interested party' or, should third party resolution be sought, by the 'sorte d'anarchie juridique' employed by President Magnaud of the Tribunal of First Instance of Château-Thierry at the turn of the century. He disregarded law and doctrine and decided as if he were the incarnation of justice on the basis of his subjective appreciation of the merits of the case and of the parties. With reference to the latter option, to eliminate an indeterminate rule of law is simply to consecrate a judicial rule of thumb. ('Radical Scepticism', pp. 361-362)

In order to supply the necessary framework within which it is possible to distinguish the linguistic acts involved in legal reasoning from the actual system they address, there must at least be concepts suitable to the purpose. As we saw, the identification of those concepts must be in terms of their semantic character, which in turn can only be given by noting their behaviour with respect to the "internal logic" of the system. In order for knowledge of law to go beyond the mere ability to construct legal sentences, there must actually *be* a network of concepts whose various inter-relations we can identify and discuss and debate over. In other words, there must be a (legal) system about which we can make true or false statements and occasionally more or less likely ones, and in virtue of which those statements are true, false, likely or whatever. This need not issue in a thesis of realism,[28] but it must be an anti-realism at least as strong as Intuitionism if the gap between the sentences and the legal "facts" they describe is to be preserved.[29]

Put in less colourful language, the appeal to identifying criteria for legal concepts is just this appeal to the seemingly reasonable intuition that, to be able to pick out legal systems from other, non-legal ones, one must be able to point to a difference in internal logic or system structure: Legal systems are just those systems with a particular kind (or perhaps *family* of kinds) of internal logic. Again, the need to distinguish our recognition of, or ability to derive, the relations holding between the various legal concepts from their actual obtaining as a matter of semantic fact — a distinction essential for keeping psychologistic considerations out of law — need not depend on platonic standards, but it does need to rest on intersubjective standards, so that we *are* committed, in some cases at least, to certain conceptual outcomes on the basis of given operations on given legal concepts. To abandon the idea of identifying criteria, therefore, is to abandon the idea that legal systems are

distinguishable from any other kind of system dealing in normative relations, and correspondingly that the "subject-matter" of law is anything but an indistinguishable part of the combined subject-matters of all such systems. The positivists' legal systems, according to their own criteria of recognition, were therefore clearly not what the positivists thought they were. They had constructed *something*, to be sure, but what?

III: What is "law"?

3.1. Definition and Criteria

By the end of the book that was based on his doctoral dissertation, Raz had effectively shown that law is *not* a Sorites concept. His attempt to deal quasi set-theoretically with the standard core model of a legal system had established that there was no obvious or settled way in which it could be semantically identified. Of Raz's two identifying criteria explored above, we have already seen the inconclusiveness of criterion (1) (semantic and empirical grounds of membership) for borderline cases; but the considerations above show that (2) (membership by entailment) fares no better, even supposing the relevant notion of entailment can be precisely defined.

The plurality of syntactic forms required for the expression of law had shown that attempts to restrict the type of expressions used in legal statements would not produce any useful advance in the search for identifying criteria. There are, of course, recognised (if sometimes controversial) procedures for characterising entailment relations between various kinds of normative expression, so the idea that legal systems (and concepts) could be identified is tantamount to the claim that there is a specifically legal way of handling such concepts, presumably in the form of an idiosyncratic set E of entailment relations, some of which may well be typical of several or all branches of normative theory: it is their particular *combination* and inter-relationship that is special to law. Let us suppose that this inter-relationship (meaning, roughly, the conditions under which the various forms can be applied, relative to each other) can be characterised by extending the set E into an abstract algebra $\langle E, \varphi, f \rangle$, which we may denote $\overline{E}$ (where φ is the set of possible orderings and f a function from φ into $E \times E$). Then $\overline{E}$ will be the internal logic of the system.

Now the procedures of entailment under Raz's criterion (2), by definition, describe only *part* of the system because there are non-entailed, or non-formally entailed, elements of the

system under (1).[30] Because (1) includes these elements as well as those of (2), we know that (1) contains *at least* the system, i.e. it is at least as big as $\overline{E}$, and, because of the way it is defined, (2) ⊆ (1). But we also know that, for (1) to contain elements of the system that (2) cannot account for, it must contain an empirical element, i.e. something that does not appeal to any relations that could be characterised purely semantically (because if it could be so characterised it would be in (2) or (2) could be extended to fill the gap). This leads to a situation in which (2) is not enough to describe a standard legal system (i.e. it is less rich than $\overline{E}$ which, by definition as the identifying criteria, is capable of recognising all and only legal concepts), but (2) ∪ (1) is too big, because it lets in too much; so because (2) ∪ (1) contains non-semantically characterised elements, (2) ∪ (1) is bigger than $\overline{E}$. With little extra machinery this is to say that there is no such thing corresponding to the intellectual construct $\overline{E}$, that is, no specifically legal system-structure that could account for the concept of law.

The proof rests, of course, on the inconsistent definition of $\overline{E}$, which is supposed to delimit all and only legal concepts belonging to some system by semantic means alone. By proving that there is no such concept, we are proving that semantic considerations *in the form of identifying criteria* (or membership restrictions) cannot lead to a specification of just those concepts.

What the positivists had been after was some principled means of deciding whether given borderline systems should be reckoned legal or not. Their method for doing this was, as we saw, to "identify" a paradigm case and classify non-standard cases according to conformity with its criteria. This method of deciding was not supposed to be logical, but it was supposed to be rational or at least non-arbitrary. But directly because the cognitive criteria of recognition could hardly be logical in the case of borderline systems, this raised the spectre of our relative inability to account for the reasons *why* certain systems should be counted legal. The question was, how far did the cancer spread? Or, to put it differently, what was there to prevent it from spreading into the heart of the spectrum of available cases?

Hart, for whom law *was* a Sorites concept (cf. *The Concept of Law*, p. 4), was probably unaware of the problem. Raz was aware of it, but his entire response was to advise that 'When faced with borderline cases it is best to admit their problematic credentials [. . .] and leave it at that' (*Practical Reason and Norms*, p. 150, quoted above). But this is, as seen, a rather thin response in view of the fact that the positivist criteria give us no better conceptual

grounds for our apparent recognitional ability in "standard" cases than it did in the borderline ones. How did this paradoxical situation arise?

It is not difficult to find the answer. Following their unassailable conviction that any non-psychologistic cognitive ability to account for the evident differences between various modes of reasoning, such as legal- and ethical reasoning, must arise out of *semantic* differences at the conceptual level between the various subject-matters which the various modes of reasoning address, the positivists were led, via the apparent necessity of classifying concepts contextually, to the fairly natural assumption that legal *systems* are semantically distinguishable from other sorts of system. The incidences of doubtful cases strongly testified to the probability that such differences may well fall short of constituting a semantic natural kind, but it did seem plausible that one should be able to point, as Comparatists had been happily doing, to various "families" of systems linked by resemblance. And what else but structure and internal logic could form the basis of the resemblances that constituted the families, and furnish the differences which would keep out the systems that are not family members?

In fact, the positivists had mis-described their project, or at least misled themselves over the nature of the tools to be used in the endeavour. As the struggle with $\overline{E}$ showed, the key notions of identifying criteria, system-membership, internal logic and so on, which were used to try to separate out legal systems, or legal uses of concepts, from those that are not legal, were all essentially *logical* in nature. But as the positivists well knew, logical operations are far from exhausting all of the concept-forming operations that are open to us when speaking a language, and it is certainly unlikely that our knowledge and reasoning about law is capable of representation in the form of a logic. These and similar intuitions within the positivist account were bursting out of their analytical framework, as the necessity of falling back on "factual" and "intensional" grounds, such as social practices, critical reflective attitudes etc., showed. Was there then *nothing* in our use of legal concepts that could help to disentangle the foundations of legal reasoning from those of other forms of (practical) reasoning? In order to see if this is so, it is necessary to examine certain semantic properties of sentences.

3.2. Use and Force

It was Wittgenstein who first introduced the philosophical (and legal) community to the fundamental importance of considerations of *use* for the theory of meaning. But as he was well aware, there is more to the use of concepts than the enumeration of the assertability- or

proof-conditions of a given sentence. Indeed, it had been the Logical Positivists' fallacy to assume that to every sentence there corresponds a uniquely determined empirical content against which the sentence is verified for truth or falsity. That view had led to (and in fact, had emerged from) a stale atomist philosophy in which each sentence was a separate semantic unit whose meaning had nothing essentially to do with its neighbours in the surrounding language. Now, sentences are certainly *significant* semantic units, principally because they are, in general, the smallest semantic unit by which we can "mean" anything (that is, "make a move in the language-game" as Wittgenstein put it). But in assuming that each sentence means the fact or facts by which it is verified, or in virtue of which it is true regardless of our capacity to verify it, the atomists entirely ignored the contribution to meaning of the underlying language from (some part of) which the sentence emerges (is constructed), as if a single sentence could exist quite on its own. The consequence of this is worth recalling:

> The means of verification must therefore be described independently of the use by the subject of any other sentences; it had accordingly to be taken to consist of one of a set of sequences of sense-experiences. This obviously yielded an account of meaning bearing no recognisable relation to what is actually involved in a speaker's understanding of a sentence. (Dummett, 'Language and Truth', *The Seas of Language*, p. 138)

In any case, a semantics would be automatically ruled out that could not describe how we come to recognise new sentences, composed out of old terms, that we have never seen before.

Frege was the first philosopher to be able to solve this problem, by revolutionising, via the "Context Principle", the way in which we regard the process by which linguistic expressions are formed. Again, Dummett's reconstruction of the general import of Frege's principle is worth quoting:

> we have first to categorise words and expressions according to the different kinds of contribution they can make to the sense of the sentences containing them, and then give, for each such category, a general account of the form taken by the semantic rule which governs them [. . . .] Thus, on Frege's account of the matter, we cannot grasp the sense of a word otherwise than by reference to the way in which it can be used to form sentences; but we understand the word independently of any particular sentence containing it. Our understanding of any such particular

sentence is derived from our understanding of its constituent words, which understanding determines for us the truth-conditions of that sentence; but our understanding of those words consists in our grasp of the way in which they figure in sentences in general, and how, in general, they combine to determine the truth-conditions of those sentences. (Dummett, *Frege: Philosophy of Language*, p. 5)[31]

The immediate consequences of taking a sentence as true or false therefore include a commitment to certain outcomes for other sentences of the language, or to put it the other way round, the truth-conditions of a given sentence are at least partly determined in virtue of the meanings of certain other sentences, in general those of lower complexity than the given sentence.[32]

But Frege had also recognised components of the meaning of a sentence that do not directly concern truth-value, and his corresponding distinction between the components of meaning that matter for truth (i.e. sense) and those that belong to this second category, *Tone* (cf. Dummett, *Frege: Philosophy of Language*, Ch.1), was on the whole overshadowed by his more celebrated distinction between Sense and Reference.[33] Dummett, in particular, later reiterated the point as a need for a theory of *force* as a component of linguistic meaning (cf. Dummett, *The Seas of Language*, passim). The (legal) positivists had, of course, been aware of both points, or if they had not then they at least observed them in practice through their respect for "ordinary usage". However, though Hart, Raz, MacCormick and others had used "force elements" in the shape of internal statements, statements from a point of view, *Verstehen* and so on, in the evaluation of legal statements, they had largely failed to apply these insights to the analysis of legal systems and legal concepts — in effect restricting them to a role as heuristic principles designed to enhance understanding of the import of legal statements *after* the relevant categories (of concepts, systems and so on) had been constructed and assumed settled. In other words, the "heuristic" principles played little if any part in the *determination* of those concepts and concept-ranges, the determining of which formed the central problem of this chapter. (In this context "truth-conditions" are simply replaced by a suitable notion of "legal concepthood" i.e. the conditions under which a concept is one of law. In fact, the impact of force considerations could have resolved the positivists' problems on this matter at a stroke.

The first thing to notice is that an appeal to linguistic force (of some expression) is not an appeal to any intrinsic semantic property of concepts. Because it is readily understandable as concerned with established linguistic practice, there is no need for the force of an

expression to be considered as anything more than intersubjective convention (though it must be at *least* intersubjective). The way in which speaker's intention and speaker's knowledge fit into general semantic theory is of course a complex matter;[34] however, one can gain a general impression of at least part of its import if one reflects on the character of the syntacticist stage of mathematical Formalism.

Formalists had viewed mathematical activity as consisting in the formal derivation of consequences, at the metamathematical level, of some axiomatised set of mathematical statements. As Dummett helpfully illustrated it, for syntacticists, 'nothing is assumed about the form which an interpretation might take. The formulas of a mathematical theory do not in themselves bear even a schematic relation to sentences which can be used to make assertions, true or false, any more than do, say, the steps of a dance: if an interpretation can be put on them which establishes such a relation, that is no concern of mathematics, any more than it would be of choreography' (Dummett, 'Platonism', *Truth and other enigmas*, p. 205).

Russell had succinctly dismissed such a project as irrelevant on the grounds that it could never hope to explain anything about mathematical *practice*; in particular, counting:

> This theory [. . .] had the disadvantage of failing to explain the application of numbers in counting. All the rules of manipulation given by the formalists are verified if the symbol 0 is taken to mean one hundred or one thousand or any other finite number. (Russell, *My Philosophical Development*, p. 82)

One could, in other words, construct a proof-theory on some standard axiomatisation of set-theory, and even go so far as proving the derivability of an infinite string of symbols Λ, {Λ}, {Λ, {Λ}} {Λ, {Λ}, {Λ, {Λ}}} [. . .], but in the absence of an interpretation, there is nothing to say whether these strange symbols stand for the Von Neumann ordinals, tables chairs and beer mugs, or nothing at all.[35] A set of rules for manipulating symbols, therefore, falls well short of a *language*, in that one cannot assert anything, question anything, command, hypothesise or wish anything, any more than one can with the steps of a dance.

Hart, of course, was well aware of the need for a semantic *interpretation* linking symbols to actual meanings. His famous example was of a game of chess, and what I am here calling "force" is simply what one learns about chess when one learns that there is more to it than just a series of regular moves on a board composed of coloured squares. One can readily imagine a purely formal (i.e. uninterpreted) game of chess: the various pieces would be the

primitive symbols, their respective movements the rules of inference (or, more abstractly, algebraic functions), the board the universe of discourse and each possible scenario a theorem, i.e. a valuation or "model" of chess. But one could, in principle, know all this and yet not be said to know how to play chess, because understanding chess involves understanding the crucial notions of "game", "winning" and "losing", which cannot be taken account of by just the definition of "valid move" or "sequence of valid moves". In particular one would lack any understanding of the *purpose* behind a given move (or for making one at all), or for making one (valid) move rather than another (valid) move. To borrow Russell's argument, the formal rules of chess are compatible with our playing to win as normal, for first checkmate, for annihilation, for numbers of pawns turned into queens, or any other permutation imaginable. And the relevant notions of "game", "winning" and so on (and the importance under the notion of game of playing to win, on the vast majority of occasions) are exactly the "force" notions required, which are not to do with truth-conditions (i.e. the elements of the sense of an expression that connect up with its reference) but which, broadly speaking, matter for tone and therefore for meaning.

If one can call chess a "system", then the purpose to which that system is put (here, playing a game) holds one important key to its meaning. (If the outcome of chess games were used to decide guilt or innocence in courts of law, its meaning would be radically different.) As Raz had said, 'The point to bear in mind [. . .] is that to explain the nature of games one must go beyond the rules of the game to their underlying reasons'. The same is true of legal systems, which again the positivists knew, but did not apply to the *construction* of the relevant categories. The force-elements, as noted, functioned only as heuristic aids to facilitate understanding of the practical import of legal expressions, concepts and so on. But the concepts themselves were, as we have seen, assumed defined in virtue of much narrower semantic principles basically reducing to system-membership. The fact is, however, that there need be no such extra restriction, via the notion of identifying criteria, on the concepts themselves in order to explain their legal character. Nor, as it turned out, *could* there be, on pain of circularity or the total (eventual) collapse of the idea of "legal concept" (or of "identifying criteria"). Correspondingly, the theory and practice of law do not require the concepts used in legal reasoning to form a specifically legal domain or subject-matter. All that matters is that the relevant collection of concepts of *whatever* semantic character be *used* and *regarded* as a system of law, i.e. one used for legal purposes rather than political ends or, perhaps, diplomatic ones.[36]

This returns the discussion to the point made earlier, that a system of law need only be justified as such on the grounds that it is best explained as legal rather than anything else: the notion of a "legal system" can remain as vague as ever. This does not, however, resuscitate the whole positivist theory of the nature of legal systems, because in particular it involves giving up the notion of a paradigm case which is intrinsically more law-like than systems dissimilar to it. As I argued in that context, there is no need for supposing that international legal practice must justify itself on the basis of a municipal law model, simply because there is no reason to accept (and many reasons to doubt) that a single theoretical framework can effectively account for the concept of law. One must give up, in other words, the notion that certain systems are "distinctly" legal.[37]

3.3. Closing Remarks

The line of analysis I have suggested, in terms of the use to which concepts are put, rather than the line the positivists actually took, seems in fact to be the most natural development of the (mostly) perfectly respectable intuitions and ideas that formed the philosophical standpoint from which the Hartian school had started. It is, in addition, tempting to say that the "official line" on legal systems, and on the status of international law, was the product not so much of a wrong view of those systems as much as of the unfortunate way in which they chose to express that view (or views).

Such temptation should, however, be resisted. The problem with the positivist conception of legal orders, such as I have identified it, goes beyond cosmetic issues of presentation. It concerns the extent to which the positivist school, like others, had neglected the foundations of legal reasoning and their fundamental importance to the legal enterprise, and misunderstood (though it is hard to know whether this is the cause or the result of that neglect) both the importance and the significance of the semantic doctrines on which they rested, based on developments in the philosophies of language, logic and mathematics. The result of this was, in effect, to become modern institutional positivism, which as I intend to show in the next chapter is basically an attempt to account for the foundations of legal reasoning (legal systems, and legal practice) in terms of the kinds of facts of which they are composed and to which they give rise.

Since just such a foundational account of legal reasoning is essential to understanding the particular case of international law, the next three chapters are concerned with foundational issues of this sort. A study of these matters will be best approached via the Institutional

Theory of Law (ITL), both to uncover the truth in its responses to foundational questions, and (hopefully) to avoid the elements of the theory which caused it (in my view) to fail. Though in particular Ota Weinberger's ITL represents probably the most semantically enlightened treatment of the foundations of legal reasoning within the positivist school, ITL was, as I hope to show, neither the first nor the last time the positivists would confuse semantics with ontology in the pursuit of foundational issues.

2

Philosophers on legal knowledge (I) — institutional foundations in legal thought

The most distinctive feature of the crisis of *modern*, legal philosophy is the conflation of subject and object, the knower and the known, and, with it, any assured legal method or technique. For instance, the deconstruction of legal texts through some undefined, "spontaneous" exercise in immanent critique assumes, even if it does not express the fact clearly, that there is no more than the knower to consider. The "known" is simply what he produces or participates in. In the context of international legal discourse this means simply a language which mirrors the ontological anxieties of its subjects. (Carty, 'Recent trends in the theory of international law')

I am interested in judicial decision-making and its constraints, that is the duty to decide any properly presented case. This is an institutional framework [. . . .] and in this sense one may refer to law as institutional fact. (Wróblewski, 'Problems related to the one right answer thesis')

0.1. Opening Remarks

Alberto Coffa once defined Logicism in terms of an enemy, a goal, and a strategy ('Kant, Bolzano and the emergence of Logicism', *The journal of philosophy* 74 (1982), pp.679-89). The same may be said for the Institutional Theory of Law, issues arising from which form the main subject of this and the next chapter. In this case, the enemy was, broadly speaking, Reductionism; the goal that of presenting an ontological account of law sufficient for legal practice whilst avoiding incredible theses about impossible objects; and the strategy was to cast talk about law in terms of "institutions" and "institutional facts". This chapter is devoted, in essence, to a discussion of problems with that strategy which prevented it (in my view) from reaching the goal. The next, chapter 3, is an attempt to show that there is, nevertheless, a very simple way in which that goal could have been achieved. The important details of that account are then explored and fully developed in chapter 4.

In chapter 1, I raised three questions concerning the foundations of legal reasoning: (1) whether international legal reasoning really is a species of *legal* reasoning; (2) whether the latter notion makes clear sense at all; and (3) what the foundations of such a practice, and the knowledge on our part it embodies, are (Ch. 1, p. 4). I argued that the proper order of explanation is (2) → (3) → (1): a correct account of reasoning in international law must be rooted in a proper view of what constitutes legal knowledge. In chapter 1 I therefore examined (2) and returned a qualified affirmative. For the next three chapters the primary concern will be the character and foundations of our knowledge of law, that is, with (3).[1]

Since the entire practice of legal reasoning is conceptually dependent upon our knowledge of its targets (i.e. of the law), until we are clear about such matters we shall be powerless to account for the particular case of international legal reasoning which interests us.[2] But what is the character of that dependence, and in what does knowledge of the targets of our statements and propositions about the law consist? One of the most developed attempts within the positivist school, to address the central foundational questions, is the Institutional Theory of law (ITL).

The main purpose of the next three chapters is therefore to consider ITL in detail, and to assess, in the light of what that theory has to say about the foundations of legal reasoning, the best form for a general account of legal knowledge to take. Based on those considerations, I shall offer (in chapter 5) what I think is the best way in which to view the foundations of international legal reasoning. As will be seen, the Institutional Theory grew out of the positivist tradition principally in order to answer the question how knowledge of legal entities is possible. An important part of this question concerns the nature of those entities and their link with the conceptual machinery used in effecting talk about them. This question falls to be discussed in chapter 4; for the moment, the issue of knowledge is of most concern.

I: MacCormick, Weinberger, and institutions in municipal law

1.1. Introductory

Proponents of the Institutional Theory of law, no matter which system it is applied to, have always prided themselves that ITL simply gives theoretical expression to the assumption centrally behind black-letter approaches to law (MacCormick and Weinberger, *An*

Institutional Theory of Law, pp. 1-2). That is why so many proponents of ITL, like MacCormick, tend to think of ITL as being as commonsensical as legal theory can get:

> ITL offers [. . . .] a suitable theory of knowledge for legal dogmatics ('black letter law') as a wholly respectable and indeed valuable domain of humane [sic.] knowledge. What [ITL] would not support would be the claim that there is any justification for a legal dogmatics pursued in complete abstraction from legal theory and from the sociological appreciation of the conditions and consequences of actual legal forms and institutions. 'Legal science without consideration of social reality is', as Weinberger puts it [. . . .], 'unthinkable'. We hope that this will be recognised as an underlying *leitmotif* for our whole approach [. . . .] For what we seek to do, *inter alia*, is to resolve a fundamental ontological problem in the face of every sociological or doctrinal approach to law. (*ITL*, p. 7)

> The fundamental problem is, of course, normativity. Any successful theory of law must account for the normativity of legal rules, which means recognising that those rules cannot be stated merely in terms of "brute" facts, such as the occurrence of strings of symbols on a page of legal text or the existence of certain psychological dispositions in the minds of people (pp. 4-6). Any such approach would involve 'inevitably a reductionist sociology and therefore a contestable sociology':
>
> > Since the critique of legal dogmatics and normativist jurisprudence is founded on the charge that they reify non-existent entities, it follows that the prescribed sociology of so-called "law" would necessarily avoid using in its explanatory theses any reference to norms or the normative conception of law. (p. 5)
>
> What the Institutional Theory is dependent on is, of course, a notion of *social* or *institutional* fact, in which various legal concepts are involved. Legal argumentation, even in the case of international law, is therefore about something real, viz. "law". At the most abstract level, the Institutional Theory requires the handling of concepts through the faculties of ordinary language. This requires *prima facie* the superimposition of a semantic dualism over the field of inquiry, such that normative concepts are explained in terms of their normativity and not subjected to atomistic reduction to real-world entities with which those concepts share no logical relation (p. 5).

1.2. The defeat of reductionism

ITL stood firmly out against the idea that law, or any normative phenomenon, could be explained in terms of pure fact. Anti-normativity theses were thus promptly rejected by MacCormick and Weinberger as being reductionist enterprises that are obliged to dissociate the analysandum from all reference to norms and the normative conception of law. Such enterprises, they said, have the result that, first, many concepts that are ordinarily thought intelligible to us must be abandoned, and secondly, any alternative conceptualisation would itself stand in need of explanation. Attempts at such explanation would, moreover, amount to an informal *reductio* of the reductionist enterprise, even supposing it could be carried through:

> These concepts so re-defined would bear only a chance relationship, if any, to the concepts we currently deploy by using the terms mentioned [. . . .] A sociological approach such as that of Max Weber, a sociology which assumes the necessity to use concepts with understanding (*Verstehen*) in the same sense as that in which they are intelligible to social agents, could have no truck with such reductionism. (pp. 5-6)

This point, which should be familiar from Hart's writings, basically reiterates the now standard view that legal action or rule-governed action of any sort cannot be exhaustively described in purely behaviouristic terms. Taken as such it has both an epistemological and an ontological component.

The epistemological point is the familiar Hartian one about the need for an "internal aspect" on the interpretation of legal norms and normative statements generally. Any account of legal reasoning that missed the significance of norms in reaching legal decisions would be as pointless as an account of chess without the notion of winning and losing. Certainly it would be powerless to explain the significance of argumentation pertaining to, say, the status of the common heritage principle in the current law of the sea. Indeed, without a conception of normativity it is unlikely that we would even establish a foothold on what the argument is *about*. The ontological point, though implicit in Hart's writings, is drawn far more starkly in ITL where it is made to play a significant role in the foundations of legal reasoning: if normative theses are not *understandable* solely in virtue of behaviourist (or other non-normative) characterisations then norms must exist, if at all, outside the realm of "brute" facts. This purely cognitive criterion thus delivers up exactly the epistemic warrant needed for recognising as valid the existential assumptions present all the time in "dogmatic"

legal argumentation (always granted the little extra machinery that the discourse *is* understood). Talk about norms as real "objects of thought" (as MacCormick often put it) is therefore compatible with our legal knowledge.

The point being made here is essentially semantic, as Weinberger was keen to acknowledge (pp. 32-33), and in their hostility to reductionism MacCormick and Weinberger are in good philosophical company. Though they chose to state the point in terms of the concept of *Verstehen*, that is in terms of our actual understanding ("cognitive grasp" or "understanding as a matter of course" may be better translations) of statements involving norms, it could have been made more strongly in terms of semantic properties of the relevant sentences alone. MacCormick and Weinberger both endorse normative statements as referring to (actual) norms because reduction to a set of brute factual reports will never do as an *explanation* of those statements. So for example, if we want to understand why the United States refused to become party to the 1982 Convention on the Law of the Sea, it is not enough to talk in terms of certain individuals not carrying out the act of appending signatures to certain pieces of paper, nor in terms of other individuals arguing in front of the conference in Montego Bay. Nor is it even sufficient to know the content of those arguments, because until we know what their significance is — what the terms employed in those arguments *mean* — we shall not have the information we need even to begin to understand the US action, just in virtue of that action being normative in its significance.

The point of the epistemic thesis is that the normative content of such arguments can never be restated as a set (however complex) of *factual* statements even about the psychological states of the individuals engaged in making them. This is obviously so, because for example Article 2(4) of the UN Charter prohibiting the use of force by states can be understood (and, in fact, is standardly taught) without reference to specific individuals (even states), their attitudes or their brain-states. Even where reference to subjective elements of state practice is warranted — say, for the purposes of interpretation of the exact content of some conventional provision or customary rule – this is always *supplemental* to (and parasitic on) a prior understanding of the normative provision at issue. An example of this may be seen in the controversy surrounding the 1969 Moratorium Resolution on deep seabed mining. When the group of western states challenged the validity of the G77 nations' argument on the issue whether signing the moratorium amounted to custom-forming *opinio juris*, this could only be settled on grounds of the normative significance of the action (its "norm-relevance"), and not on those concerning either the action itself or even the intentions of

those performing it. Again, the intention of those signing was an integral point of the argument; but although relevant to the issue of custom-formation, it is not decisive. The argument rather *starts* from there, and then proceeds to assess the normative significance of such intentions and such actions within the framework of international law. If this were otherwise, what significance would attach to the subjective opinion of any (bound) actor or, for that matter, persistent objector?

Our understanding (*verstehen*) of statements such as Article 2(4) UNC then, does not seem to depend on auxiliary knowledge of "brute-" factual situations devoid of normative components. Where, as above, factual considerations are in play in determining the content of some law it is because such "facts" *already* contain a normative component and possess corresponding normative significance. It is, in other words, because they are not brute facts but (in the terminology of ITL) "institutional facts". As generalised by Weinberger, this amounts to the familiar claim (dating at least from Hume) that we do not *know* how to derive ought-statements from is-statements.[3] However, by concentrating on the semantic structure of the reductionist's argument, Crispin Wright has shown how we can use that argument to suggest stronger grounds for *rejecting* reductionism that bypass altogether the need for appeal to (possibly contingent, possibly necessary) features of knowledge.

The reductionist's claim is essentially one about meaning: that some range of statements *N* containing reference to normative entities is meaningful only by virtue of being equivalent in meaning to some other range *R*, which contains no reference to anything except non-normative objects or states of affairs. The apparent reference within any particular *N*-statement is thus dismissable as an accidental surface-grammatical feature of *N*-expressions generally, which must be reinterpreted according to the more fundamental forms contained in *R*-expressions. Such an idea is clearly what motivated the early Ross in his treatment of norms as emotive expressions. The more recent work of Koskenniemi too, although his thesis is certainly not exactly what we would call reductionist in any traditional sense, has the same effect as reductionism in attempting to reduce normative entities to (irredeemably indeterminate) linguistic ones. The difficulty for this sort of reductionism comes, Wright said, when justification is sought for treating the right-hand sides of the reductionist's equivalences (viz. the *R*-statements rather than the *N*-statements) as *fundamental*. Precisely because both kinds of statement are supposed to be equivalent, we have no reason, in the absence of any independent criteria, for holding one kind of statement as semantically *prior* to, or more basic than, the other. This is because we are free to argue, via the equivalence

hypothesis, that the contextual paraphrases contained in *R*-statements are merely superficial forms of *N*-statements, containing *implicit* reference to normative entities. If the reductionist insists on there being no such implicit reference, then by the same token it is hard to see what ground there might be for clinging to the hypothesis of their equivalence in meaning. The attempted reduction of norms to some other kind of object therefore necessarily fails.

On the face of it then, ITL offers hope that "dogmatic" accounts of reasoning about international law need not be reduced to anything else, since statements made in the course of such reasoning make indisputable reference to normative entities standardly recognised by persons in the field as belonging to a system of international law. This yields a clear line of sight as to where ITL locates the foundations of international legal reasoning: the relevant unit is the so-called "institutional fact". Since institutional facts are the semantic building blocks out of which ITL's philosophy of legal reasoning is fashioned, it is important to know exactly what they *are*. Fortunately, MacCormick and Weinberger are unusually explicit on the ontological characteristics of institutional facts; *un*fortunately, their opinions are ultimately divided as to what those characteristics are. It will therefore be necessary, notwithstanding their desire to highlight the unifying features of their positions, to consider each account separately to some extent.[4]

Weinberger and institutional theory

One of the striking features of Weinberger's account of institutional facts, and thereby of the foundations of legal reasoning, is its tendency towards semantic realism.[5] This tendency may appear somewhat odd in view of the fact that MacCormick and Weinberger are both legal positivists (of different sorts), whose natural centre of gravity in semantic terms would ordinarily be some form of constructivism. Nevertheless, it is fair to say that once the semantic underpinnings of his account are brought out in the open, realism (or even platonism) — at least with respect to norms — is something approaching what Weinberger's views, at various stages, amount to.

In their joint introduction MacCormick and Weinberger gave a fairly traditional account of the sort of thing an institutional fact must be, in order to discharge its function as a theoretical posit capable of grounding our understanding of certain ranges of statements, without threatening to become something so far removed from ordinary experience that we are denied cognitive access to it. The most common way of accounting for so-called

"abstract" objects such as contracts, marriages or maritime boundaries, is to grant them existence in time independently of any concept we may have of spatial existence.[6] Since this places abstract objects beyond our sensory ability to pick them out, we seemingly stand in need of an alternative account of how we can get acquainted with them. In ITL, the existence of institutions and institutional facts is inextricably linked to *rules* (*ITL*, p. 11).

Particular institutions are existentially linked to a system. Presumably, if the institution is a legal one, then the system will be a legal system; but since a legal system is itself an institution in this sense, the relevant grounds for its existence will lie in a system of *thought*, i.e. as part of a set of rules and conventions which govern human practices (id.). Thus, our access to the objects of legal thought is at least partly mediated by our semantic knowledge of them: 'It is not the concept "contract", "treaty", "competition" or "game" which exists in itself. The concepts are made meaningful and intelligible through conventions and rules'.

This amounts to something approaching Raz's doctrine of "statements from a point of view" (Raz, *Practical Reason and Norms*, pp. 142-144, 175-177), and is again linked to the very plausible idea that what mediates our faculty of access to such things as norms and other institutions is (rule-governed) argumentation, or in the case of the description of a legal system, the exhaustive description of forms of argument presupposed as valid for that system. All such notions — internal statements, the internal aspect, internal logic — are part of the on-going series of attempts by positivists to give substance to the idea of a category of normative entities whose existence, relative to some system, is unproblematic and conceptually straightforward when they can be uncontroversially inferred from some particular system of positive law (or positive morality), but whose existence outside the system is, if intelligible at all, the subject of serious ontological dispute. For any institution or institutional fact belonging to some system, 'If the rules are in force, it does [exist], and if not, not. Institution-concepts thus exist relatively to given normative systems, and determine what institutional possibilities exist within the system' (*ITL*, p. 11).

This evidently makes the normative (i.e. rule-governed) nature of institutions crucial to their existence:

> Institutions and instances of them do not exist as (so to say) free-standing objects in the world [. . .] they exist in the context of and for the purposes of norms or rules which (in complex sets) variously give sense to, justify, regulate or even authorise human conduct in social settings. (p. 14)

The natural interpretation of this is constructivistic: since legal institutions are determined relative to the rule-governed possibilities of some particular legal system, the correct method of investigating international law is not a question of casting one's eye over the international scene in a search for political action to be tested, via some filtration process, for elements which would identify it, though not others, as distinctly *legal* in character — although the comprehensive nature of the sources as framed in Article 38(1) of the ICJ Statute sometimes appears to make it so. All that matters for identification, accordingly, is the entry of some institution via one of the sources, or the possibility of inferring its validity on the basis of the existing content of the system. There is no need of reference to "specifically legal characteristics" that legal norms possess but non-legal ones do not.[7]

This has obvious consequences for an argument like Koskenniemi's, but the point is not without its legal repercussions. A substantial part of the argument over the status and content of the common heritage principle in the law of the sea as it occurred in the late 1970s centred on normative commitments arising from United States action concerning the leasing of commercial contracts for seabed mineral extraction. Though state practice is centrally relevant to the establishment of custom, much of the argument was directed at the *legal* status of the action in the light of extremely vague alternative formulations of the common heritage principle, found in documents ranging from General Assembly resolutions with alleged quasi-legal effects to the press-releases issued by various state departments. Though deployed more in terms of strategic diplomacy than legal rigour, the point is that such arguments, in either direction, could hardly expect to get off the ground if their main purpose was to identify legal characteristics of one sort or another somehow already present in the action, in the same way as, say, Eratosthenes's sieve identifies the prime numbers of surveyable cardinality.

But if system-relativity and the rule-following considerations allow ITL to escape involvement in platonism (at this stage anyway), because the admission of an institution as legal requires *decision* (as opposed to pure recognition, say), why speak of such things as *facts*? The reason offered in the joint introduction is given in terms of the semantic properties of statements about institutions: 'They are facts in virtue of being statable as true statements' (p. 10). The obvious question Position I sceptic will immediately want answered is why such ranges should be taken as *true*; and it is exactly here that Weinberger and MacCormick part company. What is Weinberger's truth-theory?

1.3. Norms and Truth

The semantic pineal gland of both Weinberger's and MacCormick's normative ontology is the notion of *verstehen*. The idea that it is possible to understand existentially quantified normative statements without a component of *verstehen* is, if not unintelligible, then at least false. Full access to ITL's institutional ontology is 'entirely dependent on our being able to give some account of the nature and existence of norms and rules' (*ITL*, p. 14). Because the central semantic notion fundamentally involves, not the idea of rules but the rules themselves (since access to and talk about institutions rests on our ability to use language in a regular way), it must be statable in terms of rules that are not institutional in the relevant sense. To avoid circularity in the explanation of institutions — some but not all of which are rules but all of which are rule-governed — 'There must be some account of the possible existence of rules or norms on a basis of pure convention or custom or at least some non-institutional foundation' (p. 17) yet at the same time preserving their normativity. Weinberger's answer was to link norms with actions, and to construct a complex truth-theory on the basis of the way normative statements discharge their referential function in relation to both the abstract and the concrete components of normative action so construed.

The most significant ontological commitment this raises is the need for 'Practical data (norms, etc.) in the sense of meaningful thought-objects [. . . .] to be distinguished from norms-as-realities — only norms in actual sets of operative action-determinants are facts, constituent parts of reality by contrast with purely linguistic entities or possible objects of thought' (p. 16). This is because '[. . . .] one can properly speak of the real being or existence of norms only on the ground of their relationship to observable processes which are describable as brute facts' (id.). There are thus two components of a Weinbergerian norm that must be understood before their role in legal reasoning is recognised: (i) its 'ideal existence as a thought-structure' and (ii) its 'real existence as a social phenomenon' (p. 32). This distinction seems to correspond to another between the normative *information* by which knowledge of norms is conveyed, and their actual *normativity*:

> Legal knowledge is a matter both of "norm-logical" analysis of the legal "ought" and of recognition of its sociological reality. (p. 16)

Exactly what the relationship between these two components is, is of course a matter for semantics. What should be fairly clear is that Weinberger (and MacCormick) place the foundations of legal reasoning (the manipulation of legal concepts) in *rules* and *actions*.[8] To

understand the significance of this, it is essential to understand the anatomy of a Weinbergerian norm.

Weinberger has always maintained that there is no sense in which a legal norm could be a material entity (p. 33). This is reasonable enough, and any account of the abstract/concrete distinction that made norms qualify as concrete would be suspect as a result. Therefore it is plain that legal reasoning cannot have its foundations in real-world events alone, even when it pertains to a purely customary legal regime. On the other hand, a legal system, especially one like international law, is clearly *linked* to action because we cannot work out its entire content a priori, in isolation from any reflections on state practice; and, more importantly, the notion of normative action itself depends on their being *some* linkage between norms and actions. Until these foundations to legal thought are worked out, an account of legal argumentation cannot get off the ground (in the sense that we would not know how to assess it). If the central notion of *verstehen* is to have any substance at all, we need to have some account of the existence of norms (and our knowledge of them) that does not simply posit a bizarre faculty of intuition of abstract objects.

Weinberger's solution to the problem of cognitive access was to assume that the whole issue rested with the notion of *existence*. The key to a successful characterisation of the semantic pineal gland, Weinberger must have supposed, is a matter of supplying normative entities with the right kind of existence-predicate, that is, of defining reality and existence in such a way that "ideal" entities can have it (pp. 37, 86). Because, as far as Weinberger's semantics could tell, a norm must consist of *two* radically different ontic components if it is to carry out its dual role as a unit of information and a constituent of real action, Weinberger must have seen that the most obvious way to a resolution of the whole set of problems (both ontological and epistemological) lay in the particular method of uniting these two elements of a norm into a single structure.

The essential first step in this direction is the realisation that 'the existence of ideal entities is not without connection to material existence' (p. 38). Any concept of normative existence must therefore be defined by: (a) their composition as parts of real events, and (b) in virtue of that participation, our ability to assign them temporal coordinates (id.). In this respect, in the sense that norms cannot exist without *some* action, they are not "pure" abstract objects:[9] they stand to actions, we may perhaps say, as shapes stand to physical objects.

In his earlier writings on the subject, Weinberger had assumed that this aspect of a norm — its involvement in "social reality" — exhausted the content of existence-claims concerning

it: that its connection with action 'corresponds to the existential aspect of the norm' (p. 44). The problem came when he then tried to explain the first aspect of the norm, its informational component. Having confined all existential commitments to aspect (ii) (what he had earlier called its 'real existence as a social phenomenon') Weinberger took most of the point out of aspect (i) (its 'ideal existence as a thought-structure'). Now all the existence a norm could have, real or ideal, derived solely from its involvement in *action* (at p. 38, Weinberger explicitly claims that a norm's *ideal* existence is determined relative to its social component). But because a norm's ability to convey information is central to its utility in legal reasoning — otherwise we would not make ourselves understood when talking about law — Weinberger put himself in the uncomfortable position, on which the fate of the legal dogmatic enterprise rested, of explaining the content of aspect (i) without the aid of auxiliary existential claims. Exactly what then, we may be tempted to ask, *is* a thought-structure?

Our ability to communicate the normative content of legal statements is of course taken for granted by anyone who seriously claims to understand (for example) the modern law of the sea. Without such an ability there would be no significance attaching to legal statements generally, and certainly no prospect of legal practice as we know it. The notion of a legal system no one could tell anyone else about is as incoherent as Wittgenstein showed the notion of private language to be. The law of the sea is therefore not just a series of (normative) actions (viz., state practice as defined under aspect (ii)), but a discourse on them as well. Legal dogmatics is therefore most easily described as 'the description of legal reality' (p. 43). It is, in other words, 'an attempt to understand and give a complete picture of the law in action by means of a logical reconstruction of it' (p. 42). For such a reconstruction to be possible — i.e. for aspect (i) to be a faithful representation of aspect (ii) — it must be possible for the semantic information contained in (i) to be an accurate reflection of the norm-governed actions in (ii) that are their non-linguistic correlates:

> To describe law in this logical way would be impossible if there were not an underlying connection between the unity of the legal order in our normative thinking and the reality of society. The legal order must be recognised as socially existent positive law, that is as a system having the quality of fact — factual existence. (p. 43)

This is presumably what Weinberger had in mind when he remarked that 'Legal knowledge is a matter both of "norm-logical" analysis of the legal "ought" and of recognition of its sociological reality' (p. 32) quoted earlier. In other words, logical operations on certain types

of sentence are the semantic correlates of "oughts" and other normative properties, which are (abstract) entities in virtue of their figuring in social facts. This characterises the basic relationship between the two components of the Weinbergerian norm, but it falls short of an explanation of it: How can the semantic conception of an "ought" (or of other normative operators) represent something as ontologically different as a ("real") particular rule in the law of the sea, or even the fact that international law recognises, in certain circumstances, things called "peremptory norms"?

Weinberger's strategy was again to characterise the problem (this time, the nature of thought-structures) in terms of their connection with the notion of existence. Giving expression to a norm — asserting its informational component — is to 'be understood as a mark of the existence of real valid norms' (pp. 39-40). Clearly units of information and actual norms cannot be the same thing. This can be seen from the fact that an actual norm and its 'established' (i.e. uttered) counterpart may exist at different times (p. 39). This is, as we might expect, because normative actions do not cease to exist because we stop thinking about them, and do not fail to exist because we do not name them; but norms may also exist without our speaking (or thinking) about them in virtue of "objective" logical deductions not yet carried out.

The essence of a norm as a "thought-object" is intersubjective communicability:

> The norm as thought-object must be viewed as the same thought-object with the same logical connections in the mind of the individual norm-issuer, in the mind of the norm-addressee, in that of the duty-bearer or right-holder and that of the mere observer (for example, a legal scholar). (p. 34)

and again:

> Understanding a norm is broadly analogous to understanding an indicative communication. When the communication is flawless and its goal fully achieved, there must be an identity between the norm as thought-object which was uttered by the norm-issuing subject and the norm as thought-object in the recipient's understanding of it. (id.)

The point about communicability is uncontroversial and incontestable: the idea of meaningful units of information that are incommunicable is simply inchoate. The "private language argument" as it occurs in *Philosophical Investigations* (§§.243-332 — as it applies

to sensation predicates) is most famously advanced in the context of a sensation language, but its point is far more general than that (see e.g. Kripke's discussion in *Wittgenstein on Rules and Private Language*). The reasons why a language that could not *in principle* be communicated or taught to anyone else is an incoherent idea need not intrude here — they are important for later considerations[10] — but for now it may be taken at a fairly intuitive level that the point of language is to enable the communication of ideas, concepts or whatever, and that anything that is not open to description as an instrument of communication is thereby not a language, whatever else it may be. Since Weinberger's thought-structures (or -objects) *are* linguistic and communicable, an account is needed of how communication of them is possible: understanding being the key which unlocks the door to the ITL ontology, Weinberger's account of ITL stands or falls by his ability to supply an answer to this central question. In fact, it falls.

The collapse of the strategy

Why did Weinberger's strategy fail to reach his goal of an ontologically and epistemologically sound view of law? The reason is his choice of psychology as the basis of his semantics. In virtue of developments in the philosophies of language and mathematics which took place around 1890, psychologism is seen by many working in these areas today as a dead philosophy. It continues however, to hold attraction as an explanation of conceptual knowledge partly because of the initial plausibility of its premises. In order to see why this plausibility is illusory, and why its rejection as an explanation of the foundations of our legal thought is imperative, those developments will shortly be reviewed in bare outline. Before that, it is necessary to recount Weinberger's employment of a version of psychologism at the crucial point in ITL.

Weinberger began his account of our knowledge of law by stressing the intimate links between norms (presumably in the context of their informational component) and the thought-processes in which they are involved when we are engaged in legal reasoning:

> Norms are thoughts in the same sense as this expression is used in characterising logic as the "analysis of thought". That is to say, they are thoughts in the objective sense, derived by abstraction from the processes of consciousness. (*ITL*, p. 33)

The fact that Weinberger perceived norms and logic as arising out of essentially the same cognitive operations — namely, conceptual abstraction from particular thought-patterns —

is important in that he took some form of logic to be the basic instrument of analysis of normative orders generally: 'In the perspective of legal dynamics', he said, 'the validity of law depends on the logical connections internal to the legal system' (p. 43). This makes 'appreciation of the norm-logical connections' between norms the central task of legal science:

> The logic of norms must be built up as a branch of formal logic in general, not as a part of legal theory. It constitutes the formal basis of argumentation in all normative disciplines, not only in the legal sciences. (p. 46)

In the case of formal logic itself, '[. . . .] at least since Husserl's *Logical Investigations* (1900-1901) it has become clear that logical relations can only be studied by way of abstraction from psychic activity' (*ITL*, p. 33).[11] In view of Weinberger's belief that the structure of a legal system is given by (some mode of) logical analysis, not only the content of the system but also its structural properties and orderings (and thereby the whole project of legal reasoning) rests on basically the same kind of concept-forming cognitive operations.

The idea of the "analysis of thought" stemmed originally from Kantian orthodoxy on the subject of analytic judgements. Despite his re-drawing of the analytic-synthetic boundaries, Kant was at heart a conservative about meanings: he was largely content to follow the post-Cartesians in taking meanings to be inseparable from experience, in the form of "representations". According to Kant, in order to understand the meaning of "obligation" or "duty", say, we have to have experienced feelings of obligation or duty towards various things, and our understanding of the general concept is enhanced the more minutely we analyse those feelings. From there it is easy to conclude that the meanings of those concepts just are the "psychic phenomena" that are the targets of the analysis (Coffa, *The Semantic Tradition from Kant to Carnap: To the Vienna Station*, p. 9). Likewise for all expressions: '[. . . .] they will mean something only in so far as, and to the extent that, they relate to human mental processes. Number expressions, for example, may be thought to derive their meaning from the mental processes in which they are involved — the natural numbers through the process of counting, geometric objects through acts of measurement, and so on' (id.).

The important thing to realise is that the notion of analysis Kant was working with demanded a distinction between the concepts *duty*, *obligation*, *permission* and so on themselves, and the mental acts in which they were involved:

If our understanding of the concept *virtue* can be bad at one time and good at another, those two different acts or states of understanding must somehow concern or involve the very same concept. Hence, in some sense of being, there must *be* a concept of virtue that is both the target of mental episodes and distinct from them. This concept need not be extra-subjective; but it must at least be intersubjective, since the very same conceptual representation is involved in different representings, or psychic acts of representation, in the same or different persons. (Coffa, *The Semantic Tradition from Kant to Carnap*, p. 12; compare Weinberger, *ITL*, pp. 33-34)

We might have expected the (realist) Weinberger who wrote the remarks about the Law's factuality quoted a few pages back to say something similar: if the Law of Contract is something about which I have a poor understanding at the start of my studies but a decent understanding subsequently, then what changes is not the law, but merely my perception of it. Unfortunately, Weinberger (like Kant), though alive to this distinction, never drew it with any great consistency or conviction in his theoretical practice.

Kant's failure to resolve the confusion amongst his (largely tacit) semantic categories — between concepts and the mental acts that contain them, and correspondingly between concepts and the objects they "represent", had a lasting and devastating effect throughout the 19th Century. This culminated in the kind of work Husserl was producing around 1894, on which Weinberger avowedly based his semantics for ITL (*ITL*, p. 33),[12] and which was based on Kant's tendency, whenever specificity was required, to embrace the subjective elements of his theory of judgement.[13] Abstractionism of the kind Husserl promoted was arguably based on what might be called a "multiple reference theory". The idea is that the essence of a concept is its ability to refer to more than one thing, and that therefore (sic.) it must be understood by reference to a number of things that make it up. Generalised concepts are thus formed by abstraction from those particulars. As Husserl put it:

> [. . .] concepts originate through a comparison of the specific representations that fall under them. Disregarding the characteristics (*Merkmale*) that differ, one holds firmly to the ones that are common; and these latter are the ones which then constitute the general concept. (*Begriff der Zahl*, p. 299; quoted in Coffa, *The Semantic Tradition from Kant to Carnap*, p. 68)

Husserl had intended to apply this to the concept of *number*, in order to explain how we form the concept of *unit* and, ultimately, the whole edifice of Cantor's Paradise. But as Frege

pointed out with great irony, no such concept — indeed no concept at all — can be formed on such a basis:

> [Detaching our attention] is particularly effective. We attend less to a property and it disappears. By making one characteristic after another disappear, we get more and more abstract concepts [. . . .] Inattention is a most effacious logical faculty; presumably this accounts for the absentmindedness of professors. Suppose there are a black and a white cat sitting side by side before us. We stop attending to their colour and they become colourless, but are still sitting side by side. We stop attending to their posture, and they are no longer sitting (though they have not assumed another posture), but each one is still in its place. We stop attending to position; they cease to have place, but still remain different. In this way, perhaps, we obtain from each one of them a general concept of Cat. By continued application of this procedure, we obtain from each object a more and more bloodless phantom. (Frege, Review of Husserl's *Philosophie der Arithmetik* [1894])[14]

The purpose of abstractionism was to grapple with the so-called "problems" of multiple reference. Husserl's neo-Kantianism led him to assume that all concepts are general representations and that conceptual analysis consisted in identifying (preferably, exactly) the number of constituents in some proposition as went to make it up. The emptiness of the appeal to "psychological abstraction" can be best illustrated with an example taken from mathematics.

According to a psychologistic reading of number theory, the natural numbers are constructed through the process of counting. The number 1, for instance, is what results from considering what is common to all one-membered collections: in other words, it is what is left over once we have disregarded all particular features of various (single) objects which do not pertain to their *number*. What we are left with is what Husserl called a 'featureless unit' (*Philosophie der Arithmetik* [1891], e.g. pp. 201-2). But consider what this says about the number 2 (or indeed any natural number >1). Initially, this is just what emerges from all two-membered collections once the particular features of their member-objects are disregarded as before, leaving only their number, i.e., 2. The problem is, how can this number be composed of *featureless* units? Featurelessness is essential to psychologistic versions of counting. For the number 1 to enumerate tables as well as, say, giraffes, the number of tables must contain no features of a table (except its "number"). If that were not the case, the number of a single giraffe and that of a single table would be different entities

with different properties, thereby making counting and numerical comparison impossible. The problem this raises for 2 is that we need to say it is composed of two featureless units. But if those units are indeed featureless, then they cannot be told apart: they are the *same* unit, identical by Leibniz's Law ($\ulcorner a = b \leftrightarrow \forall P\,[Pa \leftrightarrow Pb]\urcorner$).[15] If they are distinguishable, this can only be by retaining some distinguishable feature which tells them apart; if this is so, these feature(s) can only come, via the abstraction hypothesis, from below (from the objects). Universality of counting is thereby destroyed.[16]

In invoking the abstractionist theory, of course, what interested Weinberger was not mathematics, but the objects of legal thought. In both cases however, what sparked the theory off was what I have been calling "multiple reference", the realisation that a single concept is involved on successive occasions of our thinking of it.[17] Recall the problem that Weinberger wanted the theory to solve. This was to show how something as apparently private as a thought-structure could serve as the basis of our (collective) knowledge of law, i.e. as the foundation of our legal reasoning. His promotion of that theory ensured that this problem could never be solved within the confines of the strategy he pursued.

Weinberger's strategy rests on the mistaken assumption that a concept is a "general representation" consisting of an abstraction from all those singular representations that make it up — as if the explanation of its power to refer on more than one occasion comes from gathering up all the individual instances of its use. Clearly, though, understanding of concepts like the number 1 does not rest on any such thing, and what concept-terms refer to is not any kind of collection (either of objects or, as Weinberger sometimes thought, mental acts) but a *concept*. To put it another way, when someone understands a sentence, what they understand is its *content*, not what it may say about any mental representations I, or anybody else, might be having. If psychological processes come into it at all it is only the *content* of them that is important for meaning, i.e. the concepts themselves.[18] However, it is not merely that psychologism paints a ludicrous picture of concept-formation and epistemology, though that is certainly true. More importantly, it shows that Weinberger's strategy failed at two crucial points: communication of normative information; and knowledge of its truth.

1.4. Normative communication and legal truth

The immediate problem was, then, to guarantee communication. But Weinberger's strategy cannot even begin to make sense of the means by which linguistic expressions discharge their primary semantic duty as meaningful units of information. This is because there is no

guarantee that the mental states I associate with a given concept will be the same as anyone else's — for all we could ever tell. Had Weinberger accepted that what is communicated is *content*, all his problems would have vanished. But the reasons underlying this failure had even more serious consequences; and this is the second point. As noted, in invoking psychological abstraction to explain how aspect (i) of norms ¡their informational component) allows us knowledge of normative states-of-affairs, Weinberger confused thoughts about the legal order with that which they are thoughts of, and the thoughts themselves with the mental acts in which they figure. As a result, when the time came to demonstrate our access to the world of institutional facts — in the sense of the real constituents of reality under aspect (ii) — we find the way decisively blocked. This can be seen as soon the role of truth is considered.

Both MacCormick and Weinberger were adamant, quite rightly, that facts about the legal order are facts 'in virtue of being statable as true statements' (*ITL*, p. 10): naturally so, because we know the meaning of a statement quite generally iff we know what circumstance would make an utterance of it true. It is therefore essential to recognise the distinction between logic and psychology on the matter of truth and validity. In the particular case of logic, which is what concerned Weinberger when he invoked Husserl, the gap between logical operations and "psychic activity" is as wide as ever. Logic is concerned with truth and valid inference — that is, *actual* truth and *actual* validity, whereas mental processes have, as Frege said, 'no inherent relation to truth whatever' (*Posthumous Writings*, p. 2).

The major difference between the logical and the psychological is in the role played by truth. Whether or not we think that $64 + 46 = 110$ is true does not effect its truth-value, the fact that it *is* true. The gap between what we *think* is true and what actually *is* true is essential for any philosophy that believes in an external world and the possibility of separating empirical phenomena from what we say about them. Any philosophy that supposed formulas of sentential logic to be built up out of psychic phenomena would be powerless to account for logical necessity: Coffa recounted Lewis Carroll's construction of a famous paradox in which he noted that valid inferences can never be drawn in less than infinitely many steps; for if we acknowledge that, from If A then B and A, B follows as a logical consequence we *must* have granted *both* (1) $A \wedge A \Rightarrow B$ *and* (2) $(A \wedge A \Rightarrow B) \Rightarrow B$. But, by parity of reasoning, if we fail to grant in addition (3) that (1) and (2) together entail B we will still not be entitled to infer B, and so on indefinitely. The flaw is, of course, that the justification of the inference to B does not depend on whether *we* have granted anything: it is valid not by

reference to our "thought-patterns" but in virtue of the truth-definitions of the logical constants and the assignments to the variables (*The Semantic Tradition from Kant to Carnap*, pp. 161-162).[19] Weinberger's Husserlian view of logic as objectified thought-patterns similarly fails to make clear any reason for accepting valid inferences as valid. Prior to distinguishing objective content from the mental acts in which it is involved, we have no obvious reason for holding someone who did not accept, for example, the schema (2) as being *wrong* rather than simply having different thought-processes (whatever they are). This is, in part, because when logical operations are construed as thought-patterns we have no means of supplying them with *truth* (or falsity). Thought-patterns are not true or false, they are simply events. Wherever Weinberger's truth-predicates for his normative logic come from, they cannot be defined on the basis of psychology, that is, psychic episodes.

Because Weinberger confused logic with thought-patterns, and objects with concepts, it is clear that for him (or rather, his strategy), the difference between a statement's truth and our belief in its truth is, at best, non-existent. By failing to respect his semantic natural kinds, Weinberger not only made legal practice — in the sense of the communication of legal information — impossible; he also cut off our only access to the truth of legal statements, and thereby any means of deciding when the states of affairs denoted by such statements obtain.

* * * *

These are far from being the only problems afflicting psychologism as a basis for semantics, but they are the only ones needed to establish the point here. Weinberger introduced his psychologistic considerations as a vehicle for explaining how communication of 'thought-structures' is possible. We may now safely conclude that this line of argument has collapsed since it cannot guarantee communication of any sort. Among the various topics on which this touches is Weinberger's notion of *verstehen*. For it essentially notes that the semantic underpinnings of ITL — the foundations of our legal thought — cannot lie where Weinberger says they do.

For Weinberger, both norms (systemic content) and the logical processes in which they are involved (systemic structure) derive from thought-patterns through a process of isolation of what is common to them all (MacCormick and Weinberger, *ITL*, pp. 33, 43, 46). But, as noted, the process of psychological abstraction, insofar as it is intelligible at all, cannot account for the way concepts of any sort are formed. Likewise, reliance on psychic processes

to explain conceptual phenomena blocks any attempt to supply the resulting semantics with actual *truth* that could account for the way descriptive statements of language are used. The necessity within ITL to explain concepts with *verstehen* — which involves recognition of truth (both of norm-logical operations *and* descriptive statements about the legal system and, for instance, state practice) — shows that the source of our understanding of legal phenomena does not lie in thought-structures. Where, then, does it lie?

A proper answer to this demands a closer look at two further aspects of the treatment of norms in ITL. One pertains to MacCormick's view of norms which will be explored shortly. The other concerns one further aspect of Weinberger's theory of norms. As I shall attempt to show, Weinberger's answer to the question took a turn toward platonism at key points. This aspect of his thought is the subject of section II of the present chapter; but it is worthwhile saying a word about it right now.

An attractive way in which to view Weinberger's problem is to note that it arises from a pre-semantic view of norms. Roughly speaking, a good deal of the confusion seen in the previous discussion arose because Weinberger's picture of legal knowledge did not differentiate between different ways in which normative ideas are presented to us. A more revealing way of looking at the problem, therefore, is this. Weinberger's main concern had been with our seeming ability to refer to, and have knowledge of, norms for the purposes of legal practice. In examining this issue for the purpose of analytical explanation, Weinberger thought that he could account for that feature of legal practice, and our general ability to conceive of norms, by uniting what I have been calling aspects (i) and (ii) of norms – their abstract, informational component and social reality respectively – into a single complex entity. But what Weinberger failed to appreciate (or, rather, appreciate fully) was that "aspects" (i) and (ii) were not, in fact, different aspects of a common entity. Actually, they correspond to fully independent semantic components of legal judgements.

In effect, the implicit subtext to Weinberger's treatment of norms is this. Because we talk about the law in a non-reductive way (in making ineliminable reference to norms), there must *be* norms which are the targets of that discourse. Thus far, so good. But, the logic of the argument went on, we also judge *actions* according to whether or not they conform to legal expectations; *hence* (sic.) those norms must somehow be present as constituents of that action. After all, how else could we judge that action from a normative point of view? So, when we make a judgement (formulate a proposition) about an action, as in:

(*) States must apply equitable procedures in effecting maritime delimitations

we are not making a judgement *of* what happens in the world. We are making a judgement *about* what goes on there, viz. its normative quality.

It is natural to see in this a distinction (though perhaps not a clean one) among the targets of the judgement, between those which are purely factual and those which are "things" about those factual elements, i.e. those things which hold of them. This "thing" is the norm — in this case, Equity — and what we *say* about it is part of its constitution (under aspect (i)). What we are left with in a judgement like (*) is therefore a hybrid entity which is both a constituent of the action under investigation ('thought in it') *and* an object of thought delimited according to the way it features in legal reasoning. A norm, such as the equity norm of the example, therefore has a camp in both the "real" and the "ideal" realms.

It is crucial to realise, however, that despite this misleading line of analysis, what features in action is *not* a norm, but a *quality*. This distinction corresponds, naturally enough, to that between an object and a predicate. Weinberger's mistake had been to ignore the vital distinction between these two very different semantic entities, although he was far from alone in doing so. In the *Frontier Dispute* case, a Chamber of the International Court failed to make a similar distinction when, in a passage displaying its usual discomfort on matters pertaining to equity, it said:

> [The Chamber] will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes. (ICJ Repts. 1986 567-8, para. 28)

Had the Chamber realised fully that the equitable characteristics of legal rules can only be assessed on the basis of an equity *norm* (which must, of course, be a separate entity from those rules themselves) some at least of the ensuing confusion on the matter of whether 'rules of equity' can or cannot operate independently to create their own rights, duties and obligations or whether they can merely moderate or correct "strict" rules of law, could perhaps have been avoided.

The difference between equity and equitable characteristics corresponds, at the level of semantics, to two radically different parts of a judgement: to that between singular term and predicate. When considered as a norm itself, 'Equity' corresponds to the entity named by '*x*' in a judgement of the form *F(x)* (as in '*x* is a part of the legal system'). When considered as a feature or attribute, however, equity corresponds to the other part of that form of

judgement, i.e. to *F*( ) (as in 'This action (*x*), is equitable'). In other words, a norm is one thing; a normative attribute is quite another. One is an entity itself, the other a feature or property of such an entity. It is in this gap that Weinberger's platonism[20] emerged from between the lines of his argument. It was born in his refusal to see in those two kinds of legal judgement two very different semantic entities.

MacCormick and institutional theory

MacCormick's thoughts on the ontological aspects of ITL are less explicitly semantic than Weinberger's. He was bound to have semantic views, of course, in the sense that his ontological theses and those on language will inevitably hold semantic consequences; but those consequences never really get drawn, making it harder to attribute to MacCormick views anything like as concrete (if problematic) as Weinberger's (i) and (ii). It does seem likely that something in the neighbourhood of (i) and (ii) was what MacCormick was after, with the important difference that with MacCormick (i) and (ii) are not clearly distinct even from the start. But the necessary concern with the semantic properties of his ontological categories which would give us a clear line of sight is, or at least appears to be, absent.

MacCormick's starting point is familiar enough. The basic question is again how, for example, a carved piece of wood can also do service as the white knight on MacCormick's chess set? Clearly the physical attributes and appearance of the piece are of no importance to its function, since something else (such as a paperclip) could stand in for it just as well without any loss of sense, and it is possible in any case to play chess without the necessity of a physical board or pieces. The answer is, not surprisingly, that the piece's status as a piece of wood is a matter of "brute" fact whilst its significance for chess is a matter of institutional fact (*ITL*, p. 10). As already seen, these latter are facts 'in virtue of being statable as true statements'. However:

> what is stated is not true simply because of the condition of the material world and the causal relationships obtaining among its parts. On the contrary, it is true in virtue of an interpretation of what happens in the world, an interpretation of events in the light of human practices and normative rules. (id.)[21]

This is the root of the psychologistic treatment of semantic issues that characterises both MacCormick's and Weinberger's accounts of ITL. Legal- and other normative statements,

on this account, are not connected, via their truth-values, to what happens in the world, only to *an interpretation* of what happens there. As a result, the senses of those statements are not semantically connected to what we would normally have thought of as their referents, i.e. the (actual) matters of fact which we may have supposed them as standing for, but only to thought-processes concerning them. If one seriously believes that such statements can be *true* in virtue of those thought-processes, then this says in effect that truth and falsehood are a matter of mind-dependent fact, with all the now familiar consequences that this entails (including the dependency (for truth) of statements about the existence of an "external world", the truth of 64 + 46 = 110 etc., on *my* taking them to be so). What this shows is that the attempt to account for the factuality of institutions (i.e. their participation as the referents of semantic constituents in ranges of statements that are to be interpreted as being true or false) cannot be usefully furthered by extending the concept of *truth*. Rather it is the notion of *existence* regarding those institutions which must be faced. This includes showing how such existence claims as can be made for them connect up with the notion of truth.

Assuming, again, that neither MacCormick nor Weinberger would wish to be knowingly involved in psychologistic semantics of this sort, and only promoted that line as a result of a failure to address sufficiently the semantic issues involved, the key problem remains that of accounting for the ontological status of institutional facts (the referents of legal expressions) and our epistemic access to them. In regard to the first matter we have an obvious lead in the numerous statements in the Institutional Theory *of Law* to the effect that:

> ITL [. . . .] regards the existence of law as an institutional fact, a matter of what is actually existent in social reality — and does so even when norms are considered as ideal entities available not to direct observation but only to the understanding. (*ITL*, p. 20)

In order to avoid psychologism and its idealist offspring, the reference to 'social reality' here must either be objectively construed, or at least intersubjectively; presumably this is something neither MacCormick nor Weinberger would see as problematic. As MacCormick put it:

> If law exists at all, it exists not on the level of brute creation along with shoes and ships and sealing wax [. . . .] but rather along with kings and other paid officers of the state on the plain of institutional fact. (p. 49)

This, of course, makes a rather robust existential claim, namely that 'many more things exist than can be accounted for in terms of physics, physiology and behavioural psychology' (id.). Combined with the idea that we have access to such facts (can know them), that is, have some sort of cognitive acquaintance with 'ideal entities available [. . . .] only to the understanding', the claim that there is legal knowledge:

> is of course to make a strong claim. Knowledge is propositional and I can only know that *p* if *p* is true. So the claim that there is legal knowledge is the claim that there are at least some true propositions which are propositions of law. (p. 96)

The idea that legal statements *can* be true (and are therefore *capable* of standing for matters of fact) presumably wants arguing on the basis of the availability of a suitable logic of norms underwritten by a truth-valued semantics. But assuming for the moment that this is the case,[22] how do we know, or can we know, that that is what legal expressions actually *do*? To see MacCormick's answer, it is necessary to look more closely at his account of how legal statements connect up with truth.

1.5. MacCormick's truth-theory

The statement that there are matters of (institutional) fact that are '*available* to the understanding' is, prima facie, a realist one if it is assumed that understanding, or rather intellectual operations in general, play no part in their construction. This will, in other words, be where the role of *verstehen* is restricted to putting us in touch with abstract matters of fact that exist mind-independently and waiting for us to become acquainted with them, rather than actually being responsible for constituting them. On the other hand, the psychologism discussed earlier stems essentially from an extension of the concept of *verstehen* to the point where existence-claims are confined to reports on *it*. We cannot, in other words, conceive of the intellectual activity expended in thinking about institutions in such a way that reference is conceived of as being to those thought-processes themselves rather than that which they are thoughts about. Weinberger, as we have already seen, initially confined all existence claims to his aspect (ii), but, in offering an explanation of it, his semantics refused to let him get beyond the abstract thought-processes of his aspect (i). MacCormick's position is somewhat different, in that he never seems to have supposed aspect (ii) (or a version of it) to be other than an ontologically harmless off-shoot of aspect (i).[23]

Despite the realist-looking statements that sometimes issued from the pages of *An Institutional Theory of Law*, MacCormick's tone is generally constructivistic. A willingness to believe in the unrestrictedly objective nature of institutional facts, or some of them anyway, will, as Wright has observed, carry with it a certain conception of what it is to understand members of the class of statements that deal with those facts (see e.g. Wright, *Wittgenstein on the Foundations of Mathematics*, p. 8). Understanding of such statements, on that account, will generally involve 'possession of a concept of the fact which it putatively describes, that is, of the circumstances under which it would be true, of a kind not essentially reducible to a capacity to recognise those circumstances should they obtain' (id.). MacCormick's willingness to concede that '[t]here may be valid legal rules really in existence that determine possibilities not yet realised by anyone's actions' (*ITL*, p. 11) raises at least the possibility that there are certain (legal) consequences of our future actions about which no one is currently aware, though we are in principle able to discover them when (but, if inspiration is limited to the extent that we cannot legislate for every possibility, only when) those actions actually occur and the matter is brought before the courts.

The extent to which we wish to hold that legal provision may exist for as yet unactualised behaviour currently existent in the legal system — in virtue, say, of norm-logical entailments on the basis of established laws of the system — will depend on how far we are willing to accept the one right answer thesis. But clearly it is possible to reject that thesis without being forced to abandon totally the idea that there are unexplored but logically determinant extensions of the system. There could, in other words, be parts of the system that have not been articulated but which do exist in the sense that a rejection of them if and when they came to light would be incompatible with current provisions of the law which we *do* accept. MacCormick and Weinberger were clearly open to such an idea: '[W]e are', they said, 'as profoundly convinced of the existence of logical entailments and implications in juristic thought as of the non-cognitive character of the personal convictions on which legal opinions are ultimately based' (p. 19). In addition, MacCormick's insistence that 'Any analytic inquiry requires an analysandum, something to be explained analytically which is supposed to exist independently of the inquiry itself' (p. 94), is realistic in tone insofar as one could hold there to be matters of law as yet uninvestigated, but whose subject-matter may well exist, presumably on the basis of similar considerations about norm-logical entailments on the basis of existing legal material.

The basic point here concerns the relationship between legal reasoning (in the broad sense, including statements descriptive of the law) and the structure of the system it purportedly addresses, and the issue is this. If it is characteristic of statements about the law to be true in Wright's sense (i.e. true or false independently of our present capacity to say, of any given statement, which it is), and for relationships between such statements to be logically determinant, this forces upon us a certain picture of the system thus described. Its norms will be objecive, mind-independently existing entities waiting for a mind to get acquainted with them, and the relationships between them a matter of fact and not of our choice.[24] In particular, our acceptance of the existence of a given norm will, in general, give rise to (i.e. entail) the existence of other norms on which it depends or whose contraries are incompatible with it. Such norms will, on this account, therefore form part of the system even when we do not know of their existence.[25]

Whether or not this turns out to be a reasonable view for a municipal legal system, it is rather a difficult one for international law, whose conceptual structures have traditionally developed along far less rigid and more pragmatic, often conflicting, lines. The result of maintaining such a view is often a thesis about international law (and international legal *reasoning* in particular) which inevitably sees it as non-standard (if the point of view is positivist) or more political than legal (if viewed sceptically), and which sees international legal norms as, in any case, of no direct resemblance to those of municipal legal orders.

It is hard to know how far MacCormick would have wished to take the realist elements of his theory, though we do know that they fall somewhat short of acceptance of Orat. But it is safe to say that he carried a commitment to realism at least as far as acceptance of determinant outcomes to cases of 'purely logical character' (i.e. "easy cases") like that of *White's Lemonade* (*Daniels and Daniels v R White & Sons and Tabard* [1938] 4 All ER 258). These are usually described as being outcomes which were, in some thus far unexplained sense, determined in advance of their actually being drawn.[26]

The basic tenor of MacCormick's thesis is, however, constructivistic. Constructivism, like its rivals, has both an epistemological and an ontological dimension, though it is typically seen as being epistemologically motivated. It is characteristic of MacCormick's argument in ITL that he began instead with ontology. 'Strictly', MacCormick and Weinberger said, 'it is only particulars that exist' (*ITL*, p. 11). In other words, as far as ontology is concerned, only individual contracts as opposed to a general notion of contract may be said actually to exist. This still involves the need to 'argue for the reality of ideal entities or thought-objects

(as distinct from material entities)' (id.) but the order of priority (of construction) is from the material world of facts to the institutional world and not vice-versa, hence escaping involvement in platonism (id.). (In fact it is far from obvious that this truly avoids platonism; cf. § 2.) The question which naturally arises is: (assuming that MacCormick and Weinberger are not psychologistic logicians) how do we get from the material world to the world of institutions?

MacCormick's answer was that since '[t]he existence of an institution as such is relative to a given legal system, and depends upon whether or not that system contains an appropriate set of institutive, consequential and terminative rules' (p. 54), our access to it must be via 'rules' of use (which embody the system) and the ability to assign them temporal coordinates. ('Most importantly, [legal concepts] all denote things which for legal purposes we conceive of as existing through time' (p. 52).) The point about system-membership is straightforward enough. Concepts do not 'exist in themselves', that is, do not exist independently of human knowledge of them (there are no matters of institutional fact about whose obtaining we are unaware), but 'are made meaningful and intelligible through conventions and rules' (p. 11). In other words, there is no more to (the meaning of) a concept than the way in which it is used in some language, or in the case of technical terms, some framework. The point about temporal involvement is less straightforward. According to the constructivist tenor of MacCormick's remarks, our access to the world of institutional facts is *from* the material world (i.e. in virtue of an interpretation of it) since it is only particulars that exist. As we saw, MacCormick and Weinberger regarded only e.g. *particular* contracts as worthy of being the subject of existential claims and not any general notion of "Contract". But, said MacCormick, '[. . . .] it is clear that the institution as a concept is logically prior to any instance of it' (p. 55). This is because:

> The existence of an institution must have antedated by some space of time the existence of any instance of it. Just because we are dealing with abstract institutional concepts and facts, the institutional concept must be logically prior to any factual instance of the concept. (id.)

This, on the face of it, reverses the order of construction outlined at p. 11.[27] A first response might be to point out that, whilst generalised institutions of the appropriate sort provide the conditions under which particular instances of them are meaningful, they do not themselves actually *exist*; they are merely abstractions. But this is no serious response at all. For one thing, an abstraction from given institutional facts could hardly be used to explain

anything about their existence or our cognitive access to them. For another, it in any case wholly undercuts MacCormick's idea, which is probably essential on any sane view, that a concept must exist prior to any instance of it. It can, after all, only be in virtue of the existence of that concept that the relevant institutions are instances of *that concept* (see Kripke, *Naming and Necessity*, Lecture I). Moreover, it is that concept which is supposed to provide the grounds on which the meaning of the individual instances of its use rests. If a concept is to do any of these things, it can hardly do so without *existing* in some sense.

MacCormick's own criteria do not, in any case, allow him a means of denying existence to "general" institutions such as "Contract", "Unjust enrichment" and so on. He had said that involvement in some system and assignation of temporal coordinates (i.e. involvement in time) are necessary conditions for the existence of an institution. Just as specific contracts, exercises of the right to free speech and so on meet these criteria for the appropriate systems — that is, exist according to the law between such and such dates — so too do the general concepts of which they are instances. The Law of Contract is part of the Law of Scotland, for example, and has been for some time; Usufruct was (arguably) part of international law and remained so until (arguably) the effect of the Truman Proclamation rendered it null, and so on. We do not yet know whether these criteria are also *sufficient* for institutional existence, and on that basis there may be grounds for doubting whether the general concepts to which MacCormick wanted to deny existence exist according to more refined criteria. But it is not at all obvious that any such criteria could be specified which would not also rule out the admissible (particular) institutions, because there seems to be little in the way of semantic distance between the two types of institution (at least, which would count as being relevant here) *except* level of generality.

It is in any case hard to see how any ruling out of general institutional concepts could further the institutionalist cause. Any institutional theory of law worth its salt will at some point have to conjure up a general body of doctrine called "the Law of Contract" ("the Law of the Sea" [. . . .]) which governs the making of particular contracts or whatever, and to which appeal may be made on occasions of conflict. It will have to do so if only to explain how we may be said to regard e.g. the Law of Scotland as possessing a notion of Contract. If it does, as it seems to, then that notion has to *exist* under the law. As MacCormick put it:

> On the one hand, we can break down complex bodies of legal material into comparatively simple sets of inter-related rules; and yet on the other hand we can treat large bodies of law in an organised and generalised way, not just as a mass of bits and pieces. (*ITL*, p. 53)

Clearly then, it is not just "particulars" that exist. If institutional facts are facts in virtue of appearing as the referents of true statements made concerning them, then statements such as 'The International Law of the Sea is a complex body of law' or 'Scots Law recognises a well-defined doctrine of Contract' have just as much claim to embody legal truths as have such "singular" statements as 'It is an offence to send a ship to sea laden with grain if all necessary and reasonable precautions have not been taken to prevent the grain from shifting' (Merchant Shipping (Safety Conventions) Act 1949 s.24).

Despite the rather heavy-handed expression of the issue in *An Institutional Theory of Law*, it seems likely that what MacCormick intended was not to deny *existence* as such to abstract matters of institutional fact, but rather to provide them with an existence predicate not essentially similar to that which does service for "brute" facts. Weinberger's method had been to tie in normative entities (as examples of institutions) with actions coupled with an informational component. MacCormick's blueprint followed the same general pattern, but in a much stronger way.

1.6. Verstehen on the rocks

Weinberger had been concerned to show that the "social reality" of norms under aspect (ii) — the way they connect up with the real world — could be explained by reflecting on the means by which normative information (aspect (i)) is conveyed. Unfortunately, his understanding of those procedures led to a picture which was not, in the end, credible. For MacCormick on the other hand, it is exactly those procedures which define the facts:

> My point, you see, is to deny that it is an oddity of legal facts or other institutional facts that they are rule-defined. What is admissible as a fact in any sphere of activity or inquiry is dependent not only on what really happens but also on the rules for the conduct of that activity or inquiry. (*ITL*, p. 102)

If this were meant merely to deny the existence of a clear abstract/concrete distinction in classifying matters of fact, objects and so on, then that is clearly true (Cf. chapter 3). Unfortunately, MacCormick's semantics gave him no clear viewpoint from which to say this.

Because of his tendency to exaggerate the role of *verstehen* in the construction of meaning, MacCormick often failed to distinguish between three general elements in the meaning of an expression, or proposition, whose separation is crucial to an intelligible

account of the sense of those expressions or propositions: (i) the subjective act of "representation" of a state of affairs before the mind's eye (i.e. one's state of mind as one perceives a physical object); (ii) the "objective representation" (to borrow the Kantian terminology) i.e. the intersubjective content of those thoughts or acts of representation; and (iii) whatever is represented, i.e. that which the thoughts concern, that which they are thoughts about.[28] The difference between (i) and (ii) is best seen when the subjective representations under (i) are about number-theoretic entities, and the fact that 'each meaningful grammatical unit is associated with a host of subjective representations but only with *one* objective representation, which has being even when the object of the representation does not' (Coffa, *The Semantic Tradition from Kant to Carnap*, p. 30). Thus the subjective representations associated with the answer to '46 + 18 – 64' are manifold though more or less equal for every reader; but there is only one objective representation which this designates.

More important here, however, is the difference between (ii) and (iii). The Kantian terminology is appropriate since, in effect, MacCormick promoted the idea that all "facts" are intellectually constituted, that is, *all* facts are "institutional":

> If the objection is to my notion that there are norm-defined facts, my reply is: find me a fact that isn't so defined. It is not "institutional facts" which are problematic, but "brute facts". (MacCormick and Weinberger, *ITL*, p. 102)

In fact, more than being problematic, the class of brute facts, on this account of them, shrinks away to nothing at all. The basic problem seemingly is MacCormick's failure to make a clear distinction between two essential semantic categories: the meanings of certain expressions, and that which they are the meanings of. In MacCormick's hands "fact" is being used to stand for both the worldly constituents with which Dr. Johnson was so familiar *and* the meanings of those objects as they appear in our linguistic expressions and thoughts about them. Because his semantics gave him no clear means of telling the difference between these two types of category, MacCormick was pushed into believing that the basic procedures by which we become acquainted with institutional facts hold in the case of all facts. The remaining steps of his argument must be traced very carefully.

Since it is reasonable to assume that we know what various given facts *are*, in the sense of knowing what is meant by expressions that concern them, MacCormick seems to have concluded that access to them has to be via the notion of *verstehen*, which plays an essential

part in our knowledge of, and the meaningfulness of, them. Clearly the *verstehen* component was shown to be irreducibly necessary for statements about treaties, normative state action, violations of Article 2.4 UNC and so on, since without it we simply do not know what those statements mean. Since, presumably, we cannot be said to have knowledge of something of which we do not know the meaning, we do not, MacCormick supposed, therefore approach those facts unmediated but can only do so via *interpretations*, by which for all we know they are at least partly constructed. In other words, all facts *must* contain some element of meaningfulness or significance for us, which has to be interpreted as a normative notion:

> I am asserting the primacy of "ought", "*sollen*", "*devoir être*". To define the sphere of the "is" relatively to some activity or inquiry, as with all such definitions, involves us in resorting to the "ought". That there is relativity here is important, yet little acknowledged. (*ITL*, p. 103)

What this signals is a retreat into idealistic semantics. Earlier, MacCormick had robustly defended the need for an analysandum (even for the case of law) 'which is supposed to exist independently of the inquiry itself'. All that remained of this claim by this stage was a rather empty appeal to action:

> The analysandum of analytical jurisprudence is legal order as constituted by actions, words and thoughts of its committed participants [. . . .] Legal knowledge is knowledge of what *for the committed participants* are the norms of the order, and of the institutional facts *constituted by the interpretation* of natural events within the schemata which the norms provide. (p. 105, emph. added)

Pressed about what constitutes action, MacCormick would have reminded us that our understanding of the meaning of that term, as well as of "natural events" generally, is dependent on our *verstehen* of them, however else they may be fixed, and that such terms (which will correspond to the totality of available terms of the language) are simply unintelligible without it. In Weinberger's philosophy, actions and events fall under aspect (ii), but for MacCormick the distinction is not sustainable. Because, MacCormick said, nothing can be known to us which is not also intelligible to us ('knowledge is propositional'), whatever is intelligible to us or known to us in aspect (ii) is therefore *already* present in, and meaningfully instantiated by, the intellectual operations of aspect (i). Indeed,

if there are elements of (ii) that are not also in (i), it appears that we cannot know of their existence.

MacCormick's unwillingness to put semantic distance between the ultimate constituents of what we say and the ultimate furniture of the world was largely the product of the Kantian background from which his views on the subject seem to have emerged. A closer look at that semantic picture shows that it inevitably leads either to the implausible version of Idealism into which German philosophy collapsed in the nineteenth century, or to the restrictive and equally implausible atomism with which Russell was engaged in the first few decades of this century (cf. Coffa, *The Semantic Tradition from Kant to Carnap*, pp. 76-140). Kant had said that there can be no knowledge without a mixture of concept and intuition (what Russell later called acquaintance), and the Kantians had made it their main business to explore the role of intuition in the propositions and judgements that express our knowledge (p. 100). Accordingly that tradition, as Coffa recounted, favoured a very tight link between those two elements (id.):

> In all of these cases it is being assumed that a singular representation can represent its object only if it satisfies a condition that makes knowledge by description virtually impossible; for it is required that the source and the target of the referential relation be in some respect identical. (Coffa, *The Semantic Tradition from Kant to Carnap*, p. 101)

In the case of logical atomism, this eventually led to a picture of e.g. mathematical knowledge that rested on a platonism so strong that not even Frege would have accepted it. On the other hand, so strong a reliance on intuition (which is, broadly speaking, the role MacCormick's *verstehen* was being made to play at this point) entailed that there could be no discernible difference between the desk in MacCormick's room and MacCormick's idea of it. Because the semantic pineal gland of MacCormick's institutional theory is, roughly speaking, knowledge by acquaintance, properly "external" or "brute factual" reports are not constructible in those parts of MacCormick's semantics with which we are concerned here. Little wonder, then, that he regarded them as 'problematic'. But neither are institutional facts thus constructible when conceived as being anything like as "real" as MacCormick, at various stages, wished them to be.[29]

Again, it is unlikely that MacCormick properly intended anything like such an idealistic philosophy of language. It is nevertheless deducible from premises about the character of the semantic entities with which he was concerned that are clearly endorsed in MacCormick's

writing. Together with the earlier lapses into psychologism and intermittent hints of realism about even abstract ("ideal") entities, it is hard to avoid the conclusion that, ontologically speaking, MacCormick's account of ITL is deeply at odds with itself. Nowhere is this more evident than in the remarkable discussion of platonism.

II: Are legal entities platonic objects?

2.1. Platonic intentions

If the truth of legal statements does not reside in thought-structures, where does it lie? The original line taken in *ITL* had been, quite reasonably, to say that the subject-matter of legal statements resides in some sort of factual domain. Indeed, no other view seems capable of sustaining the picture we have of the kind of activity legal reasoning is (See chapter 3, § I). On the face of it, however, both MacCormick and Weinberger would reject the idea that law, or whatever the subject-matter of legal expressions is, has an existence anything like that which platonists attribute to "abstract objects" such as numbers, classes, square roots and the like. '[W]e can', they said, 'and do bluntly reject platonistic idealism' (MacCormick and Weinberger, *ITL*, p. 11). Beneath the surface however, things are less clear.

Part of the problem may have been that the character of the platonism from which MacCormick and Weinberger were concerned to dissociate themselves is a body of doctrine which bears little relation to the well-respected and highly complex philosophical standpoint that goes by that name today. For MacCormick and Weinberger, a rejection of platonism is a denial of the idea that the "material world" as we know it derives from an ideal "World of Forms", that is, a refusal to 'treat the material world's existence as being derivative from or subordinate to that of an ideal world' (p. 11). This kind of platonism may indeed, at least on some accounts, encourage a conception of reality that leads to idealism, of a sort for which both MacCormick and Weinberger had no sympathy (see e.g. p. 38). But it is also a position which rests on a view of ontology that few philosophers are willing to take seriously anymore. To that extent, the remarks made against platonism in *ITL* seem rather like tilts against windmills, though of course the rejection is perfectly in order. But it leaves open the question whether, or to what extent, MacCormick and Weinberger escaped involvement in what is now regarded as platonism, or whether they would even wish to avoid it.

Because of their rather untidy treatment of semantic issues, an answer to the second question is probably not worth the attempt (though the fact that they are legal positivists would suggest, though perhaps not compel, a negative answer); as it is, there is textual evidence in *ITL* sufficient only for a sketchy and incomplete answer to the first. It is the task of this section to uncover it. Before moving on it is worth mentioning briefly the general terms in which a modern platonist would view the legal order, in advance of a closer consideration of the issue in the next two chapters.

The issue for platonism is not so much whether legal statements are descriptive of an objective legal domain of the sort Koskenniemi arguably required for legal practice but found lacking. It is, rather, whether or not a distinction is capable of being drawn between meeting the most refined criteria of legal acceptability (i.e. according to legal reasoning, or legal rationality) and actually being legally *true* (cf. Wright, *Wittgenstein on the Foundations of Mathematics*, p. 7; Wright's discussion, of course, proceeds in terms of mathematics). There will, in other words, in general be a difference for the platonist between a statement's being accepted (by us) as a correct depiction of how legal matters stand, and its actually *being* an accurate depiction, that is, being (legally) true. This in turn entails, as Wright also pointed out, a difference in principle between the truth-conditions of (legal) statements and the conditions under which we would regard them as being positively verified. It must, in other words, be the case, even for matters of law that can be effectively decided (because, perhaps, created or otherwise clearly derivable from existing law), that truth-conditions and verification-conditions, though necessarily coinstantiated, do not necessarily coincide (cf. *Wittgenstein on the Foundations of Mathematics*, p. 8):

> [Although] any explanation of the truth-conditions of a statement places a condition upon what verification of it has to determine, or what recognition of its truth has to be recognition of [. . .] for a platonist, the fixing of truth-conditions is not *aimed* at teaching someone a procedure of verification or at effectively determining for him under what circumstances he may regard himself as having recognised the statement's truth. If truth-conditions are defined in a platonist spirit, it is no objection to their intelligibility if it is not apparent how one might set about determining whether they obtain, or what would count as the experience of their obtaining. (p. 10)

Something of this requirement may be captured in the reflection that, when one is teaching a newly-enrolled law student the basic elements of, say, the Law of Contract or the Law of the Sea, one is in some sense to be taken as instilling in the student a knowledge and

appreciation of certain *facts* about the law, and not, or not directly, techniques of legal research or legal *reasoning*. In that same sense, the student may be said to have some knowledge of the law, or a particular branch of it (at least, when the material taught is *true*), though he may well lack the ability or resources to verify what he has been taught. In this sense also there is a parallel with mathematical knowledge, in the sense that, as I said in chapter 1, knowledge of mathematics is not *just* knowledge how to prove theorems or manipulate strings of symbols. It is knowledge *of* a body of (allegedly) true statements (This issue will be of significance in chapter 5).

The principal difference between those bodies of knowledge is, however, that mathematics is (for the platonist at least, though not the intuitionist) held to be mind-independent in a way that usually supposes the content of mathematical statements to be other than *created* by human intellectual activity, whereas law is, on virtually everyone's account, something which was created, at various stages, principally by human intellectual activity. The constructive element in law, if one may without prejudice call it that, is part of the reason why a platonistic account of law is somewhat more complicated than is the case with mathematics. It does not, however, make such an account of it impossible. As Hale has recently pointed out, 'Poems and musical compositions, for example, surely owe their existence to mental activity, and are in that sense mind-dependent, but are not happily classified as mental entities' (*Abstract Objects*, pp. 1-2). They can, in other words, be "abstract" objects on the platonist account. Insofar as created normative objects *plus* norm-logical deductive apparatus may form a system that gives rise to certain statements whose truth-value we may not at present know, that seems to offer an adequate basis for a platonistic account of the truth-conditions of those statements, although it will probably be the case that all such statements will be adjudged effectively decidable. (It will, if the deductive apparatus is none other than our actual procedures of "practical" reasoning.) This, arguably, is the case with MacCormick. Weinberger however seems to have had something slightly more robust in mind.

In examining Weinberger's case, it is possible to forget, temporarily, the character of the supposed legal objects and matters of fact (that is, what *sort* of facts they are), and concentrate on our *knowledge* of them via the statements that concern them. It remains true, however, that our attitude to the character of the truth-conditions of those statements will inevitably condition our conception of what *kind* of thing the referents are, of which the

various parts of those statements (the singular terms, the functional expressions, predicates and so on) are the linguistic representatives.

2.2. Is Weinberger a platonist?

Weinberger's primary conviction was that 'The legal order must be recognised as socially existent positive law, that is as a system having the quality of fact — factual existence' (MacCormick and Weinberger, *ITL*, p. 43). This does, after all, virtually define the institutionalist project: viz., to provide a proper epistemological and ontological foundation for legal dogmatics. In fact, the semantic machinery in *An Institutional Theory of Law* was deployed mainly in order to validate this thesis, that is, to provide a believable explanation of how we can come to know such facts, which enjoy, at least in part, an "ideal" (i.e. abstract) existence. That the semantic doctrines Weinberger promoted in that work are not capable of providing such a foundation is, in a sense, a secondary matter. It is likely that for Weinberger, the factual and objectual existence of law is the given, and the task of explaining it the project, and not, as with Koskenniemi, the other way round. It is therefore equally likely that, were Weinberger persuaded that psychologistic semantics could not work, he would reject the semantics rather than dispute the ontological convictions of ITL.

That this is so may be inferred from those passages in Weinberger's writings where he was more sympathetic to the need to set limits on mental ('psychic') processes in the formation of normative concepts. In particular, both MacCormick and Weinberger were keen to show that value-neutrality in positivist thinking attaches to the scientific detachment with which the subject-matter of law is addressed, rather than to the objects of that investigation themselves:

> What positivists assert to be possible is a neutral or value free *representation* of the law of a given state — not the possibility that the law is itself value free. (*ITL*, p. 3 (JI))

For this distinction to work, of course, there must be held to be a corresponding distinction, at the level of semantics, between the object of representation (itself) and the object as it appears *in* any representation. Indeed, Weinberger (only) once made the point explicit that a normative "meaning-content" must be dissociated from the conscious processes by which we come to know it. If we are able, say, to accept a given law as being ethically sound at one time, and as ethically flawed at some subsequent time, then it must be that it is our judgement of it which changes, not the law itself, since *its* content is constant. If this distinction holds

for other propositional attitudes, in particular, *understanding* (as seems prima facie necessary), then we are obliged to treat that object as an entity which is (semantically) separate from any cognitive attitude we may hold towards it (*ITL*, p. 88). Unfortunately, as noted, Weinberger seemed on the whole to be never more than dimly aware of the need for such a crucial distinction.

Reconstructing a semantic picture of what might have been, if in his writings Weinberger had observed the distinction with more rigour, is a risky business. It is nevertheless appropriate to ask what Weinberger's ITL would have looked like under a different semantic interpretation from the one he actually gave. This is particularly important because many of his statements on the characteristics of norms suggest, on the face of it, a realist interpretation of the sort which could give rise to a platonistic view of them, notwithstanding the attempts made in that book to get round the problem of 'essentialism'. It is perhaps not unfair to say that, where attention was fixed on the goal, the language used was realistic; where it was on providing an epistemological strategy for reaching it, the language was that of psychologism. It has already been noted that the factuality of the legal order and the (often) *descriptive* role of legal analysis were among the strongest intuitions of the institutionalist project, forming the most important "givens" which ITL is meant to explain. It is, in particular, the law's factual nature which explains the reason for what Weinberger called the 'fundamental nature of legal dogmatics' (i.e. black-letter law) as taught to students. It is in virtue of the need for students of the law to become acquainted with[30] the pre-existing legal system (p. 44).

This is one area in which legal- and mathematical epistemology may talk to each other. It is equally obvious, of course, that mathematical knowledge as well as legal knowledge can be given an anti-realist interpretation. What, then, are the reasons for thinking Weinberger's view of the legal order, despite his psychologistic tendencies, is nevertheless a realist one?

It is an important fact, though hardly conclusive, that Weinberger regarded the connections between norms of some system as being often based in some kind of logic. This is, however, fairly inconsequential until we know what his views on logic were (i.e. whether they are realist or anti-realist in tendency) and how extensively he intended to apply them. In any case, the use of norm-logical analysis in regard to legal systems is perfectly compatible with anti-realism regarding legal orders, whether or not it is intuitionistic in form (in not containing $P \vee \neg P$ as a theorem), since it may be that classically construed entailments hold over a legal universe that is not only effectively decidable but also known.

A more reliable indicator would therefore be to look at what Weinberger said about the ontological status and, in particular, the existence-criteria, of norms, only then linking this to logical considerations. In other words, did Weinberger admit the existence of norms, or better, the truth of normative statements, in situations even where we cannot verify it?

2.3. Knowledge by description?

Both MacCormick and Weinberger, as previously noted, often employed realist-sounding language when describing the Institutional Theory, not only in insisting on the "real", as opposed to "ideal" aspects of the existence of norms, and the involvement of normative statements in true and false ranges, but also in the sense that the job of legal analysis is, as Weinberger put it, 'the description of legal reality' (p. 43). That the role envisioned for this type of analysis is not constructive, but merely "observational" of a separately existing legal order ("separately" in the sense of existing autonomously of logical characterisations of it, rather than, especially, our knowledge of it) is a prima facie reasonable interpretation of one passage from the Joint Introduction:

> With the possible exception of some varieties of realism, every contemporary approach to legal theory includes a substantial analytical element. This involves taking seriously the job of describing the kind of thought-object or conceptual construct a legal system is, of elucidating the logical relationships among its parts, and of showing how legal relations, indeed the totality of legal phenomena, can be mapped on to conceptual relations, operations and systems. (JI, p. 17)

Whether or not this is indicative of a platonistic attitude to those phenomena depends upon the interpretation given to the key phrase 'showing how legal relations [. . . .] *can be mapped on to* conceptual relations'. One way in which the difference between platonistic and non-platonistic (just possibly including, for these purposes, semantic realist-) views may be manifested, is that the platonist will insist that logical operations, and semantic relations generally, are merely *representative* (descriptive) of the actual phenomena under investigation (including the actual relations which hold between them); whereas a non-platonist in this sense will typically view the semantic and/or logical relations holding between the corresponding concepts as constitutive and instantiative.

It is thus possible that one could hold a platonistic view of law without necessarily believing in semantic realism. This will come about where the concept of *truth* for normative statements is held to be subject to our powers of verification (in principle), but where the

notion of *reference* regarding normative singular terms is held to be the same as that which does service for concrete singular terms, such as those for tables and chairs. The notion of reference, in that case, will be conceived as a relation of name to bearer, rather than as semantic role, in Dummett's sense.[31] Where the latter view is held, referentially-placed abstract singular terms are taken as being such on the basis of the contribution made by them to the senses of sentences in which they figure, and not, as with concrete terms, because they succeed in picking out some object with an existence autonomous with regard to language. Where the former view is held, however, it will be reasonable to suppose that some properties of its existence will be such as to give rise to circumstances and states of affairs of which we are not aware; that is, which obtain independently of our knowledge of them, even though we may safely agree that any *logical* relations in which such entities are involved are those actually carried out or at least knowable to us.

To see this, consider the example of general principles of law, as a source of international law (disregarding, for the moment, questions regarding its utility or legitimacy). Since the existence of such a source is the product of human intellectual activity, being conceived in Article 38(1) of the ICJ Statute, the fact of its obtaining may be safely reckoned to be mind-dependent. Nevertheless, in view of the specification given to it, we may be justified in holding there to be concepts (of the municipal law of various states) which fall under "General principles" (when conceived as embodying certain general shared standards of legal principle common to most or many domestic systems), about whose title to be recognised as principles of international law we are unaware, perhaps because circumstances of their possible application have never arisen, or because the potential for appealing to them in such circumstances was simply overlooked. There is no inconsistency in supposing, in addition, that where such principles do come to light, we are entirely free, within the bounds of existing concepts and received logical relations, to work out the details of that application and position relative to other rules and principles of international law.

Coupled with the following statement, that:

> Such a representation of legal orders and legal processes presupposes that the logically formalised picture of legal phenomena is to be understood as a rational reconstruction which states the substantive meaning of the law as this results from interpretation of raw legal texts. (id.)

the passage from the JI, quoted above, is such as to render it probable, though by no means certain, that it is the former, platonistic construal which was intended. Again, whether or not

this interpretation is justified will to some extent depend on any evidence that (MacCormick and) Weinberger held there to be legal matters of fact about whose obtaining we do not know.

In Weinberger's case, at least, there is some such evidence. Again, the reason for believing so is in virtue of his distinction between the "ideal" and the "real" aspects of a norm. I have already canvassed some of the problems with Weinberger's account of this distinction; however, it is the intention behind the making of it which is of concern here. That Weinberger intended an ontological distinction between meaningful statements (his thought-objects) and that for which they stand (the actual matters of (institutional) fact) is reasonably clear:

> Institutional facts [. . .] are in a peculiar way complex facts: they are meaningful normative constructs and at the same time they exist as elements of social reality. (p. 113)

That a distinction, in terms of *what kind of entity* is under consideration, between semantic entities (meanings) and their "real" counterparts, is intended is further clear from a passage in the JI, which is attributed solely to Weinberger:

> Practical data (norms etc.) in the sense of meaningful thought-objects are to be distinguished from norms-as-realities — only norms in actual sets of operative action-determinants are facts, constituent parts of reality by contrast with purely linguistic entities or possible objects of thought. (JI, p. 16)

What is of interest here is not so much the distinction itself but the use to which it is put, and the implications it holds for the issue of when we are justified in holding a fact to be the case, and when the corresponding statement may be held to be true. For Weinberger, it appears, the former may hold without the latter:

> When I speak of the being or real existence of the norm, I am not concerned with the act through which the norm is posited, nor with the existence of an utterance which expresses the norm, nor with the knowledge and conduct of the people who more or less guide their behaviour according to the norm. (p. 39)

and later:

The norm posited by an act of will is an object with its own existence. The norm and the act have different time-co-ordinates; the norm-creating act can be seen as a momentary occurrence [. . . .] (p. 87)

It is the temporal element here which is of most importance. The (real) norm's character as 'an object with its own existence' is relatively uninteresting unless it is meant that it is capable of existence at a given time irrespective of whether or not expression has in fact been given to it at that time. This more interesting claim is, nevertheless, seemingly what Weinberger intended:

The norm as ideal entity is identical neither with its linguistic expression, the corresponding sentences, nor the speech-acts by which the sentences are uttered. In the legal field this means that [. . . .] a norm can also be socially existent without any explicitly presented verbal formulation. (p. 88)

'Linguistic expression' here seems to mean "linguistic *manifestation*", as actual (acts of) expression approximate more to speech-acts, which are mentioned explicitly. Elsewhere, Weinberger made the temporal point more explicitly:

[. . . .] it is perfectly possible for an "ought" to exist without ever having been explicitly formulated [. . . .] (p. 33)[32]

The same, moreover, seems to hold also of relations between norms: 'A norm leads to inferences which are *always* valid together with it although the inferences are not contained in the meaning of the [norm-giving] act' (p. 39, emph. added). Such relations, in addition, were often held by Weinberger to be "real", i.e. that our formal rules of inference merely represent the (actual) relations that hold between norms (pp. 41-42, 42-43, 46, 91; though see also 34, 45).

This, together with the broad purposes of ITL as Weinberger formulated them, seems a sufficient basis on which to draw the conclusion that Weinberger's institutional theory was, at key points, platonistic in its treatment of norms and legal matters of fact. It does not follow that Weinberger should necessarily be considered a platonist philosopher of law. His stand against "platonistic idealism" and the many parts of his theory which tend towards anti-

realism, or are at least incongruous with a platonistic treatment of norms, tell against such a crude conclusion. What must be faced, however, is the fact that certain *elements* of his theory are platonistic in orientation, though that label does not suitably characterise his entire approach to law.

2.4. Closing remarks

Having examined the Institutional Theory fairly closely, it is now time to consider the issue of realism more fully. There are elements of Weinberger's theory which, I have argued, call out for a realist interpretation. MacCormick's position is less clear, in that there is not sufficient evidence in his writings to suggest conclusively that he understood institutional facts as being such that at least some of them could in principle obtain without our knowing it, though nor is there evidence which strongly suggests the contrary. Clearly, he did accept the existence of abstract objects and abstract matters of fact (*ITL*, pp. 49-50, and elsewhere), and his discussion of their character, though less detailed, mirrors Weinberger's discussion of them to some extent (though again by no means totally). One possible reading of MacCormick's views is that he effectively endorsed a fairly standard Fregean argument for the existence of abstract objects (and matters of fact) both in view of his willingness to ascribe truth-value to normative statements and in virtue of his discussion of "propositional knowledge", as described earlier. This, however, is far from certain, and it would be unfair or misleading to suggest that the following discussion of the Fregean argument in chapter 3 in any way captures MacCormick's views.

3

The Fregean Strategy

When someone comes to know something it is by recognising a thought to be true. For that he first has to grasp the thought. Yet I do not count the grasping of the thought as knowledge, but only the recognition of its truth, the judgement proper. What I regard as a source of knowledge is what justifies the recognition of truth, the judgement. (Frege, 'Sources of Knowledge of Mathematics and the Mathematical Natural Sciences', *Posthumous Writings*)

The erroneous belief that a thought (a judgement as it is usually called) is something psychological like a representation [. . . .] leads necessarily to epistemological idealism. (Frege, 'Logik', *Nachlass*)

Your theory seems to me to emerge from the fact that it is so easy to confuse the concept of reality with reality itself [. . . .] an illusion to which the Marburg neo-Kantians have fallen prey. The determination of the length of a rod does not seem to me, for example, to belong to the definition of the real rod — the real is always beyond all definition — rather it is the determination of a characteristic of our *concept* of a rod. (Schlick, Letter to Reichenbach, 26 November 1920)[1]

0.1. Review of the argument

At the beginning of this thesis, I suggested that a proper view of International law is one which transcends the (I think, mistaken) assumptions on which both positivist and sceptical appraisals of its status rest. Such a view, I argued, can only be achieved by gaining a clear picture of the foundations of the reasoning procedures which address it. The last chapter dealt with perhaps the wisest attempt within the positivist tradition to do that for a municipal system of law, and saw the attempt break down at several key places. In this chapter, I shall be suggesting an alternative strategy which, I believe, serves ITL's goals much better and which is, as a result, genuinely illuminating of the foundations of legal reasoning at a general level. Whether such an account is straightforwardly transferable to the case of international

law is a question I raised at the beginning of chapter 2; I continue to defer an answer to it until chapter 5. In the interim, a general account of the foundations of legal reasoning will begin to take shape.

0.2. Reason for the strategy

One of the great technical achievements of the Institutional Theory was to demonstrate how we may speak of the existence of norms, and of legal objects, relations and concepts generally, in an epistemologically respectable though non-reductive way. This achievement may have been obscured, partly due to its relatively unsystematic treatment through scattered remarks in the various papers which constitute *ITL*, and partly because when concern was focused on epistemological matters, the strategy associated with it took backseat to its more outspoken psychologistic cousin.

The less celebrated strategy began from the reasonable premise that facts about the legal order are facts ("institutional facts") in virtue of being statable as true statements. Part of the reason for the fairly minor role given to that principle in *explanation* of ITL's theses may have its root in certain prejudices about the character of platonism (chapter 3, § 2). MacCormick had suggested in *ITL* that the world of legal institutions may well be a haven for the platonist. The fact that he immediately withdrew this revealing admission as a joke shows the extreme hesitation with which MacCormick allowed himself to be associated with that doctrine. Quite literally, the platonistic assumptions of ITL were bursting out of his anti-realist (and occasionally neo-Kantian) epistemology.

There can be little doubt, as the final section of the last chapter was designed to show, that parts at least of the institutional vision were, in some sense, platonistic. But exactly what does this sense amount to, both in terms of ontology and epistemology? It is the main purpose of this chapter to discover the kernel of truth in MacCormick and Weinberger's treatment of matters pertaining to legal ontology and legal knowledge. Though we may ultimately come to doubt the platonistic character of the objects of legal discourse, there can be little doubt that the general strategy underwriting it is largely sound, and forms an important part of our conception of law. It is, in fact, a version of Frege's strategy for the treatment of foundational issues in mathematics.[2] It is also the strategy which forms the basis of the reflections on the foundations of international legal reasoning which make up Part II of this thesis. Before going on to examine its merits in detail (in chapter 4), I want to look at what that strategy is, first in general terms and then in slightly greater detail.

I: The strategy in outline

1.1. Introductory

The previous chapter recalled ways in which institutional theorists had responded to the need to account for the meanings of ordinary legal terms and expressions (to provide, in other words, an analysis of what legal discourse is in general about) by supposing that they correspond to a certain type of fact. This has the advantage that it reflects well our actual legal practice, which proceeds on the fairly explicit assumption that legal arguments make factual claims regarding the content of a body of laws to which they are addressed. Many of these, moreover, involve inferences that rely on the appropriate range of statements being in the market for truth. Given that the institutional theorist will want to stand her ground on this issue in order to preserve the naturalness of ITL's account of legal reasoning, she will eventually have to provide answers to two fundamental questions which threaten to make the theory look incredible:

(1) If legal statements involve factual claims, to what sort of facts do they appeal, and;
(2) what sort of knowledge do we have of them?

In chapter 2 I attempted to show how Weinberger's attempts to account for these questions — that is, to supply an explanation of the status of aspect (ii) via consideration of that of aspect (i) — ended unsatisfactorily because his account of legal facts as abstractions from thought-structures did not provide a basis for his ontological assumptions. Whatever (legal) institutional facts are, they must rest on something stronger than just 'psychic' activity; but what? One way, and perhaps the strongest way, in which to supply the required basis, is to embrace a platonistic view of institutional facts.

1.2. Abstract Objects

One of the most natural ways, on the face of it, to effect talk about law is to admit reference to abstract objects into one's theoretical account of the subject. This of itself does not amount to *platonism* about law — for that one must also believe in the mind-independence of abstract objects — but some species of platonism is certainly the strongest line for a defender of abstract reference to take, and in particular it is arguably the easiest route by which to access the ITL ontology. Additionally, platonism provides probably the best vantage point from

which to launch a counter-attack on sceptical arguments concerning international law, whether Position 1-sceptically- or Position 2-sceptically motivated: Position 2 scepticism is banished by showing that legal argumentation does indeed concern legal objects or concepts to which reference may easily be made. Position 1 challenges are shown to fail because we do not, on the platonist account, have a choice over the character of the normative entities we employ: reference to legal norms is to legal objects, reference to political- or ethical norms is to political- or ethical objects, notwithstanding our human inability (perhaps) to hit upon the correct classification.

Though few legal theorists would consider themselves to be platonists on the classical account, it is nevertheless fair to say that some form of platonism is clearly the most natural choice of philosophical basis for someone who defends the institutionalist viewpoint. Certainly, most if not all legal discourse proceeds on the fairly explicit assumption of the acceptability of reference to abstract objects, such as rights and duties, even if this falls short of platonism as so far described. Consider by way of random example the following passage taken from Churchill and Lowe's book on the Law of the Sea:

> State practice and doctrine on the question of the extent of a coastal State's rights to enact legislation — its legislative, as opposed to its enforcement, jurisdiction — varied according to whether the territorial sea was regarded as a mere "bundle of servitudes" or as a belt of maritime territory under the plenary jurisdiction of the State. The aim, in all cases, was to reconcile the right of innocent passage with the legitimate interests of coastal States in the enforcement of their laws in the territorial sea. (Churchill and Lowe, *The Law of the Sea*, p. 77)

Passing over state practice which, at a pinch, may be taken as a series of disjoint spatio-temporal actions (ignoring, that is, the institutionalists' point about *verstehen*), the passage contains clear objectual references to *doctrine*, and, not only *a coastal state's rights* and their *extent* but also *the question* of that extent. Further, particular sorts of *jurisdiction* are mentioned together with, not the sea itself but *the territorial sea* (which may or may not be *a bundle of servitudes*). Additionally, *the right of innocent passage, the aim in all cases, the legitimate interests of states* and *the enforcement of laws* all involve similar objectual reference. With what right do we talk about extents, interests, rights and the rest? Reductionism with respect to such objects is not, in view of Wright's argument, an available option (chapter 2 § 1.2.). Nor is it possible to avoid such references when talking about the

law (or for that matter, anything else), as the following extract from the Court's judgement in the *Nuclear Tests Case (New Zealand v France)* shows:

> An undertaking of this kind, if given publicly, and with an intent to be bound, even if not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made. (ICJ Repts 1974 477, para. 22)

Again, one could argue that a juridical act is concrete in some (extended) sense at least insofar as it involves human action, but what exactly is its *strictly unilateral nature*, or an *undertaking*, or a *quid pro quo*?

The immediate objection will of course be that these and other such readily available phrases are not meant to be taken as indicative of *objects*, abstract or otherwise, but are merely a manner of speaking. What logicians and philosophers of language sometimes call "surface grammar" may be thought misleading in this respect. Clearly, although the syntactic structure of the sentences in the passage quoted above seems to point to a consideration of (and a reference to) something for which, for example, *legitimate interests* stands, in a manner identical to the way in which language treats terms for concrete objects such as tables and chairs, it is not obvious that the authors of *The Law of the Sea* intended to claim *objectual* existence for such things as rights, duties or even territorial seas. It would, moreover, be intolerably pedantic of legal theorists with philosophical scruples to insist upon a rider at the start of every book and judgement explaining that such "abstract" terms are not to be read as picking out abstract objects; but here we get a shock. For even the most cursory inspection of the philosophical literature in point would most likely be longer than the book itself. This is, in part, because modern conceptions of platonism, and of abstract reference generally, are fairly distinct from their classical counterparts, making it far from obvious that what the syntactic structure of natural language hints at (viz., reference to abstract objects) is not the most reasonable explanation for what is, in fact, the case.

At the very least, we are owed an explanation of why we should not accept abstract terms at their referential face-value. To assume otherwise indeed does intolerable violence to the purported sense of passages like the one quoted above. For example, if *the right of innocent passage* does not stand for an (abstract) object, our intuitive understanding of sentences like

the one beginning 'The aim, in all cases, [. . . .]' above, must be misinformed. Indeed, if we cannot go on from such a sentence to ask 'What, in all cases, was it the aim to reconcile the interests of coastal states [. . . .] with?' and expect the answer 'The right of innocent passage', then the whole exchange threatens to descend into meaninglessness; yet such an exchange, at least on the face of it, depends on the ability of singular terms like 'the right of innocent passage' to bear the weight of *objectual* reference constantly placed upon them. Additionally, seemingly unproblematic inferences such as that from 'All undergraduate students of international law ought to know the *Right of Passage* case' to 'There is something that all undergraduate students of international law ought to know' (strictly: 'There is something such that all undergraduate students of international law ought to know it') are impermissible, as will shortly be seen.

None of this yet establishes the point that reference to abstract objects underlies legal discourse generally. But it does, I think, point up the need for some significant and careful explanation of what such discourse is about, if not about *objects*. Since the use of abstract reference is apparently so widespread — a glance at the UN Charter shows the commitment of that document, on the face of it, to abstract entities such as *the pacific settlement of disputes, the use of force* and even *the Security Council* — it is of the essence to work out the details of this use and commitment, and the extent to which lawyers and theorists are reliant upon it.

As Hale has pointed out, the question of abstract objects belongs to ontology in the first instance, and the issues surrounding the importation of abstract objects into various theoretical frameworks are as old as philosophy itself. Yet modern and classical platonism are relatively far apart (far enough at any rate for the common label to be misleading if one is not careful) and, correspondingly, the notion of abstract objects is, as Dummett has explained and Hale has reminded us, in an important sense a wholly modern one (Dummett, *Frege: Philosophy of Language*, pp. 471-474; Hale, *Abstract Objects*, p. 3). The gap in both cases is due to the notion of "object" brought into philosophical currency by Frege. For Frege, an object is just anything that is the target of reference of a non-vacuous singular term, and, since there is no end of non-vacuous singular terms (number expressions, for example) there are, in this sense, abstract objects corresponding to them. (Quine was later to express the same idea in his famous slogan: 'to be is to be the value of a bound variable'.) So rather than us calling Fregean platonism naive because of its assumption of abstract

objects, it is the Fregean platonist who convicts us of naivety over our preconceptions about what an object, in this sense, is (cf. Hale, *Abstract Objects*, pp. 3-4).

For a Fregean platonist, the question whether or not something is an (abstract) object is inseparable from questions in the philosophy of language:

> [A]sking whether there are objects of a certain general kind is tantamount to asking whether there are, or at least could be, expressions functioning as non-vacuous singular terms of a certain kind. When the domain of objects is understood as including at least the referents of all genuine singular terms, it is anything but obvious that it does not include abstract objects of various sorts; rather, there is quite a strong prima facie case for believing that it does. (*Abstract Objects*, p. 4)

Moreover, it is often unclear whether an object in Frege's sense is to count as abstract or concrete. On the face of it, it seems quite reasonable, given an appropriate abstract/concrete distinction, to put things like *the territorial sea* or *state practice* into either category: Although there is a sense in which we cannot point (ostensively) to boundaries or "acts" as such (in the sense, that is, in which one requires *verstehen* properly to understand such terms), what is a territorial sea but a particular area of water, and what is state practice except instances of behaviour such as sailing ships along a given course, or firing cannons on the battlefield? On any account, our intuitive notion of the sortal "concrete object" is a vague one: statute books and judges' wigs belong to it, but radio waves, oral pleadings and the UN Charter (conceived of institutionally, that is, apart from the various documents in the world that contain identical ink-marks and bear its name), if they belong at all, belong less straightforwardly:

> Vague though the common notion is, it is evidently outrageous to suggest that numbers, classes, directions and shapes, say, are objects in that sense. But the same goes for hurricanes, speeches (i.e. the actual historical events) and holes in the ground. (p. 4)

There is, however, no doubt that all of these are objects in Frege's sense, since in that sense "object" is not a sortal. An object on that account is just, to repeat, what is referred to by a referring singular term. Such is the strategy in outline. In order to see more fully what it can do for ITL, it is necessary to look in some detail at Hale's argument for platonism.

II: The platonist's argument in detail

2.1. Singular terms and denoting

There are, I argued earlier, parts of the institutional theory which, at first glance, cry out for a platonistic construal. At the very least, Weinberger's philosophy (and, probably, MacCormick's too) was seen to contain elements of platonism with regard to legal orders as well as other matters of "institutional" fact. Though the semantics of Weinberger's ITL was less than satisfactory, it is perfectly clear both from the tone of his argument, and from explicit remarks on the role of *verstehen*, that there is no sense in which Weinberger's position, as a whole, could be described as *nominalist* (i.e. in repudiating the existence of all abstract objects). That being the case, we (or rather, Position I sceptic) are still owed an explanation of what abstract objects are, and how we can come to know about them. Before such explanations are given, it is unlikely that much progress could be made on the accompanying question whether the legal orders and matters of fact our thoughts address are *mind-independent*.

In his robust defence of platonism in *Abstract Objects*, one of Hale's first admonitions is that the issue of abstractness ought not to be confused with that of mind-independence. Though both are necessary for platonism there has been a tendency to see in mind-independence an essential component of abstractness. However, poems, musical compositions and games of chess are all mind-dependent to some degree without being happily classifiable as mere "mental entities" (*Abstract Objects*, p. 1). To this list law, one would suppose, could be comfortably added, being certainly connected with intellectual operations yet distinct from them and therefore abstract (in the sense of being extra-mental and non-concrete) on any reasonable definition. Hale is also keen to emphasise platonism's relative conceptual independence of other forms of semantic realism (where statements belonging to some specified range are held to be true or false independently of our ability to assign them any definite truth-value): A realist need not accept a platonist ontology (where the range is statements about the past, for instance) and it is, moreover, unclear whether a platonist need be a realist in these terms:

> Whether or not he must largely turns upon whether we can make clear a sufficiently robust notion of mind-independence without invoking the possibility of verification-transcendent truth. Since Anti-realism threatens to collapse into some fairly obnoxious form of Idealism if we cannot do that, the anti-realist ought to hope that we can. (p. 2)

Presumably an institutional theorist, or at least one like MacCormick, would hope so too: ITL certainly counts laws, and also systems and groupings of them, as being among the sorts of things that are counted as facts, i.e. which have the property of 'factual existence'. But his account of legal reasoning as practical reasoning (cf. MacCormick, *Legal Reasoning and Legal Theory*, pp. 53ff, 197ff) and general commitment to Hartian orthodoxy regarding "open-texture" rules and (ultimately) systems clearly illustrate the constructive basis of MacCormick's legal vision, and avoidance of the notion that to every legal problem there is a predetermined right answer. Fortunately, though, a positive outcome seems most likely:

> The anti-realist's claim is a claim about meaning — that we cannot have succeeded in endowing our words with meaning in such a way that statements we can make using those words may be true or false regardless of our capacity, even in principle, to determine their truth-value. As such, it directly requires that the states of affairs in virtue of which our statements are true or false shall not be in principle beyond our powers of discovery. (Hale, *Abstract Objects*, p. 2)

But, says Hale, this does *not* seem to require that the truth-conferring states of affairs should be of our making (that they would not have obtained except for our thought or talk of them — in particular, our cognitive ability to recognise the corresponding statements as true or false). In other words:

> there is — or at least, there certainly appears to be — a gap between the claim that those states of affairs in virtue of which (at least some of) our statements are true or false obtain independently of our knowing or believing them to do so (or our holding any other relevant cognitive or other attitude) and the (realist) claim that the truth-conferring states of affairs may be such that we could not know or reasonably believe them to obtain. That seems a sufficient basis for the relevant notion of mind-independence. (id.)

One could, in other words, hold there to be certain legal institutional facts (say, that when a contract is formed there exist actual *relations* in law between the parties) without having to concede that our truth-predicates are of such a character as to manoeuvre us into a position where we could assert C or $\neg C$, for given C, in advance of our actually having to construct C (where C may be, for instance, a certain legal consequence or set of consequences flowing from some action, such as signing a contract, or from a legal decision) in appropriate

circumstances or on subsequent occasions. In just the same way, I can think about the game of chess without meaning either the physical board and pieces or any particular instance of a game actually played, without involving myself in the notion that the game of chess was discovered as opposed to invented (constructed) at some point in time.

Central to ITL in all its forms is the notion of institution, which for the platonist (as well as *anybody* who counts law as a species of social *fact*) will fall on the non-linguistic side of the dichotomy between expressions and that which they represent. But the categorisation of non-linguistic entities into objects, properties, relations (taken extensionally) and so on is dependent, as both Hale and Dummett stress (cf. Dummett, *Frege: Philosophy of Language*, pp. 55-57) on a prior logical categorisation of types of expression into singular terms, predicates, functional expressions and so on. But the claim is not controversial, since the prioricity:

amounts to little more than a reminder that there is no fully general explanation of what it is to be an entity of one of those types save by reference to the type of expressions of which entities of that type are the non-linguistic correlates. To be an object, in the sense intended, is just to be the sort of thing that can be referred to by means of a singular term. (Hale, *Abstract Objects*, pp. 3-4)

To put it a little more sharply: '[A]sking whether there are objects of a certain general kind is tantamount to asking whether there are, or at least could be, expressions functioning as non-vacuous singular terms of a certain kind' (op. cit.).

Hale's case for the existence of abstract objects is 'no more than a generalisation of the argument which underpins Frege's claim that numbers are objects' (p. 10):

since the *principle* on which the Fregean argument proceeds is perfectly general, the particular argument which gives us numerical objects is a special case of a general pattern of argument which, on provision of a suitable minor premiss, will, if sound, establish the existence of objects of a kind determined by the minor premiss.

The Fregean argument is essentially this (cf. p. 11):

(1) If a range of expressions function as singular terms in true statements, then there are objects denoted by expressions belonging to that range

(2) Numerals, and many other numerical expressions besides, do so function in many true statements

Therefore:

(3) There exist objects denoted by those numerical expressions (i.e. there are numbers).

Again, this will not amount to platonism unless it is held that numbers are *abstract* objects, *and* that they are appropriately *mind-independent*. Clearly, in the case of both numbers and laws (and the targets of legal reasoning generally), there is no real issue about their abstractness: As Hale put it, any account of the distinction that placed numbers (we may add *laws*) on the concrete side of the dichotomy would be suspect *for that reason*. The notion of mind-independence is more complicated, especially where we are dealing with putative abstract objects whose existence has at least some connection with cognitive activity, as is arguably the case with law (at least under Weinberger's aspect (i)).

We have already mentioned that this argument is neutral with respect to whether the objects in question are abstract or concrete (if that distinction can be made out clearly at all). The important underlying principle of the argument is that, as with ITL, it 'firmly links ontological questions to questions of truth' (p. 2; compare MacCormick and Weinberger, *ITL*, p. 10: '[Institutions] are facts in virtue of being statable as true statements'). This means that we do, of course, have to satisfy the minor premise, i.e. demonstrate — to Position I-sceptic, in the case of law — that the statements involved *are* true.

Trivially of course, as Hale points out, to say that there exist *F*s is the same thing as saying that the statement 'There are *F*s' is true; but there is also a less trivial sense. Supposing *A(t)* is a true statement with *t* as a singular term:

> The role of such a term is, quite generally, to convey reference to a particular object, about which the statement as a whole says something. That is the semantic contribution of a singular term, its contribution towards determining the truth-conditions of the statement. Those truth-conditions cannot be fulfilled unless the contained singular term discharges its referential function. Hence there is some object to which the term refers. The argument thus subordinates questions of reference (and so of ontology) to questions of truth and of logical form. (Hale, *Abstract Objects*, p. 12)

This would, naturally, be circular if the only means of characterising singular termhood was by establishing that an object existed of the sort referred to. The Fregean argument therefore requires a means of testing for singular terms that does not proceed via the verification of the existence of an object for which *t* stands. In *Abstract Objects* Hale based this "independent" means on Dummett's criteria in *Frege: Philosophy of Language*, Ch.4, regarding which:

The underlying idea is that there are certain patterns of inference which are valid when certain positions in their premisses or conclusion are occupied by singular terms, and are otherwise invalid. (*Abstract Objects*, p. 15)

As originally formulated, Dummett's criteria were as follows:

t is a singular term iff:
(1) for any sentence *A(t)*, the inference from *A(t)* to 'There is something such that *A*(it)' is valid
(2) for any sentences *A(t)* and *B(t)*, the inference from *A(t)* & *B(t)* to 'There is something such that *A*(it) and *B*(it)' is valid
(3) for any sentences *A(t)* and *B(t)*, the inference from 'It is true of *t* that *A*(it) or *B*(it)' to '*A(t)* or *B(t)*' is valid

Though these criteria do offer problems in dealing with expressions involving nested second- or higher-level generalisation (cf. pp. 16-17) their major problem lies in choices of *A(t)* and *B(t)* that contain opaque contexts essentially.

The problem of opacity of context is especially pressing for the institutional theorist since most of her contexts will be opaque. In broad outline, opaque contexts are contexts of utterance in which transparency of reference and transitivity of identity are not preserved (see, generally, Quine's discussion in *Word and Object*, p.166ff). Generally, these will involve what Russell used to call "propositional attitudes", such as expecting, wishing and so on (Russell, *Principia Mathematica* I, p. 463). By way of example, assume that Edward is expecting Bussell to dance Odette tonight. Then:

(i) Edward believes that Bussell will dance Odette tonight

is true. But unbeknown to Edward (and the rest of the ROH's clientele), Bussell is really Durante. So

(ii) Bussell ≡ Durante

is also true. But from (i) and (ii), the statement

(iii) Edward believes that Durante will dance Odette tonight

clearly does not follow; moreover it is false. The reason is that within the opaque context (⌜*x* believes . . . ζ . . .⌝), any singular term that, outside such a context would refer to its bearer, has no such reference. So the ordinary Tarski-equivalence (T)'*φ*(Bussell)' iff *φ*(Bussell), fails. Opacity potentially threatens a wide class of statements which could be made about the law, not merely those which involve quantification into *normative* contexts (e.g. it will affect anything which is *judged* or *determined* to be the case, and anything which is true *according to law*).

In terms of Dummett's criteria, if *t* is irreferential in *A(t)* (i.e. if *A(t)* is an opaque context of *t*) then the inference in (1) fails. As Hale noted (*Abstract Objects*, p. 17), demanding that the contexts of *A(t), B(t)* be restricted to referentially transparent ones is hardly a solution in advance of a principled means of distinguishing transparent contexts on some independent ground, and this we do not have. Therefore, the solution is to relativise the original criteria in terms of *use*, that is, to recognise that certain expressions that in some uses contain singular terms do not do so in others, notwithstanding the fact that they are typographically identical (p. 18). Thus, the modified (1) becomes:

t is a singular term in a use of *A(t)* iff:

(1') in that use of *A(t)*, the inference from *A(t)* to 'There is something such that *A*(it)' is valid

In the case of (2), simply adding ' . . . and *any* sentence *B(t)* . . . ' is too strong, because if *B(t)* is opaque the inference will fail. Stipulating ' . . . *any* use of *some* sentence *B(t)* . . . ' also will not do because this assumes that each *t* has only one referential use, and this is not the case. As Hale pointed out, we can readily imagine contexts in which one may say 'The

whale [i.e. the one before my eyes] is much improved today', and also in which we may say 'The whale is increasingly rare'; but to conclude on this basis that 'There is something that is both increasingly rare and much improved today' is clearly wrong, causing (2) to fail and therefore inviting the conclusion that *neither* use involves a singular term, though we would like to say that the first plainly does (p. 18). Similarly, Hale said, we can rule out '. . . *some* use of *any* sentence *B(t)* . . . ' since this assumes that there are contexts which are invariably opaque, an assumption for which we have no verification. The relativised formulation must therefore be:

(2') in that use of *A(t)* and *some* use of *some* sentence *B(t)*, the inference from *A(t)* & *B(t)* to 'There is something such that *A*(it) and *B*(it)' is valid. (p. 19)

Hale is keen to point out that (2') is not too weak: Suppose *F( )* is a context either trans(parent) or op(aque); then assume *A(t)* to be *Ft* with *t* op., and *B(t)* as $Ft \Rightarrow (Ft \wedge Gt)$, with *t* op. in its first instance but trans. elsewhere. Then *A(t)* and *B(t)* together will entail $Ft \wedge (Ft \Rightarrow (Ft \wedge Gt))$ with *t* referential throughout. Therefore $\exists x\,(Fx \wedge (Fx \Rightarrow (Fx \wedge Gx)))$ and hence $\exists x\,(Ax \wedge Bx)$, but *B(t)* on its own does not entail this (id.).

However, (2') does *not* need strengthening because its role is merely to exclude generality-phrases like 'something', 'someone' and 'some *F*' which are not excluded by (1'). In other words, (2') does not ensure that *t* is referential in *A(t)*, but (1') *does*; (1') does not ensure that *t* is definitely referential (i.e. is a *singular* term) but (2') does. The last relativised criterion is:

(3') in that use of *A(t)* and some use of some sentence *B(t)*, the inference from 'It is true of *t* that *A*(it) or *B*(it)' to '*A(t)* or *B(t)*' is valid.

(pp. 20-21. However, Hale stressed that, though there was nothing apparently to prevent a strengthening of (3') to (3''): ' . . . *some* use of *any* sentence *B(t)* . . . ', the weaker version is strong enough.)

These relativised tests serve to exclude some candidates that we would not wish to count as singular terms, by dint of their being merely semantically inert fragments of larger expressions not free for existential generalisation (cf. p. 21: Hale cites *my friend's sake, the lurch* in which we were left, *the nick of time* etc., to which may be added such others as *a mere bundle of servitudes* which is ruled out by (1') and *the aim in all cases* ruled out by (2')). But they do still admit as singular terms, and therefore as objects, some candidates of ontologically suspect character, such as *the speed of light* or *the colour of Ingrid Bergman's eyes* (p. 27; we could add, inter alia, *the International Court, the Ihlen Declaration* and so on). But this is just what was expected: A platonist thesis that ruled out all but the kinds of object which would be acceptable to an anti-realist would be no sort of platonism at all; a proponent of the Fregean argument must therefore be prepared to stand his ground against the ontological intuitions of his opponents:

> Those intuitions are not hard data, and until good reason to think them reliable is provided, he is under no obligation to treat them as such. (pp. 21-22)

This is, roughly, the position in which the institutional theorist was left at the end of § 1.2. The Fregean argument certainly provides the sort of semantic machinery required to deliver up the ITL ontology, since according to its tests, singular terms such as *the law of maritime delimitation* ('The law of maritime delimitation is something about which reasonable people may disagree') or *x's contractual relation with y* and so on all go through. But what is still lacking is a means of convincing Position I sceptic that what the Fregean argument tells us is actually *true*.

The basic problem with the objects admitted by the Fregean argument, according (Hale says) to the anti-realist, is that they threaten to force upon us an acceptance of a bizarre and chaotic ontology where there exist (for example) not just people but also their identities, whereaboutses, laws to which they are subject, laws with which they disagree, their acceptance of the Euclidian proof of the infinity of the primes, and so on. The general sense of disbelief at such an ontology is certainly part of Carty's concern regarding the status of international law ('Recent trends in the theory of international law', p. 74ff) as well as the

sense of embarrassment over the 'perhaps misplaced attempt at jocularity by MacCormick' in the *Institutional Theory of Law*, Ch.2, where he remarked:

> [. . . .] at least the world of legal institutions is a safe world for platonists; whether that is good or bad publicity for the world of legal institutions I should not care to say; but it is clear that the institution as a concept is logically prior to the existence of any instance of it. (MacCormick, *ITL*, p. 55 n. 7)

(This was, as seen earlier, quickly qualified in the joint introduction with the assertion that 'we can and do bluntly reject platonistic idealism' (*ITL*, p. 11).)

In any case, says Hale, there is no need to worry, since the appearance of a bloated ontology dissipates upon recognition of an appropriately narrowed categorisation of the Fregean objects in question — in terms of, for example, events, processes, quantities, features and so on (Hale, *Abstract Objects*, p. 28): 'What, after all, is *the whereabouts of the PM* except a particular spatio-temporal location?'. We may wish to debate whether the referents of legal expressions form a class on their own, or form some part of the class of processes, political norms or whatever, but (we hope) the right method of classification will always ensure that the platonist's universe is an ordered one. In the problem instances, such as opaque expressions, Hale's strategy comes into its own. Where, for example, we are left to explain irreducible (by Wright's argument) expressions like 'what the legal age for tobacco consumption is' in 'James and Henry disagree about what the legal age for tobacco consumption is', we cannot treat that singular reference as an *age* (there being little sense in saying that James and Henry disagree about *16*). Hale's strategy offers us a way out: what they disagree on is not e.g. 16 (or whatever), but rather the answer to a question — in other words a truth, i.e. a true proposition (p. 29). This simply involves recognising that expressions of the form 'the *NP* of *t*' (NP = noun phrase) on many occasions have a dual function, in some contexts serving to direct reference to a single object, and in others effecting an indirect reference to some (unspecified) true proposition (id.). This again fits neatly into MacCormick's account of ITL.[3]

2.2. Deflationism?

If there is no question of treating singular terms for norms as illusory, can Position I sceptic argue that statements about law are ontologically neutral on some other ground? The above discussion makes it clear that the Fregean argument is effectively immune from nominalism

in the traditional sense. In view of the intricate relationship between the role of singular terms and the assignation of truth-conditions, it is simply not open to a sceptical mind to argue that, e.g., statements about the law are true yet do not refer to anything. Nominalism supported by a thesis of reductionism is similarly unavailable, in view of Wright's argument (cf. chapter 2 § 1.2.). There is, in other words, (for Position I sceptic) no mileage to be made in the idea that the objectual references in the platonist's expressions can be disposed of by effective paraphrases in terms of, say, concrete objects or brain-states, there being no reason other than the weight of philosophical dogma for preferring one side of the supposed equivalences, in terms of semantic priority, over the other (Hale, *Abstract Objects*, p. 25).[4] If existence-claims concerning abstract objects, via involvement in truth, are to be rejected, a more sophisticated approach is required.

According to Hale, just such an approach was taken by Carnap in 'Empiricism, Semantics, and Ontology' (*Meaning and Necessity*, p. 205), which Hale calls 'deflationism' (*Abstract Objects*, p. 5ff). Though Hale agrees that not all deflationists support Carnap's method of dealing with abstract reference (i.e. that affirmation of objects of a given range is a decision to adopt a linguistic framework), Carnap's *negative* account (that questions such as 'Are there . . . ?' are not to be taken at face-value, for various reasons) is, in one form or another, the one adopted by all deflationists. To question that account, he says, is to question all such accounts (p. 5).

According to Carnap, when one is asking about the existence of *F*s, there are two possible ways in which this question may be understood: first, *internally* (to some given system), as asking whether or not a given *F* exists under the rules of the system; and secondly, *externally*, whether or not the system of entities as a whole exists ('Empiricism, Semantics, and Ontology', pp. 206-207). Internal existence questions are, on Carnap's view, philosophically uninteresting, because they are (trivially) answered by application of what amount to existence-proofs associated with that system. External questions are different: they *seem* to be of the same type as internal questions (i.e. 'theoretical'), but they are in fact *practical*: The question 'Are there *F*s?', conceived externally, should be seen as asking: 'should we employ a linguistic framework in which we may talk of *F*s?' (Carnap, 'Empiricism, Semantics, and Ontology', pp. 207-208; Hale, *Abstract Objects*, p. 6). Since the answer to external questions, unlike that for internal questions, is a *decision* (to employ the framework), we do not, on Carnap's view, commit ourselves to a *belief* about the

existence of *F*s; and this, in turn, allows us to employ the language of, say, classical mathematics without involvement in platonistic metaphysics (Hale, *Abstract Objects*, p. 6).

As noted above, this position will be of interest to the institutional theorist, since something like the distinction between internal- and external claims regarding normative entities, is a principal standpoint of legal positivism. Certainly it is an issue on which Weinberger took a stand (*ITL*, p. 14, for example). However, it would be a mistake to assimilate these two views, as some critics of legal positivism, arguably, have effectively done. It is often thought that, in appealing to the system-relativity of (certain classes of) norms, positivists have been attempting, in a way similar to Carnap, to maintain the utility of talk about abstract objects whilst trying to avoid having to pay the ontological bill. However, closer inspection reveals that the legal positivist's claim (here using Weinberger's account as a template) regarding the existence of norms *qua* entities, is not, as is sometimes supposed, the Kelsenian one regarding validity. It is true that, in general, the positivists will only accept the existence of a law when it is involved in some system, and not as a 'free-standing objec[t] in the world' (id.); but this has more to do with Weinberger's real/ideal distinction than with existence per se. In other words, though by no means all positivists would be disposed to accept Weinberger's distinction, it is nevertheless true that, on the whole, the types of expression used in talking about those norms which do not form part of any system (are not valid norms of the system) are the same in kind as those used in discussing systemic norms, principally in being true or false. Thus, on Weinberger's account, a statement regarding a norm which lacks positive validity is one which addresses a 'pure thought object', or 'possible norm', which is just to say that the norm, as an ideal entity, lacks the attribute of 'real' existence as a social fact (p. 15). In particular, Weinberger was keen to emphasise, in terms of his belief that norms, such as customary norms, can have "real" existence without linguistic manifestation, that the Kelsenian norm-hierarchy is no good guide to positivity (and hence, reality):

> The norm-logical analysis of law is a logico-semantic analysis, in which the question of the positive character of the system cannot be judged. Positivity is a sociological and not a norm-logical attribute of a norm-system [. . . .] the hallmarks of positive validity are sociological characteristics. (MacCormick and Weinberger, *ITL*, p. 45)

This would seem to indicate that, for Weinberger at least (and, perhaps, any theorist tempted to modify Kelsenian doctrines in the direction of Hart), it is sometimes the case that external

questions (such as customary practice or social acceptance of certain standards) are capable of fixing the answers to internal questions regarding the validity and existence of norms within some given system.

Carnap's position is still, of course, of interest, precisely because, if Hale is correct, Position I-sceptical concerns regarding the existence of legal phenomena will be based, to some extent, on ideas similar to those which Carnap employed. In particular, elements of Carty's position are reminiscent of Carnap's deflationist treatment of abstract entities, as may be seen from the quotation at the very beginning of this chapter.[5]

The basic difficulty with Carnap's position, according to Hale, is that there is no obvious reason for agreeing with Carnap that external, 'ontological' questions are pseudo-questions, devoid of cognitive content (*Abstract Objects*, p. 7). The root of the error, on Hale's view, is in supposing that there can be philosophical point to an existence question only if it has a distinctively philosophical sense (id.). Why, that is, should Carnap suppose internal questions to be trivial (and true)? (pp. 7-8) The idea that such questions are trivial, in that highly generalised existence claims ('There are numbers', 'There are laws' . . . .) follow immediately, internally speaking, from 'more or less any of the true statements one might make' using mathematical- or ordinary language, is of little help, since this merely points to epistemological triviality, and not to ontological triviality. And, Hale says, it is the latter sort which is required for the claim that ontological disputes do not centre on internal questions (p. 8). Nor, Hale argues, can Carnap draw support from his belief that acceptance of the framework — of legal language, say — is a decision rather than an 'answer', since the non-cognitive content of external questions was meant to function as a conclusion, not a premise in support of the argument (id.).[6]

Moreover, with regard to the "truth" of internal statements:

> if internal statements [. . . .] are indeed in the market for *truth*, then if the decision to adopt the appropriate framework is sufficient to ensure their truth, it simply cannot be the case that that decision involves no commitment to any existential beliefs; if, on the other hand, it is held that merely deciding to adopt the framework does not suffice to ensure the truth of such general existence statements, then the argument from the (allegedly) non-cognitive character of the decision to their triviality simply collapses. (p. 8)

This point ties in, to an extent, with that made earlier in regard to MacCormick and Weinberger's use of the notion of *verstehen* in the characterisation of institutional facts (or,

as with MacCormick, all facts whatever). I had argued that if the senses of legal- and other expressions are allegedly fixed by reference to an *interpretation* of what happens in the world, rather than to what actually goes on there, then such statements cannot, strictly speaking, be regarded as being *true* or *false*. In the present context, if it is correct that the decision to adopt the framework is sufficient to ensure the truth of internal statements, then (where the decision is non-cognitive in character) what is meant by "truth" in that framework, i.e. truth-in-*L*, cannot amount to "proper" truth in an external sense, since, as specified, no truth-concept for *L* is strong enough to bear such an interpretation.

In any event, Hale suggests, it is unlikely that the alleged freedom to relinquish the framework at any time can be invested with the significance Carnap intended. This is because:

> What matters for the question: *What kinds of object are there?* is not whether the language we actually employ provides the means of singular reference to and quantification over objects of some kind, but whether we could (coherently) employ such a language — at least, that is what matters, unless an appropriate form of *ontological reductionism* can be upheld. But to embrace that option is to abandon the deflationist aim altogether and take sides with the nominalist in his more familiar guise. (p. 9)

Whilst it may be the case that some lawyers are tempted to think in the way here criticised, it is certainly not a charge that could be levelled at the Institutional Theory of Law. Moreover, although this certainly closes off one possible line of assault on the institutionalist viewpoint (i.e. that legal singular terms do not refer to anything ontologically significant), it is not the only, nor perhaps the principal, line that Position I sceptic could advance against the idea that legal statements are metaphysically true or false. (Cf. chapter 4 §§ 1 & 2.)

2.3. Closing remarks

Now that the Fregean strategy is out in the open, the next task is to assess its implications for legal knowledge in-depth. I shall tackle this in two parts. The first, straightforward, matter is to recall the significance of the strategy for the central argument in ITL (§§ 3.1., 3.3.), and to show, briefly, how it resolves the problems encountered in the last chapter. The second, and more important, matter concerns the issue of "realism" which the strategy raises in regard to statements about law. This is by far the most important clue in establishing the foundations of legal reasoning, and it will be almost the sole concern both of chapter 4 (for

the case of legal statements generally) and of chapter 5 (for the case of international law). In order to set the stage for that discussion, and to establish the link between it and what has come before, I shall be introducing, roughly in parallel, at both issues in the final Part of the present chapter (esp. § 3.2. ff.).

III: The significance of the Fregean strategy and the issue of realism

3.1. Significance of the Fregean strategy for ITL

By now, a broad picture of the Institutional Theory has emerged which, I believe, shows how the central goal of that theory can be achieved via the Fregean strategy. That strategy, moreover, appeared to make reasonably good sense of the institutional theorist's viewpoint as presented by Weinberger. The strategy's main argument was a version of (Hale's generalisation of) Frege's argument for the thesis that numbers are objects, and it was conducted on the basis of logical considerations about issues in the philosophy of language. Superficially, such an argument seemed to be at the root of, in particular, MacCormick's account of, ITL, as embodied in the thesis that legal matters of fact are (abstract) facts in virtue of our making reference to them in ranges of statements ordinarily thought of as being in the market for truth. But at the same time, the Fregean strategy offers a much better, much sharper, basis for the Institutional Theory than arguments advanced by MacCormick and Weinberger, particularly in circumventing the need for complex (and erroneous) metaphysical speculation about the status of "social facts", and in clarifying much that was unclear in the *Institutional Theory of Law* about the semantic categories of representations, meanings and objects.

Appearances are, it is therefore tempting to conclude, deceptive: it would be a mistake to see in MacCormick's or Weinberger's accounts of ITL, a developed version of the Fregean argument. As argued in chapter 2, the motive centrally behind the Institutional Theory was that of accounting for the ontological status of law – in particular, its factual nature – whilst simultaneously explaining how knowledge of it in such terms is possible. The difference is that in *ITL* the latter explanation, of our knowledge, was seen as constituting the *justification* for believing in the existence of abstract objects. As it happens, the explanation proceeded in terms of our ability to make true statements concerning them, though there is nothing to suggest, in that book, that any other mode of knowledge (such as

direct intuition) would not have done just as well. By contrast, in the Fregean argument, platonistically interpreted, it is due to the existence and properties of abstract objects that our propositions regarding them are true or false, and it is in virtue of the logical structure of the corresponding sentences that we are able to understand, and to justify, existence-claims made in regard to them.

This is more than just a change in the order of explanation, and has to do with the logical priority of the concepts employed. In *ITL*, language plays merely a convenient justificationary role, designed to mediate our access to access to "social" entities of a different order, and is not fundamental, logically, to the terms of the argument. In the Fregean argument, however, language is constitutive of the sense given to the notion of "object", even where interpreted platonistically, as standing apart from linguistic structures, so that it is central to the logical structure of the entire argument. The argument in *ITL* as it stands, therefore, is analogous neither to realist nor to anti-realist versions of the Fregean argument. The question is, if MacCormick and, independently, Weinberger came so close to adopting the strategy, what prevented them ultimately from doing so?

The answer, it seems, lies in long-standing prejudices about the character of platonism, and about the attendant conceptions of object-hood and abstractness. One gets the impression that despite a strong commitment to normative realism, MacCormick and Weinberger wanted so badly to avoid the pitfalls of a platonic theory of law that they were obliged to perform semantic somersaults so as to avoid positing a faculty of intuition to abstract normative objects. The result was that, when pressed about our mode of access to those objects, both MacCormick and Weinberger retreated in the direction of psychologism. But, as we saw, it is far from obvious that the Fregean strategy demands the kind epistemological excesses both thinkers feared. What needs recognising is that the notion of "object" brought into philosophy by Frege is one which effectively neutralises such epistemological anxieties. This is precisely because it relegates questions of epistemology and ontology to questions about meaning.[7] Metaphysical questions about existence of legal norms and other such entities *are* legitimate (and meaningful); but answers to them are arrived at via semantic considerations pertaining to the statements in which they figure and not, as the positivists were often given to suppose, in terms of an analysis of the epiphenomena of social action.

What is of particular interest now is the *way* in which statements about the law receive their meaning, and are understood. A systematic explanation of this – of the foundations of our talk about the law – is at the same time an explanation of our knowledge of the targets

of that talk. This, in turn, is the information needed for a proper look at the kind of activity which takes place within international law. The systematic explanation we seek turns essentially on notions of *referring* and *truth*. Of course, very little has so far been said about either the precise character of normative entities (the "targets") or our mode of access to the truth of statements about the law. Since both of these matters are ones which Position I sceptic and (especially) Position II sceptic will be reluctant to endorse, they are still owed an explanation of the nature of legal truth, and its relationship to the epistemology of normative entities. No answer, in other words, has yet been provided to the Position I-sceptical question *why* legal statements, where correct, ought to be taken as being *true* (i.e. that such statements fulfil the minor premise of the Fregean argument). But such questions are just what stand to be answered in the course of an account of the meanings of statements about law.

The position, now, is this. In ITL – or rather, the Fregean version of it, assuming that that version captures the truth about legal systems at which MacCormick and Weinberger were aiming – we have a basic template for an explanation of the foundations of legal reasoning. Thanks to (Fregean) ITL, we now know *where* to look for that explanation: we must look closely at the semantic structures ("meanings") of legal statements. It is now necessary to begin furnishing that explanation, by looking where ITL says we should. The next task, therefore, is to show (a) how meanings are assigned to statements about the law, based on an understanding of the mechanics of *reference* of such statements; and (b) how and when statements about the law are *true*, and what it means for them to be true. Since both questions are intimately connected with matters relating to the "objectivity" of legal orders, it is via this issue that, eventually, it is possible to reach the desired general account of the foundations of our reasoning about law. I call this "the issue of realism".

3.2. The varieties of realism

The term "realism", in law, unites a rather loose family of related dogma, all of which are associated in various degrees with a sceptical view of legal practice, and in particular, of legal reasoning. Typically, the term applies to those who believe there to be nothing essentially present in juridical reasoning which could constrain, to any great extent, the conclusion to be reached on the basis of law. Because such reasoning often rests, to some degree, on the notion of precedent (at least in municipal law), it is unsurprising that, in taking sceptical account of this purported feature of legal rationality, there are more shades of

realism in law than there are colours of the rainbow. But there are also views called "realism" that are equally well-entrenched within the philosophical literature. There is the traditional view, by which a realist is one who defends platonism as a general world-view. And there is the version of realism identified by Michael Dummett, according to which a realist with regard to a given range of statements, or theory, is just someone who accepts the Law of Excluded Middle for that range, or theory; one, that is, who believes all such statements to be determinately true or false independently of our ability, in principle, to decide their truth-value.

Alongside this attitude toward sentential *truth*, a concomitant attitude is usually thought to exist with regard to *reference*. One who accepts the view that statements are mind-independently true or false will be generally supposed to do so on the basis of, or else as a result feel bound by, a realistic view of what those statements *say*. That is to say, sentences are true or false mind-independently just, in general, because they are a faithful description of the facts they depict. Such facts (and usually their constituents) will therefore as a rule be thought of as themselves existing mind-independently. In contrast, an *anti*-realist will typically regard truth as conferred on statements, not from "above" (from the facts), but from "below", usually in the shape of rules of use, or "grammar".

It is intuitively appealing to assume that Legal Realism[8] has a natural ally in some form of (philosophical) anti-realism. This is because both positions argue from the perspective that right answers are, theoretically, no different from the best answers at which we can arrive on the basis of our most refined criteria of correctness for statements of that kind. This is not, of course, necessarily to say that those criteria fall short of what is required. For one thing, the model theory of Intuitionistic logic provides objective enough criteria for the notion of a valid inference within (Intuitionistic) mathematics – one, that is, which is assessable on purely semantic criteria. All that is denied is that there is anything more to that notion than is identifiable by means of logical theory. In law, parallel considerations would, inevitably, lead to the view that the outcomes to chains of reasoning in legal contexts are fixed only insofar as our established techniques and methods of legal inference point unambiguously to a given fixed conclusion. This amounts to their ability to supply us with grounds for establishing the truth, or acceptability, of some statement of law, and (perhaps) not that of others. Where no such ground is available – where, that is, our techniques of legal reasoning do not supply us with the means justifiably to assert some statement on the basis of existing legal resources – then, on the anti-realist view, there simply is no correct answer to be had.[9]

However, to assume this neat relationship is perhaps to assume too much. (Indeed, in the next chapter I shall argue that it is possible to doubt, on general philosophical grounds, whether the undeniable relationship between truth and reference is quite so tight as it appears.) As noted, there is a perfectly intelligible sense in which someone who believes that legal matters of fact are mind-dependent entities could hold there to be corollaries of (at least some of) our legal statements – perhaps in virtue of their semantic properties – of which we have no immediate knowledge, or about which, by not remaining faithful to our concepts, we are mistaken. On the other hand, where the primary belief is of the mind-independence of (again, at least some) matters of legal *fact*, it is still possible to regard any *inferences* made in the course of legal reasoning regarding such matters, and therefore the corresponding relations holding among them, as being completely determined by our actual procedures and modes of thought regarding them. To that extent, to be a realist in the legal sense is not necessarily to be an anti-realist in the philosophical- or logical sense.[10]

Realism of all types intimately concerns the foundations of legal reasoning, because what is at issue is whether or not there are limits, either in principle or in practice, to the application of techniques of legal reasoning, which fall short of the full range of behavioural traits and inferential relationships thought to hold between the targets of that reasoning. Where platonism figures in this claim (as, perhaps, with some forms of ITL), this will involve ontological arguments, in the form of a debate over the types of legal entity that there are (or are not), in virtue of which our legal statements are true or false, as well as corresponding epistemological claims about the ground, scope and kinds of legal knowledge we may be said to possess. I shall examine these in chapter 4.

Such dimensions to the platonist position have, to some extent, been underplayed in recent times as a result of Dummett's work on realism, which, as we saw, rests almost entirely on questions of meaning. Hugely important and ground-breaking though that work is, the fact of its having, in a sense, relegated ontological theses to a secondary position has been unfortunate, in that it tends to mask important differences between semantic realist and platonist theories. These differences shall emerge in the next chapter, where they become fairly important. I have already attempted to show, in part, why they arise: it is because legal theoretic matters, in contrast to mathematical ones, have a fairly incontestable claim to be, to some degree, mind-dependent even when the targets of the corresponding propositions are not. In particular, I argued, it is possible to hold there to be legal "objects", in a

platonistic (i.e. mind-independent) sense, even granted that they are involved, for the most part, in inferential relations which are entirely of our making.

It is now time to refer back to the two sceptical positions outlined in chapter 1. Both express distrust at the thought that our knowledge of law is such that we could be held to be reasoning about mind-independent, purely "legal" orders. Elevated into a semantic claim, this amounts to the charge that we cannot have succeeded in endowing our statements with meaning in such a way as to allow us to make reference to legal concepts, distinct from e.g. diplomatic or political ones. Position I sceptic will demand that, therefore, there is no such thing as "legal" reasoning as distinct from any other sort of normative reasoning, in the sense outlined in chapter 1. Position II sceptic, on the other hand, will use the same conclusion to argue that the reasoning procedures we *do* use in relation to our "legal" concepts do not give us any coherent means of making judgements based on objective, semantic grounds. (That is, that we have no rational means of *assessment* of legal argumentation, in the sense of knowing when and why certain of our arguments, in relation to those concepts, are valid, and others not.)[11]

It is often supposed that any decent account of legal reasoning – one that can successfully beat off the sceptic claims – must be founded on the solid bedrock of a theory of *justification*. Wróblewski's and Tammello's accounts, among many others, begin this way; also, Raz's theory of practical reasoning, in its essential terms, is a theory of argumentative justification. It may not be wholly unfair to state that, in general, such a view stems from the idea that the matters of which such reasoning treats are not "factual" in any usual sense (in that our statements could be true or false of them), but belong to some other mode of being, of which our arguments concerning them can be merely better or worse, or whatever. This concern partly derives from that concerning the fact/value distinction, and certain questions in normative logic.[12] But no matter what the ultimate status of such legal matters is, there is, as already seen, a much deeper and more fundamental foundation to legal reasoning, which concerns primarily the building blocks out of which such justifications (or judgements) in law are built: namely, their semantic structure. Questions of semantics do, of course, concern the targets of such justificationary attitudes, as well as the nature of our knowledge of them. But exactly what those targets are, and how they figure in the semantics of legal reasoning, are inseparable from questions about the meanings of legal terms, and how they function in legal statements.

3.3. Concluding remarks

This is, roughly, where the institutional theorist was left a section ago. She was left at that point with what seems like a strong argument for the existence of legal entities and legal matters of fact. Such things are said to exist, not as unanalysable "givens" which are constituent parts of social action, but as the referents of genuine singular terms, and other referring expressions used in the course of statements about the law. And, as the issue of realism was intended to demonstrate, the view we take of the mechanics of reference (and of truth-conference) will shape our attitude to the way in which legal *reasoning*, qua activity of concatenating such statements, should be judged. The semantic analysis of such statements, and not the analysis of intentional action, is what shall supply the beginnings of the answer that is sought. We investigate the relevant issues by inspecting the terms in which we frame our arguments and statements about the law, and, crucially, assign meanings to them. In the next chapter, I shall make a start on this activity by initially asking such questions of statements of law of fairly arbitrary character. More specifically, the questions I shall be dealing with are:

(1) is the passage from the Fregean argument for the existence of legal objects to a platonist conception of them, legitimate?

(2) what view are we to take of the status of legal orders, i.e. to what extent are legal systems properly classified as *systems* of norms, parts at least of which are considered determinate in advance of our construction of them?

The answer to (2) is rather complicated, and much of it attends on issues not fully discussed until chapter 5. A brief sketch of that answer, insofar as it connects with immediate concerns, is nevertheless returned towards the end of chapter 4.

Supplying an answer to (1) is the main business of chapter 4. Upon the character of our answer hangs the range of possible responses one can give to the problem of identifying the structure of international law, as will be seen in chapter 5. The answer to (1) also brings with it a firmer conclusion about the Institutional Theory. As will also be seen, the abstract objects of the platonist's ontology correspond roughly to the "real" component of Weinberger's norms (i.e. as opposed to their 'ideal' or 'informational' component). Though this is not a direct correspondence – the social reality of norms being, according to Weinberger's break

with Kelsenianism, a feature of their positivity, the manner of their real existence in the way Weinberger describes clearly *is* a matter of their ability to stand as the (objective) referents of abstract singular terms.

This brings me, nominally at least, to the end of my examination of positivist approaches to the foundations of legal reasoning. As I shall endeavour to show, an appreciation of the problems which those approaches tried to overcome — in combination with the Fregean strategy lately outlined — is an essential step in the project of returning decent answers to the questions listed at the start of this thesis. With a good deal of the groundwork done, and most of the issues out in the open, it is now time to turn to some of the most important questions concerning the foundations of international legal reasoning. The beginning of that task is a full investigation of the issue of realism and anti-realism about legal orders. Starting with the next chapter, I shall begin to give a concrete answer to the question: *what are the foundations of legal thought?* To begin with, the terms in which an answer will begin to take shape will be, of necessity, at a fairly high level of abstraction. Nevertheless, a rather philosophical discussion is necessary in order to lay the groundwork for a full and credible account of the foundations of international legal reasoning, both "internal" and "external", which shall emerge in the latter half of Part II.

PART II

The foundations of legal reasoning in international law

4

Philosophers on legal knowledge (II) — realist and anti-realist legal orders

The notion of denoting, like most of the notions of logic, has been obscured hitherto by an undue admixture of psychology [. . .] But the fact that description is possible — that we are able, by the employment of concepts, to designate a thing which is not a concept — is due to a logical relation between some concepts and such terms, in virtue of which such concepts inherently and logically *denote* such terms. (Russell, *The Principles of Mathematics*)

Really, existence is what is proved by the procedures we call "existence proofs". When the intuitionists and others talk about this they say: 'This state of affairs, existence, can be proved only thus and not thus.' And they don't see that they have simply defined what *they* call existence [. . .] We have no concept of existence independent of our concept of an existence proof. (Wittgenstein, *Philosophical Grammar*)

0.1. Introductory remarks

The concern in Part I of this thesis was to chart various ways in which legal positivists have understood the status of international law. This was seen to have two aspects: (i) a general account of legal orders and systems, and whereabouts in this picture international law goes; and (ii) an account of how any particular system of law is structured, and how we must reason about it and operate within it. In chapter 1, I tried to cast doubt on the utility of a single, unified theoretical framework in response to (i). Nonetheless, I believe that there are significant underlying similarities which form part of every system-specific answer to (ii). These common features do not form part of any general theory of law; they are, rather, the very general questions about the meanings of legal statements which have been the centre of concern through the last two chapters.

The last chapter witnessed the development of a basic strategy for the analysis of statements about law, in this general sense. Its purpose was to uncover what I have been calling the "foundations" of our reasoning about, and knowledge of, the law. In the present chapter, I shall be showing exactly what that strategy says about such statements, and therefore also about the more general, underlying features of systems of law and our knowledge of them. With that account finally at hand, I shall consider in chapter 5 the particular case of international law, where I shall try to show that the foundations of legal reasoning are, as promised, rather different than in municipal systems of law.

I: What is talk of law talk *about*?

1.1. Meaning and Reference

In the previous chapter, I argued that a natural interpretation of ITL's very plausible central thesis is some form of Fregean platonism about law. The contention at the heart of ITL, that talk about law is, *ex definitione*, talk about *something*, therefore commits us to taking some stand on what the references of legal statements are. The question which must now be faced is, which one?

Michael Dummett has frequently reminded us that platonism, as a philosophical outlook, is more properly opposed to constructivism than to nominalism, the latter involving the repudiation of all abstract objects.

The problem with nominalism, it will be recalled, is that it can provide no satisfactory explanation of the meanings of our linguistic expressions where they involve reference to abstract objects. As such, it suffers from a joint implausibility. First, any nominalist position must sooner or later hold that quantification over, inter alia, institutions, laws, the ICJ, numbers and so on, is merely apparent; that when we assert claims regarding such things — that such-and-such is a valid and recognised doctrine in the Law of the Sea, that a certain norm is effectively binding on some state, or that 5 + 7 = 12 — this is not what we truly mean. Terms such as 'the ICJ', 'the laws of guerrilla warfare', and 'the number 5', are not references to objects, but are a shorthand and deceptive way of speaking about, e.g., physical objects or brain-states. This is, however, manifestly implausible. In asserting such claims, what we usually *understand* by those propositions is clearly what we *do* mean. And, as I have tried to show, it is simply not the case that our statements about the law can be rephrased, without loss of equivalence, as reports on "brute" factual events. Furthermore, where reductive equivalences are available, Wright's argument stands in the way of the nominalist conclusion as to their priority, without further deliberation.

Second, and much more important, as Hale noted, it is not whether or not we mean a certain thing by our linguistic practice that is important, but whether it is possible, in principle, to mean that at all. Whether or not we can depends on whether we could supply that linguistic practice with a coherent semantic theory. It is therefore destructive of the nominalist position that we can: by the Fregean strategy. Indeed, semantic theories which permit reference to abstract objects seem to be the only theories that can preserve the validity of laws of logic which we take as being indisputably valid, such as that from $A(a)$ to $\exists x\, A(x)$. As I stated earlier, our linguistic practice threatens not to make sense if we cannot go on from a statement such as 'The ICJ takes great care to distinguish previous decisions' to infer that 'It is true of the ICJ that it takes great care to distinguish previous decisions'; and so on. It is therefore unclear why we should deny ourselves the utility of reference to abstract

objects, when "object" is understood in the Fregean sense. The central question for philosophy (and, derivatively, for legal theory) is, therefore, how are we to regard those objects?

This question is central to ITL, since the centrepiece of that theory was supposed to be exactly an explanation of the subject-matter of legal statements (and, in particular, of normative existence-claims) within the confines of a believable ontology. The Fregean strategy supplies the basic framework for such an explanation, in terms of the only reliable guide we have (language). But, as so far expounded, that strategy tells us little about the character of the entities we supposedly talk about; a fuller account of that depends upon a response to the issue of realism. It will be necessary to begin that account with a journey into the philosophy of mathematics.[1]

1.2. Metaphysics in mathematical theories

In the philosophy of mathematics, the debate between constructivists and platonists takes the form of an argument about the meaning (and about our understanding and acquisition of the meanings) of mathematical statements. For the platonist, mathematical statements, of various sorts, get their meaning from involvement in mathematical structures which are said to exist independently of our ability (even in principle) fully to comprehend them, and which form a mathematical reality separate from any intellectual activity involving it. So, for example, the natural number sequence is construed as an infinite totality that we are somehow able to intuit, and whose structure and properties it is the job of elementary number theory formally to describe. What this means is that, in our model theory, there is held to be a determinate "intended model" of the natural numbers, whose structure it is our task to capture, usually by means of a second-order logic. The fundamental problem, however (from which, according to many, platonism derives its attraction as an explanation of mathematics), is that second-order logic is incomplete, making a full description of the "intended" model impossible.

Thus our formalisation of standard arithmetic is incomplete: there exists a statement expressible within the system, which we recognise as being true, but which is not provable within the system.[2] For platonists, this result came as a gift from the gods, since it offered an indisputable reason for preserving the strict distinction required between a body of truths and our knowledge of it. It also shifted the burden of proof back on to the constructivists, to show why they thought that our mathematical knowledge cannot go beyond our ability to provide constructions of (what platonists insisted were) mathematical facts. In other words, because our formalisation was an attempt to give conceptual body to our intuition of an abstract structure, its failure fully to capture that intuition (or more precisely, its target), results in the conclusion that mathematics is a body of fact, from which our statements about it derive their truth-value. The question is important because, although no parallel result would seem to hold for law (cf. § 3.2.), the correctness of the platonist thesis about

mathematical statements would signal the possibility that it is, in general, necessary or at least plausible to regard statements about such abstract realms as holding in virtue of *de facto* properties of externally subsisting objects.[3] This would, as argued in chapter 3, hold profound implications for sceptical views of both international and municipal systems of law.

For anti-realists, however, all talk of "the" intended model is meaningless, at least insofar as it is (they maintain) impossible directly to intuit some abstract structure completely on its own terms, devoid of any description of it. The basic idea is that whatever mathematical intuition is, it is not the simple analogue of perception in the case of physical objects: though arguably language does not exhaust thought (because there are such things as, for instance, dreams), it does, by definition, exhaust *conceptual* thought, and mathematical structures are exactly concepts in that sense. Since the point of semantics is the analysis of concepts, it is, anti-realists say, impossible for a model to exist, or be thought of, apart from its own description. For Dummett, platonism collapses for this reason: the proposition that our intuition of the natural number sequence cannot be unproblematically communicated by means of any formal system makes sense only if there is some other sense in which it could be communicated ('Platonism', p. 210).[4] As Coffa once put it:

> The trouble with Platonism had always been its inability to define a priori knowledge in a way that made it possible for human beings to have it. Identifying the *topic* of a priori knowledge, saying that '*all* a priori *knowledge deals exclusively with the relation of universals*' (*The Problems of Philosophy*, p. 103), is not enough to explain how we *know* it. One must add an explanation of how we have access to such universals and their relations: What is the semantic pineal gland that links the World of Universals and Forms with merely human epistemology? That is why any Platonism that is more than just a colourful rephrasing of commonsense beliefs must postulate *both* an incredible world and an incredible faculty of access to it. (*The Semantic Tradition from Kant to Carnap*, p. 126)

In the present context, and in the case of legal systems, the central error committed by platonism, on the anti-realist view, is that of explaining the *semantic* notion of a model as something other than semantic. It would be as if, in addition to its semantic structure, there were some other, "transcendent" structure that it tries to embody. The only reason for supposing that such a thing exists, in the case of elementary number theory, is our failure to point to concrete examples of disagreement over instances of membership of the natural number sequence, in the context of our inability to state fully, in formal terms, what we *mean* by that sequence.

In the context of mathematics, therefore, the issue between platonists and anti-realists boils down to an argument over the source and character of mathematical intuition, and therefore of meaning. For anti-realists, this will always be a matter of semantics. For platonists, the issue is one of our ability to describe, correctly or otherwise, a distinctively

mathematical reality which exists independently of our semantic characterisations (and in virtue of which those characterisations have meaning), and concerning which those characterisations are determinately either true or false independently of our being able to verify or falsify them, in terms of existing models. It is the existence of such a reality outside of semantics, beyond our models and proof structures, that anti-realism seeks to deny.

1.3. The metaphysics of legal orders

As noted earlier, this characterisation of the situation ought to be modified before it is applied to the case of law. But modification is necessary in any case, not because of any gap, as such, in Dummett's characterisation, but rather because of a need for a change in emphasis, from the *sense* of sentences involving abstract terms, to their *reference*.

In the previous chapter, I tried to demonstrate the importance of observing a precise distinction between three very different semantic categories; namely:

(i) the mental acts by which we represent ideas to ourselves;
(ii) the judgements (or conceptual contents) themselves; and
(iii) the various entities denoted by those concepts.

The first part of chapter 2 was an attempt to demonstrate, in the context of the Institutional Theory, the extreme danger which results from confusing (i) with (ii). In the present chapter, it is with (ii) and (iii) — or rather, their particular relationship — that I am concerned.

On the picture of meaning dominant since Frege, an expression must perform two radically different functions if the judgement it expresses is to be regarded as true. Each meaningful unit of information must be able to express its sense (*Sinn*) and signify its reference (*Bedeutung*). The sense of a normative expression is roughly what Weinberger ended up with once the psychological elements of his theory of meaning are removed. But no less important is the *Bedeutung* of those expressions: what they refer to. Roughly speaking, the *Sinn* of an expression tells us what it means (by specifying its truth-conditions), whereas its *Bedeutung* tells us whether what it says is true.[5]

The relative contributions of these two notions can be given using Frege's own favoured example, which concerns an identity-statement. Consider, said Frege, the judgement:

(*) The Morning Star = the Evening Star.

This statement, as it happens, is true, both being names for the planet Venus. So, too, is

(**) The Morning Star = the Morning Star.

What is important from the point of view of logic (or semantics) is not, however, the respective truth-values of (*) and (**), but our mode of access to their truth. Those prepared to make sense of modalities wrt truth will typically argue that, whereas (*) is true *contingently*, in virtue of a certain correspondence with the facts as it were, (**) is true *necessarily*, come what may. At the level of epistemology, we may make a similar partition of knowledge. we know (*) holds *a posteriori*; our knowledge of (**), on the other hand, rests only on its meaning[6], *a priori*. Those different modes of access to truth are an important matter in their own right, but they only concern us here insofar as they point up the fact that, while 'The Morning Star' and 'The Evening Star' have the same *reference* (i.e. Venus), they have different *senses*. Expressions with different senses may therefore have a common reference, and it is this difference in sense between (*) and (**) which explains the difference in mode of access: different names for the same object correspond to different ways of determining which object they name (see Coffa, *The Semantic Tradition from Kant to Carnap*, p. 78).

The crucial importance of this last principle will become evident when considering Hale's theory later in this section. That theory centres partly on the means by which we may be said to identify various objects as the bearers of names. This harmless-sounding issue is in fact central to the project of settling the fundamental question of this chapter (and of ITL), namely: exactly what are the objects of legal discourse, and how are they given to us?

The Bedeutungen of legal expressions

The most natural way in which to regard disagreement over abstract objects is, as noted, via questions of meaning, and of the nature of truth. For platonists, mathematical statements are regarded as true on the basis of ontic necessity, in virtue of matters of fact.[7] For constructivists, on the other hand, mathematical statements are true in virtue of proofs of them, and this is an epistemic necessity (cf. *Frege: Philosophy of Mathematics*, p. 29). Since, as Dummett points out, these notions are coextensive at the first-order level, but diverge at the level of second-order logic, the fact that we cannot prove the truth of some statements which hold in certain models is an attractive way in which to regard the distinction between those two positions. Whereas a platonist will regard her statements as deriving their meaning from (true) states of affairs of which we may have no knowledge, constructivists will deny meaning to statements that do not fall within our powers of verification. Further, Dummett stresses, insistence on verificationist truth-theories will greatly narrow the sense/reference distinction (*Frege: Philosophy of Mathematics*, p. 16). It does not, however, obliterate it.

If this latter fact has been to some extent disguised, it may have been the rigidity of mathematical concepts that has been partly to blame; but it comes out strongly in the context of law. This is just the earlier reflection that it is possible to take a broadly anti-realist view of the senses of legal expressions, whilst maintaining a platonistic view of their references. As noted earlier, the most natural reading of ITL, as presented by MacCormick and

Weinberger, involves holding essentially an anti-realist attitude toward the composition of the legal order, since it is hard to imagine a theory hostile to the one-right-answer thesis which nevertheless held that legal matters of fact obtain without our actually constructing them. But, equally, to take account of what MacCormick and Weinberger called the "social" dimension of norms, it is closer to the spirit of that theory to regard (constructed) matters of law as mind-independent to some degree, or at least, as having some sort of existence beyond the role names of them play in semantics. The way in which the latter is regarded has to do, not so much with sense, but with our conception of the mechanics of reference. In particular, it raises the question whether the relationship between singular term and object is that of name to bearer, as with reference to concrete entities, or whether it is that of semantic role, in Dummett's sense as outlined earlier. There are, of course, difficulties with any such account — particularly since belief in the existence of objective legal name-bearers, beyond the role such names play in semantics, would seem to entail a further belief in the possibility, all things considered, of their possessing certain properties of which we have no knowledge. But that does not automatically invite the conclusion that such difficulties are irresolvable. For one thing, lack of knowledge of those properties does not mean that it is beyond our power to establish their obtaining, *in principle*. In that case, there is no reason to believe that the definition of the truth of their obtaining is proof-transcendent. The problem, however, is really whether it can be established that those two notions, beyond their being contingently coextensive, necessarily coincide. In advance of deeper investigation, I believe the issue is at least open.

The result of these reflections is that, particularly in law, it is insufficient to take a stand merely on the issue whether or not to adopt a truth-conditional- or verificationist account of legal semantics. The choice between those two alternatives is, of course, the major part of any investigation into the foundations of legal reasoning, and can only be made on the basis of deep reflections about the nature of legal "logic" and of legal uses of language. However, this must be supplemented by an explicit stand on the mechanics of reference, i.e., on the question: what are the targets of legal reasoning?

The spirit behind ITL would, as we saw, benefit most from a platonistic construal of reference, such as the one given by Hale in *Abstract Objects*. The reason, again, has much to do with the unshakable positivist belief that the ultimate answers to the institutionalist's questions lie in sociological reflections, rather than in semantics. As Raz once put it:

> If philosophy of law was the study of the meaning of the word 'law' then it would not include the theory of legal systems as a major part. But legal philosophy is not and never was conceived to be by its main exponents an enquiry into the meaning of this or any other word. It is the study of a distinctive form of social organisation. ('Postscript', *Concept of a Legal System*, pp. 209-210)

The view that legal philosophy is not concerned with meaning, which I continue to believe is deeply misguided, is roughly the one in mind at the end of chapter 1, where I argued that it is a general trait of legal positivism to mistake semantic questions for ontological ones. This trait is clearly evident in the remark that Raz made immediately after the quoted passage: '[. . . .] it is the study of the social organisation and its normative structure which is the subject of this book, not the meaning of any word'. Whatever view is taken of this, however, the above considerations regarding reference, which *do* rest on questions of meaning, establish the need to investigate the positivists' ontological stance further. In particular, we are owed a much clearer account of what the constituents of the positivists' institutional facts *are* than has so far been forthcoming. Since any such account is inseparable from the issue of our knowledge of them, and since that knowledge is — in the absence of a direct acquaintance with them — 'propositional' (i.e. semantic) as MacCormick said, we can do no better than examine the platonist's argument for the existence of "real" objects as the bearers of names. Nothing less will do to establish the existence of (and our knowledge of) the kind of "socially real" norms which feature so consistently in the writings of the major legal positivists.

In the remainder of the present section, I intend to bring my reflections on the nature of legal objects (and this aspect of our knowledge of them) to a close. I shall be arguing, in particular, that a platonistic conception of reference of the objects of ITL, which is implicit in some of the writings of MacCormick and Weinberger, is not a pre-condition of the fruition of that project, since an institutional theorist could, theoretically, promote the anti-realist argument that the subject-matter of legal discourse, and of legal reasoning in general, is a matter purely internal to language. I shall, however, take the personal view that the platonistic conception is nevertheless the best explanation of the phenomena in question.

Significant though this is, in establishing ITL's goal of an ontology sufficient for legal practice within the confines of a reasonable epistemology, it does not yet say anything about the more general question of the nature of legal *orders*; viz., whether they should be conceived of realistically or anti-realistically *qua* their internal structure. For, whereas this section provides an answer to the question of the *references* of legal propositions, section II concerns their *senses*.

1.4. The status of abstract objects

Objects, in Frege's sense, are 'just [. . . .] the sort of thing that can be referred to by means of a singular term' (*Abstract Objects*, pp. 3-4). Though true in general principle, this expression is likely to mislead where the interpretation put upon the Fregean argument is platonistic, as opposed to anti-realistic or (semantic-) realistic. That expression is not, primarily, deigned to advance particular claims regarding properties of abstract objects (as might have been supposed). Rather it is to remind us, as Hale previously said, 'that there is no fully general explanation of what it is to be an entity of one of those types save by

reference to the type of expressions of which entities of that type are the non-linguistic correlates'. In other words, it serves as a reminder that our understanding of what an "object" is, is fully dependent on our grasp of the underlying (quantificational) logic of our language.[8] However, the admission of a platonistic element in the theory of those objects, such as the one Hale (and, indeed, Frege himself) advanced, is strictly to alter the effect of this expression. (Abstract) objects are not 'just' the referents of singular terms, but have an autonomous existence. The point of the reminder is just to impress upon us the crucial fact that, barring semantic miracles, our only means of intellectual access to (and knowledge of) such objects is via the analysis of language. A successful defence of ITL's goal, platonistically interpreted, therefore rests on the platonist's ability to reconcile these two dimensions — to show, in other words, that our ability to conceive of abstract normative entities through the medium of language is a *sufficient* basis for knowledge of their "reality" in a platonic sense.

Hale, more perhaps than other contemporary philosophers, is alive to this particular ontological dimension to the Fregean argument, and its relative independence of the issue of realism and anti-realism. That Frege advanced a truth-conditional theory of meaning rather than one in terms of verification- or assertability-conditions, is eminently consistent with his platonistic view of abstract objects; but it does not compel it. The major tendency in the philosophy of language has been to suppose that Frege's famous Context Principle[9] effectively settled that part of the question dealing with reference of abstract terms, by trivialising it. Dummett's criticisms of nominalism too centred on the fact that nominalist concerns about admitting the existence of abstract objects were, somewhat naively, due to their asking for the meanings of words in isolation[10]; whereas, in the sense in which Frege took the word 'object', the thesis that there are abstract objects — such as mathematical objects — is 'barely disputable at all' (*Frege: Philosophy of Language*, p. xxxviii).

The reason it is 'barely disputable' is due to the import of the strategy outlined in chapter 3. According to that strategy, when we speak of existence in connection with abstract objects of this kind, we are in effect referring to the role such things play in the expressions in which they occur, and not to any extra-linguistic conception of them we may be said to possess. Since the Fregean notion of "object" is simply that of its being the referent of a genuine singular term, our grasp of what abstract reference is amounts to our knowledge of the role such expressions perform in language. And a natural view to take of reference is, therefore, that it *is* the semantic role of those expressions. As noted, however, the natural view for a platonist to take of reference is that in which the paradigm is the relation of a name to a bearer; and when this is the case, nominalistic qualms about the existence of abstract objects are far less silly.

The problem with nominalism, therefore, is not its rejection of abstract objects, conceived platonistically. Rather it lies in the attempt to show that our talk about abstract objects and use of abstract singular terms *as a whole* (including, that is, our use of such terms where

reference is conceived as semantic role) is illegitimate and somehow illusory — which it certainly is not. That is to say, nominalism is vitiated, not because of its rejection of (partially-) mind-independent abstract objects, but because it supposes rejection of them to entail repudiation of abstract objects in any sense, when this is neither necessary (in view of the possibility of forms of constructivism), nor possible. What remains, therefore, is the need to show why we could accept an constructivist view of abstract objects, in terms of "semantic role", rather than a platonistic one in the strict sense, in terms of names and (objective) bearers. It was roughly to the opposite task — of establishing a defence of the platonistic view — that Hale applied himself in *Abstract Objects*.

The major premise of Hale's argument is, as we saw, that there are objects iff there could be (non-vacuous) singular terms to cover them. More precisely, it is that 'asking whether there are objects of a certain general kind is tantamount to asking whether there are, or at least could be, non-vacuous singular terms of a certain kind' (*Abstract Objects*, p. 4).[11] It is therefore pertinent to ask exactly how the bi-conditional arises. The inference:

(i) x is an object $\Rightarrow$ there could be a singular term to cover x

is, of course, impossible to verify, though perfectly straightforward in view of the Fregean definition of "object". As long as objects are just what singular terms refer to — where, in other words, the notion of "referent of singular term" exhausts that of "object" — (i) is more-or-less true in virtue of definition. Where the sense given to "object" is platonistic, however, (i) would appear to be, if true at all, only contingently true.

The problem is that on the platonist account, though not the realist account, the notion of an "object" is that of a mind-independent abstract entity whose existence is *not* essentially tied down to the existence of linguistic terms. Of course for a realist, the natural number sequence exists in its entirety without there actually being numerals to name each individual element of the sequence; but for any element of the sequence, there could in principle be found a (determinate) numerical term to cover it. But because the realist conception of object is a semantic one in the Fregean sense, if it were impossible in principle to find a singular term for some x, then x would not be an object (though it may be some other kind of entity, such as a function or a relation). Strictly speaking, the platonist conception of "object" is not, or is not entirely, semantic. On the platonist account of mathematics for example, it must be viewed as possible for numbers in some sense to exist even if it were impossible in principle to supply a determinate language for mathematics. If there could not in principle be found, among the things in the universe, any singular terms at all, the platonist would presumably still be committed to there *being* the distance between the Milky Way and Andromeda at some given time t, or the rate of expansion of the universe at t + 3μ-seconds after the Big Bang. The example is somewhat artificial and slightly unfair, since (by the Fregean

argument, as well as any sane view) it is, literally, inconceivable that such things could exist without the inference in (i) holding for them. But the point is that, for the platonist, even though our understanding of "object" is that given by the Fregean argument, it is ultimately immaterial to the existence of such objects whether we can actually conceive of them or not: where they exist, they do so non-relative to human intellectual capabilities.

The combination of the platonist insistence on the mind-independence of abstract objects with that of the name-bearer conception of reference requires that the link between the notion of "object" and that of "referent of singular term" is loosened, with the result that (i) holds, if at all, only contingently. Except for heuristic purposes as an explanation of contingent features of human conceptual powers (and perhaps less contingent features of human linguistic practices), there seems little reason within the framework of the Fregean argument, platonistically construed, to continue to insist upon it.

Much more crucial, from the point of view of explanation, is the inference:

(ii) 'x' is a singular term $\Rightarrow$ x is an object.

Again, where the notion of "object" is Fregean, with no additional platonistic element, the inference is unproblematic. It is, nevertheless, informative: we may have doubts about whether something is a singular term (as Hale showed); but if it is proven that something is functioning as a singular term, there can be no further doubt about the status of its referent as a genuine object. For example, the fact that we can, coherently, employ a language which uses singular terms standing for laws *shows* that there are legal objects, and that lawyers engaged in legal reasoning habitually talk about such objects rather than spurious entities such as brain-states or ink-marks on paper. This vindicates (a version of) the Institutional Theory, in the sense that one may legitimately talk about institutions, and decisively refutes the views of deconstructionists who see reference to legal objects as problematic. Once a platonistic construal is put upon the notion of object, however, it must be conceded that (ii) is not really based on anything that could be taken as a direct ground of validity.

The reason is familiar. It is not the thesis of mind-independence that is problematic, nor that of the name/bearer relationship of reference. It is rather the *combination* of those two theses which creates the trouble. It is possible to conceive of abstract objects as standing in a name/bearer relationship to linguistic terms, and remain within the terms of the Fregean argument, so long as such objects — such as, for example, musical compositions or laws — are held to be firmly mind-dependent in the sense of owing their existence to human creative processes essentially. It is also possible, as we saw, to believe in the existence of abstract objects (such as the natural number sequence, conceived as a completed totality), and remain within the terms of the Fregean argument, so long as it is held that such objects are *semantic* entities, entirely constituted by language and concepts. Both of these positions preserve the primacy of language over thought, and of word over object. Belief in objective name-bearers

of which we may in principle have no knowledge, on the other hand, stands this priority on its head. Propositions — of mathematics, say — are then true or false in virtue of actual, mind-independent states of affairs and of objects which are not essentially linguistic and do not owe their existence to concepts or, presumably, the possibility of concepts. When "object" is given its platonistic sense, it is difficult to see why the platonist should be entitled to regard the Fregean major premise as true. Or, to put it the other way round, where the argument for abstract objects is the Fregean one, it is hard to see why the platonist should feel entitled to a thesis about those objects stronger than that to which non-platonists are committed. Moreover, since non-platonist accounts of, e.g., mathematics and language yield a seemingly coherent account of mathematical and linguistic practice, and of the corresponding objects etc. which make up the bodies of knowledge addressed by those practices, it is not clear why extra, platonistic, theses about them should be thought necessary at all.

It is not really until the final two chapters of his book that Hale gets round to addressing these matters in detail. The central question is, 'How is reference to abstract objects possible?' (*Abstract Objects*, p. 149), given that Dummett 'seeks to show that the ascription of reference to abstract singular terms is, ultimately, unjustifiable' (p. 150). This is slightly unfair given that Dummett *does* ascribe reference of a sort — namely semantic role — to such terms. In view of the preceding discussion, which suggested that verificationist proposals within mathematics are usually, falsely, seen as obliterating the sense/reference distinction for all practical purposes, it may, nonetheless, stand in that context. But as Hale notes, Dummett's real problem concerns the possibility of a thesis of reference strong enough to endorse Frege's realism:

> For Dummett repeatedly insists upon the importance of distinguishing two aspects of reference: on the one hand, reference conceived of as a relation between an expression and some external, independent entity in the world; on the other, reference as "semantic role", or the contribution made by an expression towards determining the references of more complex expressions of which it may form part. (id.)

The former aspect, Hale says, is the one Dummett finds in Frege's thesis of realism, and it is characterised (according to Dummett) by acceptance of the name/bearer relation as the prototype of reference (pp. 150-151; Dummett, *Frege: Philosophy of Language*, Chapter 14 passim). Dummett's argument against this conception centres on the apparent semantic disanalogy between references which serve to *identify* an entity, and those, such as references to predicates or abstract objects, which do not. That is, it is centred on the uses of *identifying thought* for abstract objects.[12]

Regarding Dummett's resistance to recognition of "external" reference to abstract objects via abstract singular terms, Hale notes that it stems from an argument which:

closely resembles that which is deployed earlier against the ascription of reference to predicates etc. Against ascribing reference to predicates, he argues that whilst there is a kind of analogy which may seem to justify extending the notion of reference from the paradigm afforded by the name/bearer prototype to apply to predicates, this analogy breaks down at a crucial point — there is no work to be done by the notion of identifying an entity (a Fregean concept) as its referent in an account of what it is to understand a predicate. Against ascribing reference to abstract singular terms, he argues that whilst there is again a kind of analogy that might seem to bring such terms within reach of the name/bearer prototype, the analogy again collapses, and at much the same point - there is no application for the idea of identifying an object, belonging to the external world, in an account of our understanding sentences incorporating such terms. (*Abstract Objects*, p. 151)

The difference alluded to is just that of predicates failing to fall within the model of reference to objects via the use of singular terms, and of abstract objects not fitting in with that of reference to *concrete* objects via proper names.

Hale distinguishes three strands in Dummett's argument against the ascription of "external" (i.e. name/bearer prototypical) reference to abstract singular terms (p. 151). All of these were implicated, though none were singled out or differentiated in the discussion of the issue earlier in this chapter, and, as Hale noted, they are interconnected.) They are:

(1) The thesis that Frege's realist conception of reference for the case of abstract objects is deeply at odds with his own Context Principle.

(2) 'the claim that the analogy on which Frege supposedly relies between names of abstract and names of concrete objects is broken-backed — there being, in the end, no type of statement which can be regarded both as playing the role, *vis à vis* names of abstract objects, played by what Dummett calls "recognition statements" in regard to names for concrete objects and as preserving the realistic conception of reference.' (p. 152)

(3) the realistic conception of reference breaks down irrevocably for names of "pure" abstract objects (those existing quite independently of what concrete objects there happen to be), since it is, for Dummett, 'clear that they are "internal to language" in a sense inimical to Platonism' (id.).

In the case of (1), Hale points out something that may not have been evident in the preceding discussion of the issue, namely that the idea that platonism and the Context Principle are in conflict has its root in the notion of *truth by convention* (*Abstract Objects*, p. 154). Whilst I am inclined to agree that this is the case, I cannot go wholly along with

Hale's account of the matter. For Hale, the idea of "external" reality (in the case of abstract objects), once any improper suggestion of spatiality is removed, reduces to that of mind-independence:

> the bearers of names contextually introduced will thereby lose their title to be regarded as belonging to an external reality if, but only if, it is to our thought and talk alone that the relevant containing statements owe their truth. (id.)

In the context of a discussion of Dummett's position this is just, though for a bad reason. For Dummett, whilst the Context Principle stated for reference defeats nominalism, on the ground that '[f]or a name introduced by contextual definition, there is simply no answer to the question what its reference is on its own', neither does it supply a rationale for realism. This is because all the Context Principle gives us is:

> a method for explaining the truth-conditions of any sentence in which it occurs, [but] Frege is saying that that is all we have a right to demand. We may thus interpret [the Context Principle] as expressing, in addition, a thesis about reference: namely that it is illegitimate to suppose that we may always ask to be *shown* the object which is the bearer of a name. (*Frege: Philosophy of Language*, p. 496)

Hale's point, as I understand it, is that this is only destructive of platonism if, in addition, those truth-conditions are explained as purely a matter of linguistic convention; and that this, in turn, only holds if one has already made up one's mind about the nature of referential relations (viz, as "semantic role"). If so, it is patently true: this merely reflects the point earlier, in connection with the need for an additional stand on reference, that reliance on the Context Principle alone does not exhaust the possibilities for reference. The sense/reference distinction is not obliterated by that principle. Only the addition of a conventionalist account of the truth-conditions of the contexts can, as Hale said, do that. The extra premise in Dummett's argument for reference as "semantic role" must therefore be truth by convention in exactly this sense — an account of truth that Hale sees as question-begging for well-established reasons.[13]

The criticism, I suggested, is just, but the reason why it is just is bad. This is because the ground on which it is made is ambiguous. Figuratively speaking, this is due to the fact that it rests on assumptions which belong in what must be described as the analytic swamp at the basis of this area of philosophical theory. Less figuratively, the fact is that it is often equivocal whether Hale is arguing from a realist premise or a truly platonist one. Similarly, Dummett's arguments are sometimes ambiguous over whether it is realism or platonism that is the (legitimate) target of criticism. The root of the problem is that the difference between those two positions is not always obvious. Hale had said that "externality" is essentially

constituted by the notion of mind-independence. This is certainly true so long as both notions are left as obscure as they normally are. But the fact is that we have no good idea of what "mind-independence" is (spatiality being properly excluded) *except* by virtue of, e.g., a realist interpretation of universally quantified statements which lie outside our powers of proof. This is because, as Hale stressed, our knowledge of abstract objects (and the meaning of terms for them) derives exclusively from language, on pain of positing a supernatural faculty of intuition in Coffa's sense, something which Hale emphatically does not do. However, neither do we have a good or complete explanation of what governs the truth-conditions of classically construed universally quantified statements *except* by holding in mind something like the platonist account of reality and reference. However that may be, there is, as we saw, an intuitive account of the difference as exemplified by the case of legal statements,[14] problematic though that intuition may be. It seems that, in the context of mathematics, those problems have no immediately clear solution which could avoid the two positions apparently collapsing into each other.

What the mathematical context shows us is that, for platonism to succeed (in *any* context), we must seemingly posit a direct, unmediated faculty of access to abstract objects conceived as the bearers of names. Language-use alone cannot guarantee the platonistic conception of those objects. But, if *all* we have is knowledge of the semantic performance of singular terms and their containing expressions, it seems that we have no need for any further account of abstract objects, at least if our account of semantic performance is well-taken. However, Hale says it is not: the only acceptable explanation of the truth-conditions of such statements, realist or anti-realist, is one in which "external" reference is ascribed to abstract singular terms. In particular, therefore, a realist view (on Hale's account) seems to demand a platonist account of reference. The question is whether or not Hale can supply grounds for one without positing a supernatural faculty of access to abstract objects. The problem is that such an intuition is just what seems to be required if knowledge of the semantic role of singular terms and their governing contexts is *not* enough, of itself, for understanding of the truth-conditions of statements containing abstract terms.

His ability to supply such grounds would seem to depend on the possibility of returning favourable answers to four questions posed by Dummett.[15] Properly split between (2) and (3) above, they go directly to the heart of the matter:

(i) If the sense of a name is not (always) to be given in the form of a criterion for identifying an object as the bearer of the name, how is it to be given?

(ii) Having 'assume[d] airily that we can specify truth-conditions for sentences containing names of abstract objects', how are these truth-conditions to be specified if we do not begin by laying down what the reference of the constituent terms is to be?

(iii) What happens to realism, as embodied in the name/bearer paradigm and in the principle that the referents of words are what we talk about?

(iv) 'In what sense are we entitled to suppose that abstract objects are constituents of an external reality, when possession of reference by their names has been interpreted as a matter wholly internal to language?'

(*Frege: Philosophy of Language*, pp. 498-499; *Abstract Objects*, p. 153). Recognising the first two of these questions as falling broadly under (2) (i.e. that the name-bearer analogy is broken-backed), Hale began with (iv), challenging the assumption on which it rests — namely that 'embracing [contextual] definitions as a means of introducing abstract singular terms is tantamount to interpreting their possession of reference as a matter wholly internal to language'. But 'the ascription of reference to such terms', Hale said, 'rests upon *two* claims':

> it rests not only upon the claim that terms so introduced pass the appropriate tests for singular termhood but equally on the claim that they function as singular terms in appropriate true statements. The first of these matters might indeed be held to be internal to language in at least the sense that the criteria by which singular terms are to be recognised (inevitably) exploit features of the language to which they belong. But unless it is argued [. . .] that the truth of the appropriate containing statements is, in some relevant way, an intralinguistic matter, there is no ground as yet for holding that possession of reference by the terms in question has been made a matter wholly internal to language. (*Abstract Objects*, p. 154)[16]

Hale's point is simple: the use of contextual definitions to justify the use of names for abstract objects, though it appears at first to act, as Dummett said, 'as a way of explaining their use without ascribing reference to them' (*Frege: Philosophy of Language*, p. 500), does not so act, because understanding of them requires still a realistic conception of reference. Hale poses this as a dilemma. In the case of definitions of the form: '$\mathrm{dir}(a) = \mathrm{dir}(b)$ iff $a \mathbin{/\!/} b$', *either* the left-hand side possesses a semantically significant structure (in which case we need to ascribe reference to its syntactic constituents), *or* it does not; but this latter option is, fairly obviously, false for reasons canvassed earlier.[17] Hale agrees that Dummett does see the lhs as having some structure of its own, since it is on the basis of this that such definitions legitimate the use of those names; the question is whether this view is consistent with a denial of referentiality (*Abstract Objects*, p. 159). Hale is adamant that an explanation of the face-value of such valid inferences as '$\mathrm{dir}(a) = \mathrm{dir}(b) \Rightarrow \exists x\,(x = \mathrm{dir}(b))$' requires a realistic conception of reference, unless it be held that the entire inference is in some damaging way mind-dependent. Explanation in terms of the "semantic role" of expressions is not adequate to the purpose, because only a realistic conception of reference can show *how*

the semantically significant parts of the lhs's discharge their role without the necessity of positing ambiguity in the use of '∃' etc.

This is a powerful argument to which, I think, there is no very convincing answer. One possibility might have been to use our (apparent) lack of direct knowledge of abstract objects to deny the platonist's major premise. This would amount to an argument that our knowledge of how to use language-forms which involve abstract singular terms, combined with our lack of knowledge of abstract objects conceived as the platonistic referents of those terms, yields the conclusion that knowledge of the latter sort simply cannot be necessary for knowledge of the former sort. But clearly this will not do as a defence against the platonist's argument, for the platonist will (rightly) suggest that it cuts both ways, being restatable as a modus ponens inference which guarantees the presence of abstract objects. Reference to platonistically conceived abstract objects *is* necessary, she will say, for language-use, and that the fact of our understanding linguistic expressions of the appropriate kinds thereby entails that we have knowledge, via language, of the corresponding objects.

In other words, what Hale is saying is that the way in which abstract singular terms go to determine the truth-conditions of more complex expressions in which they figure is not *explained* in terms of their semantic role; it *is* their semantic role, for which further explanation is still required. Moreover, as Wright has recently pointed out, reference in regard to abstract singular terms cannot be ascribed purely on the basis of their semantic role because of the profusion of expressions such as 'The largest prime', which certainly have a semantic role, but which equally certainly lack a referent (cf. Wright, *Truth and Objectivity*, p. 179). The idea that the anti-realist could respond by stating that non-vacuous singular terms possess different semantic traits from those of empty ones, merely begs the platonist's question. What other explanation of the difference is there, except that one sort of term makes (genuine) reference to an abstract object, and the other sort does not?

The only response I see to this charge is that it falls short of what is required for the platonist conclusion that there are, after all, abstract objects which are the bearers of names. The most that the platonist is strictly entitled to is the conclusion — seemingly inescapable — that the anti-realist theory of meaning is incomplete. Nothing in that argument suggests that the anti-realist treatment of abstract reference could not, in principle, be extended so as to provide an explanation of the kind the platonist requires. The fact that the platonist conclusion is (so the platonist believes) the only available explanation of abstract reference currently at our disposal does not, without further ado, invite the conclusion that it is the *correct* one. For one may insist that knowledge of abstract objects, platonistically conceived, wants arguing on a basis more substantial than that afforded by our practical ability to handle certain types of linguistic expression. For such a person, the platonistic thesis will stand or fall by its ability to demonstrate that knowledge of abstract objects can genuinely be attributed to us on some other basis.

As Hale notes, such a basis can only be established if we can rebut the proposition, at the root of Dummett's account, that 'an expression is a genuine proper name only if grasp of its sense can be represented as possession of a criterion for identifying some object as its bearer, where this in turn is thought of as something approximating to a capacity to recognise a presented object as what the expression stands for' (*Abstract Objects*, p. 161). The question therefore boils down to *how* the senses of names are to be given if, not in the form of criteria for identifying objects as their bearers, and how the truth-conditions of sentences containing such names, whose senses are not so given, are to be specified (p. 162). That is, in effect, the same as the question whether satisfactory answers to (i) and (ii) of Dummett's foursome are possible. This turns essentially on whether an account can be given of what Russell called "knowledge by description", independent of the possibility of ostensive demonstration. The reason for this may not be immediately obvious, but understanding of it is crucial to any account of legal reasoning. The following remarks show why this is so.

1.5. Identifying thought and the objects of legal theory

Dummett's argument is founded on the charge that the use of names for abstract objects is at best an analogue of the use of names for concrete objects. That analogy, he says, is imperfect, making it impossible to ascribe a realistic reference to objects such as laws and numbers. As Hale points out, Dummett's model for the sense of a proper name 'is intended to represent the kind of knowledge in possession of which understanding [of] a proper name should be taken to consist' (id.). This in turn is rooted in the conviction that to know the sense of a proper name is to have a criterion (= possess an effective method) for recognising, for any given object, whether or not it is the bearer (i.e. referent) of that name (id.). If grasp of sense (e.g. of legal theoretic expressions) is a recognitional capacity, then objects must be "given" — that is, singled out/identified — in a definite way (p. 163). Earlier, Dummett had said:

> a general criterion for recognising something as established concerning any object in a given range cannot genuinely relate to the *objects* in that range, but must relate rather to such objects considered as identified in some particular way. (*Frege: Philosophy of Language*, p. 232; quo. *Abstract Objects*, p. 163)

The question therefore, is, for objects in a given range, how are they given? In the case of objects of legal expressions, that is, of course, exactly the question at the heart of ITL: exactly what *is* it that lawyers argue about?

In the case of concrete objects, Dummett has said that they are given iff they are picked out demonstratively. That amounts to grasp of sense being exactly knowledge of what is required to determine the truth-value of a "recognition statement" — a particular type of identity statement in the form 'This is ψ'. But, as Hale observes, although it only works for

possible objects of ostension (in Dummett's very broad, and rather imprecise sense), it is the use of identity statements that is at the root of the analogue:

> For such names [of abstract objects], the account 'must be revised so as to consider the ability to recognise an object as the referent of the name as relative to some other standard method of being given or presented with such an object'. (*Abstract Objects*, p. 163)

It is possible, as Hale noted, for the case of abstract objects which are values of first-level functions, to equate knowledge of their sense — at least in cases where the argument of the function is a possible object of ostension (as in 'the shape of ( )') — with knowledge of what would decide the truth-value of an identity statement such as 'Square is the shape of this' (p. 164). Clearly just such an independent ground is operative in the case of the sorts of action that Weinberger saw as central to the existence of norms as "real" entities and the constituents of social facts. We are in some sense able ostensively to identify actions ('Look at what he is doing'), and, it seems, even (in certain circumstances, and at a slightly higher level of abstraction) *legally significant* actions of the sort required by ITL ('That man is involved in an illegal act'). This will also be true, as Hale pointed out, of any abstract object that is a type that has physical tokens — such as moves at chess and *pas de deux* (p. 169). The question is, regardless of whether those examples are held to be ultimately persuasive, can they supply the requisite basis for realistic reference to *laws*, as opposed to the legal significance of actions?

Clearly, if ostension remains the basis of the account, the answer is no. Hale was careful to state that the analogy with demonstrative identification through ostension *does* break down, sometimes even before we reach functions of second-level. Expressions such as 'The Law of the Sea' are fairly high up in the language: they are not of the same level as 'the colour of Ingrid Bergman's eyes'. This is partly because such uses of 'the law' belie an internal complexity, and partly because one cannot, in this context, point to that which it is the law of. 'The sea' does not, in that expression, denote a possible object of ostension, nor even a genuine object at all; it is, rather, a concept. However, the expressions used most in legal reasoning and legal argumentation are of a higher level still: this is clear from expressions such as 'the United States' use of the Monroe doctrine', 'the equidistance interpretation of the law of maritime delimitation', or even 'the non-appearance of the US before the court' in the *Nicaragua* case.

An anti-realist view of abstract objects which lack ostensive capability is only compelling, however, if the breakdown of the analogy has the devastating consequences (for platonism) that the anti-realist thinks it does. Hale doubts it: for the platonist also regards such objects as *mind-independent*, and it is the combination of that claim with the thesis that the referents of singular terms are objects which yields the conclusion that they belong to an external

world. For them to do so, Hale argues, it is not necessary for them to be capable of demonstrative identification (p. 165). However:

> One very pervasive kind of doubt about Platonism — canvassed most forcefully in regard to number-theoretic Platonism — concerns whether we can make satisfactory sense of the idea that appreciation of, say, number-theoretic truths is in any way a matter of coming to see that certain *particular, identifiable objects* have certain properties and stand in certain relations; whether, that is, we can make any good sense of the suggestion that our thought about the (supposed) objects of number theory is genuinely identifying. (p. 166)

This, clearly, is the root of the issue, because:

> Certainly it can seem that, failing the possibility, at least in principle, of an object's being singled out demonstratively, we can make nothing of the idea that we are capable of identifying thought about it. (id.)

> The basic idea is that, if a person can be said to be talking about a (particular) object at all, she must know *which* object her thought concerns.[18]
>
> The two classical kinds of identifying knowledge are *knowledge by acquaintance* and *knowledge by description*. The first of these, Hale subdivides into the demonstrative identification of an object in the visual field, and the ability to recognise the object one has in mind in favourable circumstances, respectively (p. 167). The question is whether all (three) types of identifying knowledge are of a single kind. For the anti-realist, this is the case: demonstrative identification is basic, and the other two types are held to be dependent on it, with knowledge by description held to be a method for "tracking down" abstract objects, 'that is, a route by which you could, in principle, get into a position where you could identify the object in the first, basic way' (id.). This does not require that demonstrative identification in fact be possible; but it *does* require that it be possible *in principle* in every case. There is, in other words, 'simply no room for identifying thought about objects which *constitutionally* resist demonstrative identification' (id., emph. added). Since this will be the case for most of the objects with which lawyers are concerned in legal reasoning — just as it is with objects of number theory — the theorist wishing to ascribe "external" reference to them must therefore supply a unifying account of identifying knowledge which sees knowledge by description as a fully independent alternative to demonstration, not a parasite upon its back (p. 170).
>
> Hale begins[19] by noting that a realistic conception of reference — i.e. a "mind-independence" view of abstract objects — is not incompatible with a general anti-realist (verificationist) view of meaning. Verificationism at the level of sentences requires us to have knowledge of what circumstance makes a sentence true in order to know its meaning.

But, Hale says, this does not necessarily require that we ostensively identify constituent *terms* (i.e. demand that all objects be possible objects of ostension). It is enough to grasp their sense if they can be described uniquely (p. 175). In support, Hale quotes Frege's famous remark that 'we must always have a criterion for deciding in all cases whether *b* is the same as *a*, even if it is not always within our power to apply this criterion', but states that 'if all is in good order, such a criterion will be implicit in the description; there is no requirement that the intended referent of the name be recognisable in any further sense' (id.).

How, then, are we to regard descriptions? In order to show that knowledge by description is a branch of identifying knowledge independent of ostension, Hale says that:

> We must [. . . .] see the fact that a capacity for demonstrative identification amounts to identifying knowledge of an object as itself capable of explanation in more fundamental terms. (p. 180)

In order to do this, we must think of our identification of objects (of all kinds) 'as exploiting ontologically prior differences between those objects — differences which obtain prior to, or at least independently of, our efforts at identification' (id.). To see this, it is vital to note that identifying knowledge is at least partly *sortal*, since part of the identifying process involves establishing which sort of object a particular object is. However, we must also know how to distinguish it from all other objects of the *same* kind (id.). If, we are asked to imagine, *F* is an imprecise sortal under which fall spatio-temporally extended objects, then we can clearly use *F* to distinguish a given *f* from non-thus extended objects. Within the sortal, we can use place-time co-ordinates to differentiate a particular *f* from all other *f*'s (p. 181). This, Hale says, shows *why* demonstrative identification is a form of identifying knowledge.

Demonstrative identification is, in effect, a practical ability just as swimming is; it essentially gives us a means of *locating* a given object (p. 182). However, Hale argues, being able to specify a location is not always necessary to identification even of physical objects — such as objects no longer existing, or objects whose whereabouts is unknown. In those cases, identification is largely effected by descriptions which give no clues as to their whereabouts (id.). This, says Hale, shows us something important: that (where objects are identified relative to others):

> Identification of particular objects takes place within a framework, against a background of identifying knowledge of many other objects — people, places, events, etc. — the identifiability of which is treated [. . . .] as raising no especial problems. One object may be singled out from all others by its distinctive relations to other objects, where these relations may or may not tie it down to particular spatial positions at particular times. (p. 183)

In the case of objects whose existence is not so relative — as with laws, for example, whose existence (as abstract objects) is not based upon legally significant actions — Hale argues that they are given by singling them out in some other way; for example, by describing their salient properties (p. 190). Hale is emphatic that this is not to be thought of as specifying some non-spatial position (for instance the place of the number 7 in the natural number sequence), since *classes* cannot be distinguished in this way, nor obviously the sequences themselves. What is important is just that each object be described in order to meet Frege's condition.

The problem I see with this argument is that it is basically a reiteration of that condition: that unique description is enough for identifying knowledge of abstract objects. But as Hale pointed out earlier in relation to a thesis of Carnap's, this was supposed to be the conclusion of the argument, not an assumption on which it all rests. Hale *does* have an argument for it — that not all concrete objects are capable of demonstrative identification. But it is in fact not at all clear to me in the cases cited (those of no longer existing objects and of objects whose whereabouts is unknown) that it is genuinely *concrete* objects that are being identified. The anti-realist could, rather, use the lack of demonstrability to suggest that what are being identified are (possibly isomorphic) abstract objects which may not be unique in the required sense. Possibly there is an answer to this, but in any case I do not believe that the platonist conclusion can be sustained on this basis. As noted earlier, what is needed to establish that conclusion is a truly independent (i.e. non-linguistic) ground of knowledge of abstract objects. The bald statement that we do not need one simply will not do.

* * * *

The net effect of the discussion is, I believe, to show that it is possible to adopt an anti-realist line with regard to the references of legal statements – in other words, to regard legal phenomena as being, in the appropriate sense, internal to language. The question now is whether such a view is desirable. Though such anti-realism is a position one may defend, I think the answer is ultimately *no*.

It was seen in chapter 2 that the notion of "institutional fact" is the keystone of the institutional theory's explanation of law, and of our knowledge of it. What kind of thing are these facts? In terms of the Fregean strategy, we have two choices: either they are *truth-values* (i.e. semantic entities), or they are things *captured* by truth-values. An institutional theorist will typically and, I think, rightly, choose the latter. The reason is that the anti-realist explanation of such things as linguistic entities goes circular at precisely the point where we ask: what is the status of the proposition that facts are truth-values – is *that* a fact? If so, in what does its truth reside? The response that its truth resides in "rules of language", likewise, does us no good until we have a non-question-begging account of what *they* are. Because the

anti-realist explanation sees referents as, in effect, the semantic performance of their own names, we have no non-circular account to give.

But if facts are not semantic entities, what kind of thing are they? Here, as was seen, platonism has no satisfactory answer to give in the absence of a direct faculty of intuition ("acquaintance") with abstract objects. All the knowledge we have of them derives from what we say about them in language. It should not be supposed, however, that this defeats either the platonist position or the Fregean strategy on which it is built. The purpose of that strategy was never, in that sense, reductionist: its point was not to eliminate reference to abstract objects (in the sense in which anti-realism ultimately does), but rather to *clarify* our knowledge of such things by recognising that our sole access to them is via the semantic role of constituent names for them in language (i.e., by description). The reason for accepting platonism is that it, and not anti-realism, can make sense of this feature of language in a non-question-begging way, via reference to abstract objects.

1.6. Excursus

To conclude this section it is worth reiterating what has been done so far. I have now presented a conclusion about what the foundations of legal reasoning, in the external sense, are: the process of talking about the law rests upon effecting reference to abstract, though in some sense mind-dependent, objects, and the activity of making statements about them is an act of *description*. In saying this, I have also, hopefully, provided a neater account of ITL. That theory wanted to show how we may speak about the existence of *law*, and not that of some concrete or otherwise non-normative kind of object. But neither did it wish to espouse "platonistic idealism", where this is indicative of Orat or realism about legal orders. In other words, a robust explanation was needed of reference, and of the meanings of legal statements, suitable for legal practice, without having to suppose that the matters involved are in some damaging, anti-positivist way mind-independent. But, as chapter 2 showed, ITL's view of what constitutes knowledge of law was not able to deliver such an explanation. The present chapter has presented an account of legal knowledge that does reach ITL's goal: our knowledge of law is "by description".

As promised, I shall now return to the unfinished business of this chapter, that is, to the question whether the (international) legal order be regarded realistically or anti-realistically. Such an inquiry is especially pressing now that an explanation has been furnished of the contribution of the semantic role of such expressions in our understanding of reference. That role, as noted, does not *amount* to reference; but it provides the bulk of our understanding of that relation. The semantic role of legal statements will be, in general, just the way in which their senses are given to us, that is, the means by which various parts of those statements contribute to the whole in order to specify the truth-conditions of the resulting judgement. This means addressing the semantic properties of legal propositions in terms of their *senses*. Two questions require answers:

(1) Do legal propositions address a legal reality (in terms of semantic structures) at least some parts of which exist in advance, if not wholly independently, of our actually discovering properties belonging to them to hold? If so, to what extent?

(2) Does what holds, in this respect, for the international legal order necessarily hold, or (most importantly) *derive* from, what holds generally with regard to municipal legal structures?

This latter question was one which was touched on in chapter 1; I delay a fuller treatment of it until chapter 5. For the remainder of this chapter, I intend to focus on the former, that is, on the question, how "real" is the international legal order?

II: Realist or anti-realist legal orders?

2.1. Introductory remarks and a question of equity

The foregoing argument was designed to show that talk about law is to be taken at face-value, i.e. that arguments concerning law are about *law* and not about something else, or nothing at all. This is a form of platonism about the referents of legal statements, knowledge of which is not by acquaintance but by description. As such, it is relatively independent of the issue of realism. It is not, however, wholly thus independent: realism is an issue concerning truth, and the platonistic theory about referring depends, as seen, upon the possibility of statements about the law being *true* (i.e. of fulfilling the minor premise of the Fregean argument). We are therefore owed an account of *when* we may regard what we say about law as true, in other words, of legal truth.

There is no doubt that statements about law are in the market for truth, as ITL had shown. In order briefly to reiterate this point, and to illustrate the issue of realism regarding such statements, I shall consider the dictum of the ICJ in the *Frontier Land Case* (ICJ Repts. 1959, p. 209). The dispute concerned areas of land situated on the border between Belgium and the Netherlands. The Court observed:

> The final contention of the Netherlands is that if sovereignty over the disputed plots was vested in Belgium by virtue of the Boundary Convention, acts of sovereignty exercised by the Netherlands since 1843 have established sovereignty in the Netherlands. This is a claim to sovereignty in derogation of title established by treaty. [. . . .] The question for the Court is whether Belgium had lost its sovereignty by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843. (id., p. 227)

The question before the Court was, roughly, whether title to territory may be acquired through prescription. The Court found, in effect, that it could. This amounts to a *claim* about international law; namely that the doctrine of prescriptive title forms part of the Law of the Sea. Acceptance of this claim carries with it a commitment to its *truth*, i.e. that it is true to say, of the Law of the Sea, that the doctrine of prescriptive title is a valid body of rules within it. If the claim is indeed true, then, via the Fregean argument, the doctrine of prescriptive title *exists* in the Law of the Sea – not nominally, in a manner of speaking, but as a matter of *fact*. The question, then, is: how do we adjudicate such claims, that is, decide their truth? This is the issue of realism.

The question of realism is the question whether such claims as we can make about the law are true independently of our decision on their truth, or because of such decisions. Questions of the sense of legal expressions pertain, as Kreisel said, to the nature of their truth. If knowledge of the meaning of a statement resides in knowledge of what condition would make an utterance of it true (or, for the anti-realist, what condition would allow us to verify it), then what we require is a general account of the truth-conditions of statements about the international legal order. The questions being asked, therefore, are: Do various bodies of international law possess contents and structural characteristics in advance of our discovering them to obtain, or is their truth purely a matter of our construction of them? Are there in any sense "uniquely correct" extensions of the system of international law about which we have not yet any firm knowledge?

Answers to these (as yet fairly imprecise) questions will typically be returned on the basis of the way in which we regard the notion of a legal *system*. The most natural, though unhelpful, way in which to conceptualise that notion is in terms of non-spatial structures, like matrices, or underlying spaces. Such structures are, however, essentially conceived in terms of spatial-type images. But, as previously noted, to construe the legal order in this way is deeply at odds with the platonistic account of both its *abstractness* and its *objectivity*. Preliminary investigations in chapter 2 also demonstrated the possibility of treating legal orders with some degree of realism without any general commitment to a one-right-answer thesis. The question is, then, whether such structures have properties in advance of our discovering such properties to obtain. Equivalently, are at least some of our legal propositions true or false in virtue of whether they accurately describe such structures, or does our talk about "system" and "structure" gain sense from our decisions about the truth-values of legal propositions? If the latter view is taken, then the legal order is no more than the totality of true statements made about it, and the way they inter-connect. If the former is taken, then there are statements we *could* make which are true of the law as it is; but through, say, lack of knowledge or simple error we are not aware of their truth. In that case, the law outruns our descriptions of it.[20]

It is not my intention, in the remainder of this chapter, to argue for a thesis of anti-realism about legal orders. Such a project would be a major undertaking quite out of place in the present thesis. Rather, I shall simply assume that reasoning about the law is constructive in the sense positivism usually takes it to be. I shall therefore sketch a few important consequences, from the point of view of legal reasoning, of adopting an anti-realist view about law. My purpose in so doing is, first, to attempt to show that the positivist explanation of the anti-realist character of legal truth, which is based on the "practical" nature of reasoning addressed to legal norms, gives rise to very specific problems at the level of semantics. These problems are, however, by no means peculiar to positivism; at this stage I wish merely to highlight the fact that positivism does not escape involvement in them.[21] Secondly, I wish to lay the intellectual foundations for a particular form of anti-realism about international law which I am going to advance in chapter 5. Accordingly, I want to consider a case of a different kind, in order to introduce these issues.

The case arises in connection with equity in maritime delimitation, i.e. whether the "equitable principles" often invoked in such contexts are part of the law, or remain technically outside it. The view that there is no conceptual room between decisions made according to equity and those taken *ex aequo et bono* is one that has a distinguished history in debate about maritime delimitation cases, recently canonised in an article by Jennings. It is not, however, a view that the International Court is free to share. As a matter of principle this is straightforward, since Art. 38(2) requires the consent of the parties for such a decision, to proceed. The question whether the distinction is theoretically significant is another matter. Lauterpacht doubted it:

> It must be appreciated that whether we are discussing a decision *ex aequo et bono* (in traditional terms, a decision completely outside the law) or whether we are considering [. . .] "equity within the law", we are talking about a situation in which the court is being asked to apply a subjective or discretionary element. The court is not applying the law; it is creating the law for the parties. ('Equity, Evasion, Equivocation and Evolution in International law', *PA ILA* 1917-1918, p. 45)

For the ICJ, however, the distinction is crucial in the light of the competency issue raised by Art. 38(2). It is not surprising therefore that Jennings (speaking extra-judicially) took a radically different view of its significance:

> A decision taken *ex aequo et bono* could well be made without the need of specifically legal training or skill; indeed it may perhaps be made better by one with a different skill. On the other hand, a decision according to equity as part of the law should mean the application to the case of principles and rules of equity for the proper identification of which legal training is essential. The appreciation and application of equity so conceived is essentially juridical. (Jennings, 'Equity

and Equitable Principles', quo. Thirlway, 'The Law and Procedure of the International Court of Justice, Part One' ['L/P-I'], 1989 *BYIL* LX, p. 53)

This debate raises two types of question which, though technically distinct, cannot be wholly divorced from each other. Both concern foundational issues. The first relates to matters discussed in chapter 1, regarding the possibility of distinguishing legal concepts from non-legal ones via system-membership (i.e. semantic) criteria. The second concerns the issue of realism lately discussed, namely the level to which (valid) legal reasoning is constrained by notions of legal truth and legal acceptability. Both types of question play on the notion of *system*. The first suggests, via suasive arguments in chapter 1, that any attempt at separating "legal" equity from general equity on any formal grounds (i.e. by assigning them different, though perhaps equivalent, meanings) is bound to fail because normative concepts are not capable of formal separation into legal and non-legal categories. A distinctively "legal" concept of equity is therefore not sustainable, casting doubt on the significance of the putative internal/external distinction. The second type of question casts doubt on that distinction because, for the anti-realist, there is no difference to be found between decisions which are correct *in virtue* of previously undiscovered legal consequences of the system and those which *constitute* such extensions. Though not cleanly separable, it is possible to take a realist stance wrt type (ii) questions, irrespective of whether there is said to be a credible internal/external distinction under questions of type (i). Nevertheless, views about type (ii) issues will clearly be *linked* to views about the nature of that distinction.

In fact, there is no reason to doubt the validity of the distinction as such: the chapter 1 arguments were deployed against the idea that legal systems could be identified by a distinctive internal logic whose particular combination of rules of inference could be used to pinpoint something essentially legal in the concepts falling under them. But there is no denying that one could identify various *systems* in this way. Because we are free to play around with combinations of axioms and rules of inference, it should be possible to separate a *systemic* (though not intrinsically *legal*) use of equity — contextually in relation to its behaviour towards surrounding norms — from use of an imported "equity" element which suspends, rather than modifies or forms part of, other norms of the system. Because of Art. 38(2), the Court was forced to deliver a concept of equity in the first of these senses, originally settling for (though later largely abandoning) an effective importation of the English conception of legal equity, as a modification of the application of legal rules, into delimitation cases: 'Equity is not a sort of independent and subjective vision that takes the place of law' (Gros, diss. op., *Tunisia/Libya case*, ICJ Repts 1982, p. 153, para. 19).

As Thirlway pointed out ('L/P-I', pp. 51-52), the issue insofar as it concerns the legal matter of the Court's competence, is misinformed. The Court had initially noted a customary rule requiring equitable principles in maritime delimitation originating in the Truman Proclamation, where it probably referred to a "fair shares" basis, or (Thirlway argues)

possibly geological grounds (natural prolongation) or geometric principles (equidistance). Either way, the Court could have shown itself to be working within its normal powers (p. 52). But the Court went on to find a wider basis for equity in the general duty of courts to give just 'and therefore equitable' decisions: 'Whatever the legal reasoning of a court of justice, its decisions must by definition be just and therefore in that sense equitable' (*North Sea Continental Shelf case*, ICJ Repts 1969, p. 48 para. 88). The result, according to Thirlway, was a muddying of the distinction between legal rules and equitable principles, by treating the latter as a jurisprudential concept (like that of English equity) rather than a general concept of fairness. This culminated,[22] in the Court's famous dictum in the *Tunisia/Libya case*:

> Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task it is by definition to administer justice is bound to apply it. [. . .] Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the parties agree (Art. 38, para. 2 of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as a part of International law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice. (ICJ Repts 1982, p. 60 para. 71)

Though it is doubtful whether this remains the Court's view, the issue it raises for theory is crucial. A realist would hold, in terms of the Court's and Jennings's view, that there is an available sense in which a decision taken on the basis of equitable principles in the Court's sense is a different decision from one reached on the basis of general equity, even if the conclusion in each was the same. This is because one is based on the internal structure of the system (i.e. is "internal") — the decision being constrained to the extent that legal training is needed to reach it — and the other is not. A constructivist, on the other hand, would hold that, since reasoning in this way to an accepted conclusion is *constitutive* of the legal relations involved, there can be no further question, aside from acceptance, over its legality. This, indeed, is the more widespread view among lawyers. Bowett, for instance, in a recent review, applauded the author's recognition of the 'fact' that maritime delimitation cases are decided on the basis of relevant circumstances, not according to abstract theories of equity (Bowett, 1989 *BYIL* LX, p. 442). The question of most interest, however, is whether it is possible to make sense of the Court's view at all.

Whether or not we can depends on our view of the relations holding between the relevant concepts. If decisions taken on the basis of legal equity differ from those made according to

general (i.e. non-systemic) equity, in virtue of the fact that special training is needed for the former, this must be in virtue of relations holding among the various concepts, in terms of which a decision is correct or otherwise acceptable on systemic grounds, and in regard to which our (legal) arguments are faithful or unfaithful. Whilst this does not require endorsement of Orat — since more than one conclusion may be acceptable or true to those concepts and relations — it does require us to regard the corresponding semantic structures (models) as possessing properties, usually in the form of conceptual consequences and extensions, which we have not yet "constructed" in our reasoning. It supposes, in other words, that there are parts of the system which are knowable in principle (and perhaps even in practice) but of whose existence we are currently unaware. The metaphor of a "system" of law is therefore only appropriate if its norms and principles are governed by some internal ordering, or structure. This ordering need not be logical or give rise to "unique" right answers, but our statements about the system must be right or wrong in terms of *that ordering*, and not in terms of *us*. We must, in other words, have some means of deciding, in terms of that structure, when a proposition about it is correct. This does not mean that such systemic properties must exist, as the realist believes, prior to statements being made which the anti-realist believes to be constructive of them. But, for the idea of a "system" to make sense, it does require that there be some constraint upon *which* statements can be made. This takes us to the heart of the institutionalist's image of the international legal order as a system of positive law.

2.2. The reality of the legal order

What is the nature of the system of which international legal concepts form part? If legal systems do not have the same semantic structure as a system of formal logic, what kind of structure do they have? Though positivist orthodoxy on the matter of legal inference steers clear of logical orderings in at least the law's penumbral areas, the positivist will eventually have to stand his ground and say what it is the weaker orderings *are*: what kinds of processes are the norms of the system involved in, and what uses are made of them? Because positivism is committed to a theory of non-compelling legal argumentation for at least parts of the system (partly due to various kinds of *vagueness*), the question of the shape of the positivists' legal orders becomes pressing: In what sense is "system" the correct metaphor for legal orders like international law at all?

There is pressure, even within the constructivist paradigm, to accept legal orders as fairly free-standing, reasonably well worked-out systems which, though not by any means complete, contain enough of a base of settled rules and standards to meet the majority of needs. One would expect such a system to contain sufficient procedural rules, techniques and institutions to guide lawyers through hard cases and constrain legal reasoning to the point where discretion in hard cases is sufficient to reach a decision whilst not being wholly

arbitrary: all decisions must be (legally) *reasoned* ones, often expressed as the requirement that new decisions must "fit" the existing law.

In the sense that what is required are *legal* solutions, decisions, analyses and so on, what preserves the systematic nature of law is legal reasoning. Legal decisions are set apart from non-legal ones by involvement in a system. As argued in chapter 1, such concepts cannot be identified in a semantic vacuum, and so what constitutes a legal decision will be contextually identified in relation to a specific system. This does not guarantee *legality*: only the use to which the concepts are put can do that. But it does show what belongs to a *system* of law (and therefore what counts as a decision according to law) and what does not. What we need therefore is effectively a characterisation of what is fashionably called "internal logic". In fact, reasoning inside the system need not amount to logic — or at least it is not immediately obvious that it must — but it must at least be *regular*, since we have to be able to pin down *some* semantic structure to legal argumentation if the identifying criteria are to hold, and if the notion of "system" is to remain the central metaphor. (If internal logic is either irregular or indescribable, then system-membership and identifying criteria are correspondingly either arbitrary or completely meaningless.)

Faced with these reflections, the positivists must address two issues about the nature of their systems, which ought, for clarity, to be distinguished. The first concerns the relative "completeness" of the legal order (how extensive and conceptually rich it is supposed to be; how free-standing its contents are with respect to human mental processes). The second — which is intimately linked with the first — bears on the problem of the semantic status of rules within the system. These questions are in an important sense equivalent, in that an answer to one is, with minimal extension, an answer to the other. Also, both are directed at the same criteria for legal concepts since they are asking about the semantic basis of legal reasoning procedures within the "system". Both pertain to what might be called the "reality" of the legal order: the extent to which we are allowed to assert that parts of the system exist in advance of a description of them, and how far "correct" answers (in easy cases) are determined or constrained rather than arbitrary.

1. Completeness

In the philosophy of mathematics, Gödel's Theorem is often cited in support of the view that mathematicians investigate actual mathematical structures, not just semantic models of them, and that those structures can exist (in fact *do* exist) independently of whether we have a model of them. On the face of it this says nothing about legal systems, since Gödel's result is bound up with incompleteness within formal systems of arithmetic, and whether or not such a system (in effect, of second-order logic) is capable of adaptation to law is exactly what has not yet been decided. But if the view expressed in terms of mathematical structures were to turn out to be correct it would certainly signal the possibility that structures generally *can* exist independently of semantic characterisations of them, and that the link between legal

reasoning ("internal logic") and the system it characterises is less immediate than was thought. The philosophical significance of Gödel's Theorem is therefore of considerable, albeit indirect, importance to law and the "completeness" of legal orders.

In the course of his rejection of Koskenniemi's semantics for legal 'argumentation' (though Koskenniemi's real target was reasoning in a more fundamental sense), Scobbie argued that even *if* legal argumentation could be logically formalised, this is not in itself enough to warrant an all-out realist view of legal orders ('Radical Scepticism', p. 348). Though the argument in 'Radical Scepticism' was presented as an assault on Koskenniemi's *platonism* (via his employment of a classical semantics), Scobbie's principal concern can also be seen as addressing the issue of *completeness* in legal orders, not especially from the point of view of platonic realism but in far less lofty semantic terms. One of Scobbie's principal complaints had been that Koskenniemi's view of international law (as a fully determinate, formally complete system of rules) was conditioned by his bivalent truth-theory and his application of the Law of Excluded Middle (LEM) across the whole universe of legal statements:

> Underlying Koskenniemi's thesis is a rather odd conception of the nature and aims of a legal system which arises from his claim that international law is predicated on a liberal political doctrine and from his adherence to a bivalent truth-theory. By the latter is meant that, with the apparent exception of political discourse, Koskenniemi sees propositions as being either true or false, either objective or subjective — indeed this latter dichotomy dominates his work. (Scobbie, 'Radical Scepticism', p. 347)

Part of the argument in 'Radical Scepticism' is concerned with categorematic issues in the foundations of legal reasoning. One was that Koskenniemi's underlying (and largely tacit) semantics for legal argument cannot provide the sort of foundation required for the construction of ordinary legal statements, because it is not rich enough in terms of its natural kinds, and too rigid in terms of its truth-functions, to account for the (broadly, modal) distinctions needed to facilitate the wide diversity of speech-acts used in legal argumentation. This part of the argument is important, but it is not the fundamental issue; in fact, one of the difficulties with Scobbie's argument as a whole is his failure to distinguish this semantic issue from another, closely related one. The root of Scobbie's argument is a question about *realism* or as Koskenniemi puts it, the 'objectivity' of legal statements and legal orders: how far are we committed in advance to certain conclusions or outcomes in law as a result of applications of legal reasoning? How this is answered will depend crucially on the kind of logic (if any) that is supposed to underlie legal reasoning and on its metatheory, including its definition of truth.

It is clear from Koskenniemi's remarks in *From Apology to Utopia* that he took there to be an intimate linkage between the concept of objectivity and the concept of truth. As a result

it is hard to treat his theories on truth separately from those on the objective-subjective divide. Nevertheless, the two issues are worth separating: Kreisel's remark that the key issue in the foundations of mathematics is not the existence of mathematical objects but the objectivity of mathematical truth, was meant to indicate that once we have defined the right truth-predicate for mathematical statements (which is a question of *meaning*), the ontological status of mathematical objects will look after itself. It would be nice if this were also true of law; but the fact is, we have no clear idea what "truth" in legal terms could mean. No easily definable and settled truth-predicate for legal statements has ever been devised (assuming one is possible) and no viable alternative has been forthcoming in the notions of validity or deontic acceptability. At the same time, the question of the existence of legal objects is best understood as a question about the objectivity of legal statements. This notion is related to truth, but is not, as Koskenniemi sometimes thought, synonymous with it.

The general idea is that, within any discourse, if a truth-predicate is fixed so that the truth-values of statements within the domain of discourse hold mind-independently (that is, independently of our ability perhaps in principle to decide what value they have) then we must regard such statements as we can confirm (and as those we cannot) as holding in virtue of actual states of affairs that are nothing essentially to do with any knowledge we may have of them. If, on the other hand, we fix the truth-predicate so that it always lies within our powers of verification (again in principle), then there is no reason to regard the states of affairs in virtue of which the corresponding statements are true or false as anything but linguistic constructions tied to human mental processes. It is a characteristic of Koskenniemi's thesis that, whenever he is asked about the *concept* of a legal system, he responded by tying its very possibility (e.g. as a thought-object) to the objective side of this distinction; but asked for its realisation, he almost always embraced the subjectivist reading.

Against Koskenniemi's "objective" reading of truth for legal statements, and its crude equation of a legal system with a (classically defined) logical one, Scobbie deployed a Gödelian argument designed to show by informal *reductio* that bivalence (and therefore realism) in legal argumentation is not a legitimate semantic option:

> Gödel demonstrated that any formal (logical) system of relative complexity is necessarily incomplete as it will contain propositions which are undecidable. Given the necessary complexity of any legal system, Koskenniemi's underlying model cannot be fulfilled as, assuming the possibility of its translation into a formal system, some legal questions will be undecidable or "intractable". ('Radical Scepticism', pp. 348-349)

It is worth pointing out that Scobbie effectively dismisses the possibility of any such formalisation (and his sympathies in 'Radical Scepticism' are clearly closer to the rhetorical analysis of Kratochwil's book). But even with the rider clause, the argument is in trouble. Not least, the bald statement of the Theorem is neutral with respect to realism and anti-

realism, at least insofar as both sets of theorists have absorbed its result into their positions with minimal modifications. But before going into this any further it is necessary to look at a side-issue of Gödel's Theorem in the context of deontic logics, which are epicyclically held out as providing semantic models of legal reasoning (e.g. in the works of Tammelo and Soeteman).

The argument for applying Gödel's Theorem in 'Radical Scepticism' rested on the assumption that any system of logic appropriate to law would be of a complexity sufficient to contain the necessary semantic materials for constructing the Theorem. In fact, Gödel's Theorem has nothing to do with *complexity*; the importance of the result rests with the fact that it applies only to those formal systems rich enough to include standard first-order arithmetic as a proper fragment. It is quite conceivable therefore to construct a highly complex formal system that would not house the appropriate tools for constructing the Theorem: standard systems of deontic logic provide such an example. As Scobbie said, legal reasoning is significantly more complex than 'crude' deontic logics; but insofar as the relations between the elements of the system are in the main modal rather than (directly) quantificational, it is yet unclear that Gödel's Theorem applies. To show that it does, legal reasoning would have to be shown to contain something like a logic of second-order deontic predicates.[23] For now, it suffices to note that the "deontic fragment" of legal reasoning which, once the existence of systemic resources is guaranteed, would seem to form a significant part of the basis of a good deal of legal reasoning, is not open to the construction of Gödel-sentences. This is, briefly, because the construction of the universally closed Gödel-sentence U (i.e. the undecidable sentence itself) requires the universal quantifier, since U is always of form $\ulcorner \forall x\, A(x) \urcorner$. Deontic logics are not easily open to quantification because most if not all of their wffs involve opaque contexts essentially. Assuming that Quine is right to hold that no good sense can be made of quantification into such contexts, properly quantified deontic logics cannot get off the ground, which means that deontic logics are not suitably equipped for the construction of Gödel-sentences within them.[24]

In 'Radical Scepticism', Scobbie made it abundantly clear that he thought the idea of law (especially International law) as a 'purely declaratory' or 'oracular' system arises from a basic misunderstanding about the nature of legal orders (or more precisely the semantics underlying them): that they correspond not to brute facts but to institutional facts, which are not 'objective' (i.e. determined in advance) but probably intersubjective (i.e. constructed; 'Radical Scepticism', pp. 348, 350-351). Legal argumentation correspondingly does not aim at 'platonic truth but is an instrumental enterprise which attempts to justify action' (p. 351). Because of the rhetorical nature of legal argumentation, 'States must persuade judges of the worth of their argument. Consequently the decision-maker need only endorse the argument he thinks more plausible, which need not entail judicial recourse to justice, but simply an

assessment of relative weight' (id.). Scobbie backed up this position with a passage from the PCIJ's judgement in the *Eastern Greenland* case:

> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other State could not make out a superior claim. (PCIJ Series A/B no.53 (1933) p. 46, quoted in 'Radical Scepticism', p. 351)

In fact, this is not so much a consequence of the *rhetorical* nature of legal argumentation (which is after all just a feature of the specifically judicial use of legal argumentation) but its (alleged) constructive basis. What the constructive basis consists in is therefore important, not least for the issue of completeness, or "realism". Because legal orders are, as a rule, constructed in the course of legal argumentation (or better, legal reasoning generally) rather than "discovered" through it, a classical logic incorporating the law of excluded middle is clearly the wrong choice for a semantic foundation to legal reasoning. Though Scobbie is dismissive of the possibility of a legal *logic*, he clearly recognised the need for a constructive *semantics*:

> A bipolar approach is [. . . .] question-begging, especially in the light of the covert ontology which Koskenniemi's analysis appears to entail. As for the excluded middle, a rigid categorisation of propositions into either true or false ignores the possibility of their being probable, plausible or, importantly, undecidable propositions. (p. 347)

It is here that Scobbie's categorematic argument against bivalence becomes unhelpfully tied up with his rejection of the Law of Excluded Middle. The law:

(1) $A \vee \neg A$ (LEM)

('either A or not A') amounts to a rejection of the principle of bivalence, the principle that every statement is either true or false. In classical logic truth-values are reckoned to distribute over all (possible) statements within the domain (in this case, the "complete" legal system), so a rejection of (1) is a rejection of the idea that truth-values distribute over anything but a subdomain (effectively decidable) of the whole universe of discourse, i.e. the subdomain whose sentences coincide with those for which our proof procedures could yield a definite truth-value, T or F. It is clear from context that Scobbie, quite rightly, wanted to abandon LEM in favour of constructivist principles. On the other hand, as Dummett has shown, (1) must be kept distinct from another law of logic:

(2) $\neg\neg(A \vee \neg A)$

('it is not the case that neither *A* nor not-*A*'), which does not speak to the issue of provability but which does rule out the possibility of a third truth-value. Scobbie's remarks on 'bipolarity' and his conviction that any legal "logic" would have to take account of, not truth or falsity but the relative weight of arguments (including "probable" or "plausible" ones) indicate his rejection of (2) in addition to (1). It is also clear that he believed (1) and (2) to be intimately linked, in view of his remark that 'The bivalent distribution of worth is inadequate, falling into the logical trap of the excluded middle' (p. 347) and since both corresponding semantic principles are always mentioned together (e.g. pp. 347-348). In fact, however, in most logical systems (2) is not reliant on (1), but is a consequence of:

(3) $\neg(A \wedge \neg A)$

(non-contradiction) (cf. Dummett, *Truth and Other Enigmas*, p. xix).[25] LEM states that all statements are either true or false, thereby conferring a *definite* truth-value on all statements in the domain, and creating issues for completeness which we shall come to in a moment. (2) on the other hand states that no statement is neither true nor false, and its negation does not (contrary to what Scobbie clearly thought) rule in the possibility of unprovables, but merely expands the field of (definite) valuations across *all* sentences. That is, each sentence in the domain, once (2) is rejected, will still have a definite truth-value, only the number of truth-values open to it in the valuational system may exceed the standard two. So a rejection of (2) can give a many-valued logic which is nevertheless capable of realistic interpretation and "completeness" (subject to the limits laid down in Gödel's Theorem). This is not to say that there are no grounds in law for adopting such a logic, but since Scobbie ultimately doubts the value of logic as a means of legal analysis anyway, it does not advance his argument to adopt one, and so the issue may as well be dropped.

Crucially, Scobbie's assessment of (1) is also wide of the mark, though as a constructivist he is right to reject it. His assessment is off in the sense that he misread the significance of undecidable propositions in formal systems of logic: one often gets the impression that 'undecidable' in 'Radical Scepticism' is thought of as a truth-value itself. If we are careful to distinguish between two types of incompleteness — Gödelian- (or G-) incompleteness and what we might call constructive incompleteness, it ought to be apparent that both types could be present in the same system, i.e. that rejecting (1) does not somehow "absorb" G-incompleteness, for example by addition of an extra truth-value ("undecided"), but merely adds a second type of incompleteness. The difference between the two types is obvious: "Constructive incompleteness" as I have called it merely signals the presence of statements constructable in terms of the rules of the system that are undecidable in the sense that they have not (yet) been proved within it. Where (1) is abandoned we must hold $\ulcorner \neg(G \vee \neg G) \urcorner$ in relation to those statements. G-incompleteness, on the other hand, involves being able to

construct proofs, using the consistency of the system itself as a premise, of *both G and* ¬*G*, leaving the truth of *G* undecidable in terms of the proof-theoretic resources of the system. Clearly the two sorts of incompleteness are not equivalent: (*G* ∧ ¬*G*) is not the same as ¬(*G* ∨ ¬*G*). Scobbie's "Gödelian" argument is therefore better seen as one concerning the application of constructive principles in the foundations of legal reasoning.

* * * *

Having selected a constructive basis for legal reasoning, a theorist must provide two things: a *justification* for employing it, and an *explanation* of how it works. The justification, we already have from the earlier discussion of the Institutional Theory, bound up as it was with questions of *meaning*. Assuming that that issue is settled, for the moment at least, what is now needed an explanation of it: what, as I asked a few pages ago, is the semantic basis of constructivism in the foundations of legal reasoning? If, as Scobbie argued, legal arguments (and presumably reasoning generally) are "intersubjective", what is the basis of this intersubjectivity? If certain arguments are more plausible than others, what makes them so, and how are judges to assess 'relative weight'? This brings me to the second of the two issues above, that of the semantic status of rules.

2. The semantic status of rules

Having taken an anti-realist position on the nature of legal orders the next question must be what position to take on the semantic principles underlying the anti-realist position itself. If the semantics underlying legal systems (or the international legal system) is constructive, do the formation rules and the internal workings of the "internal logic" not themselves have to be assumed to be anti-realistic? If so, how are we supposed to account for the semantic status (or in a wider sense, the *knowability conditions*) of these? In other words, once we allow the anti-realism assumed of legal orders to spread into the semantic basis itself, is not Koskenniemi's point about interpretation, in a roundabout way basically confirmed? Indeed, once the deconstructionist subframe to his argument is removed, what remains bears a striking similarity to a KW-sceptic[26] argument about the functioning of legal orders and their semantic foundations.

The problem we face is this: how is an anti-realist to give an account of the ordering principles and criteria on the basis of which we are able to take a decision on which arguments to accept and which to reject – those principles and assumptions, in other words, in virtue of which legal reasoning may be legitimately called a form of "reasoning"? It ought not to be forgotten that, despite their general adherence to the notion of non-compelling legal argumentation, the positivists still need to provide a decent account of the internal structure of their legal systems, if the sceptical charges concerning legal reasoning and the internal/external distinction are to be beaten off. Such an account is clearly required anyway,

in virtue of the obvious fact that, outside the sphere of juridical argumentation, lawyers and academics carry out investigations into the structure and content of various bodies of law, in something like the way that mathematicians investigate, e.g., properties of countably infinite point-sets on the Continuum. Two issues, again hard to separate to any extent, are in play:

(1) If legal reasoning is genuinely a form of *reasoning* (and if therefore legal systems are genuinely systems and not just ad hoc collections of norms), then it must be in some way non-arbitrary. It must, in other words, be possible to assess, in some non-arbitrary way, which arguments or propositions of law are acceptable (in terms of some as yet unspecified criteria) and which are not. That being the case, we are under an obligation to specify in what way legal arguments are to be assessed on a rational basis, usually framed as the request to specify a conception of "legal rationality". Here, the method of assessment will be definitive of the notion of "rationality", in that a rational argument will be one conforming to a proper use of the method. In any event, our notion of rationality could hardly outrun our ability to decide in theory what is rational and what is not. There can be, in other words, no question of our having a concept of "rationality" without knowing what is to count as a paradigm case of rational decision. The very minimum we could ask of such a method is that it deliver up, in at least the majority of cases, some coherent way of deciding which argument-chains are to be accepted as valid (or correct, preferable or whatever), and which are not. We require, that is, some standard, or set of criteria, by which we can, in a regular way, put legal arguments and propositions into one of any number of sets: those we wish to accept (in the limit case, the true ones), and those we do not (the false ones). (The number of sets, or (roughly) categories, will depend on the number of grounds on which we wish to regard the arguments and propositions as being acceptable or unacceptable.)

The key notion in play is that of *non-arbitrariness*, since a procedure could hardly be called "rational" which assigned arguments to the categories ad hoc, and without some notion, however vague, of a fixed standard that those assigned to a particular class have to meet, whereas those failing the standard are denied access — unless, that is, we settle for defining rationality in terms of such a process. But then we should have to justify why our notion of rationality is incapable of distinguishing a good- from a poor argument. For the anti-realist, as we saw, the foundations of legal reasoning are a rational procedure in exactly this sense.

Because the anti-realist is not willing to say that the corresponding arguments and propositions are true of a more inclusive semantic structure, but are rather constructive of it, an account of the non-arbitrary character of the criteria of assessment (the criteria, that is, which *generate* the structure) is pressing. Thus, if there are propositions which are undecidable or lack truth-value, we must nevertheless know how to recognise a proof of their truth (or falsity) when we see one, even where it is held that such proofs are *constitutive* of

the requisite notion of truth. Legal concepts, in contrast with mathematical ones, are not generally thought to have this character; but clearly a relaxation of the criteria of assessment cannot go so far as to make the acceptability of propositions about law arbitrary. Any answer to the question 'What are the foundations of legal reasoning?' must therefore supply an answer to the question what makes legal arguments non-arbitrary, even if non-compelling?

(2) The second issue concerns the same criteria of assessment in a different, and possibly more pressing way. If it cannot be shown that the criteria of assessment are relatively fixed, in the sense of being non-arbitrary and changing, then we must conclude that our notions of "valid (or otherwise acceptable) legal argument" and "true legal proposition" are inchoate. Such terms and those associated with them are meaningful only insofar as we are able to communicate them. If I know that a certain proposition is true of a certain body of law, then the character of its truth must be such that I can communicate knowledge of it to others. This directly requires that the means by which we understand such propositions to be true, and such arguments to be acceptable, be capable of being known by anyone who is in possession of the appropriate concepts. Any conditions on truth which are not in principle thus capable of communication cannot matter for legal practice, since they cannot enter into it at any stage in either the formulation of legal "information" or its exchange. This is true even where we disagree about which statements about the law are true: for there to be (genuine) disagreement, I must know both what the statement in question means — which amounts to knowing what circumstances would make it true — and that those circumstances cannot, for whatever reason, be said to obtain. The basis of disagreement is thus as much a matter of meaning as assent to the truth of legitimate statements.

Wittgenstein told us throughout his later writings that there can be no such thing as a 'private language', in the sense of meaningful predicates which cannot, in principle, be communicated (see *Philosophical Investigations*, § 243 ff.; also, generally, *Remarks on the Foundations of Mathematics*). The way out of the problem, for Wittgenstein, was, famously, to tie meaning to use so that the meaning of an expression is the way it is used in the linguistic practice of a given community of speakers. In terms of criteria of assessment of legal reasoning, it would therefore seem, initially, that knowledge of such criteria need not be *verbalisable* knowledge, since that would involve an "extra" ability to restate those criteria in terms of *other* concepts. All that is needed, it seems, is the lesser requirement that we can *exhibit* knowledge of them, in the sense that we could reasonably attribute knowledge and understanding of such criteria to ourselves on the basis of our legal argumentative practice. In fact, this is not the case, as I shall now try to establish.

It seems to me that, in the sense in which the notion plays a role in the private language argument, the identity of meaning with use is designed to serve both as an *upper-bound* on meaningfulness, and as a *lower-bound*, though the latter role is significantly more complicated. As an upper-bound, it serves as a prohibition on the notion of, inter alia,

verification-transcendent truth, and on the general notion that we can regard semantic structures as more inclusive than that part we can construct in our reasoning. As a lower-bound, it serves as a guarantor of meaning by cutting out of linguistic practice anything that is not actually communicated in our various statements. The question is, how?

I shall try to answer this via an analogy. Coffa recounts a quotation, attributed to Lincoln, who is said to have asked, 'If we call a dog's tail a leg, how many legs does it have?', to which he apparently responded 'Four, because calling a tail a leg does not make it a leg' (Coffa, 'Hempel's Ambiguity' *Synthese* 28 (1974), pp. 141-163). This may be said to denote a form of realism with regard to "external" matters. A proto-Wittgensteinian response, by contrast, would presumably conclude that, since our use of concepts determines their meaning, the answer must be 'five', since for us, a dog's fifth appendage is a leg. In fact, these two points talk past each other to some extent. In terms of meaning, the latter claim is technically correct. But the former is correct from the point of view that, in *assigning* meanings we must have regard for the things they are the meanings *of*. In other words, we must have a reason, in this case in terms of what we may loosely call "natural kinds", for assigning the same meaning to two radically different parts of a dog.

The analogy is this: 'Is an explanation called "valid" because we regard it as such, or because it really is?'. The answer is again that explanations that are *valid* are all and only those which fall under our conception of validity. But our reason for calling an argument "valid" cannot be based on anything less than the fact that it *does* have the requisite property of validity. According to a KW-sceptical argument, the difficulty lies in attributing to ourselves the ability to follow rules and procedures (e.g. for checking validity) correctly, and to know that *my* following of the rule is the same as everyone else's. The restriction of meaning to use ensures that there are no more components to this process, in semantic terms, than can be effectively communicated, thereby providing the lower-bound. Either we accept the argument, or we do not; if we do not, then we must exhibit a reason why we refuse to fit in with established practice — why, that is, we regard the argument as defective — on grounds that do not show us to be employing different though homophonic concepts. But the reason why this is so is because of semantic properties internal to the concepts — especially those of validity, acceptability etc. — themselves. Our notion of validity is, necessarily, a semantic one: it holds according to the formal system in which it figures, and does so because valid inferences are all and only those which, in terms of the inference rules of the system, preserve truth across the notion of consequence. To exhibit knowledge of validity in this way is therefore to be able to show aptitude in handling formulas of some formal system. And since, in a formal system, all inference rules and steps in the proof are explicit, this is essentially verbalisable knowledge. This should not be surprising since it was towards just this conception of formalisation that all 19th century mathematicians had been working, and which first found expression in the works of Frege.

It should be obvious how these two matters interconnect. For legal reasoning to be assessable in the sense of point (1) — that is, for us to be able to agree (or to disagree) over what is a rational argument in law — there must be some means of showing *why* certain legal statements follow from others. Unless we can do this — that is, present some semantically respectable version of the intuitive notion of "following from" — it must be conceded that legal reasoning is not rational in the sense usually claimed for it, and legal orders are not systems in the sense usually claimed for them.

To be sure, most legal theorists and lawyers are adamant that reasoning in the case of law is not logical reasoning in any formal sense; that it is some form of 'weaker ordering', as Kratochwil put it. Two points are worth reiterating in the face of this reasonable claim. First, such a claim is usually made in the course of a theory promoting non-compelling argumentation as the correct model for legal reasoning. In most cases, the model in mind is practical reasoning of some kind, or some form of rhetoric, and the notion of legal reasoning is that of contentious reasoning before courts. As I have tried to show, neither rhetoric nor, in an extended sense, practical reasoning seems wholly suited to "academic" reasoning about legal structures in the context of analytical enterprises, or even in legal *studies* or learning of the law in general. Insofar as one is taken to be addressing (what the institutional theorist rightly takes to be) a body of established doctrine, or a body of "truths" about the legal order, the appropriate view to take of such investigation is as some form of theoretical reasoning. Its (possibly) non-compelling nature does not automatically invite the conclusion that its inferences are of (purely) practical form. Secondly, even where legal reasoning is thus held to be something short of logic, this can hardly be a claim that its inferential relations are short of *semantic*: that notion would very clearly be inchoate.

If such reasoning is therefore path-dependent or pattern-orientated in some non-logical sense, it remains of the essence to demonstrate exactly in what such inferences consist, and therefore how the corresponding bodies of law are structured. Claiming such relations and structures to be "practical", without further elaboration, is of no more explanatory value than the bald statement that one legal statement follows from another by magic.

Because of the constructivist tone of most legal philosophy, we might wonder whether we cannot exhibit our assessment criteria, which are, supposedly, totally determined by our use of them in "practical" contexts, under just such a weaker ordering. This would have to be based on semantic relationships among legal concepts, short of formal logic, by which we can assess, in the appropriate sense (i.e. relative to those criteria) the acceptability or otherwise (again relative to the criteria) of argument-chains involving them. Such criteria would therefore provide *restraints* on what can be asserted on the basis of what in the course of argument in the sense required.[27] This, in addition, allows us to relativise the key notions of acceptability and justification to particular legal theories (such as positivism or Dworkinian right-answer theories) in relation to individual legal systems, which is what,

intuitively, we would have expected from any account of the foundations of legal reasoning worthy of scrutiny.

Intuitively pleasing though this line of reasoning is, it seems to me to run into insurmountable difficulties that threaten its internal collapse. This is due to the amount of argumentative weight placed upon the new semantic notions that are designed to serve both the needs of our modified notion of normative "inference" (which is no longer strictly logical inference) and our demands that the promissory notes made in the name of legal rationality are made good (*vis a vis* our method of analysis of legal arguments). If we abandon altogether the need for semantic analysis, and insist totally upon the "practical" character of legal reasoning, we also effectively give up any right we had to talk of "inference" in normative argumentation (at least, in any readily available sense) and with it any clear means of talking about arriving at conclusions on the basis of sets of premises. Russell once said, in the context of axioms of infinity, that the method of postulating whatever we want has the same advantages of theft over honest toil. Insisting that our knowledge of meaning resides totally in our practical ability to speak the language is one thing; saying that that practice is fundamentally closed to analysis is quite another. In both cases too the disadvantages are the same: lack of explanation of how we came by our spoil.

The great problem for such a view, then, is that to be successfully *explanatory* of (our allegedly practical ability of) legal reasoning, the semantic notions being used as the basis of analysis — the "restraints" as we have been calling them — must themselves be open to analysis.[28] Just renewing the appeal to the *notion* of restraint is not enough, at the risk of resting the crucial concept of legal rationality on so slender a basis as our putative and utterly mysterious ability to know a valid normative inference when we see one, even if we are unable to explain why or how.

Weakening the central notions into something less rigid — something not open to logical analysis but which, for any particular operation, we can agree on what is or what is not a proper use of a notion of that type — seems to provide the only hope for the basis of the sort of alternative assessment procedure we are after: one in which the key semantic notions (of what follows from what, what provides a justification, etc.) are not answerable to algebraic checks on their character, but only to our ability in practice to decide on what fulfils the notions and what does not. On such an account, the justification for asserting an inference (let us call it) lies not in any formal proof structure, but in our ability to supply reasons for supposing there to be a genuine inference and on our willingness, on hearing the explanation, to regard it as such.

This idea of *justification*, of the giving of reasons, is the one at the heart of most characterisations of legal reasoning furnished by modern positivistic jurisprudence, constructivistically interpreted. But, as noted at the beginning of this thesis, it is not the *character* of legal reasoning we are after, in this context, but its *foundations* — and for that we must know *why* certain arguments are acceptable as justifications (and others not): what

is the basis of our agreement, or disagreement, over what counts as an acceptable move in the legal language game? Clearly, at the level of foundational questions, we are debarred from appealing to "rationality" or "intuition". As has been seen, these notions must stand at the beginning of the analytical process, not at its culmination. But it seems likely that, in the absence of a justification based on a *semantic* operation, intuition, rationality and other such straw-man notions are exactly what we end up appealing to.

It may be worthwhile to pause for a moment to reflect upon this situation. There are in effect two sides to the issue under consideration. The first may be called the "system problem"; the second, the "inference problem". The inference problem, which is strictly the topic of Appendix I, is the problem of how we decide, objectively, when one proposition in or about the law follows from another such proposition or set of propositions. Broadly, we are asking, 'Under which circumstances are we permitted to make such-and-such a statement about the law (and regard it as true)?' The system problem is the problem of how we are to account for the structure of (various parts of) the legal order in question. In what way are various concepts, norms and so on belonging to some branch of law connected with others in that branch (and other branches)? When is a proposition about the law to be regarded as elicting hitherto undiscovered consequences of existing parts of the system, and when to be merely constructing such "consequences"?

These problems are, of course, clearly linked — particularly on an anti-realist view, as this chapter has attempted to demonstrate. It is, however, the latter — the "system problem" — which has been of concern in this chapter. In a sense, the questions raised by it have still to be answered. What has, hopefully, been achieved in the foregoing discussion is a clarification of a general framework within which various accounts of the structure of legal orders (on the issue of realism) take place. Apart from taking sides against certain forms of realism, the argument has, as it were, displayed the (semantic) conditions in which debates about the structure of branches of law are conducted. I have not taken an explicit stand on the concrete issue of what various international legal structures "look like". Such a task is the one I am about to embark upon in chapter 5.

Though the questions with which the system problem deals are common to all legal systems, in the case of International law they receive a peculiar twist. Not the least important element of this issue is the role of courts in deciding legal disputes on the basis of law. This topic forms the main business of the next chapter; but to close the present chapter, I would like to consider a particular aspect of what is involved. In doing so, the discussion shall, in a sense, have arrived back at issues with which I began in chapter 1, and which shall continually resurface in chapter 5.

2.3. How real is the Law of the Sea?

To the extent that some notion of legal validity is required, based on purely semantic grounds, even the staunchest anti-realist must admit a degree of realism into her semantics

somewhere. The need arises because of anti-realism's links to older forms of Idealism, because of which anti-realist theoreticians cannot remain forever silent over the status of the semantic building blocks of their first-order languages. This is also a problem for constructivist legal theorists attempting to account for the conceptual formation (and argumentative deployment) of normative structures manipulated in legal reasoning, because sooner or later they will be forced to take a decision over what those normative structures, interpreted semantically, actually *are*. Just how much of a degree of semantic realism is required, and where in the theory it must go are linked to issues in the philosophy of language. But there is also a specifically legal issue to be made out in this respect connected, oddly enough, with the domestic analogy.

On the face of it, rejection of the domestic analogy presents no great problems for international law. If anything it seems a necessary corollary of the recognition of international law *as* law once it is perceived that important differences of structure exist between the municipal and international systems. In fact, the problems generated by rejection of the domestic analogy are not only unexpectedly difficult; they are among the hardest and most fundamental a theory must tackle in the context of an account of legal reasoning. The most important of these problems concerns the theoretical model on which the International Court was constructed. Pending an alternative explanation of conceptual structures in *private law*, a realist view of normative structures seems to be inherent in the very institutional fabric of the ICJ.

Both Article 33 of the UN Charter (following its predecessor Article 15 of the League Covenant) and international practice observe a very strict distinction between the various methods of arbitration open to states on one hand, and the judicial settlement of disputes on the other. The importance of the distinction, according to Rosenne, is in maintaining a parallel structure for dispute resolution within which states can, more or less, decide in advance the level of politicisation they wish to admit into each stage of the resolution procedure. The amount of control states have over both the organisation and the personnel of arbitral tribunals means that those bodies are able to pursue courses of action, more in line with traditionally diplomatic techniques (specifically, like compromise), that are foreclosed to the ICJ. Among other things, this means that the character of an outcome to arbitration is supposedly much less certain, and less structured, than in a case before the ICJ, and this differentiation is crucial in making for a regular legal framework of a more stable and lasting character:

> The permanency of the Court, which transforms into constants most of the variables inherent in international arbitration, makes of the Court the most refined instrument at present existing for the depoliticisation of the process of pacific settlement and its implementation through the application of legal techniques, that is to say, [. . . .] the renunciation by the parties of their

individual powers of decision and their submission to the impersonal criteria of the law. (Rosenne *The Law and Practice of the International Court*, pp. 8-9)

Many have attacked the so-called "World Court" model as outmoded in an increasingly fragmentary and regionalist international legal system, and they are probably right to do so (I shall not go into the merits here). But the point is, such a model sits rather oddly with the rest of the conceptual parephenalia of international law. Even at face-value Rosenne's comments, echoing de Vischer's words about 'the impersonal criteria of the law', seem out of place within the consent/consensus paradigm of international law. How can any system based to such an extent around custom and treaty be *impersonal* in that respect? More fundamentally though, the sort of law/politics distinction this model aims at (and which is clearly an element of Art. 33 UNC) seems far too simplistic (or deliberately exaggerated) a view for international law, and its attendant model of legal reasoning in particular, to sustain.

As many theorists have pointed out (including, again, Rosenne), the law/politics antithesis of municipal legal theory, if it exists at all in international law, exists in a radically different form, together with corresponding differences in the meanings of "law" and "politics" respectively. As lawyers from federal backgrounds will point out, municipal courts are characterised for their applicative role rather than their capacity to generate far-reaching normative orders. Their function is to look after the legal relationships of citizens, since all parties, and the court, are subject to the constitution. In common law jurisdictions, courts may have a greater freedom to generate new regimes — medical law may be teeming with examples — but the idea is basically the same, with the court definitely a part of the constitutional process. Exceptions are those cases in which the courts are called upon to decide on the *constitutionality* of enacted law. In international law, famously, it is this second task that most characterises the Court's workload, if the first properly applies at all. The reason is (and here is, in essence, the basis for rejection of the domestic analogy:) that each contentious case brought before the ICJ for resolution is, almost by definition, a dispute between two or more political, norm-creating groupings (viz., states). The crucial difference is that there is no "super constitution" above those groupings that regulates their interactions (international law is traditionally *ius inter gentes*) and provides a power-sharing structure in advance of agreement to settle.

This insight is usually expressed as the lack of a legislature in international law, but that is an unfortunate way of looking at things, since it concentrates attention too much on domestic legal paradigms. The overarching difference in constitutional arrangements of the municipal and international systems is of far greater significance than the mere absence of a central legislative authority; and this is particularly the case when it comes to the impact on, and the conceptual foundations of, legal reasoning for that system. As Kratochwil has recently reminded us (*Rules, Norms and Decisions*, p. 3), those who accuse the Hobbesian model of inconsistency in not espousing a "Superleviathan" above states have simply

misunderstood the whole point of Hobbes's model. The point of the State of Nature was rather to illustrate the *different* choice-structures that underlie and motivate action in the international and domestic arenas.

2.4. Concluding Remarks

It is considerations such as these that have led many theorists to withhold the name "law" from what lawyers are pleased to call international law, and they commonly point to the highly politicised and controversial nature of the disputes that make up the ICJ's business to back up their case. On the other hand, the same considerations led Hart and his followers to *extend* the concept of law to cover systems that deviate from the municipal model within the bounds of certain "family resemblances", and their efforts were reviewed in chapter 1. What the issue really concerns, however, is the difference, not so much in the structures of international law and, say, municipal private law — structures which the courts supposedly address — but their semantic foundations. Insofar as private law provides the paradigm of a body of law that is supposed to be philosophically coherent and logically well-structured, a comparison of it with international law will afford a valuable insight on the extent to which the kinds of legal theoretic metaphors (system, and so on) applied to such domestic orders, are suitable in characterisations of the international legal order.

It is therefore the task of the next chapter to investigate in some detail the theoretical structures of those two types of legal system. The aim in so doing, is to reach a firmer (i.e. less abstract) conclusion regarding the exact foundations of international legal reasoning — what its "structures" and so on actually look like, in relation to those of domestic law — and on the questions raised, and only partially answered, in the present chapter concerning the extent to which such structures may be regarded with (some degree of) realism.

At the end of this chapter, there is at last at hand a general and rather abstract answer to the question, *what are the foundations of legal reasoning?* I have suggested *where* to look, but not yet exactly *what* they look like. I have argued, in addition, that legal positivism, with regard to international law, owes us (or rather, Position-I sceptic) an explanation of *exactly* what the foundations of international legal reasoning are, and of how we should regard the international legal order. Providing answers to these questions is the job of the final chapter of this thesis.

5

Public international law and municipal private law: analogies

> Lawyers will continue to detect, by an entirely mysterious process, the *ratio decidendi*, the essential pattern, of a decided case [. . . .] and they will relate that pattern to the essential pattern of the case before them. (Allott, 'Language, Method and the Nature of International Law')

> The nature of general custom is an easy starting-point in an argument which tries to place legal doctrine at the head of the sources of international law. Jurists are not agreed about the nature of general custom. Therefore the task of the jurist cannot simply be to identify phenomena as legally significant by applying an agreed legal criterion of identification. Legal controversy goes to the very nature of the criterion itself. (Carty, *The Decay of International Law*)

0.1. Introductory remarks

In chapter 4 various aspects of the issue of realism were examined with respect to legal orders. The purpose of the present chapter is to link that discussion more explicitly to the issue of legal reasoning and legal argumentation in international law. At the outset, I suggested that the questions of the conceptual structure of international law, and its relationship to municipal law, are best approached from the direction of legal reasoning; because it is only via consideration of what constitutes the sense of a proposition of law, its inferential powers and knowledge of its truth, that we can form an accurate picture of the legal order it (partially) describes. By the end of chapter 4 I had offered a general such account, in the form of an outline of a theory of meaning for statements about law ("outline" in the sense that it went no further than to lay down very general conditions for a statement about law to possess a meaning). I promised there that, in this chapter, I would go some small way towards sharpening up some of the more abstract remarks I made with a concrete analysis of legal reasoning in international law. This I intend to do in parallel with giving a somewhat deeper account of the relationship between international law and municipal law, as the matter arose in chapter 1.

This tandem approach I believe to be necessary to any plausible such account. I shall be arguing, in particular, that our conception of *what kind of activity legal reasoning is* must undergo a quite dramatic shift if we are to be able to make good sense of its nature and role in international law. This is particularly so if we are to respect the plausible belief that legal reasoning in general does not have the quality of apodeictic certainty. The issues of this chapter are back in the world of Hartian questions and (quasi-) Hartian answers. All legal theorists stand (or should stand) to some degree in the shadow of Hart, just as generations of philosophers stood in the shadow of Kant and now stand (or should stand) in the shadow of Wittgenstein. This does not, of course, imply that Hart, any more than Wittgenstein, was always, or even mostly, right; but if Hart's answers did not succeed in uncovering fundamental truth about the nature of legal orders, then at least the spirit of his investigations came closer than others to putting us on the right track. That it is necessary to begin with his basic questions in mind is, perhaps, testimony to this assertion. The proper place to begin is then with a fresh look at what Hart said about legal systems.

I: Rôles of Recognition

1.1. Primitive law?

It is often said that international law resembles in its essential respects a primitive legal order. This widespread tendency to see in international law a social organisation analogous to primitive law is, of course, based on tacit acceptance of the proposition that all legal systems eventually gravitate towards the model presented by municipal law, not only in fact but conceptually so. Reasons for drawing the analogy will therefore depend to some extent upon one's preferred view of municipal law. Once the theoretical model for that case is settled, primitive systems and international law may be judged relative to it. On the traditional view, the alleged deficiency uniting the latter two systems rests with the lack of an ordered regime of sanctions, or in virtue of questions about individual or state sovereignty (the latter itself resting on assumptions about the existence of social contract and the operation of rules in pre-contractual societies). Hart, for whom law was characterised by the celebrated concept of a union of primary and secondary rules, based the primitive law analogy precisely on the basis of the alleged lack of secondary rules in both international and primitive societies. Specifically, Hart comments upon the lack of a proper rule of recognition for international law, which specifies the sources of law and what is to count as a rule of the system (*The*

Concept of Law, p. 214).

It is therefore important to become clear about both the reasons for assuming the lack of secondary rules, and the nature of the role played by rules of recognition generally in the theory of legal systems. For an answer to the first of this pair, it is necessary to look at what Hart said about likely candidates for the job of a rule of recognition in international law. Since, strikingly, he said nothing about this in his writings on international law — including the most obvious contender, Article 38 of the Statute of the International Court of Justice — the place to start is with more general aspects of the role such rules play.

It used to be a favourite question among scholars of Hart, whether he had intended to posit *rules*, or only a *single* rule, of recognition. The question is of only scholastical interest in municipal law: upon it turn merely the plausibility of Hart's claims for municipal legal systems and the cogency of his own theoretical system. But because perceptions of international law tend to be formed from views of municipal legal theory, the same question in the international context is less innocuous: if a single rule of recognition, fulfilling all of Hart's criteria, is sought, then the chances of finding one in international law are remote. The logic of the argument therefore guides us without much further ado into the primitive law analogy. If, on the other hand, we are looking for a number of rules, each of which only partially fulfils Hart's criteria, chances are rather better. Two questions, therefore, arise:

(1) What is the nature of the rule of recognition?
(2) What is the role of the rule of recognition?

(1) Nature of recognition. An initial reaction might be to assume that the question whether rules or a single rule of recognition is at issue is glib because the various rules of recognition (if such there be) can always be converted into a single rule by the rule of &-introduction: RR can simply be taken to be the product of R_1 & R_2 & R_3 & . . . & R_n. But this attitude masks an important issue, that of the *nature* of the rule of recognition. It is sometimes said that, by Hart's criteria, the rule of recognition of the UK legal system is best seen to be the rule of Parliamentary sovereignty. As a single rule this is plausible, if it is assumed that the purpose behind such a formulation is the location within the system of the source of legal authority — the specification, as it were, of the source of all formal sources of UK law, and an explanation of what legitimates recognition of them as such. As a means of recognising specific rules, or of the means by which they are recognised, it is manifestly implausible: for

that, one would require enumeration of the sources themselves, the nature of any hierarchy obtaining between them, who may use them, how they operate, and so on.

In such a case, a single though very complex rule is unlikely to be of much help. What is required is something in the region of what Carty calls, for the case of international law, "doctrine" — albeit not conceived of as a formal source in this context, but as a volume or stock of general though perhaps quite detailed instructions and understandings about how one may go about finding the law, and how one may recognise it as such on meeting appropriate instances. That is, Hart's general criteria for recognition of a rule as one belonging to the system are, very roughly speaking, what one knows when one has mastered the basic concepts and ideas contained in introductory chapters of textbooks on law. It is, again, not the source of this information which is important (i.e. the textbooks) but, rather, the information itself: the point is just that, in a legal system of sufficient complexity, the background knowledge required to be able to grasp with success the criteria whereby rules are recognisable as rules of the system, and how one in general goes about finding them, will be substantial, and not automatically likely to be capable of formulation as a *rule* or rules.

One may, in this respect, ask what one must know, or at least be aware of, in order to know how to recognise a rule as legitimately belonging to international law, and in virtue of which procedures one may set about finding the law. Any such knowledge will include understanding or at least awareness of, inter alia, the concept and nature of state sovereignty; reciprocity and opposability; persistent objection; unilateral acts; the alleged quasi-legislative effect of General Assembly resolutions;[1] the contested notion of *opinio iuris* in custom-formation; and the status *of travaux preparatoires* in the interpretation of treaty provisions. Formal sources notwithstanding, without knowledge of these and related matters, one cannot be said to know how to go about finding the law, or answering the question, for any given putative rule, whether it can be said to be valid within the system. This knowledge, if it is such, can no more be plausibly reduced to a complex rule or set of rules than the provisions of the Wills Act alluded to by Hart (*The Concept of Law*, pp.28, 34-36) can be reduced to a order backed by a threat.

Though I have misgivings about its suitability, I shall continue largely for simplicity's sake to use the phrase "*rule(s)* of recognition"; it should however be kept in mind that my usage of this phrase, in the *second* sense lately outlined, is intended to refer to the concept of knowledge required for basic understanding of the legal system and recognition of its laws, rather than anything Hart intended by it. It is important also to note that some such "rule" in

this second sense is a natural requirement of legal reasoning. For the requirement that legal reasoning be non-arbitrary, in the sense that one may only infer the existence of non-posited legal norms (or properties of them) on the basis of that which is already accepted as valid within the system in question — in some as yet undefined sense of "infer on the basis of", essentially reduces to the rule of recognition in the second sense. Or, to point the arrow of explanation in the proper direction, the rule of recognition, in that sense, naturally inflates into such argumentative criteria, since it is only on the basis of what we may regard as correct argument, based on the sources, that legal norms can be shown to demand recognition as norms of the system.

It is, in fact, something rather more like this second idea of rules of recognition which seems to have concerned Hart at the point indicated earlier. What is lacking in international law, Hart said, is:

> a unifying rule of recognition specifying the sources of law and providing general criteria for the identification of its rules. (*The Concept of Law*, p. 214)[2]

As this seems fairly reasonably to characterise the content of Article 38,[3] the question is why Hart was so ready to discount it — or not, anyway, to consider it — as a rule of recognition.

The answer, I conjecture, lies not in the *form* of the Article, but in its position relative to the surrounding law. Most plausibly, Hart would have been tempted to suppose that it lacked the character, and therefore the status, of a genuine secondary rule: Art. 38 is not, in the proper sense, a rule which specifies law-finding directives to *all* empowered legal personnel (which in the case of international law would naturally include states). Notionally, it merely lays down what *the Court* may apply as law; it is primarily therefore a rule of the Court, and not a constitutional document in the wider sense. What, then, is the significance of this? Is it enough to rob Art. 38 — or rather, its content — of genuine constitutional importance? To answer these questions it is necessary to address the second of the two questions lately introduced, namely: what is the role of a rule of recognition?

(2) Role of recognition. Hart wrote that the rule of recognition, whose presence is a precondition for the existence of a developed legal system, must supply 'general criteria for the identification of its rules'. What is of concern here is not the generality of the criteria, but their purpose in theory. They seem, on reflection, to have two purposes: what one might call

their "constitutional" function, and their juridical function. The constitutional function approximates to the first sense mentioned earlier, namely the formal specification of the formal sources of law and of the hierarchy of authority within the system which allows us to keep track of which putative rules and principles of law are legitimate in terms of that authority. To employ a (no doubt illegitimate) geometrical analogy, the rule of recognition fixes what Hart sometimes called the "legal pedigree" of a rule by specifying its Cartesian co-ordinates within the whole structure, and by plotting its justificationary route, via all premises on which it is based (and *their* location in respect of the structure), to the sources or ultimate centre of authority. As such, this aspect of rules of recognition bears some resemblance, in purpose if not in form, to Kelsen's conception of the Basic Norm. Just as Kelsen narrowed sociological inquiry to one point only, so Hart argued that the "fact" of general acceptance of the system in this sense is a necessary condition of its existence (cf. e.g., *The Concept of Law*, pp. 113-117).

Two views could be taken of the significance of Art. 38 in this respect.[4] According to the first, one could argue that the content of Art. 38 is *de facto* accepted by all subjects of international law as a correct statement of the sources, or at a more abstract level, necessarily so if what they profess to practice is what is commonly known as international law at all. This acceptance cannot, of course, be *de jure* acceptance — either as a matter of custom or of conventional agreement among states — since for both Kelsen and Hart, the existence of such agreement is always an empirical, and never a legal, matter. (As Wittgenstein might have put it, states cannot, with any legal significance, *say* that they accept the sources, but can significantly *show* their acceptance of them through their legal practice.) As long as its content is formally distinguished from the Article itself, the objection that it is addressed purely to the Court is ill-founded. On the second view, one may argue with equal force that, if the international community has no constitution to speak of — at least, not one in any measure resembling that of a municipal society, either written or unwritten — then likewise it has no need of a basic norm of recognition in *this* sense. This cannot, however, be said *vis a vis* its juridical function.

What I am calling the "juridical" function of rules of recognition amounts to the role such rules play in specifying the premises on which legitimate legal arguments may be based, and legitimate legal conclusions reached. This is, in other words, what Hart referred to as the need for 'general criteria for the identification of [legal] rules'. Because the sources are usually reckoned to be precisely the things on which a legal institution may legitimately base

the ultimate authority for its arguments and decisions — and on the basis of which participants in the legal process at any level must proceed — and if such criteria may take the form of a rule or rules, then Art. 38, or rather its content, seems a reasonable candidate for the job. This aspect of the rule of recognition — its identifying function — is of crucial importance in the argument to follow. It is also heavily involved in the issue of realism discussed earlier. For the moment I wish only to note its parallel importance for the primitive law analogy, at least in the context of Hart's theory: for it is essentially based on various assumptions about what rules of recognition are, and what their role can be. It is hard to avoid the conclusion that Hart was too ready to decide the fate of international law on the basis of his general criteria for the characterisation of legal systems — that discussed in chapter 1 — rather than take a decision based on a thorough and patient analysis of the sources of law.[5]

Clearly, however, this has not yet exhausted the significance of the assertion that, for a developed system at least, a rule of recognition possessed of identifying abilities in the sense outlined is a necessary condition either of efficacy or of existence. I have suggested that such a rule, in respect of this function, need not resemble one of municipal law; or it is not immediately obvious that it must. The need to specify an alternative however remains, particularly since the issue of identification (of which norms are norms of the system, and on what basis we may so recognise them) is an ingredient of our general problem about legal reasoning: what is the structure of international legal argumentation, and thereby of international law? Alteration of the identifying function has, as I intend to show in § III, profound implications for the general structural features of legal reasoning. First, however, I would like to pave the ground by introducing two "models" of legal reasoning, which amount to two different ways in which to view the structural features of the reasoning process. I call these the "Fixed-point" model and the "Path-definition" model.

II: Two models of legal reasoning

2.1. Introductory

In this section, my intention is to set out two radically different (though not, perhaps, wholly incompatible)[6] views about what kind of activity legal reasoning is. The first is, I hope, recognisable as an articulation of the model underlying orthodox accounts of municipal law.

I call it the "Fixed-point" model, and I believe it to be the basis of, not only positivism, but also legal realism, right-answer theories and many shades in between. I shall also be arguing that it lies at the root of many conceptions of international law, where it is used either to "demonstrate" the legality of principles employed therein, or to "show" that international law does not deserve the name of law. Because the model is, or should be, easily recognised as the one which most writers on legal reasoning have in mind, I shall not spend much time on explaining it, or on justifying imputation of it to such otherwise diverse traditions beyond a few perfunctory quotations.

The second model, which I call the "Path-definition" model, is due to Friedrich Kratochwil in his recent study *Rules, Norms and Decisions*.[7] Kratochwil's thesis about international law has not been slow to generate controversy; it is, nevertheless, a compelling analysis which I think has great power as an explanatory tool whatever its ultimate validity taken as a whole. I shall therefore spend some time, in § 2.2, outlining Kratochwil's views about international legal argumentation, though I delay most of my assessment of its legal import until section III.

The Fixed-Point Model

2.2. Standards for Interpretation

Two basic ideas characterise the Fixed-point model: that legal norms are *standards* to which we appeal; and that such standards, if unable to support appeal to them outright, require *interpretation*. What is understood by those key terms – "standard" and "interpretation" – will differ from theoretical tradition to theoretical tradition. Nevertheless, I strongly believe that the view of the nature of legal reasoning which underlies them is fairly constant throughout. In order to see this, I shall begin explaining the Fixed-point model in the context of its most familiar surroundings, legal positivism. I shall then go on to argue that it also lies at the basis of Dworkin's right-answer thesis and the teachings of the American legal realists. Finally, I shall show that a prominent defender of the efficacy of international law, Hersch Lauterpacht, and two prominent sceptics about international law's claim to be called "law", Antony Carty and Martti Koskeniemmi, make appeal to the Fixed-point model in their writings on the legal reasoning of international lawyers.

Nigel Simmonds once recalled being asked by a non-lawyer, 'How is it possible to do *research* in law?' Simmonds's reply is worth remembering:

> The question is obviously founded on the assumption that law consists entirely of black-letter

rules laid down in statutes or decided cases, and that writing a legal treatise must be merely a matter of reporting and restating those rules. While not doubting the value of such an enterprise, the layman may well be surprised when he discovers that lawyers regard the writing of textbooks and articles as a demanding intellectual task, in which the writer should display far more than mere thoroughness and accuracy: over and above these qualities, the legal scholar may be praised for his "insight" or "analytical skill". But to what mental operations do these terms refer? What exactly does the legal writer do beyond repeating, reporting and re-arranging? (*The decline of juridical reason*, p. 17)

He concludes:

The embarrassing truth is that academic lawyers at the present day could give no very confident answer to this type of question, or no answer that did not fall back on a lot of empty rhetoric about "analysis" (a word that here, as elsewhere, does more to obscure than to inform). (p. 19)

The underlying problem is that the law, as ordinarily conceived, contains a mixture of both reasonably concrete "rules" and more imprecise or generally formulated "principles". Legal doctrines, as enshrined in statutory materials and in precedential findings may well, and often do, consist of both. A pertinent question is therefore how legal reasoning addresses such things in order to produce (among other things) authoritative judgements.

The modern perspective on such matters is to hold that rules, principles and the other varieties of legal norms are all types of *standard*: things which tell us, not how we do behave, but how we must, ought, can or must not behave. For those who see the legal order fundamentally in terms of a network or system of norms, legal reasoning will be an exercise in appeal to those standards: (valid) legal norms are facts about the legal system, and cases are judged in accordance with them. The role of legal reasoning lies therefore in selecting the particular standards which are in point (which are best applicable to the facts of the case) and, via appeal to the terms of the standard, telling us how the facts are to be regarded in terms of the law. The fundamental form of legal argumentation on such a view is syllogistic, with the final step, after the selection of premises, being a subsumption (of the facts of the case under the norm(s)) or something like a subsumption: the law says *this* about *this*. Where the case is an "easy" case, this subsumption can proceed reasonably straightforwardly. Where "hard" cases exist – where no existing rule clearly and cleanly applies to the facts – something in the way of a creative act is required, either by devising a "new" rule or

extending an old one in conformity with pre-existing law, or by *interpreting* an existing rule as also applying, perhaps in modified form, to the new facts.

It is at this point that various schools of thought emerge as to how to regard the process of interpretation. Positivists, at least those of the Hartian school, will typically regard the act of interpreting precedents and statutes as constructive and ("rationally") creative; right-answer theorists, such as Dworkin, will argue that there is only one correct way to do it; legal realists will tend to favour the notion that interpretation is based upon subjective grounds, usually of morality or political belief; and so on. Underlying all such views is the notion of legal reasoning as manoeuvring the reasoning agent into a position where a final subsumption can occur. Legal reasoning is therefore fundamentally *justificationary*.

In order to see how this model fits into contemporary legal theory, it may be instructive to recall MacCormick's views in *Legal Reasoning and Legal Theory*. In the Foreword to that book, the author claimed to stand 'four-square for the idea that a form of deductive reasoning is central to legal reasoning' (*Legal Reasoning and Legal Theory*, p. ix). This follows from the "factual" status of the norms with which lawyers work:

> A system of positive law, especially the law of a modern state, comprises an attempt to concretise broad principles of conduct in the form of relatively stable, clear, detailed, and objectively comprehensible rules, and to provide an interpersonally trustworthy and acceptable process for putting these rules into effect. [. . . .] Accordingly, the logic of rule-application is the central logic of the law within the modern paradigm of legal rationality under the "rule of law". (pp. ix-x)

The ontological basis on which this view rests has already been explored in chapters 2-4 of this thesis. Given the notion of legal reasoning as an appeal to standards, it is not surprising that MacCormick, initially, endorsed *propositional* logic as the logic upon which deductive judgements are based:[8] 'Rules are hypothetical normative *propositions*' which 'exist as relatively concrete formulations of more abstract principles. At least, that is their aspirational character' (p. x, emph. added). In straightforwardly deductive cases:

> The simple but often-criticised formula "$R + F = C$", or "Rule plus facts yields conclusion" is the essential truth. (p. x)

However, deductive logic is not the only device employed in judicial reasoning. This is because:

reasoning from rules can only take us so far, and it is inherent in the very character of law for the rules frequently to fall short of their own essential virtue, being indeterminate for a given practical context. (p. xiii)

As Raz characterised the problem:

> the law is settled [according to the "sources thesis"[9]] when legally binding sources provide its solution. In such cases the judges are typically said to apply the law, and since it is source-based, its application involves technical, legal skills in reasoning from those sources [. . . .] If a legal question is not answered by standards deriving from legal sources then it lacks a legal answer – the law in question is unsettled. In deciding such cases courts inevitably break new (legal) ground and their decision develops the law (at least in precedent-based legal systems). Naturally their decisions in such cases rely at least partly on moral and other extra-legal "considerations". (*The Authority of Law*, pp. 49-50)

It is such considerations which force recognition of non-deductive elements in legal reasoning. Such elements are usually thought of as being persuasion-orientated, or at least dialectical in nature. This is particularly true of Common law systems where judges are selected from experienced advocates:

> It should hardly therefore be surprising if in some considerable degree the style of judicial argumentation in that tradition mirrors the style of advocative argument. (*Legal Reasoning and Legal Theory*, p. 11)

Yet, MacCormick urges, this stylistic feature of legal argumentation need not be a reliable guide to its essential nature:

> Underlying the practical aim of persuasion there is, it appears to me, a function of *justification* [. . . .] (p. 14)

The reason why legal arguments, even in contentious proceedings, are not merely persuasive, is that they are constrained by the law in point. Legal decisions are made 'in the context of a whole body of "knowledge" – in this case, the whole corpus of the normative legal system'

(p. 103). Legal arguments must, therefore, remain faithful to the facts of the legal system:

> the reasoning stated in the judicial opinion *actually supports* the decision to the extent that it *shows* why the order given [. . . .] is justified given the facts established and the relevant legal norms and other considerations. (p. 14, emph. added)

The justification, however, is constructive. This is because when a precedent is held to be binding, it is not the actual words used in the decision which form part of the law, but the *ratio decidendi* (roughly, the reasons for which the decision is given) (p. 82). This gives rise to the need for "interpretation" of precedents:

> some precedents contain relatively clear rulings on fairly simply defined points of law [whilst] others contain implicit rulings of similar, but perhaps less, relative clarity. (p. 84)

Thus:

> Whenever the problem of interpretation o[r][10] the problem of relevancy arises, the particular decision handed down in the particular case is justifiable only given some reading as to the "proper" interpretation of the applicable rule, or some rule settling (or negating) some "proposition" of law covering the particulars of the instant case and any other like case which may in due course arise. (pp. 82-3)[11]

MacCormick gives the example of a judge confronted with the need to formulate a general principle in order to justify a decision in an instant case. Formulation of such a principle ideally 'express[es] the underlying purpose of a set of specific rules [and] at once rationalises the existing law so as to reveal it in the light of a new understanding, [thereby providing] a sufficient ground for justifying a new development in the relevant field' (p. 126). In carrying out such an activity:

> [the judge] does not simply find and state the rationale of the rules; to a greater or less degree, he makes them rational by stating a principle capable of embracing them, and he uses that as a necessary jumping-off point for a novel decision, which can now be represented as one already "covered" by existing law. (id.)

This is, of course, only one of the examples MacCormick gives in support of a rather subtle thesis of second-order justification built up in chapters III-X of *Legal Reasoning and Legal Theory*. My intention is not to oversimplify that thesis, but rather to have shown that its very basic structure, at a fairly high level of abstraction, is an instance of the Fixed-Point model. The following passage may also lend weight to this interpretation:

> What is crucial is that in an earlier case a court in making and justifying its ruling in law subsumed the facts in issue within certain categories. The new case partially overlaps in the sense that its facts can be assigned to a partially similar set of categories, or a set of categories which, together with the earlier set, can be presented as a species of some larger genus. The "similarity" between cases is similarity in respect of those categories. (p. 186)

Thus:

> Not merely must a decision be justified by good arguments [. . . .] It must also be shown not to be inconsistent with established rules. But whether a given proposed ruling is or is not inconsistent with an established rule may plainly depend upon the interpretation which is put on the established rule. (p. 196)

I believe that the basic elements of MacCormick's view of legal reasoning, as outlined, may be taken as the standard view among modern positivists of the Hartian school, whatever differences may arise over details.

A similar thesis may be seen to lie at the root of Dworkin's conception of "law as integrity". Dworkin's conception of law, it will be remembered, differs from positivism principally in holding the "positive" system of rules, which for positivists makes up the law, as being derivative from a more abstract set of principles. The content of the rules upon which judges rely derives from, and is justified by reference to, those principles. The law, as such does not contain any gaps but rather is formally complete.[12] What supplies this completeness of the law in the absence of a comprehensive code is, again, the interpretative function of legal reasoning:

> Law as integrity assumes [. . . .] that judges are in a very different position from legislators. It does not fit the character of a community of principle that a judge should have authority to hold people liable in damages for acting in a way he concedes they had no legal duty not to act. So

when judges construct rules of liability not recognised before, they are not free in the way [. . .] legislators are. Judges must make their common law decisions on grounds of principle, not policy: they must deploy arguments why the parties actually had the "novel" legal rights and duties they enforce at the time the parties acted or at some other pertinent time in the past. (*Law's Empire*, p. 244)

In Dworkin's case, it is clear that this interpretative function is an objective matter, wherein judges have no discretion to embark upon justifications based on "policy" rather than legal principle (see *Law's Empire*, pp. 52 & 65-92).

In the case of the American Realists, the reverse is true: interpretation of the law (and, particularly, legal subjects' expectations of it) are shaped by personal and political preferences of reasoning agents. It may be thought that fitting the Realists into the Fixed-point model is not without difficulty, since a number of their most deeply held convictions about the law – the prediction theory, for example, in the case of those who subscribed to it – do not square with a view of rules as *standards* which require "interpretation". There is probably some measure of truth in this, which I shall have course to mention in regard to Kratochwil's thesis in the second half of this section. But for the moment I shall draw attention to a passage of Llewellyn's which highlights a further view of the nature of legal reasoning which is yet, I believe, another instance of the Fixed-point model:

I should like to begin by distinguishing real "rules" and rights from paper rules and rights. The former are conceived in terms of behaviour; they are but other names, convenient shorthand symbols, for the remedies, the actions of the courts. They are descriptive, not prescriptive, except insofar as there may commonly be implied that courts *ought* to continue in their practices. "Real rules", then [. . . .], would *by legal scientists* be called the practices of the court, and not "rules" at all. And for such scientists statements of "rights" would be statements of likelihood that in a given situation a certain type of court action loomed in the offing. [. . . .] "Paper rules" are what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time and the place – what the books there say "the law" is. The "real rules" and rights – "what the courts will do in a given case, and nothing more pretentious" – are then predictions. They are, I repeat, on the level of isness and not of oughtness; they seek earnestly to go no whit, in their suggestions, beyond the remedy actually available. Like all shorthand symbols, they are dangerous in connotation, when applied to situations which are not all quite alike. But their intent and effort is to describe. (*Jurisprudence*, p. 21)

Having attempted briefly to characterise, and give various examples of, the Fixed-point model, my next aim is to point to instances of its use in international law. The importance of this lies in the following two propositions:

(1) Both defenders of international legal orthodoxy and sceptics have uncritically assumed that the model of legal reasoning best suited to the analysis of international law is the same as that used in the analysis of municipal legal reasoning, .i.e. the Fixed-point model; and

(2) It is in virtue of conformity to that model that the system wherein the reasoning takes place is a system of "law"; in other words, there is only one legitimate model of legal reasoning and that is the one which lies behind the traditional view of legal orders as systems of rules and principles.

My argument in the remainder of this chapter shall be that the assumption in (1) is ill-founded, and that the contention in (2) – that there is no other model which could describe a system of *law* – is false. Nevertheless, I shall argue that a serious analysis of international law cannot *wholly* abandon the Fixed-point model. But first, how does that model occur in international legal contexts?

In the first section of this chapter I have already discussed how Hart regards international law as a system of rules (possibly devoid of secondary rules), and how his analysis of international law proceeds fundamentally in terms of municipal legal concepts. Insofar as the Fixed-point model is a natural view to take of legal reasoning within such a system, it is reasonable to suppose that Hart would have had few qualms about applying that model to the analysis of international legal reasoning. The most obvious contender for an international lawyer who believes that international law is conceptually tied to municipal legal concepts, is Lauterpacht. Both in his judicial opinions as an ICJ judge, and in his intellectual writings, Lauterpacht has been famed for his willingness to import private law analogies to aid in international legal problems. (see *The Development of International Law by the International Court*, pp. 158-172). His argument was that importation of private law "standards" into international law is frequent in the practice of both states and international tribunals,[13] and that therefore international law can, in principle, be regarded as a complete system capable of answering any question put before it. Despite the institutional dissimilarity between municipal private law and international law (e.g. the Court's lack of compulsory

jurisdiction), therefore:

it is a fact that, once the parties have submitted a dispute for judicial determination, the principle of the completeness of the legal order fully applies, with the result that all disputes thus submitted are capable of a legal solution. (Lauterpacht, *The Development of International Law by the International Court*, pp. 4-5)

That international law is, in fact, a body of rules, principles, doctrine and so on (that it constitutes a body of *knowledge*) is something of which Lauterpacht appeared to have no doubt:

International tribunals, when giving a decision on a point of international law, do not necessarily choose between two conflicting views advanced by the parties. They state what the law is. Their decisions are evidence of the existing rule of law. (p. 21).

Further on, Lauterpacht explicitly draws a distinction between "juridical reasoning", which the Court is supposed to employ, and "dialectics" (p. 39). In what does the distinction consist? Seemingly, 'proper exercise of the judicial function' (p. 40) requires reasoning based on existing legal standards, whereas dialectical argument may, from the point of view of justification, persist *ad infinitum* without reaching a definitive answer (one, that is, which is "correct" in terms of the law):

A decision which rests not on the manifest foundation of the law – and this is the case of a decision not accompanied by reasons or adequate reasons – but on the personal authority of the judges who compose the majority or of the tribunal as a whole is particularly open to criticism in cases in which the subject-matter of the controversy is connected with political interests of importance.(p. 39)

This shows, I believe, tacit reliance on the Fixed-point model. For Lauterpacht, it is not true that international legal judgements are based on mere persuasion; rather they must also embody qualities of "learning" and "formal finality" (p. 42). Moreover, if it is not by reference to doctrine (i.e. to the content of the legal system) that judicial opinions are justified and assessed, how can any distinction be made between "rhetorical" or "dialectical" arguments and the 'proper exercise of the judicial function'? In the sense in which decisions

must rest upon the 'foundation of the law', the rules and principles which make up the content of the system must again be viewed as the "end-points" of legal argument: it is in terms of them that such arguments are adjudged. This is particularly so when international law is regarded as formally complete: the Court's function in "developing" international law (cf. pp. 4-11) cannot then be an arbitrary (or even, perhaps, a *subjective*) exercise in normative argumentation; rather, it must be, in the strictest sense, *interpretative*. (I shall come back to Lauterpacht's views in section III of this chapter.)

In Carty's case, the same issue arises out of a familiar question of international legal doctrine: are states free to do whatever they have not bound themselves not to do? It is worth pausing to consider Carty's treatment of it (cf. *The Decay of International Law?*, pp. 7-12). This question, a version of which was at issue in the *SS Lotus case*, is at least as old as the modern period in international law itself; but Carty treats it not as a question about the extent of a state's rights and duties under the law (i.e. the question whether freedom of action is always freedom *inter legem* or whether there can be freedom *in absentia legem*), but as one concerning the nature and existence of international law. In the *Lotus* case, the issue concerned the quantitative limit of the Court's powers to decide cases, viz., whether a decision in law is *required* on every point. The Court's response – borrowing, it is tempting to suppose, from municipal legal doctrine – was not surprisingly that a *non liquet* is a legal (doctrinal) impossibility. When coupled with the Court's often-repeated view that 'The Court is not a law-making body. It declares the law' (*Namibia (SW Africa) case*, ICJ Repts (1971), p. 55), this claim strongly implies some degree of logical completeness of the legal order.

Such a combination of views resembles Frege's classic statement of the view subsequently known as "mathematical platonism": 'The mathematician can no more create anything than the geographer can: he too can only discover what is there, and give it a name' (*Grundlagen*, § 96). Such a combination of views therefore has profound implications for legal reasoning, particularly in respect of the substantial duty this places on the notion of interpretation. Judicial modesty – or some other motive – usually drives courts, both municipal and international, to emphasise the essentially "descriptive" nature of the interpretative function. Carty uses the same premises, involving a modus tollens inference regarding interpretation, to infer the non-existence of the international legal order:

> Should the thesis be accepted that there are lacunae in international law, this can only mean that there is no international legal order, merely a series of conventions/treaties and customs covering

a number of subjects which are not necessarily in any way related. (*The Decay of International Law*, p. 10)

Koskenniemi's view of international law, which too may be seen as, in some ways, an inversion of Lauterpacht's principle, embodies a development of Carty's position. He too believes that, in order to be effacious or even to exist at all, legal systems must be formally complete and fully determinant:

> No discretion seems allowed. Legal systems are absolutely determinant. If the Court cannot reach a decision, this is not due to any indeterminacy in law. It is because no legal standards exist. (Koskenniemi, *From Apology to Utopia*, p.16)

The reason why international law is not "law" is that 'rules are not automatically applicable. They need interpretation and interpretation seems subjective' (p. 245). Unfortunately, 'Interpretation creates meaning rather than discovers it' (p. 475) with the result that:

> there is no objective meaning to legal concepts, no extra-textual referent which could be pointed at [to uphold] the possibility of delimiting law from [. . . .] "essentially contested" political concepts. (id.)

As Iain Scobbie explained the point:

> Koskenniemi's conclusion is that a rule-based approach to international law must concede that law is relatively indeterminate (ambiguous and in need of interpretation) and accordingly there is a margin of political discretion in legal activity. But this margin of discretion is uncertain and conflicting views on the correct norms are only capable of decision if a position is taken on rival theories of justice. Because rules cannot be applied automatically, the rule-approach lawyer is constantly faced with the objection that his interpretations are only political constructions and unless he can explain why his interpretation is non-political, the emphasis on the law/politics distinction is misplaced. (Scobbie, 'Radical Scepticism', p. 344).

Such a conclusion is based on a view of legal reasoning which again owes something to the Fixed-point model. Interpretation of rules, functioning as the standards to which we appeal in order to assess state behaviour, is the heart of the process of legal reasoning; its

"impossibility" rests upon the unbridgeable gap between 'our interpretation and the expression's "real" extra-conceptual meaning' (Koskenniemi, *From Apology to Utopia*, p. 474; "meaning" here may safely be taken as corresponding to the German *Bedeutung* rather than *Sinn*). Koskenniemi's reliance on what I have been calling the Fixed-point model is made fairly explicit early on in his thesis:

> Inasmuch as the law has the function of guiding problem-solution, [. . . .] it must be envisaged as a set of directives, standards, rules etc. which have "binding force" in that they claim to determine a preference between competing solutions [. . . .] (p. 16)

Much more, clearly, could be said in support of the idea of the Fixed-point model's presence as a background assumption in international legal writing. To take the matter further, however, may prejudice the argument of section III, and in any case, my purpose at this stage was merely to show in what the Fixed-point model consists and how it has been deployed in theoretical writings on international law.

The path-definition model

2.3. Motivation for the model

It is in reaction to the positivist view of the way law works – or, more precisely, its importation to the field of international law – that Kratochwil's thesis emerges. Kratochwil talks from the outset of the need to go beyond 'traditional conceptualisations of law' (*Rules, Norms and Decisions*, p. 1). These either depict law as a static system of norms (Kratochwil cites Hart as a major proponent), or else as a normative order which is legal in nature because of its sanctioning character (Kelsen is cited) (p. 2). As an example of the shortcomings of the traditional schools, Kratochwil takes the example of "soft law" as embodied by the IMF exchange agreements or the Helsinki Accords, which receive explanation 'largely in terms of negative analogies' (p. 2). Indeed, it is not merely at the level of individual norms that we see this tendency:

> we understand the international arena largely negatively, i.e., in terms of the "lack" of binding legal norms, of central institutions, of a sovereign will, etc. (p. 2).

The conclusion Kratochwil draws from all of this is that 'the concept of law itself has become increasingly problematic' (id.). Thus, '[g]iven the increasing incoherence, it might

be useful to rethink the whole set of problems' (id.). Kratochwil's programme for so doing is to '[cast] a fresh and unobstructed look at how [. . . .] norms and rules "work", i.e., what role they play in moulding decisions. [. . . .] Precisely because the concept of law is itself ambiguous, I propose to investigate the role of rules and norms in choice-situations *in general*' (p. 4). The two major weapons in Kratochwil's armoury are Speech-Act Theory and Game-Theory.

1. Speech-Act Theory. The theory of speech-acts, or communicative action,[14] was one of the major underlying currents in Hart's philosophy of law. In Kratochwil's work, that theory is accorded a much more explicit role. The theory relates to a category of expressions ('speech-acts') which enjoy the distinction that they constitute the actions they describe:

> While, for example, the word "riding" stands for an action, it functions differently from promising or claiming, in that riding is an activity which takes place independently of referring to it by language. [. . . .] But when I bet, claim, promise, etc., I am not only referring to an action, I am "doing" it, i.e., I perform the action itself. (*Rules, Norms and Decisions*, p. 4).

The distinctive feature of this category of 'performatives' is that they are rule-governed, that is, they require to be understood against the background of (social) norms and rules. This latter point is, of course, a key belief of institutional positivists.

Speech-act theory requires us therefore to move beyond the analysis of the propositional content of an utterance, and to notice instead three separate though complementary components in the "meanings" of certain classes of expression:

> the *locutionary* dimension of an utterance (saying something), the *illocutionary* force of the utterance (doing something by saying something such as, for example, making an assertion, promise, etc.) and the *perlocutionary* effects of a statement (i.e., the impact it has on the hearers). These distinctions provide a framework for specifying the conditions under which communication becomes effective. (p. 8)

Such effects do not merely include imposing obligations, but also, e.g., issuing threats (id.). The fact that statements of this and related kinds are made in rule-governed contexts allows Kratochwil to suggest that legal reasoning, particularly in international law, must be understood in such terms and not, as traditionally, against the static and ontologically-minded

background of the formation of obligations.

2. Game Theory. The second arrow in Kratochwil's quiver, Game Theory, may be likewise understood as a broader-based replacement of the traditional use of practical reasoning in the analysis of legal norm-use. It is an attempt to explain, against a rule-governed background, why actors resort to norms in the first place and, having done so, how we are to assess whether their employment is legitimate. This again is designed to show that what constitutes "legal" argumentation and "legal" norm-use is much wider than is often supposed:

> In order to arrive at decisions which are not only based on idiosyncratic grounds but which command assent, such [norm-use] will have to satisfy some formal criteria and certain substantive norms which are widely held in society. The *formal* criteria in such a discourse on grievances and obligations largely concern conditions of equality in the claiming process, as well as the acceptance of the no-harm principle as the baseline from which we argue. The more *substantive* understandings enter our arguments when we have to decide what is, for example, due care, what is an adequate compensation, what represents the adequate functioning of an institution (which allows for the assessment of whether and why certain activities fall within its authority), or which duty or right overrides others. (pp. 9-10)

Just as speech-act theory allows us to contemplate legal reasoning from the point of view of normative contexts in general, and not from that of a fixed concept of law in terms of which we 'decide by more or less explicit verbal definitions whether the status of norms in international relations satisfies [its] criteria' (p. 4), so too game-theory allows us to by-pass the static framework of obligations, empowerments and so on from which we suppose the subjects of international law to draw their concepts and construct their positions. Instead we:

> study the role of norms in shaping decisions from the baseline of an abstract initial situation which is defined, more or less, in public-choice terms. Thus, I begin with the analysis of a world in which self-interested actors with non-identical preferences have to make choices in the face of scarcity and with the prospect that they have to interact again with each other in future rounds. (p. 10)

Perceived from such a viewpoint, legal argumentation is not to be conceived in regulatory or public-order terms; rather 'one of the most important functions of rules and norms in such

a world is the reduction in the complexity of the choice-situations in which the actors find themselves' (id.).

From the twin perspectives of speech-act- and game-theory, we are thus led to a view of law which differs significantly from that identified above, where norms function effectively as standards to which actors appeal. We are led to a view of them rather:

> as [. . .] guidance devices which are designed to simplify choices and impart "rationality" to situations by delimiting the factors that a decision-maker has to take into account. (p. 10)

More than that, norms are 'the means which allow people to pursue goals, share meanings, communicate with each other, criticise assertions, and justify actions' (p. 11).

Kratochwil's theory leads, I shall argue, to a powerful conception of legal norms of international law. I do not, however, think that in its present state Kratochwil's theory *embodies* such a conception. This is partly due to the role assigned by Kratochwil to 'legality' in his largely undifferentiated conception of norms, and partly to an exaggerated view about the gulf between international law and municipal law.

2.4. Kratochwil's thesis

In order to explain the apparently non-compelling nature of juridical reasoning, positivism relied on the twin pillars of *interpretation* and *practical reasoning* about norms which function as, in effect, unmoved movers. Kratochwil's understanding of the 'initial situation' gives him a radically different reason for assuming legal reasoning to be non-compelling. It is because we are not reasoning *about* standards at all; rather, we are reasoning *with* them in order to justify choices and rationalise decisions and actions:

> Since rules and norms influence choices through the *reasoning process*, the processes of deliberation and interpretation deserve further attention. While various choice models have attempted to give a coherent account of certain aspects of choosing, such as specifying rational action as maximising choice under certainty, risk or even certain conditions of interdependence, these models are of limited help in understanding the reasoning procedures we use when we argue about our grievances. In that case, the reasonableness, fairness or appropriateness of our valuations and their attendant claims to priority are at issue. Here, rational choice models are of little help precisely because the criteria of traditional rationality presuppose the independent and

fixed valuations of the actors. (pp. 11-12)

The lack of such "external" standards means that justiciable claims cannot be assessed, "logically", in terms of them, but must be judged on their own terms alone:

Here, the overall persuasive "weight" of claims rather than their logical necessity or aggregation is at issue. (p. 12)

Simply put, there is no organised network of normative standards against which to assess such claims. We must instead adjudicate their worth against the more general background of the choice-contexts and rule-governed practices out of which they emerge. 'The crucial question', Kratochwil says, 'is simply this':

how do we reason with rules and norms when no logically compelling solution seems possible, yet when certain decisions and their supporting reasons are more persuasive than others? In spite of a great deal of indeterminacy in our reasoning, our arguments are usually not simply arbitrary statements of personal preferences. The 'logic' of arguing requires that our claims satisfy certain criteria, and that means that they cannot be based on purely idiosyncratic grounds. (p. 12)

This naturally orientates the inquiry towards practical reasoning (id.), though it bears noticing that Kratochwil's appeal to practical grounds for argumentation differs significantly from that of legal positivism. In the case of positivism the role played by practical reasoning is that of explaining why our assertions about the legal order are not factually true or false, except perhaps in very limited circumstances. This creates a tension in the positivist account of legal orders in terms of the ontological suppositions of that theory, a version of which was explored in chapter 2. Because legal reasoning, on the positivist account, involves appeal to a network of standards (albeit perhaps of mind-dependent status) we are owed an account of how *practical* grounds of reasoning can decide on the relations which purportedly hold between the norms. It is not the allegedly *constructive* nature of those relations which here gives the problem: Intuitionistic model-theory regards number-theoretic operations as mind-dependent in that sense. The difficulty is rather that positivism requires us to regard "practical" considerations as *constitutive* of those relations, when the underlying semantics of the corresponding statements, as well as general metaphysical considerations, would lead us to expect a *theoretical* ground.

The alleged practicality thus threatens the *reality* (or objectivity) of those relations in a sense inimical to both platonistic and anti-realistic versions of the Fregean strategy: it holds all relations and properties of norms to be, in Russell's sense, 'internal'.[15] Kratochwil too endorses the practical nature of normative relations, but in his case there is no posited legal order to get in the way of the practicality thesis: the claims we make in the course of legal argument, on Kratochwil's view, are not said to pertain to the normative order, and are therefore not held to be true or false of it. No role is played by conceptions of "internal logic" and thus no explanation is required of the relationship between the allegedly practical nature of the reasoning and its purported *description* (constructive or otherwise) of normative relations. It is not my contention that positivism has no legitimate explanation to give of this relationship; it is merely that a dissolution of the prima facie incompatibility of the practicality thesis with that of the objectivity of legal norms is a very complex matter, and one upon which positivists have, for the most part, had little to say.

Using something like the kind of internal/external distinction encountered in regard to the equity problem in chapter 4, Kratochwil noted that the assessment of claims in international law must always be "external" in this sense:

> Norm-appliers, therefore, *routinely* face the same problem scientists face only during crisis periods when they are confronted with the problem of validation. In neither case can the persuasiveness of arguments for treating a controversy in terms of [. . . .] one set of norms rather than another, be rooted in the validation procedures *internal* to the calculi or in the unproblematic correspondence rules. (*Rules, Norms and Decisions*, p. 33)

This is because:

> Even if it were possible to represent the validation of norms as a largely systemic task, such a system of norms would still have to be applied to concrete cases. Since by definition such a system cannot also prescribe exhaustively all possible applications, norm-appliers would still have to argue why a certain case should fall under norm *X* instead of norm *Y*. (p. 32)

The traditional view makes an appeal at this point to interpretation, exercised in some practical capacity. However, 'the basis of the validity-claims remains problematic in cases of normative statements, as neither an external check nor internal logical criteria are available to settle "practical" matters unequivocally' (p. 33). Thus, 'quite clearly, the neustic

force of the argument cannot be based on systemic or logical factors' (id.). Kratochwil is explicit about why:

> When a third-party is entrusted with the application of norms, this party will be under additional pressure to render a fair decision in the light of past cases, as well as in the light of the particular circumstances which might justify a deviation from the old precedent. The criteria for neustic persuasiveness possibly point, then, in opposite directions. While the systemic criterion favours consistency, the criterion of "justice" could favour a deviation. (pp. 32-33)

This concern is a particular instance of the general concern voiced by the statement in chapter 1, which was definitive of position II scepticism: 'The notion of legal reasoning, applied to international law, is inherently conceptually unstable because it cannot consistently serve state interests and abstract conceptions of "justice" etc. at the same time' (chapter 1, § 0.1). Kratochwil is saying, in effect, that such instability is only resultant upon the kind of view of international law embodied by the Fixed-point model, which therefore should be rejected:

> "The law", I argue, can be understood neither as a static system of norms nor as a set of rules which all share some common characteristic such as sanctions [. . . .] Rather, law is a choice-process characterised by the principled nature of the *norm-use* in arriving at a decision through reasoning. What the law *is* therefore cannot be deduced by a quick look at statutes, treaties or codes (although their importance is thereby not diminished), but can only be ascertained through the *performance* of rule-application to a controversy and the appraisal of the reasons offered in defence of a decision. (p. 18)

Rejection of the Fixed-point model cannot, however, proceed without argument. As Part I of this thesis was at pains to point out, there are strong grounds for believing that if we take what legal arguments say at face-value, then an appeal to a network of interconnecting standards must lie at its foundations. Just as number-theoretic statements depend for their meaningfulness on reference to numbers, so statements about law depend on reference to norms. To suggest that norms are not referred to (or appealed to) but rather *used* to endow a claim with authority, is therefore to suggest that norms are of a different ontological type than that supposed by the traditional picture. They will not thus appear as (Fregean) objects but will rather appear as "rules-of-the-game" lying behind the making of statements as such.

That is to say, their contribution to the meanings of legal statements will not lie in fixing the sense of those statements via their role as referents of legal singular terms; they will not, therefore, contribute to fixing the truth-conditions of such statements: no such conditions exist. Norm-use belongs, rather, to the force-elements of statements only, and consist in the *point* of making them, and in the normative background assumptions upon which they rest, and in the context of which they have meaning.

This is, evidently, a powerful claim, and one which radically alters the theoretical terrain of International law. It can only be vindicated by an analysis of legal statements which shows them to be, in the appropriate sense, devoid of essential reference to legal norms, and which shows all apparent such references to be a part of the neustic *force* of such statements. If this claim were advanced in a reductionist spirit, little interest would attach to it. In order to circumvent Wright's argument against such ploys, Kratochwil must have an alternative device which shows that actual norm-use in international legal contexts approximates more to his model than to the Fixed-point view.

Law, Kratochwil says, can be understood in terms of three levels of norm-use:

(1) First-Party Law. This is 'characterised by the issuance of commands which may or may not have a generalised character. Depending upon whether the system-specific elements dominate or whether the *general scope* of the directive is emphasised, we can distinguish between imperatives (commands) and rules' (p. 34). The Monroe Doctrine thus has the character of a threat elevated into a rule, in virtue of having 'specified its range of application by envisioning a clearly defined contingency and by claiming applicability to all outsiders' (p. 35).

(2) Second-Party Law. This context is 'characterised by "strategic" behaviour among the parties i.e. by the recognition of interdependence of decision-making, and – in many circumstances – the existence of "mixed motives" or even the perception of common interest' (id.). Thus, 'the resort to norms can be – and frequently is – subsidiary to the process of "breaking the other's will" in order to arrive at a decision' (id.).

(3) Third-Party Law. This 'is the conventional conception of law, i.e., it covers the cases in which a third party applies *pre-existing rules* to a given controversy in order either to mediate or settle [sic.] the submitted issues authoritatively' (id.).

Kratochwil is saying that international law amounts to (1), (2) and (3); whereas those who concentrate on the municipal law analogy typically regard law as (3) only. Whilst some theorists, such as Franck (*The Structure of Impartiality*, ch. 1) have recognised the presence of (1) and (2), Kratochwil contends that the distinctions among these three elements are apt to mislead:

> The distinction between first-, second-, and third party law seems to imply that the conceptual differentiation parallels that of the number of concrete actors involved in a dispute. However, such an easy analogy may be an instance of "misplaced concreteness". I shall argue [. . . .] that it is more appropriate to distinguish first-party, second-party, and third-party norms according to the type of guidance these rules and norms provide in the reasoning process. (*Rules, Norms and Decisions*, p. 36).

Admittedly, this passage is rather obscure. It is unclear, in particular, whether the 'actors' whose concreteness is in question are the parties to the dispute or norms. A prima facie reading suggests the former; but questions of context and sense favour the latter. Clearly, the *conceptual* distinction between (1)-(3) which Kratochwil regards as suspect turns on the role of norms in each rather than the number of parties to the dispute (c.f. remarks about generality in relation to (1)). Moreover, a few lines further on finds Kratochwil endorsing a suggestion due to Barkun that 'the transition between dyadic and triadic conflict situations may often be fluid precisely because rules and norms function frequently as "implicit" third-parties' (id.). Whatever the correct interpretation,[16] it is my opinion that the latter reading, whatever its correctness in terms of Kratochwil's intentions, is the one which best reflects the logic of the surrounding argument, and most strongly supports its conclusion. In any event, the conclusion Kratochwil wished to establish is this:

> that rules and norms which are used for arriving at a decision do not function in this choice-process like logical terms or causes, but rather as persuasive reasons. (id.)

Accordingly, Kratochwil takes a radically different view of the kind of activity legal reasoning is. Because there are no normative objects ('causes') to which to appeal, the standard structure supposed of legal arguments (identification of the governing norm or norm-set, justification (i.e. interpretation), and final subsumption) cannot apply. The *starting-points* of such arguments are, rather, *topoi* ("commonplaces") in the Rhetorical

sense; and those commonplaces are not objects or even entities of any kind, but simply the background assumptions in terms of which neustic statements are made, and in terms of which they have point (p. 38). Thus, for example, an utterance of 'According to law, *X* must φ' is not a factual statement about an extant obligation; it is, rather, a *command*. It does not "create" an object, nor does it say anything about "the law"; it simply tells someone what s/he has to do (c.f. p. 37).

In order fully to understand Kratochwil's view of international legal reasoning, it is necessary to address two dimensions to his thought on how that activity works. These relate to the type of guidance legal norms give, and the way we form practical arguments about them.

1. Guidance.

Because rules are there to simplify choice-situations by guiding actors' attention towards the factors (or kinds of factor) which can, or must, be taken into account, they are not situation-specific in the way imperatives are; rather, they 'delineate *classes* of events by specifying the set of circumstances in which they are applicable' (p. 72). A first question, therefore, is: how do such things emerge? Kratochwil is adamant that they do not arise out of language:

> the action-guiding function of rules does not derive from their imperative mood or linguistic form. A variety of linguistic formulations provide equivalent meanings and the prescriptive force of the norm, consequently, cannot be identified with particular modes of expression. (p. 73)

Two kinds of rule must therefore be examined for emergence-conditions: explicitly formulated rules, and tacit rules.

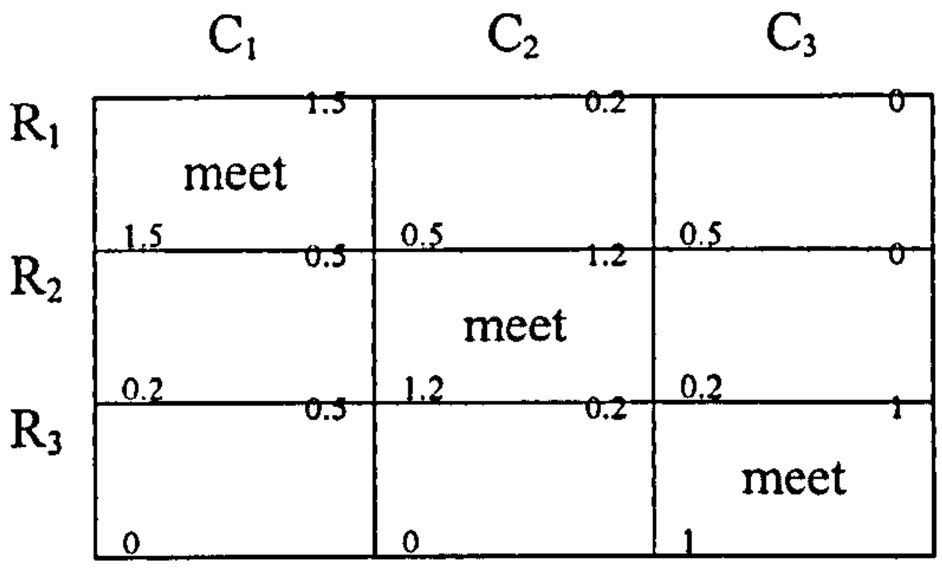
Tacit rules. The essence of Kratochwil's discussion is that such norms are typically features of co-operation games,[17] PD-games,[18] by contrast, requiring a verbalisable *conceptual* response by the actors. Co-operation games show that a winning strategy – a stable reward-structure – cannot be built upon idiosyncratic responses nor, indeed, idiosyncratic *preferences*:

> norms, in *addition to interests*, are necessary in order to arrive at co-operation. To that extent, the dictate of self-interest (win/stay, lose/change) is by itself insufficient – in the absence of certain conditions – to lead to stable co-operative outcomes. (p. 75)

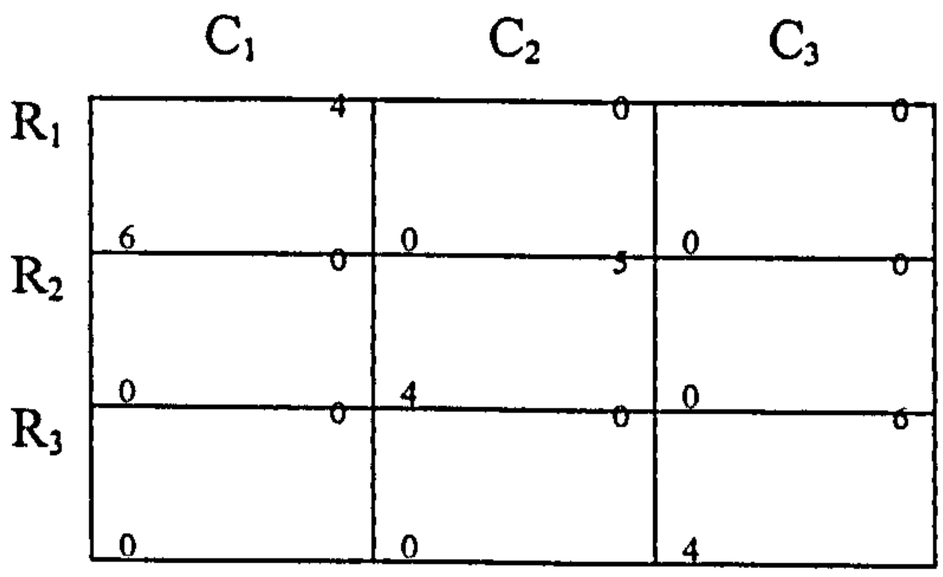
Nor, argues Kratochwil, is Reciprocity an adequate basis on which to analyse the choice-responses of the actors. Actually, what is going on is that the actors indulge in rule-following in order to bring stability to a situation, thereby creating a 'minimal social situation' within which to operate. This in turn reflects the fact that 'all norms in *social life* help co-ordinate interdependent choices – [. . . .] this is just another way of saying that norms are generically problem-solving devices' (id.). Whilst this last remark sounds supportive of a minimum content theory of natural law (essentially at issue at p. 71), it is unlikely that Kratochwil would endorse such a view: though it is '[p]recisely because these norms are "constitutive" of society that they are held to be natural, in the sense of being "fundamental" ' (p. 71), the idea of *content*, or of an innate repository of fundamental *standards*, is one which is alien to Kratochwil's position (see also below). What must be recognised instead is that the existence of choice-situations forces upon actors the necessity of *bargaining* (rationally or by violent conflict). Such bargaining is, by nature, a normative activity, and it is in this way, via their inherent problem-solving character that tacit norms emerge, and give rise to stable regimes. In the case of norms of co-ordination, the case is even stronger:

> How can co-ordination problems be solved, and what roles do norms play in guiding the choices of the participants? A closer look [. . . .] reveals that solutions are already pre-figured by the pay-off structure. To that extent, the pay-off matrices themselves have a function similar to that of a norm. (p. 78)

One such matrix is (i) below:



(i)



(ii)

(ii), by contrast, has no obvious solution (p. 78). Kratochwil says:

It is here that norms different from the dictates of individual rationality have to aid in the solution of the dilemma. [. . . .] Furthermore, as long as the interacting parties share a common background, the rules serving as solutions need not be explicitly formulated, as they are implicitly understood. (p. 78)

Explicit norms, such as those of precedent (id.), may also figure in (ii)-type situations. Though Kratochwil does not say it, (ii) may be regarded as illustrative of the kind of conflict situation which leads to the formation of customary international law. Indeed, the situation need not have the character of a conflict requiring a resolutionary norm; it may simply be disordered and in need of a regulatory norm. Rules developed for the governance of joint-ventures may constitute an example of the latter kind.

It is obvious, however, that customary regimes cannot be inferred on the back of implicit, unspoken rules alone. In earlier remarks, Kratochwil seems to acknowledge this fact when he contrasts tacit 'unspoken' rules with explicit customary and conventional ones (p. 55). The tacit rules, which, taken together, 'resemble a "game of co-ordination" ', are best seen in terms of custom's "psychological" element:

Thus, while custom is as binding as the obligations incurred through formal contracting, the implicit, or tacit underlying rule (*opinio iuris sive necessitatis*) often makes it difficult to ascertain precisely what counts as custom. The reasoning of the ICJ in the *North Sea Continental Shelf* and in the *Asylum* case show this clearly. (p. 55)

Verbalisation moreover alters the *kind* of discourse and resolution procedures open to the participants:

Casting rules in explicit verbal form is not only the most basic form of institutionalisation; it also makes the violation of rules *separable* from overall pattern of social interaction. It thereby enables disputing parties to discuss their "grievances" in the face of disappointments about each other's conduct. (p. 56)

What, then, are the emergence properties of explicit rules?

Explicit Rules. Norms require explicit formulation, Kratochwil says, whenever tacit rules

are too imprecise to give rise to a stable regime (pp. 78-79). Such norms are also required 'in cases where a deadlock among various equilibrium points cannot await the emergence of a settled practice because of the compelling character of the co-ordination dilemma' (p. 79). Explicit rules will tend, therefore, to have the character of an authoritative decree or of a negotiated norm (id.). No less important are the roles of explicit norms both in situations in which they forestall the need for future choice-reactions in quasi-stable situations facing a recurrent problem (such as the assignment of bandwidths within the radio spectrum (p. 79)), and in the case of stable situations brought about on the basis of tacit rules alone:

> Are [explicit] rules in such situations merely epiphenomena hardly needed for a solution to the recurrent choice-problem? I do not think that such an interpretation is correct. It should be obvious that rules are not simply redundant even in such situations. They simplify choices insofar as they prescribe certain moves, and thus significantly reduce the costs of bargaining via strategic moves. (p. 81)

> Cases of the first kind mentioned above – cases of "social necessity" as we may call them – seem to demand resolution in terms of explicit rules. They thus resemble to some extent the co-ordination games wherein implicit rules are, as Kratochwil said, pre-supposed within the structure of the choice-situation itself.[19] The difference is that, in cases demanding formulation of explicit rules, only formulation of *a* rule is "pre-supposed", not *which* particular rule it should be. In the tacit cases, Kratochwil hints that the particular rule itself can be inferred on the basis of its ability to establish equilibrium. The difference, perhaps, is that explicit formulation is required, not to establish equilibrium, but to *sustain* it. It is thus unlikely that Kratochwil opens himself to the charge of applying anthropocentric natural law, even in Hart's minimal sense: emergence-conditions of explicit rules are fostered, rather than impelled, by social context.

Having shown how norms emerge in a variety of social contexts, Kratochwil argues that the purpose of tacit rules is, in general, to keep the "international game" within acceptable bounds of mutual expectations, thus imparting rationality to potentially chaotic situations and maintaining a certain level of predictability (p. 82). At the same time, they allow for flexibility in the case where understandings or expectations are violated, since the resulting opprobrium will be engineered through social pressure rather than mechanical application of law (id.). Whilst tacit rules can in this way structure power-relationships and lay down

rules-of-the-game (pp. 83-88), the question of when a followed rule attains customary "force" turns upon a:

> change in the character of the rule, i.e., from an imported or generally observed rule *of* behaviour to a rule *for* behaviour. Only through this reflexive understanding can a rule guide choices by providing the template for resolving a (co-ordination) dilemma. (p. 88)

This, Kratochwil claims, squares with both Art. 38 of the ICJ Statute and the Court's judgement in the *North Sea Continental Shelf Case*:

> the ICJ [Statute Art. 38] definition of custom "as evidence of a general practice accepted as law" appears to agree with Pufendorf's point that a behavioural regularity based on a unilateral imputation is insufficient to establish the obligatory force of a practice. For custom to exist as a legally binding practice it must possess an ascertainable rule underlying the behavioural regularity. This rule must not only be articulated in order to move from the rule *of* behaviour into a "standard" or guide *for* behaviour [. . .] (p. 89)

In addition:

> the acts concerned [. . .] must be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis* (*North Sea Continental Shelf Case* (1969) ICJ Repts, p. 4)[20]

The next question must therefore be: how do rules achieve this "legal" status? At a general level, assessing the modal quality of norms is possible only via reference to *reasons*:

> Since rule-following does not involve blind habit (except in limiting cases) but argumentation, it is through analysing the reasons which are specific to different rule-types that the inter-subjective validity of norms and thus their "deontic status" can be established. (p. 97, emphasis suppressed)

If "deontic" is taken in a very wide, i.e. modal, sense, this suggests an avenue of investigation into the legal status of norms.

Kratochwil begins by reminding legal theorists of the need to avoid confusing law with judicial activity. 'Most of the time', he says, 'we conceive of an explicit third-party as a mediator or an impartial judge who applies pre-existing rules and norms to a "case and controversy" ' (p. 183). The concentration on an explicit third party is, however, misplaced as an explanation of legality. First, as Kratochwil said, the distinction between second- and third-party law is fluid precisely because rules and norms in the course of bargaining processes often function as "implicit" third-parties:

> norms not only transform conflicts by providing "standard" solutions which the parties can utilise if they so desire, but also structure the antagonism between the parties and regulate the pursuit of their respective interests. (p. 181)

Secondly, concrete third-parties, even those endowed with charismatic legitimacy, are not free to make a decision without justification. Such 'decisionism' is alien to legal principle which requires, and in terms of which the parties expect, reference to facts, interests and rights of the parties, and to accepted norms (p. 183). Indeed it is norms and not charismatic (i.e. institutional) authority which are the true pillars of adjudication:

> [. . .] in most instances, the third party is unlikely to forgo the advantage of explicitly invoking rules, norms and principles even if he/she has the power to disregard them. After all, invoking shared norms increases the persuasive power of the award as well as the adherence of the parties and by-standers to the settlement. (id.)

Thus, not every situation in which institutional agents are absent is devoid of "third-party law" in Kratochwil's sense, and not every situation in which such institutions or third parties do exist is settled on the basis of third-party law. Decisions by fiat provide an example of judicial settlement by "*first*-party law" (p. 182). This means that 'the role of norms in contexts in which rules and norms are applied to an existing controversy, is often much more varied than is usually assumed' (p. 184). This is particularly because:

> rule-application remains to a large extent nested in a wider setting of shared standards which make persuasion possible. [. . .] The importance of common understandings in buttressing norms is obvious because an authoritative decision backed by certain reasons is quite different from either the case of decisionism mentioned above, or the dictatorial fiat. (id.)

Kratochwil's intended point is that *what law is* (i.e. what makes a norm one of law) is not based on "systemic" factors such as entry via the "sources", derivation from other norms or via some process or rule of recognition; nor does legal status depend on legal "institutions" concrete or otherwise. Rather, legal status derives from the way in which norms are used in a wider bargaining process, and the way in which such norms either structure the problem-situation or successfully resolve it. Kratochwil is explicit about this in a lengthy passage which is worth quoting more-or-less in full, as it harks back to issues discussed in chapter 1 of this thesis:

> [. . . .]positivism in all its varieties appears to provide a simple answer. *Legal* norms are either those that share a particular characteristic, such as, for example, an attached sanction, or they are those norms which are part of a particular system of rules. In the first case each single rule can be independently examined and its legal character can be established by ascertaining the sanction as a component of the norm in question. The second approach makes such a determination dependent upon the existence of a "system", i.e., the (logical) inter-relationship of various norms. Therefore, lower-level rules can be "derived" from, and retain their legal character through, higher-order norms. These two approaches of positivism differ in significant respects. However, it should be quite clear that they share *one* fundamental assumption, i.e., that the question of the "legal" validity of a norm can be largely reduced to a cognitive question of how one is to recognise a legal norm. [. . . .] I want to show that a demarcation criterion can be found that avoids most of these puzzles. By emphasising the *style* of reasoning with rules rather than the intrinsic characteristics of the norms, or their membership in a system, or their contribution to an overarching goal, we can give a more realistic account of the legal enterprise. (pp. 186-7, paragraph break suppressed)

The normative quality of legal bargaining, Kratochwil is saying, arises from the bargaining process itself rather than from actual reference to a system of norms. Norms thus belong to the illocutionary and perlocutionary dimensions of utterances (i.e. the force-elements) and not to their locutionary dimension. International law is not, therefore, a system of norms but a series of socially-situated "games" and processes in which norms play a central role. Kratochwil insists that this is entailed, not from any ontological thesis, but from the nature of international law itself:

As is known, international legal arguments often do not go beyond the stage of *ex parte* contentions since authoritative decisions through adjudicative procedures are – to say the least – underdeveloped. (p. 189)

However:

unless we assume that a legal system is a deductive system of norms, the process of deciding between two possible, although contradictory, *ex parte* contentions can obviously no longer be described in terms of purely logical operations. (p. 193)

It is at this point that the positivist account appeals to the concept of interpretation. But, Kratochwil says, 'if "interpretation" becomes an intrinsic part of the legal enterprise, law is no longer simply analysable in terms of an abstract logical system of norms' (p. 190), since higher-level norms in need of interpretation are 'by definition' compatible with a variety of concrete regulations amongst which consistency and non-contradiction may not be guaranteed (id.). The failure of the standard account lies in having not given due weight to this feature of legal reasoning:

Hart recognises some of these difficulties in his criticism of "mechanical jurisprudence" without, however, drawing the conclusion that a "systemic" approach to law *fosters* such misconceptions. (p. 192, emph. added)

Why was Hart so tied to the concept of law as a system? Essentially for the reasons canvassed in chapter 1 of this thesis, i.e., that rules are taken to be "legal" precisely on the basis of their *systemic* qualities:

the systemic character of legal rules does not appear to be merely a luxury given Hart's approach. It is, rather, a necessity for an unequivocal identification of legal rules. After all, [. . . .] according to the criteria of the rule of recognition, only those rules qualify as legal which are *part of a system* and *possess a pedigree.* (p. 191)

The issues of identification and recognition shall briefly resurface in section III; Kratochwil for the most part favours their abandonment: 'one can decide to forgo a clear demarcation criterion of law altogether and make law a matter of "degree" of influence that various norms

have upon decision-making' (p. 193). As Kratochwil freely admits, 'it is clear that a shift of focus away from rules to the decision-process often makes a distinction between "law" and "politics" virtually impossible' (p. 196). This should not, I think, be seen to trouble Kratochwil's thesis, for the distinction will be hardest to make in precisely those situations in which international law typically faces the charge of being "political" in character. Most prominent among these are the areas of "soft law" and, in particular, of "quasi-legal" General Assembly resolutions (pp. 196-205).

Kratochwil is saying that the normativity of law does not lie in some abstract structure or system of "norms" with which we must enjoy some kind of acquaintance, but rather it lies in the statements themselves – not, directly, in the words used, but in their overall *point* in the context in which they are made, and in the effects such utterances have on the target audience and interested third-parties. Legal arguments are not, therefore, true or false of a normative system. Indeed, legal *statements* are not *descriptive* at all: we do not "measure" them against a legal reality in order to assess their truth or falsity. What we do, rather, is advance *claims* which may trade off present gain for future stability, which create alliances or which increase/maximise the number of available choices in the next round. It is in this sense that norms guide. They are the starting-points of arguments ('seats of argument' as Kratochwil puts it) in the form of implicit background assumptions or explicitly followed rules, which are used to close off certain avenues of argumentation and guide actors towards still permissible conclusions and away from ones which are, or become, "out of reach" or unjustifiable in terms of those starting-points. The "legal" status of some of these norms, Kratochwil suggests, lies in the *kind* of guidance, and particularly the *specificity* of guidance, they provide:

> law, in the conventional understanding of the term, is primarily *not* concerned only with providing guidance towards predetermined ends but also with the legitimacy or illegitimacy of the *means*. It is this specificity which distinguishes law from policy as well as from moral principles. (*Rules, Norms and Decisions*, p. 197)

In particular, *procedure* becomes important when 'third-party law' is in play:

> because of the specificity of contexts, the finding of the "truth" in legal proceedings is subordinate to provisos specifying what is to count as a "proof" and which facts, although

relevant to a "case", are admissible. Reference to legally relevant texts and documents limits the search for the factual delineation of a controversy considerably. (p. 207)

More obviously, '[l]egal decision-making [. . . .] is characterised by the need to come to a final decision. No judge can refuse a decision, arguing that each party "has a point" and that an ineluctable dilemma exists' (id.). Because norms function as guides, shepherding lines of argument along permissible paths, the natural model for legal reasoning is that of rhetoric.

2. Legal Reasoning.

Kratochwil believes that legal reasoning is a specialised kind of rhetoric-based practical reasoning, both in terms of its employment of specifically juridical *topoi* (such as rules of pleading and of evidence) which restrict or exclude otherwise permissible avenues of argumentation, and in its use of specialised techniques which bestow upon certain conclusions an authoritative finality, about which no further argument can be entertained (p. 38). Its main characteristic is not systemic "internal logic" but rather the 'finding and interpretation of the applicable norms and procedures, and [. . . .] the presentation of the relevant facts and their evaluations' (p. 42). Such a characteristic of law is 'independent of formal institutions, levels of analysis, or the existence of logically closed systems' (id.).

In Rhetoric, John Wisdom wrote:

the process of argument is not a chain of demonstrative reasoning. It is a presenting and representing of those features of the case which severally co-operate in favour of the conclusion. [. . . .] The reasons are like the legs of a chair, not the links of a chain. ('Gods', in *Proceedings of the Aristotelian Society* 45 1914-15, p. 194)[21]

In other words:

Rule-following is [. . . .] not a passive process in which the impact of rules can be ascertained analogously to Newtonian laws governing the collision of two bodies: it is, rather, intensely dynamic. (Kratochwil, *Rules, Norms and Decisions*, p. 61)

In the course of a legal argument we do not stand in the presence of a set of semantically-valued premises whose conjunction entails the conclusion; rather, various non-compelling grounds together *favour* an outcome though their conjunction still does not compel it. This

view of the reasoning process indeed follows seamlessly from Kratochwil's view of what norms are: since they are not "standards", and because we do not so much "appeal" to them as *use* them (make claims with them, etc.), a non-compelling view of the guidance they give is the only prima facie legitimate view to take.

The rhetorical character of judicial argumentation becomes obvious, Kratochwil says, when we consider the judge's position in the context in which s/he operates:

> This can easily be seen from the treatment of a "precedent" when viewed from the perspective of an advocate rather than the judge. Most often discussions of precedent assume the judge's perspective and quite incorrectly construe his task of finding the *ratio decidendi* as if the process of interpreting cases were like a treasure-hunt. Such a mistaken perception is less likely to arise when we put ourselves in the shoes of an advocate. This shift in perspective is naturally of particular significance for the purposes of international law since "precedents" in the strict sense do not exist there. (p. 209)

This is far from the common view of such matters:

> According to the common but naïve view of the role of norms in "third-party" contexts, the judge has to apply a norm to a case by subsuming the relevant facts under the general norm. To that extent, "judging" has to be legitimised by the use of "the law" as it is legislatively set forth or customarily received. (p. 220)

Kratochwil has little trouble in exposing the absurdities which have in the past resulted from such a view. In particular he recalls the famous French decree of 1790 which forbade judges to interpret the law, instead directing them to submit doubtful cases to the legislature (id.). Nor does Kratochwil limit his critique to the extreme case of supposedly "complete" legal codes:

> Although common law systems have always accepted judge-made law, similar difficulties of law application arise in these legal systems when courts have to apply the *ratio decidendi* of a precedent to a controversy. The difficulties connected with "finding" the *ratio dedidendi*, particularly in the case of concurring opinions, and of distinguishing the ratio from the *obiter dicta* are well-known. (pp. 220-221)

Such an activity is not like a treasure-hunt for a number of reasons; "level of generality" problems supply one (i.e. deciding upon the scope of an alleged rule), and another follows from the non-compelling character of the reasoning involved: 'the same results can be reached by different routes' (p. 240). Thus, 'while paths can be traced, following them is not reducible to clear algorithms' (id.). This latter consideration is enough on its own to discount logic as a means of analysis of legal activity, though it bears observing that, in terms of Kratochwil's overall argument, the rhetorical character of legal reasoning is a corollary of his "non-causal" account of norms, this latter consideration being the ultimate reason for logic's failure to comprehend legal argumentative processes.

Kratochwil's point is not that advocates, arguing a case, are fundamentally seeking to *persuade* the judge toward a favourable outcome, and in doing so are deploying techniques traditionally belonging to the domain of Rhetoric. Much more importantly, Kratochwil seeks to show that this is also the role of the *judge*:

> Precisely because legal norms do not *refer* to objects irrespective of the understandings of the norm-addressees, a clear meaning of legal terms simply signifies that there is no doubt or disagreement among the members of the audience [. . . .] To that extent the controversy about the correct interpretation of the meaning of the norm is 'the juridical-semantic parallel to the conflict of interests in the social world: it is the way in which law represents these differences.' Judges therefore are usually not simply "applying" norms to a case but to a large extent select among the presented interpretations which are tendered by the parties [. . . .] For this selection judges have to provide reasons precisely because the literal meaning is no longer able to represent a social consensus. (p. 227)

Whilst advocates employ rhetorical techniques to buttress the positions of their respective clients, so the judge utilises the same techniques in order to justify the outcome in the eyes of *both* sides to the dispute. Thus, 'good *ex parte* contentions are characterised by the same type of stringency of reasoning with rules as judicial pronouncements' (p. 209).

Kratochwil concludes that "logical" considerations, properly so-called (i.e. considerations of "form" and of coherence), are in the main extraneous to common law jurisdictions in general (p. 243) and to international law in particular (pp. 246-7). He cites a passage from the dictum of Judge Wellington Koo in the *Barcelona Traction case* in support of this:

> International law, being primarily based upon the general principles of law and justice, is

unfettered by technicalities and formalistic considerations which are often given importance in municipal law [. . .] It is the reality which counts more than the appearance. It is the equitable interest which matters rather than the legal interest. In other words, it is the substance which carries weight on the international plane rather than the force. (*Barcelona Traction (Preliminary Objections) case*, Sep. op. pp. 62-3; quo. Kratochwil, *Rules, Norms and Decisions*, p. 244).

The cash-value of all of these considerations for legal reasoning is neatly summarised by Kratochwil in the following passage:

As we have seen, judges are always creatively forming the law, whether they simply "apply" rules in a codified system, or whether they find it and formulate it more explicitly, as in common law orders. We also saw that such law-creation is not norm-creation *de novo*, but that it is path- and field-dependent in that dogmatic (systematic) considerations and/or precedential "starting-points" provide the context in which the decision has to be made. Thus, creativity is circumscribed by guidelines that specify what good legal arguing is. (p. 241)

2.5. Summary

The two models are now out in the open. It is clear that they embody radically different views as to the nature of legal reasoning and the legal order within which the reasoning takes place. In the Fixed-point model, legal reasoning is an activity addressed to a central body of norms, wherein those norms are appealed to as "standards" or benchmarks against which to assess legal claims. They constitute the end-points of legal arguments, the fundamental argumentative operation being that of subsumption. The Path-definition model regards legal norms rather as component parts of the "meaning" of legal arguments which "guide" the reasoning agent throughout the whole argumentative process. Because of its rejection of law as a "static system of norms", the Path-definition model must be understood as both ontologically very different (at least in attitude) to the Fixed-point model, insofar as it claims "the law" to be the contextually rich meaningful utterances themselves, rather than "separate" system of norms reasoned *about*, and as taking a fundamentally different approach to the kind of activity legal reasoning is: it is not "descriptive" of a legal order – even constructively so – but merely a series of structured claims and counter-claims contextually governed by background- and foreground assumptions, and rules of the game.

In the final section, I intend to say something about both models' suitability as a representation of the structure of international legal reasoning. In doing so, my aim is to offer

an alternative analysis of customary international law which, I hope, may be reckoned superior to the standard mode of analysis of international law in at least some respects.

III: The shape and structure of international law

3.1. Introductory

In the last section, I outlined two models which are possible candidates for the analysis of international legal reasoning. In this section my aim is to criticise and adjudicate between these models, and to suggest in the wake of that discussion a particular strategy for looking at international law. My contention will be that neither model successfully captures what is at the basis of international legal argumentation, but that a combination of them, used as templates for explanation rather than as "models" of international legal reasoning, help to illuminate the foundations of the discipline even if they do not, in the classical sense, "characterise" them. The resultant picture of international law is of a legal order substantially different from municipal law, which is broadly anti-realist in nature as characterised in chapter 4. My argument shall take the following form:

1. The charge that the Fixed-point model does not faithfully capture the justificationary structures of much of international legal argumentation is justified. The obvious ground upon which this charge may be made to stick is so-called "soft-law"; but I shall argue that the Fixed-point model similarly runs into theoretical and doctrinal difficulties in relation to customary international law. If I am correct in arguing that the Fixed-point model is inappropriate to the analysis of customary reasoning, then this is a powerful reason for rejecting the view that international law is a "system of norms", whether conceived of as a set of primary rules as Hart suggested, or as a more complex structure grouped around municipal legal conceptions.

2. I shall argue that, at a wider level, the Fixed-point model seriously distorts the "constitutional" structure of international law, particularly with respect to the position and role of the International Court of Justice.

3. Finally, I shall argue that although Kratochwil's model holds up well in a range of situations, it runs into difficulties of two, related, kinds. The first is that it would seem to *collapse* as a viable strategy if it rejects the Fregean picture of knowledge seen to underlie ITL, but becomes an *unstable* strategy if it does not. The second is that it is hard to see how the Fixed-point model of legal reasoning, which is a product of ITL's ontological approach, can be *wholly* abandoned as an analysis of international law given the conceptual and empirical difficulties which result from doing so.

I end by offering a "hybrid" view of international law, based on a modification of these two models, the analytical utility of which, finally, I attempt to demonstrate with a case-study (§ 3.4.).

3.2. Problems with the Fixed-point view

This sub-section is concerned with two kinds of problem associated with a Fixed-point view of international law: problems relating to customary international law, and problems relating to constitutional issues and the role of the International Court. My intention is not to suggest that the Fixed-point model is erroneous or deeply wrong; it is merely that, as a purported description of international law, it comes up short of what is required and results in a view of international law which I believe to be at odds with at least *some* fundamental doctrine. I shall, as much as possible, treat these two kinds of problem separately.

1. Customary international law.

The basic problem for the Fixed-point model in this context is, first of all in distorting the *nature* of customary law, and secondly, in distorting its operation within legal arguments. These two aspects of the problem go hand in hand, and the problem lies in the Fixed-point model's tendency to see in customary international law a singular system of rules rather like that of municipal precedent; in other words, to see custom as forming part of what Kratochwil called a 'static system of rules'. In fleshing out this charge I hope to give it some concrete meaning, as well as indicating in what sense I believe customary international law to issue in a system which is not "singular".

According to Stein, accepted doctrine relating to the formation and application of rules of customary international law 'consists of a relatively restricted set of core propositions' (Stein, 'The approach of a different drummer: the principle of the persistent objector in international law', (1985) *Harvard International Law Journal* 26, p. 457 at p. 458). These

'vague and indeterminate propositions' may, he says, be interpreted various ways to suit the needs of various theoretical traditions. Roughly speaking they amount to the following:

(a) In order for a rule to become part of customary international law, there must be widespread and uniform practice by states acting on the conviction that the practice is obligatory;
(b) The question of how much practice is required is undetermined, but it is clear that neither universal practice, nor the participation of the state to which the rule is applied, is required;
(c) A state which has persistently objected to a rule is not bound by it, as long as the objection was made manifest during the process of the rule's emergence;
(d) A state which fails to object prior to the time of crystallisation of the rule is estopped from claiming exemption from it.

Suppose for the sake of argument that propositions (a)-(d) are an faithful account of accepted doctrine on customary international law. Theorists who adhere to a version of the Fixed-point model, and who analyse international law, perhaps tacitly, in terms of that model, are bound to take a particular view of them. More exactly, they will typically be disposed to take a particular view of customary *rules*, and from such an ostensibly natural position, to construct and then analyse the perennial questions of international law in terms of the relationship which is said to hold, on the Fixed-point view, between states and those rules. Such questions relate, inter alia, to the nature of customary obligations, the meaning of persistent objection, the "universal" status of customary rules, and so on.

In the final chapter of *The Concept of Law*, under the heading 'Obligation and the Sovereignty of States', Hart announced:

> Great Britain, Belgium, Greece, Soviet Russia have rights and obligations under international law and so are among its subjects. (*The Concept of Law*, p. 220)

That the Fixed-point model is assumed in this quotation may not be immediately apparent; but it is discernible in Hart's use of the word "its" to cross-refer to what he calls *international law*. The importance of this comes out in the question: to whom, and in respect of what principles, do states owe duties, and against whom do they have rights? The implication is that the states mentioned do not merely possess rights and duties toward each

other, to which they are 'subject' by reference to good diplomatic practice or mutually enforced contract, but that such rights belong to a singular normative framework: they are not subject to either a complex set of bi- and multilateral relations, or to an amorphous collection or depository of normative epiphenomena; they are subjects of *it*, that is, of *the law*, and their legal relations are sorted and adjudicated with respect to it. Viewed this way, it is not hard to conceive of a potential problem in deciding who owes what obligation "under the law":

> One of the most persistent sources of perplexity about the obligatory character of international law has been the difficulty felt in accepting or explaining the fact that a state which is sovereign may also be "bound" by, or have an obligation under, international law. (id.)

Nor is it difficult to see why this problem is acute for Hart's mode of analysis. The generally accepted view of classical international law is that it is *ius inter gentes*, that is, law *between* nations rather than law *above* nations.[22] The difficulty lies in a Fixed-point view of the rules in question: if the law which generates those obligations is a (singular) system of standards, then whether something is a law or not depends upon whether it is a member of that system. Its legality, and derivatively its binding force, derive therefore not from the practice of states accompanied by *opinio iuris*, but from system-membership. This will not be immediately obvious, but in fact it follows from the tenets of the Fixed-point model. In terms of that model, relevant state practice is merely a *material* source of law, as opposed to the formal source which is, in effect, "custom" itself (that is, the doctrine of customary international law) (cf. Harris, *Cases and Materials on International Law* (4 ed.), p. 24). The formal validity, or "pedigree", of the rule which confers upon it the quality of binding force, is therefore a product of its entry into the system (via one of the formal sources) and not of the agreement or practice on the basis of which its entry was secured.[23]

Faced with such a 'radical inconsistency' (*The Concept of Law*, p. 220) – a system which is based on agreement but which can, apparently, give rise to obligations which can override an individual state's wishes – a solution must be sought which dissolves, or at least explains, the apparent tension. It is telling that Hart's explanation proceeded not from the characteristics of the *rules*, but from the concept of sovereignty:

> Examination of this objection involves a scrutiny of the notion of sovereignty, applied not to a legislature or to some other element or person *within* a state, but to a state itself. (p. 220-1)

Pages 221-6 of *The Concept of Law*, and the ensuing analysis of obligation, are then devoted to an analysis of sovereignty which makes that concept compatible with legally imposed limitations upon action. What is revealing is not the fact that Hart proceeds from municipal conceptions, both of sovereignty and other "constitutional" notions and of rights, but the fact that such an analysis, and its underlying motivation, rest upon an already settled view of the rules in terms of which states are said to be limited. Hart's analysis amounts, in the end, to an explanation of how "sovereign" states can become subject to a Fixed-point legal system.

In terms of the Fixed-point model, then, propositions (a) and (b) are explained by reference to the concept of sovereignty rather than to the nature of customary international law as such. Because the resultant model of custom is of a unified, singular system of norms, that is, a system whose content is essentially the same for all subjects of international law (modulo questions of interpretation), a view must be taken of persistent objection which makes that principle compatible with an otherwise universalist conception of the rule of law. Hart, for whom international law contains no secondary rules, would presumably have conceived persistent objection as sanctioned by a set of primary rules of customary international law in accordance with a complex system of same-level inferences between customary norms – specifying, that is, when an otherwise valid rule of the system is inapplicable to the actions of a given state in virtue of that state's appeal to other primary rules of the system which foreclose application of the rule objected to. A more sophisticated version would see persistent objection as a secondary rule, though again fulfilling the same role, and following, moreover, from the general logic of Hart's argument. Such a standpoint is arguably implicit in Stein's view of persistent objection:

> The inclusion of the principle of the persistent objector among the "rules of recognition" of the international legal order rests on an apparently straightforward deduction from the central premise of international law theory. That premise is that the international legal order lacks a hierarchically superior sovereign authorised to prescribe rules for the subjects of the order. In the absence of such a sovereign, law must result from the concurrent wills of states and, at the very least, cannot bind a state that has manifestly and continuously refused to accept it. (Stein, 'The approach of a different drummer', pp. 458-9)

What needs noticing here is that the "deduction" does not follow from international law theory, but from the Fixed-point interpretation of that theory, wherein customary

international law is, roughly speaking, the analogue of municipal precedent in the sense that Anand referred to it as the 'common law of mankind' (Anand, 'The role of international adjudication', pp. 14-15). The Fixed-point model is singular in its approach to norms, in the sense that norms derive their formal authority from involvement in the *system*, rather than from level of acceptance. Therefore, there is, by default, no room for pluralism or eclecticism on the part of subjects of that system vis a vis legitimacy and applicability of its norms – unless, that is, additional conceptual machinery is introduced. The obvious practical and doctrinal expedient in terms of the logic of the model is therefore a central norm-manipulating authority, in this case Stein's 'hierarchically superior sovereign'. Lack of such an institution in international relations necessitates that of persistent objection, which acts as a safety-valve for states which find certain rules unacceptable. The Fixed-point model thus forces upon the persistent objector principle a particular structure and a particular role.

In order for persistent objection to make sense in terms of the Fixed-point model – for it to provide a rationale for propositions (c) and (d) which does not over-stretch the credibility of that model – it must be the case that persistent objection functions in the manner of a *rule*, against which the conduct of states may be measured. It must also be the case that, regarded as such, it is not much used in international life; otherwise, the tacit premise of the Fixed-point model that universality and singularity of force and applicability are the norm, would be violated. In Stein's view, both of these requirements are met. In support of the view that the content of propositions (c) and (d) are a part of international legal doctrine (i.e. rather than being merely a reconstruction), Stein quotes as evidence the 1984 US Restatement on international relations,[24] which states:

> Modern international law is rooted in acceptance by the states that constitute the system. Particular rules of law also depend on acceptance by the states. Particular agreements create binding obligations for the particular parties, but general law depends on general acceptance. Law cannot be made by the majority for all, although states may be bound by customary law which they did not participate in making if they did not dissociate themselves during the process of its development. ('Restatement of Foreign Relations Law of the United States (Revised); (Tent. Draft No. 1, 1980)', p. 15), cit. Stein, 'The approach of a different drummer', p. 472)

The restatement goes on:

> It is this opportunity for each individual state to opt out of a customary rule that constitutes the

acid test of custom's voluntarist nature. ('Restatement', p. 433)

Stein also refers to the dicta from the *Fisheries case (UK v Norway)* and the *Asylum case* which make clear reference to, and use of, the persistent objector principle in the context of custom formation. In the *Fisheries* judgement, the Court had said:

In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast. (ICJ Repts. (1951) p. 131)

Whilst this does not support the contention that the persistent objector principle has the character of a rule (primary or otherwise), it is at least consistent with that contention, since the Court here clearly demanded, in accord with proposition (d), that some "positive" act of objection – amounting to timeous evidence of objection – have taken place; and it is hard to see, so it may be argued, how such an action may be performed and be judged to be valid unless by reference to criteria, that is, in accordance with a rule recognised (by the Court) to be part of international law.

Regarding the second condition – that the principle's use be the exception rather than the rule in international life – Stein regards this also as being fulfilled:

The paucity of empirical referents for the persistent objector principle is striking. ('The approach of a different drummer', p. 459)

He continues:

It is considerably easier to identify instances in which the principle seems to have been applicable, but was not invoked, than it is to provide examples of the principle in practice. (p. 457)

As examples of international controversies in which the principle could have been, but was not, invoked, Stein cites the Soviet Union's hostile attitude towards inroads on the rule of absolute immunity, to which it is nevertheless bound; the United States' rejection of the twelve-mile limit in the territorial sea at the eighth session of UNCLOS III; and the rejection of the view of the majority of states by the so-called "Reciprocating States" that deep sea-bed

mining can only proceed in accordance with the UNCLOS regime (pp. 461-2). Despite the objections being consistent through the period of the crystallisation of the various rules in question, Stein notes that no state took advantage of the doctrine of persistent objection. Indeed, he continues, it is impossible to find a single instance of the use of the principle in international law *except* in the *Asylum* and *Fisheries* cases themselves (p. 459).

If this is so, then it would appear that the Fixed-point model is indeed an appropriate one for the analysis of customary international law, conceived as the analogue of municipal common law regimes. So long as objection is a marginal practice, and general recognition the norm, it is reasonable to see in customary international law a singular system of norms, whose content is uniquely determined vis a vis states subject to it. In other words, one may see custom as having a "fixed" content, in regard to which there is no doctrinal analogue of the widespread use of reservations, as in the law of treaties, which modifies the applicability of rules of law to states; and no analogue of the use of statements of clarification, which purport to lay out the precise terms of a given rule which an individual state regards itself as bound by. There can therefore, under the Fixed-point model, be no question of a given rule's meaning different things to different states, at least as far as obligations are concerned, just as companies cannot "contract out" of the terms of the Unfair Contract Terms Act by informing the judge that their particular *ex parte* understanding of a given provision is the one which is to be applied to them, all other interpretations being inapplicable.

What the above considerations show, I believe, is that it is eminently possible to use the Fixed-point model to explain the operation of customary international law. It is even possible, given the addition of extra theoretical subtleties, to analyse international law as a system of primary rules, as Hart did:

> In form, international law resembles such a regime of primary rules, even though the content of its often elaborate rules are [sic.] very unlike those of a primitive society, and many of its concepts, methods and techniques are the same as those of modern municipal law. (*The Concept of Law*, p. 227)

This would involve treating arguments and rulings about the content and application of customary rules as a complex series of same-level inferences from "primary" rules concerning procedure to substantive norms of custom. The important question is not, however, whether such an analysis is possible, but whether it is *insightful*. It is my contention

that it is not. The issue is then: at what point do we come to regard the explanation furnished by the Fixed-point model as a distortion of the actual practice of international law?

The issue turns, I believe, on the correct view to be taken of persistent objection, of opposability and of acquiescence. The Fixed-point model was seen above to rely on rules of custom being universalist in aspiration (and in fact), and on persistent objection to particular rules being a minimal practice. This is because of the model's conceptions, which go together, of formal validity and singularity. Formal validity requires individual rules to derive their force from their legal pedigree rather than by reference to state practice which is, in terms of the model, a material source of law.[25] Singularity requires recognised rules of the system to be uniquely opposable, i.e. opposable *in the same way* to all states who have not persistently objected to its legal status, so that there is no question of subjective understandings of international legal obligations dominating the application of international legal rules. Questions as to the precise content of a customary rule, where its terms are the subject of doubt, or where there is conflicting practice all of which is claimed to be in accord with the rule, must therefore be solved according to legal means, either by generating further (legal) understandings of a "fixed" nature or by reference of a dispute to adjudication for authoritative settlement. It is clear that such a model, though it does not entirely break down, certainly becomes increasingly implausible if widespread use is made of persistent objection in order habitually to circumvent or modify the application of rules of custom to individual states, and where rules are manipulated by reference to subjective understandings rather than to their alleged pedigree and formal validity.

In fact, the issue of the frequency of use of the persistent objector principle is tied to conceptions of what kind of principle it is. Those who, like Stein, regard the principle as having the status of a secondary rule of international law will naturally find a 'paucity of empirical referents' when searching for instances of its use.[26] I would like, however, to suggest an alternative analysis, one which falls outside the Fixed-point model as such, and which borrows from Kratochwil's thesis. Suppose the principle of persistent objection were to belong to a radically different normative type: that of constitutional principles, rather than of systemic rules and norms. Suppose, in other words, that persistent objection, and also the associated concepts of acquiescence and opposability, are foundational assumptions within the context of which legal arguments are framed and legal claims advanced. In that case, explicit appeals to the principle of persistent objection, *qua* rule, would not be expected to be frequent; the absence of such appeals, however, would not necessarily indicate that no *use* was being made of the principle.

Such a view seems indeed more in tune both with the theory of custom and with the actual operation of customary claims in controversial proceedings. One of the fundamental tenets of customary doctrine, which follows from the requirement of *opinio iuris* in the creative process, is the notion of opposability. This notion, which is one of the first to be encountered by a student of international law, says that rules of international law are only applicable to a state when opposable to it: an obligation is opposable to a state precisely when that state has manifested acceptance of the rule which enshrines it, regarding it to be of legally binding character, it not being the case that the state in question persistently objected to recognition of the rule as legally binding during the rule's emergence prior to its crystallisation. This classical view does not make the concept of the binding force of a rule *reducible* to that of its opposability, but it does make binding force *dependent* upon opposability, rather than upon the Fixed-point notions of pedigree and system-membership. Viewed this way, persistent objection is more easily seen as a background assumption present in all legal argumentation in international law, rather than as a rule which must be explicitly invoked. Moreover, account must be taken of the role persistent objection naturally takes in overall argumentation strategy in the pressing of legal claims in international law. An example shall suffice.

Stein cites as one of his examples the actions of the United States during the deep sea-bed mining debate at UNCLOS III. As consensus emerged at the conference that deep sea-bed mining could only be carried out, roughly speaking, within the regime to be set out in the emerging conference text, actions of the "Reciprocating States" – including the United States – were, Stein points out, not justified by reference to persistent objector status but were rather based on the notion that deep sea-bed mining was, simply, lawful (despite, that is, an opposing majority view).[27] The first point to make is that, far from being silent on the issue, the United States and others did vocally object to the idea of the unlawfulness of deep sea-bed mining, both at the conference itself and by the fact of their individual actions and unilateral pronouncements.[28] The fact that these states did not avow that '*X* hereby gives notice that She is in a position of persistent objection as regards . . .' can hardly be called definitive proof that such status cannot be inferred on the back of relevant state practice and pronouncements. Rather, it is clearly easily inferred. Stein effectively acknowledges as much in stating that '[. . . .] Ambassador Richardson's statement contained no *direct reference* to the persistent objector principle' ('The approach of a different drummer', p. 462; emph. added).

The second point is that explicit avowals of persistent objector status are likely to occur only relative both to context and to litigation strategy. That is, it would seem to be both diplomatically more expedient and strategically more sensible to try to deny the existence of a rule than it would be to concede its binding force but claim immunity from it. There is, in other words, little to be gained, strategically, from admitting the existence of a rule contrary to one's interests and seeking validation of one's intention not to follow it. Whilst persistent objection (in its "explicit" guise) is not, by nature, an exclusively court-based principle, it is more likely to be a position adopted once general approbation for the rule is so evident as to be scarcely worth contesting. Again, Stein seems to admit as much:

> To be sure, the principle of the persistent objector will remain a fallback argument to be used only in conjunction with a denial that the substantive rule in question forms a part of general international law. But there will be cases where support for a substantive rule will be so broad that a dissenting state can deny its validity only by asserting that no rule of law can be made unless the dissenting party agrees. (p. 468)
>
> (It must be remembered that this second line of the argument relates only to the "explicit" version of the principle.)

Taken together, these two points – that the "implicit" *use* of persistent objection is a relevant factor in all legal argumentation, and that its "explicit" *invocation* is likely to occur as part of a litigation strategy – give rise to a view of customary international law which is radically different from that supplied by the Fixed-point model. If opposability, rather than universality or singularity, is taken as the grounding assumption regarding customary obligation and the binding force of rules, what is left of the notion that customary law forms a single "system" of rules to which states are subject? The answer is fairly complicated.

MacDougal once said that 'the international law of the sea is not a mere static body of rules but is rather a whole decision-making process [. . . .]' (1955 *AJIL* p. 356). He used this proposition in order to defend his own policy-science approach to international law; but it may also be regarded as capturing an essential truth about the conceptual organisation of customary international law, i.e. that it is not necessary – least of all for its "legal" status – that custom be conceived of as a singular system whose rules apply universally by default; rather, custom is conceivable as having no such fixed content but instead as consisting of a framework within which, as Kratochwil said, states can structure their disputes and claims. This does not mean that custom has *no* content – that it is merely a style of reasoning with

norms. Rather, it means (or may mean) that *what the applicable law is* differs from state to state, subject to the foundational norms of opposability, acquiescence etc., and depending on which states are party to a given dispute.

This is not as radical as it may at first sound. In particular, it does not mean that "what the law is" in any given dispute is merely the lowest common denominator of what all state parties accept. Nor does it entail the view that all (or even most) customary norms are subject-relative. It is, in fact, merely an extrapolation of the underlying tenets of customary doctrine. As Greig said:

> Claims at the expense of the position of other states followed by acquiescence by those states; protests at what is regarded as the encroachment by other states on a state's own rights; compromises and mutual tolerances; all play a part in the development of new rules and the modification of existing principles. (Greig, *International Law* (2 ed.), p. 19)

It is, in other words, an extrapolation of the principle that states are not, in terms of customary doctrine, bound by rules which they manifestly refuse to accept, *providing* they have acted in accord with the proper legal channels for registering their objection. The claim made by Kratochwil that most international legal argumentation fails to get beyond the stage of *ex parte* contentions is therefore not to be wondered at; the law applicable to disputes between, say, Britain and France, manifestly cannot be based on purported rules of custom which neither state accepts. As Mendelson put it:

> whilst it may be true, as the International Court of Justice said in paragraph 100 of the *Continental Shelf (Tunisia/Libya) case*, that 'the concept of the exclusive economic zone [. . . .] may be regarded as part of modern international law', this sort of statement tells us nothing about *who* is entitled to claim *what* against *whom*, and *in what circumstances*. For all sorts of reasons, the particular reciprocal rights and duties of a particular pair of states may be different from what is alleged to be the general law. ('Formation of international law and the observational standpoint', p. 943)

In case of such disputes, either the matter is resolved by reaching agreement prior to litigation, or else the International Court, or other competent tribunal, is invited to *impose* a solution on the parties.[29]

In beginning their analyses from essentially the same tenets of customary doctrine, both Koskenniemi (in *From Aplogy to Utopia*) and Carty (in 'Recent trends in the theory of international law') and, for that matter, Kratochwil, end up denying that there are any truly universally applicable customary norms. Carty, in particular, argues that international law consists, not of the application of rules and standards belonging to some 'central international legal order as an impartial point to which State actors can refer', but of 'temporary and fragile' "comings-together" of states understood as 'opposing to one another very fragile, because inevitably partial, understandings of order and community' ('Recent trends in the theory of international law', p. 67). What must be appreciated, however, is that such "opposing" occurs against a surprisingly high level of *de facto* consensus as to what the relevant rules are which may be applied, rather than, as is commonly assumed, a predictably low level. As Scobbie said:

> [There is] a tendency in both authors [i.e. Kratochwil and Koskenniemi] to over-estimate the extent of indeterminacy in international law. The archetypal international legal issue they address is the "hard case" where matters are unsettled [. . . .] (Scobbie, 'Radical Scepticism', p. 361)

Likewise, Grieg said:

> It must be realised, of course, that the consensual theory should not be taken to its ultimate logical conclusion. For example, the fact that the practice relied upon to prove the existence of a customary rule is limited to a group of states does not necessarily prevent the development of a rule of universal application [. . . . Where it is equally difficult to imply acceptance of or acquiescence to the rule to a resisting state, t]he rule is part of universal international law because it would be totally destructive of any principle of obligation to allow a state to decide that it was not bound by an existing rule of international law. (*International Law*, p. 27)

A similar approach may indeed be detected in state practice on the matter of the character of obligations. In the *Minquiers and Ecrehos case*, Counsel for the United Kingdom observed:

> The [. . . .] implication we cannot admit is that a protest, even if made, is sufficient *per se* to invalidate the act protested against. As Mr. Fitzmaurice explained earlier, the exact legal effect of a protest depends very much on circumstances, but in general all it does is to register or record

the opinion of the protesting country that the act protested against is invalid and is not acquiesced in. But if the act concerned is in fact a valid act under international law, no protest can make it invalid [. . . .] The validity or invalidity of an act depends on considerations extraneous to any protest. (*Minquiers and Ecrehos (UK v France) (Merits)*, ICJ Repts. 1953, p. 171; oral argument of Mr. Harrison.)

Both of these latter quotations emphasise something which is of vital importance to any reasonable view of custom: that to be acceptable, a legal resolution must be based on "legal" rather than on subjective grounds; but the legality of a decision need not rest with a fixed body of norms common in content for all actors. All that is required is that the law to be applied to the dispute be "found" in the legally appropriate manner, that is, subject to the doctrinal constraints imposed by customary law, the law of treaties and, possibly, of general principles: questions as to whether a given rule can be applied to a case will depend on issues of opposability, acquiescence, estoppel and so on that one typically finds in pleadings during contentious proceedings. It is, in other words, the criteria actually used by both states and third-party decision-makers which constitute the "rules of recognition" of international law, rather than a set of abstract formal criteria in accord with the Fixed-point model. As Grieg says:

international law [. . . .], being primarily dependent for the creation of its rules upon the uncertainties and vicissitudes of state practice, the evidences of the existence of a particular rule are more important than its source (whether it is a customary rule, or a general principle of law). (*International Law*, p. 49)

It is because such "evidences" amount to the arguments upon which the claims are built, and which, therefore, determine ultimately the outcome of the case or dispute, that they exceed in importance the notion of "formal sources" and of (systemic) validity. It is in terms of such a view, moreover, that most sense can be given to the contention that legal propositions are weight-orientated, that is, that the:

finding and interpreting [of] applicable norms and procedures, and presenting and evaluating [of] the relevant facts [. . . .] both turn on whether a given proposition is acceptable rather than true. (Scobbie, 'Radical Scepticism', p. 355)

Further, as Kratochwil said:

ultimately our substantive determinations cannot be grounded in an absolute Archimedian point. They depend for their validity on the assent that they can marshal. (*Rules, Norms and Decisions*, p. 138; also quo. Scobbie, op. cit.)

This view of legal argumentation, and the view of customary law to which it leads, is not confined however to scholarly writings; as Scobbie pointed out, the Permanent Court noted in the *Eastern Greenland case* that:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other State could not make out a superior claim. (*PCIJ Repts.* Ser. A/B No. 53 (1933), p. 46)

This, Scobbie observes, 'need not entail judicial recourse to justice, but simply an assessment of relative weight' ('Radical Scepticism', p. 351).[30]

In due course, I shall say more about this conception of customary international law, specifically in relation to the kind of "model" to which it gives rise. This necessitates further discussion of Kratochwil's theory. Before that, it is necessary to consider the second of the problems mentioned at the beginning of this subsection.

2. Constitutional issues and the role of the Court.

Problems faced by the Fixed-point model relating to constitutional matters follow neatly on from those considered in relation to custom; they are most keenly felt, however, in the context of the practice of the International Court. They are grouped around the notion of international law as a "singular" system. As Laurterpacht has said:

The very existence of the Court [. . . .] must tend to be a factor of importance in maintaining the rule of law. (*The Development of International Law by the International Court*, p. 3)

The question which arises is this: what is meant by the 'rule of law' in the context of custom? It is clear that in Lauterpacht's thesis, this innocuous-sounding phrase actually possesses great significance, as it does in Fixed-point theories generally. Part of that

significance attaches, as revealed in § 3.2., to the conception of the formal sources of law and their relationship to the notion of binding force dependent upon pedigree; and part of it relates to the perceived role of the Court in settling disputes. In particular, it raises the question of what law the court applies, and in what manner the Court "finds" it.

Lauterpacht's analysis of these issues begins with the observation that the decision reached in law, by the Court, is independent of the claims advanced by the parties to the dispute:

> International tribunals, when giving a decision on a point of law, do not necessarily choose between two conflicting views advanced by the parties. They state what the law is. Their decisions are evidence of the existing rule of law. (p. 19)

The *method* by which the Court must decide in contentious cases therefore is, for Lauterpacht, an appeal to standards of law not necessarily contained in the submissions and arguments of either party, or by reference to the partial assertions of rights and duties advanced by states. This naturally leads on to a particular view of the *source* of rules upon which the Court may legitimately draw: one based on the view that customary law forms a – single – legal order to some degree independent of the states which are subject to it:

> it is a fact that, once the parties have submitted a dispute for judicial determination, the principle of the completeness of the legal order fully applies, with the result that all disputes thus submitted are capable of a legal solution. (p. 5)

Two issues are involved here. The first relates to the alleged completeness and, indeed, existence of a legal order subsisting "above" states, or, if not above them, then independently of their subjective aims and preferences. (It is, in fact, the question of existence, rather than that of completeness, which is of relevance here.) The second relates to the way in which the Court decides the dispute laid before it. It is easy to conflate these issues and to suppose, as Lauterpacht does here, that the *dynamic* function of the Court – in resolving a dispute – is tied to a *static* body of norms (in Kratochwil's sense) from whence the decision is derived, and in terms of which the function is exercised.

The conflation consists in supposing that the dynamic function exercised by the Court, in finding the law to be applied and reaching a decision on the basis of it, is synonymous with its *interpretative* function in laying out the reasons upon which its judgement is based

in law. The latter function, as outlined in § 2.2., comes about on the basis of the need for the Court to justify its decision in relation to the norms with which it is working; it occurs within the context of that part of the judgement in which norms held to be in point are being matched up with the facts of the case. Because the eventual meeting of norms with facts is an integral part of every judgement, it is only to be expected that the Court will have much occasion on which to exercise its interpretative function. It is a fallacy to suppose, however, that interpretation is at the root of the Court's *finding* of the law to be applied. The fallacy arises from supposing that customary doctrine relating to *non liquet* entails the view that cases must be decided by reference to *universalised* norms. Another false supposition, in the manner of a lemma on the way to the fallacious conclusion, is that because the Court is not constrained by a requirement to decide wholly in favour of one argument to the exclusion of the other, that this means that the Court's dynamic function is *independent* of those arguments. This is to forget that that function is, particularly in international law, *adjudicatory*.

This latter point is indeed borne out in the Court's practice. Disputes, particularly those which arise in the law of the sea, are usually of two types: those in which the Court is asked to lay down the principles on the basis of which the issue before the Court is to be resolved given conflicting understandings of those principles (see e.g. *North Sea Continental Shelf Cases*, which turned on whether "equidistance" or "special circumstances" should determine the delimitation of the continental shelf); and those in which the rules in question are broadly agreed upon, but in which the parties cannot agree as to their correct application (see the *Gulf of Maine* case). In both kinds of dispute, it is often the case that what the disputing parties want from the Court is not "the" legally correct answer, but merely "an" answer which will resolve the dispute. In the *Minquiers and Ecrehos case* (ICJ Repts. 1951), which concerned islands between Jersey and France whose sovereignty was contested by Britain, the Court noted:

> The Court has to determine which of the parties has produced the more convincing proof of title to one or the other of these groups, or to both of them. (p. 47)

Similarly, in *Continental Shelf (Tunisia/Libya) (Merits)*, Counsel for Tunisia observed:

> If all [the parties] wanted from the Court was to indicate the "applicable law" *in abstracto*, without actually applying it to the circumstances of the case, there would have been no real

"dispute" between them [. . . .] and the whole *Compromis* and the present proceedings would be without object. The "value-added", the *effet utile* of the *Compromis* and of these proceedings lies in their clarification of the contested elements of the situation between them, which do not pertain so much to the applicable law as to its application to the facts of the case. (p. 429)

Thus, as Thirlway has said:

The notorious incompleteness of customary law is of less importance in a world in which ultimately solutions to differences are likely to be imposed by the stronger party than one in which it will be the task of a judge or arbitrator to apply legal principles so far as he can ascertain them. (*Customary International Law and Codification*, p. 34)

The second difficulty which Lauterpacht's view raises, aside, that is, from being arguably a distortion of the practice of the Court, is that the model of legal reasoning implicit within it (the Fixed-point view) assigns a specific position to the Court in terms of the conceptual framework of international law. Because, on Lauterpacht's view, the legal reasoning of the Court is an activity aimed at a body of concepts separate from that activity and the *ex parte* claims with which it is concerned, the Court cannot be seen as merely solving individual disputes. Rather, it must be seen as both creating a body of jurisprudence, and developing "the law". Questions raised by this include the nature of international "precedent" and the (formal) status of the Court's judgements as a source of law.

Article 59 of the ICJ Statute states:

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Taken at face value, this provision would seem to rule out the possibility of international legal precedent, and thus to foreclose the idea that the Court is able to develop a volume of jurisprudence to which it, or states generally, are bound. Lauterpacht however takes a different view. His argument is based on three grounds. The first is essentially empirical, that the Court has, as a matter of fact, in the past always gone out of its way to refer to its past decisions in support of its judgements. (*Development*, pp. 9-10); this ground, although a point of interest in its own right, may be discounted, *qua* ground for *this* argument, since the

contrary behaviour of the Court cannot be said to invalidate one of its own constitutional rules. The second ground is that:

> the limiting terms of Article 59 refer to the actual "decisions" of the Court, *i.e.*, to the operative part as distinguished from the reasoning underlying the decision and containing the legal principles on which it is based. (p. 8)

This argument is rather more solid, but in fact it too falls short of the conclusion. The reason is that, for precedent to be a source of law in international law, it must be the case that the rules and principles in question are recognised as authoritative on the basis of the Court's endorsement of them, and not because they are valid in their own right. In other words, to amount to a doctrine of precedent it is not enough that the Court's judgements are regarded as legally authoritative because they correctly state the existing law; rather, they must be regarded as legally authoritative simply because they are judgements of the Court. Fulfilment of this extra requirement, it would seem, is exactly what Article 59 is there to deny; it is, moreover, highly unlikely that a widespread *opinio iuris* could be found among states to the effect that they regard themselves as bound in such terms by the Court's past utterances, notwithstanding their reliance on those utterances, from time to time, in support of their litigious arguments (see e.g. *Continental Shelf (Libya v Malta) case*, ICJ Repts. 1985, pp. 35-43).

Lauterpacht's third ground is that 'the apparent rigour of Article 59 is mitigated by Article 38, which admits judicial decisions – including, it must be assumed, the decisions of the Court itself – as a subsidiary means for determining the rules of law' (*Development*, p. 8). To serve as an adequate basis for a doctrine of precedent, it would have to be the case that the relevant provision in Article 38 amounts to a *duty* upon the Court to decide in accordance with its past decisions. The wording of that Article is that 'The Court [. . . .] *shall* apply' the listed sources, including (paragraph 1(d)), 'subject to the provisions of Article 59, judicial decisions [. . . .] as subsidiary means for the determination of rules of law'. Because Art. 38(2) refers to decisions *ex aequo et bono*, it is clear that the criteria which the Court "shall" apply in accordance with Art. 38(1) are legal criteria. The matter thus turns on the meaning of "shall apply" and the exact relationship between Articles 38 and 59.

Depending on one's view of the structure of Art. 38, the "shall apply" clause could be taken one of two ways: either it amounts to a genuine duty, in which case it is to be understood as laying down what the Court *must* do to decide in accordance with its Statute,

or it has the character of an empowerment, advising the Court as to what it is *open* for the Court to do in reaching a decision. Which view is taken turns to some extent upon whether or not there is a formal hierarchy present among the sources listed in paragraphs 1(a)-1(d). If (a)-(d) embodies a formal hierarchy of sources, the "duty" reading is contextually easier, given the constraint upon the Court to arrive at a *legal* decision, as opposed to one arrived at *ex aequo et bono*, without the consent of both parties to the case: if there is insufficient applicable law under the "higher" sources, the Court *must* refer to the "lower" sources, even those of subsidiary character. "Subsidiarity" in this sense merely connotes a lower place in the hierarchy. It follows that the Court must decide each case with an eye both to stating the law correctly and developing the law in line with its own jurisprudence, as Lauterpacht said.

If, however, no formal hierarchy is implied, matters stand differently: (a)-(d) represent *possible* or *available* grounds upon which the Court may reach its decision. Though it is still the case that, if (a)-(d) are the only sources of law the Court *can* use, then to fulfil the requirement of a "legal" decision the Court *must* use those sources, the "empowerment" reading of the Article is the more reasonable. If there is no formal hierarchy among the listed sources, the Court is free, within the terms of its Statute, to base its decision on any of the grounds referred to in Art. 38(1). The question then becomes: if no formal hierarchy exists, what is the ordering principle which is responsible for the arrangement of the sources listed in (a)-(d)? The most often-returned answer to this question is that (a)-(d) are arranged in order of *specificity*. Looking at (a), (b) and (c) this is a reasonable assumption: conventional texts state the law in force between the parties more specifically than does evidence of state practice. The problem is that the "subsidiary sources" listed in (d) do not fit this pattern: if judicial decisions constitute a formal source as Lauterpacht says, then the careful and exhaustive manner in which the Court states its views would seem to be a more specific source of legal rules than "general principles" (Art. 38(1)(c)) and, indeed, to the extent that the Court's opinions are in written form, than the customary norms (Art. 38(1)(b)) which they are often said to articulate and clarify. A more likely explanation is therefore that Art. 38(1) (a)-(d) are arranged in order of proximity to state *consent*. Conventional instruments, for example, are deemed to be more closely linked with a state party's consent to be bound than is an abstracted customary norm under the Fixed-point model or the judgement of a Court. In either case, the "subsidiarity" of the sources listed in (d) – which includes doctrinal writings – would tend to denote an intention to regard them as *rhetorical* rather than truly *justificationary* sources.

It is important to bring this point out more fully. If Art. 38(1) does not embody a formal hierarchy of sources (ranked, that is, in order of importance analogously to the relationship between municipal statute and precedent), then the "subsidiarity" clause of (d) takes on a different meaning. Rather than denoting a formal source that the Court must apply, in the absence of other law (or at least *clear* law), it is most easily seen as representing a material source that the Court *may* apply – not to add justifying authority its decisions, but rather to add persuasive weight. If citing previous decisions *justifies* a particular ruling, in the sense that but for a past decision a particular proposition within the present judgement is without legitimacy, then a corollary is a duty upon the Court to apply precedent in the way Lauterpacht suggests, and to decide cases with past and future cases in mind (i.e. to "develop" the law). But if such citations are merely a persuasive device – designed, perhaps, partly with the aim of ensuring relative consistency in "like" cases – then it can no longer be said that the Court has a *duty* to apply them *qua* source: the authority of the principles contained in a previous decision derive from their being a faithful embodiment of the existing law, not from involvement in the decision itself. Lauterpacht, indeed, subsequently argues for something like this position:

> The Court has not committed itself to the view that it is bound to follow its previous decisions even in cases in which it later disagrees with them. It may be a matter of controversy how far in countries in which courts are bound by judicial precedent they do in fact respect decisions of tribunals of co-ordinate or higher jurisdiction with which they happen to disagree; but there is no doubt here as to the existence of the legal duty obliging them to do so. No such duty hampers the discretion of the International Court. (*Development*, p. 13)

Moreover, the relationship between Articles 38 and 59 suggests the absence of a doctrine of formal precedent. Lauterpacht's original argument was to the effect that Art. 38 was a modification of the terms of Art. 59, or at least a mitigation of them (p. 8), to the extent that Art. 38 allows the Court to refer to judicial decisions in support of its position. Ironically, this serves to confirm the "empowerment" reading of that Article which may be used to suggest that no doctrine of formal precedent exists. However, Art. 38 is explicitly 'subject to' the provisions of Art. 59 (cf. Art. 38(1)(d)), tending to suggest that the relationship of modification or mitigation is, if existent at all, the other way round. Lauterpacht himself seems to acknowledge as much when he later observes, in passing, that the Court apparently has a freedom under Art. 59:

Subject to the overriding principle of *res judicata*, the Court is free at any time to reconsider the substance of the law as embodied in a previous decision. (*Development*, p. 19)

It is hard to see, on the argument's own terms, what can be left of the principle of *res judicata* once such a freedom is established.

This creates a problem for the Fixed-point view of the international legal order, in the following terms. If there is no formal doctrine of precedent – if, that is, it is not open to the Court to apply its former rulings *as law* – then it can no longer be supposed that the International Court stands to international law as municipal courts stand to municipal private law in common law systems. In the case of the latter, it is natural to conceive of the courts as, in a sense, sitting above the law, seen in terms of a singular system of norms, and as performing the kind of operation assigned to courts within the Fixed-point model, that is, referring the facts of the instant case to the norms of the system in order to produce a legally satisfactory answer. Such an answer, it was seen, though it cannot avoid taking account of *ex parte* arguments, is logically independent of them to the extent that the court's decision in a singular system is justified on the basis of what the (systemic) law in point is, not what the individual parties agree constitutes their legal relations. Insofar as interpretation of the norms of the legal system is an inevitable consequence of adjudication, recognition of a doctrine of precedent is a fairly natural corollary of juridical activity within such legal orders.

In contrast to this, where there is no formal recognition of precedent – where, that is, the Court is free to decide each case *de novo* in accordance with what it perceives to be the law in point – it is much harder to conceive of the position of the Court as being one of surveying a singular system of norms.[31] Its judicial pronouncements require to be seen less in terms of interpretations and applications of "the law" (conceived as a singular system) in accordance with a stable body of jurisprudence developed for the purpose, and more as an activity directed at resolving individual disputes in accordance, as Art. 59 of the ICJ Statute lays down, with the joint agreement of the parties to the dispute as to the limits of the Court's jurisdiction with respect to that dispute. Conceived as such, the role of the Court, and the status of its decisions, resemble much more an instance of Bentham's view of judicial activity:

The common law was created by the courts was, according to Bentham, not a body of general rules established by the authority of the court, but only a body of particular decisions. The court

exercises certain powers over the individuals who come before it; the decision of the court is wholly particular and confined to those individuals [. . . .] (Simmonds, *The Decline of Juridical Reason*, p. 74)

Bentham's view may contain much that is problematic as a purported explanation of municipal precedent law. But as a theory about international judicial activity, it clearly has some force, given the strictures of Art. 59. Indeed, further aspects of Bentham's theory derive support from the provisions contained in Art. 38(1)(d), the drafters of which may as well have quoted directly from *On Laws in General*: as Simmonds notes, 'the key role in the creation of a body of rules from judicial decisions is played [in Bentham's eyes] by the legal treatise-writer. The decisions of the courts are particular and detached' (*The Decline of Juridical Reason*, p. 74). Thus, as Bentham said:

To give them any sort of connection with one another and with the rest of the matter of which law is made, a set of general rules must be abstracted from them and worked up into the form of a treatise. [Thus] of pure weariness and despair the authority of the treatise is preferred to that which alone it stands indebted to all for the weight that could originally have belonged to it. (Bentham, *Of Laws in General*, p. 188; quotation adapted from that in Simmonds, *The Decline of Juridical Reason*, p. 74)

Art. 38(1)(d), similarly, states that the Court shall apply:

subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.

A Benthamite reading of the subsidiarity clause therefore seems perfectly plausible.

This subsection has endeavoured to expose some of the doctrinal and practical problems associated with the view that the Fixed-point model is straightforwardly applicable to international law. My point has not been to show that international law may not be explained by reference to the Fixed-point model; it was merely that there is no reason to think, as most adherents of that model arguably do, that it *must* be. The question was therefore not *whether* a Fixed-point interpretation of international law is possible, but whether such an explanation

is analytically *insightful*. I have argued that, in some important cases at least, it is not, and I have attempted to substantiate this charge by referring to both doctrinal matters and the practice of the International Court.

The alternative conception of customary international law which is emerging is one in which no role is played by a "singular" system of norms, by which is meant a central repository of norms functioning as standards to which actors (including the Court) must appeal in order to settle disputes according to law. I have argued that, in the case of international law, there is no such "universalised" system, the content of which is constant for all subjects of law, to which one can point. There is, rather, a complex network of bi-and multilateral legal relations between individual states, the content of which must be settled by reference to "local" norms and obligations which are particular to certain states and areas, and in respect of certain states and areas. The resultant model is therefore not "system"-based, but must rather be understood in terms of bargaining processes and, fundamentally, in terms of the conceptual triad of opposability, persistent objection and acquiescence.

This may seem to indicate an endorsement of Kratochwil's Path-definition model over that of the Fixed-point model. In fact, this is not so. In the first place, I think it unwise to regard the Fixed-point model as wholly inapplicable to international law: first, as already noted, many rules of customary law can claim to be universally recognised, the areas of "settled" law arguably outweighing those in which the law is contested (cf. Scobbie, 'Radical Scepticism', p. 361). Such "universal" norms sometimes referred to as "general custom" must be seen, within the terms of the conception of customary law I have proposed, as *embedded*; whilst, arguably, such norms yet fall short of forming a *system* in the Fixed-point sense, they require the imputation of some form of central legal order beyond the doctrinal machinery utilised in the generation and adjudication of "local" norms. The conception for which I have argued, therefore, does not "reduce" international law to a "mere style of reasoning" as Scobbie remarked *a propos* of Kratochwil. The second point is that the Fixed-point model is not simply a knock-down argument about law; it is in fact a subtle thesis based upon the sophisticated view of legal knowledge explored in chapters 2-4 of this thesis, and upon which ITL is built. It is therefore out of the question simply to abandon that ontologically-minded model in favour of one, such as Kratochwil's, which purports not to give rise to an existent legal order. The conception of customary international law which I have argued for, may be seen in these terms as a hybrid of the Fixed-point and Path-definition models. But how, exactly, do those models relate, and what is the relationship between Kratochwil's view of norms and the picture of legal knowledge implicit within ITL,

for which I have argued in chapters 3 and 4? These questions form the business of the next section.

3.3. Path-dependent international law?

In terms of its legal significance, Kratochwil's thesis boils down to two propositions: first, that international law works in the particular, idiosyncratic way he describes; and second, that it may still be called "law". In the course of this section, I have argued, in effect, that the second of this pair is true, whilst the first is only partially true. In more detail, it seems to me that there is nothing to suggest that proposition two would be false even if proposition one were true, but that it is possible to adduce philosophical and legal grounds which cast doubt on the probity of proposition one.

Kratochwil's thesis is legal rather than philosophical in point. That is to say, he does not dogmatically pursue some theoretical "programme" as a means by which to re-describe the legal landscape. Rather, he starts with law (or norm-use) and attempts faithfully to describe its properties. Nevertheless, it is possible to detect in Kratochwil's writings a definite pattern of adherence to principles, strategies and lines of argument which are characteristically Wittgensteinian. Since even a theory which is not purposefully theory-driven must be theoretically *coherent*, I shall analyse its contribution to our understanding of international law initially from that viewpoint.

In calling attention to the non-systemic and non-recognition-bearing character of law, Kratochwil's thesis steers close to many of the remarks made by Wittgenstein *vis a vis* mathematics after 1935. The most obvious Wittgensteinian element is his insistence that there is no more to legal argumentation than norm-use. This may be seen to provide a more reasonable explanation of the *non-descriptive* nature of the traditional dilemma: the norm itself holds no clue as to its legal or non-legal status, as this is not an "internal" question about the "kind of obligation" the norm embodies. It is, rather, what we *do* with the norm that counts, that is, its status is to be inferred from its contribution to the process of reaching a decision or making a choice. The non-systemic nature of law is, for Kratochwil, therefore a matter of legal fact rather than ontological stipulation. The salient question, however, is whether, having drawn such a conclusion about legal norms, it is philosophically and ontologically credible.

It should be plain that Kratochwil's views amount to a powerful critique of the standpoint of those who would apply versions of institutional positivism to international law. The attraction of (the Fregean version of) that theory, I argued, lies in the credibility and power

of its accounts of legal ontology and legal knowledge, and therefore in its profound analysis and explanation of black-letter law. Kratochwil's thesis contends, in effect, that international law is so unlike domestic systems of law as to contain virtually no black-letter elements whatever: international law is not a collection of normative "causes" (in Kratochwil's terminology) but a particular way of dealing with choice-situations and bargaining processes. "The law" is, as it were, "in" the bargaining statements (or rather, it *is* those statements), and is not a body of entities described by them. It is in this sense that Kratochwil's thesis strongly resembles a Wittgensteinian strategy.

Rather than describing and comparing Wittgenstein's views about mathematics, I shall instead try to illustrate the import of the strategy for the present discussion, by recalling Gareth Evans's discussion of Molyneaux's Question ('Molyneaux's Question', in *Collected Papers*, p. 364). Molyneaux had asked Locke:

> Suppose a man born blind, and now adult, and taught by his touch to distinguish between a cube and a sphere of the same metal, and nighly of the same bigness, so as to tell, when he felt one and the other, which is the cube and which the sphere. Suppose then the cube and sphere placed on a table, and the blind man to be made to see; *quaere*, Whether by his sight, before he touched them, he could now distinguish and tell which is the globe, and which the cube? (Molyneaux, Letter to Locke, quo. Locke, *Essay Concerning Human Understanding* II, ix, 8)

Eighteenth century philosophers characteristically interpreted the question as one of epistemology and psychology. But as Evans says, of all the issues which it raises, the most important is whether blind people possess genuine spatial concepts, that is, whether 'possession of some concepts will require a capacity to use the concept in response to the appropriate perceptual experience' (Evans, 'Molyneaux's Question', p. 368), and whether it is 'sufficient for the possession of genuine spatial concepts that one can correctly use spatial terms of a public language' (p. 368). Kant would have held that an "intuition" of (Euclidean) space is a prerequisite not only of genuine knowledge, but of experience in general; and that this intuition is of a peculiar, a priori kind called 'pure intuition'.[32] A Wittgensteinian, on the other hand, would hold that there can be no knowledge extrinsic to the concept itself presupposed for understanding of it; in other words, our understanding of concepts such as *sphere, point, plane, line* etc. is totally manifested in our ability to use the corresponding terms correctly in geometric proof and, perhaps, colloquially, and is not attendant upon acquaintance-knowledge with actual cubes, spheres etc. or their platonic

formal counterparts.

The Wittgensteinian spirit of Kratochwil's thesis therefore comes down to two points: first, that "norms" are not entities to which we appeal but are instead background (or foreground) assumptions which give point to our utterances in a given context; secondly, arguing about law is not the kind of Euclidean exercise in locating the *ratio decidendi* and applying it, as orthodoxy suggests, but is rather a form of non-compelling persuasive argument which is devoid, except for characterisations of "brute facts", of genuine descriptive content. The problem, as I see it, for Kratochwil's thesis is that, for it to work, it must avoid being either an old-fashioned American Realist argument about legal rules (in which case it adds nothing really new to the debate about international law) or a reductionist thesis about legal entities (whose pitfalls have already been explored).

To deal with the American Realist issue first: it is easy, when reading Kratochwil's work, to regard it from the standpoint of European legal theory and assume that its intended target is the British legal positivists' view of the inner-workings of international law. Viewed from such a standpoint, Kratochwil seems to be saying that those theorists and their sceptical off-shoots find international law deficient because they have started from a too narrow, too *static* conception of law and, particularly, of legal reasoning. This is, indeed, illuminating of one sector of Kratochwil's thought. But there is also a strong resemblance between what Kratochwil says about international legal argumentation and what the American Realists said about law in general.

It is instructive to compare Kraotchwil's thesis with the remarks of W.O. Douglas in his 1963 article on *stare decisis* ('Stare Decisis', in *Essays on Jurisprudence*, p. 18).[33] Douglas referred to the search for precedents as a 'lawyerly search [. . . .] for moorings where clients can be safely anchored' (p. 18) – a picture of the law which, in his opinion, grossly understated the "creative" element in legal practice. Due to the need for creative interpretation, 'Even for experts law is only a prediction of what judges will do under a given set of facts – a prediction that makes rules of law and decisions not logical deductions but functions of human behaviour' (p. 19). This last point is precisely Kratochwil's contention about legal reasoning in international law: just as advocates seeking a favourable outcome for their clients manipulate legal texts, so the judge must also manipulate the same texts, using the same techniques rather than enjoying an Archimedean position above them. Just as Kratochwil endorsed Wisdom's idea of rhetoric as a persuasive 'presenting and representing' of co-operative reasons, Douglas argued that judges do not approach settled formulae for the solving of a given instant case, but are rather faced with the task of

"interpreting" and "re-interpreting" the *ratio* in order to satisfy the requirements of justice. Of course, '[t]his re-examination of precedent [. . . .] is a personal matter for each judge who comes along' (id.).

Most legal realists, and Kratochwil, agree that we do not, in Kratochwil's terms, have to re-invent the wheel, and that each case is not considered *de novo*. But Kratochwil *does* deny that solutions to cases are decided on the basis of a "normative framework" in the positivist "Euclidean" sense. Legal reasoning is not so much appeals to existent doctrine as much as persuasion on the basis of favourable presentations of "seats of arguments" or *topoi*. The interest in Kratochwil's thesis is precisely the denial of the "Euclidean" framework conception of law: unlike with legal realism, in Kratochwil's legal order there are no precedents (at least, in the "objective" sense) whose interpretation is a subjective matter; there are only arguments based on institutionalised (i.e. normative) understandings. It is this denial of objectivity, or more precisely object-hood, which is the backbone of Kratochwil's analysis.

This leads to the second point: reductionism. If Kratochwil is to avoid reductionism, then it must be the case that legal norms are naturally the way he describes (i.e. that they are argumentative assumptions rather than objects to be referred to), at least in international law. There is no doubt that *some* legal norms operate in the way Kratochwil describes, and the passages from judgements of the ICJ are chosen carefully in *Rules, Norms and Decisions* to illustrate the point. But even so, are such norms constitutionally resistant to reference? Kratochwil has three potential replies

First, Kratochwil could argue that his norms do not constitutionally resist ascription of reference when suitably placed within legal discourse. That is, he could argue that most legal reasoning proceeds according to his description, but that there is nothing amiss with the Fregean inferences to existential statements involving the norms used. Thus, Reciprocity may consist in a set of shared, and perhaps (though not necessarily) articulated assumptions or rules, and may be used as such in international legal contexts; but because the Fregean argument demands that such use of the concept of Reciprocity logically gives rise to instances of genuine singular terms referring to "the norm of Reciprocity", "reciprocity norms" and so on, one may speak with legitimacy about the existence of such an object. I am unsure whether Kratochwil would have a *philosophical* problem with this, since his thesis is not overtly reductionist. But acceptance of it would destroy the main plank of his thesis about international law, for if there is nothing amiss with the Fregean inferences, then there is nothing essentially amiss with the positivist picture of international law as consisting

in a body of norms, rules and principles related to one another via intellectual operations. Indeed, if there are such objects and relations, even if they are mere by-products of our legal discourse as Kratochwil characterises it, then the positivist view of legal reasoning as an exercise in (constructive) interpretation of those rules and principles must also be partially vindicated, as long as there is no question of each case being decided *de novo*. Decisions would instead be constrained, up to a point, by *legal doctrine*, and there would be point to the judge's hunt for a *ratio decidendi* in past case law.

Kratochwil's second option is to argue that, though there is nothing wrong with the Fregean argument, it is still the case that norms (in his sense) resist ascription of genuine reference due to essential vagueness. That is, if the non-compelling character of legal reasoning is taken seriously, then the standards which guide us in the course of legal argumentation have no definite content (they are, at the very least, "open-textured"). If "the norm of Reciprocity" were a *name* of such a vague set of assumptions, we must conclude that there are vague objects – a notion which is both unintuitive and very possibly lacking in clear sense. Kratochwil would, I think, be right to resist such a conception. However, I think it results from a confusion of semantic categories and their relative position within Fregean semantics.

Frege once explained (in 'Concept and Object', *Nachlass*) that whereas "Horse" is a concept-word and *horse* is a concept, "the concept *horse*" is an object. This looks contradictory at first glance, but in fact it is not so. A Fregean concept is, more or less, a property conceived of extensionally. If we say Antares is a horse, then we are saying of Antares that he has the property of being a horse. *Horse* delineates a class of entities (Antares among them) which share that property. However, although Antares is a horse and Venus is a planet, it is incorrect to say that Antares is the concept *horse* or that Venus is the concept *planet*. This is because "the concept *horse*" is not a concept-word but a singular term, and its reference is not a concept but an object, i.e. a semantically incomplete entity which happens to be a concept. This does not make the reference of "the concept *horse*" a concept any more than the reference of "clock" is a clock rather than an object.

The same principle is at work with norms. The charge that there cannot be vague objects may well be made to stick, though it is a challenge which affects all disciplines and not just law. But simply because the guidance offered by a norm – or, some may say, the *substance* of a norm – is imprecise or "open-textured", this does not mean that the norm in question, qua entity, is vague or imprecise. As Weinberger said, norms are there fundamentally to impart information (of a certain non-factual kind), that information being enshrined in

principles, rules and all the various kinds of devices Kratochwil mentions. The fact that a given standard embodies vague information (that it falls short of being a set of *instructions*, say) does not make the standard, qua object, vague, any more than a clock with incorrectly spaced gradations and a mis-aligned minute-hand is a vague object. In the same way, we may speak of a crossword clue as cryptically misleading, vague or contrived (in terms of the definition it gives of the corresponding light), but the clue itself, qua abstract object, is none of those things: it is the quite definite product of a setter's intellectual endeavour, printed thousands of times over in national newspapers. This is because the properties in question – vagueness, deviousness etc. – are not properly predicable of *objects*, such as "10 across in the *Times*, Saturday 18 April 1998". What is misleading is its content, i.e. the information imparted by 'Plan the French page, showing the country's emblem (5, 4)'.[34] To say that a given norm is vague, incomplete etc. is not therefore to admit vague or incomplete *objects* into one's ontology.

Thirdly and lastly, Kratochwil could simply deny the validity of the Fregean argument. Two things may be said against this. First, there is nothing in Kratochwil's writings which directly contradicts the Fregean argument, and therefore rejection of it, if it were proposed as a challenge to his thesis, would demand considerable extra argument. Certainly, Kratochwil says nothing which would lead one to abandon Fregean platonism. Secondly, it is unclear how rejection of the Fregean argument could proceed without lapsing into reductionism.[35] In any event, outright rejection of the Fregean inferences would demand the furnishing of alternative explanations of the validity of logical laws such as that from $\forall x$ *F(x)* to *F(a)*, and of mathematical equations such as $(\alpha^1, \ldots \alpha^n) + (\beta^1, \ldots \beta^n) = (\alpha^1 + \beta^1, \ldots, \alpha^n + \beta^n)$, there being no obvious candidates for such alternative explanations. Denial of the Fregean argument, even were Kratochwil to desire it, is therefore no straightforward task.

That said, I continue to think that there is great merit in much of Kratochwil's analysis, especially for international law. The above shows, however, that modification is necessary before its uncritical application to international law is considered. My argument in § 3.2. of this chapter has therefore been, in effect, to unite Kratochwil's view of the *reasoning processes* at work in international law, with an ontologically reasonable view of the *legal order* which results. In other words, I have argued that Kratochwil's insights into the way international lawyers work with legal norms provide a better explanation of the international legal order than does the model of legal reasoning supplied by the Fixed-point model. Legal reasoning in international law is often not an appeal to a set of objective (or even inter-

subjective) standards by reference to which answers and resolutions are sought; often it is a *use* of norms which guide actors towards *allowable* solutions. This does not mean that the Fregean view of norms as abstract objects, and of legal relations as actual relations, is wrong; it merely results in the proposition that there is no centralised "singular" system of norms in international law analogous to that thought to exist with respect to municipal private law. The norms thus "used" however, are not barred from objectivity as a result of this use not being an act of *reference*, any more than the use of a fountain pen to write a letter's not constituting a *naming* of it, is a denial of the pen's objectivity: to be used at all, it must exist.

3.4. Case Study: The Anglo-Norwegian Fisheries Case

In this section I have articulated a novel conception of customary international law which, I have argued, has advantages over the Fixed-point model. I have been at pains to point out that I do not regard the Fixed-point view of international law as "wrong" outright, any more than I believe the model I have articulated to be "right" over all cases. Indeed, one of the strongest proponents of the Fixed-point model's applicability to certain cases has been the International Court itself, as the *Fisheries case*, amongst others, at various points, demonstrates. My argument has not therefore been aimed at a rejection of the Fixed-point model as an explanation of international law. At most, it has been to suggest that it is better to see the Fixed-point and Path-definition models (and others that may be proposed) not as "models" of international law, but as analytical tools. As such, these various tools may be seen to work better with respect to some areas of international life, but more poorly with respect to others.

Accordingly, I do not propose to embark upon a major defence of my hybrid conception of international law against all potential rivals; such a blanket defence would be both futile and counter-productive. Instead, I would like to provide a short demonstration of what I take to be the analytical value of the approach I have suggested, at least in terms of a particular kind of case: that of maritime delimitations. As Churchill and Lowe have observed:

> It should be emphasised that it is extremely difficult to offer any precise account of the principles of delimitation, such as might be applied to future disputed boudaries. Quite apart from the inherent vagueness of the principles, each delimitation involves a situation which has its own unique characteristics which will have to be taken into account: previous practice and decisions will at best point to the kind of factors to be considered and approach to be adopted, and will not

permit the deduction of a precise boundary line which must be applied. (*The Law of the Sea*, p.153)

The suitability of this area of the law to analysis by models other than the Fixed-point model should therefore be obvious.

The case I have chosen to look at is the *Fisheries case (UK v Norway)* (ICJ Repts. (1951), p. 116). I shall be arguing, in terms of the analytical model I have proposed, that the Court's eventual decision (in favour of Norway) was correct; but that the reasons on which the judgement is based are both unsatisfactory and legally suspect.

The case concerned Norway's use of a system of straight baselines in the determination of the extent of its territorial waters, in opposition to the then standard methods of *tracé parallèle* and *courbe tangente* (arcs of circles). The particular circumstances of the case were that Norway's coastline was fringed with countless islets and reefs, known as the *skjaergaard*, which made the application of the latter two methods, whilst not impossible, highly problematic, and, moreover, any delimitation in accordance with such methods would have led to difficulties in ascertaining the outer limit of Norway's territorial sea. From the 1930s onwards, the UK began to object to Norway's use of straight baselines as being contrary to international law, the reason for the objection being that the independence of the baselines to the low-water mark effectively extended seaward the outer limit of Norway's territorial waters to the detriment of British fishing vessels which were denied access to areas of water the UK regarded as high seas. The immediate occasion for the dispute was a Norwegian decree of 1935 in which its system of straight baselines was published. In submitting the dispute to the Court, the applicants requested the Court:

(a) to declare the principles of international law to be applied in defining the baselines, by reference to which the Norwegian Government is entitled to delimit a fisheries zone [. . . .]and to define the said baselines insofar as it appears necessary in the light of the arguments of the Parties [. . . .] (ICJ Repts. (1951), pp. 118-9)

As part of its submissions, the United Kingdom had laid down a number of "principles" which, it was claimed, represented international law on the matter of delimitation. Referring to these principles (the content of which is not important), the Court said:

> The subject of the dispute being quite concrete, the Court cannot entertain the suggestion [. . .] that the Court should deliver a judgement which for the moment would confine itself to adjudicating on the definitions, principles or rules stated. [. . . .] These are elements which might furnish reasons in support of the Judgement but cannot constitute the decision. It further follows that even understood this way, these elements may be taken into account only insofar as they would appear to be relevant for deciding the sole question in dispute, namely, the validity or otherwise under international law of the lines of delimitation laid down by the 1935 Decree. (p. 126)

The Court may be seen in this passage as doing one of two things. First, it might be saying that it cannot *decide* the law, but can only *apply* the law to the present case. It is not willing, in other words, to lay down an authoritative general statement on *what the law is* between the parties on the basis of rival conceptions as to what the parties *think* the law is. Alternatively, the Court might be saying that it is not the job of the Court to "decide" the law; rather, it can only do that which it has been empowered to do by the request of both parties, namely decide (a) the principles by reference to which Norway's delimitation can occur, as taken from what is opposable *vis a vis* the parties to the case; and (b) effect the delimitation in accordance with those principles.

In the paragraphs immediately following the one quoted, the Court seems effectively to say that it is the latter version which it will follow in order to reach a decision: that it is not going to find "the law" and apply it, but will rather find *applicable* principles via reference to claims made by both Governments as to the proper way to effect delimitations. The question is, does the Court *actually* do this? The answer, I shall suggest, is that the Court remains only partially faithful to its statement.

In the main section of its judgement, the Court began by noting that the Norwegian coastal zone in question 'is of a very distinctive configuration' (p. 127). Therefore:

> [1] The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. [2] What matters, what really constitutes the Norwegian coastline, is the outer line of the *skjaergaard*. (id.)

I have inserted into the quotation, in brackets, two numbers which denote the two propositions which make up the Court's argument here. The important thing to note is that proposition 1, which is purportedly a statement of geographical fact, does not imply the

immediate truth of 2, which is a legally significant statement insofar as it decides what constitutes the "coastline" of Norway, i.e. the usual point from which delimitations of sea areas occur. It should also be noted that the Court's discussion on p. 127 of its judgement is building up a picture of "special circumstances", without actually referring to this principle outright. Instead the Court said:

> Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law. (p. 128)

This passage is significant in that it is the first in a line of statements in the Court's judgement which make ambiguous use of the imperative verb "must". At the head of that line is the following statement:

> The Court has no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of states. (id.)

The Court then goes on to note, in accordance with its original suggestion as to procedure, that both parties to the dispute are agreed as to this point, but that they differ as to its application in the present case. The Court also observes that both parties acknowledge the principle that drying rocks may serve as legitimate basepoints; the UK however suggesting that to count, such rocks must be within 4 miles of the mainland, whereas Norway recognises no such limitation. The Court, again apparently following its own advice as to its competence to decide the case, says that it will not decide this particular issue, as both sides agree that all the drying rocks which are relevant in the present case are within four miles of the Norwegian mainland. The Court then changes gear:

> The Court finds itself obliged to decide whether the relevant low-water mark is that of the mainland or that of the "*skjaergaard*". Since the mainland is bordered by its western sector by the "*skjaergaard*", which constitutes a whole with the mainland, it is the outer line of the "*skjaergaard*" which must be taken into account in dictating the belt of Norwegian territorial waters. This solution is dictated by geographic realities. (id.)

The Court went on to say that three methods 'have been contemplated' – here referring, apparently, to *general* international law – to effect the application of the low-water mark rule. The first is the *tracé parallèle*, or the following of the coastline 'in all its sinuosities'. This is simplest and easily applied to coasts which are 'ordinary' i.e. 'not too broken' (p. 128). However:

> Where the coast is deeply indented and cut into [. . .] or where it is bordered by an archipelago such as the "*skjaergaard*" [. . .] the baseline becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities [. . .] (pp. 128-9)

The Court here makes use of subtle imperatival language: the first method 'can no longer' be put forward because the baseline 'becomes' independent of the low-water mark, and 'can only' be determined by reference to other means. The Court's turn of phrase here, in the context of the passage, strongly suggests an appeal to the "physical" necessity of abandoning the first method – and to the physical impossibility of applying it – as opposed to normative necessity stemming from impossibilities due to constraints in *law*. If so, the Court is effectively pointing to a *gap* in the applicable law rather than to another rule of law, itself modifying the application of the method in certain situations. The Court continued:

> Nor can one characterise as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast: the rule would disappear under the exceptions. Such a coast, viewed as a whole, calls for the application of a different method; that is, the method of baselines which, within reasonable limits, may depart from the physical line of the coast. (p. 129)

The gist of the passage again seems to be that physical circumstances have 'necessitated' the abandonment of a rule: simply, geographical realities mean that the rule *cannot* be applied. The "situation" – i.e. the *physical* situation – therefore 'calls for' application of an alternative rule which, as a matter of logic, does not mirror the coastline.

In the face of this argument, the United Kingdom withdrew its insistence on the first method and argued instead for the application of *courbe tangente*. This method, the Court said, is a 'new method' proposed by the United States at the 1930 Codification Conference to ensure that territorial waters 'must follow the line of the coast'. It is, the Court said, 'not

obligatory by law'. Again shifting gears, the Court went on:

> The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea [. . . . I]n order to apply this principle, several states have deemed it necessary to follow the straight baselines method and [. . . .] they have not encountered objections of principle by other states. (id.)

This, the Court said, has been done in the case of bays and minor curvatures of the coastline where overall simplicity results. In answer to the UK's contention that this "third" method of straight baselines can only be utilised across bays, the Court simply said that it is 'unable to share this view' (p. 130) and that Norway was not blocked by general custom, notwithstanding the absence of practice, from utilising straight baselines for other purposes along the length of its coastline. The UK argued that, in any event, such baselines could not exceed 10 miles in length. The Court said:

> although the ten-mile rule has been adopted by certain states both in their national law and in their treaties and conventions, and although certain arbitral tribunals have applied it as between these states, other states have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law. (p. 131)

Again, two views are possible as to what the Court is doing. According to the first, the Court is not, as it said it was going to do, looking at issues of opposability within the context of the present case. Rather, it is *adjudicating* between two rival conceptions of *the law in point*, much as a municipal court would consult the common law for an answer in relation to a dispute about real burdens or trespass. According to the second view, the Court *is* looking at opposability of the 10-mile rule to Norway, given the UK's *contention* that the 10-mile rule is a general rule of international law (p. 131). On that view, the Court is saying that the 10-mile rule is not opposable, and that the UK's contention is inaccurate. Given the Court's original statement as to how it was going to proceed, the second view seems more likely; at least, that is the view which we should at least *try* to impute, in the face of that original statement. However, the Court continued:

In any event, the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast. (id.)

At first glance, this statement seems to confirm that it is the second view which is the more favourable interpretation, as the Court is looking at opposability. This would be true but for the first three words of the quoted passage: the 'In any event' clause has a major effect upon the perceived purpose and meaning of the preceding passage, for in effect it shows that the motive behind the Court's examination of customary practice was not, merely, that of dealing with the UK's contention *vis a vis* the coast of Norway, but rather it was designed to pronounce upon the existence or non-existence of a general rule of international law as such. But rather than examining claims about general international law, the Court should, in terms of its own statement as to how it was going to conduct the case, have confined its attention to the issue of opposability (i.e. in line with the second, rather than the first view) rather than look at "general international law" for its own sake. In other words, the only "event" on which the Court had given itself competence to pronounce was that of the opposability of the UK's claim against Norway, not the validity "in any event" of a general rule of customary law.

It might be objected at this point that it does not matter whether it is the first or the second view of the Court's motivation which is taken, since the conclusion reached by the Court would be "in any event" the same, viz. that the 10-mile rule is inapplicable to Norway. The view might be taken, therefore, that there is "no harm done". In terms of the *decision* the Court finally reaches, this may be true; but it is not true of the *reasoning* on which the decision is based. This is so for two reasons. The first is that the last quoted passage is not the final conclusion the Court reaches in respect of this line of reasoning: it is merely a lemma on the way to a more radical thesis. Together with the passage last quoted and the proposition that 'In this connection [speaking of the 10-mile rule], the practice of states does not justify the formulation of any general rule of international law', the Court concludes that it is:

unable to share the view of the United Kingdom Government that "Norway, in the matter of baselines, now claims recognition of an exceptional system". [Rather] all that the Court can see therein is the application of general international law to a specific case. (id.)

The view is radical because the Court is *now* saying that the Norwegian straight baseline

system is valid in terms of *general* international law, i.e. that international law (as binding on *all* states who have not persistently objected to the practice) recognises the validity of the drawing of straight baselines as a method of delimiting areas of maritime territory. The Court reaches this conclusion on the basis of the *lack* of state practice on the question rather than evidence of a general practice accepted as law. As Waldock observed:

> The judgement has been described by Professor Lauterpacht as a 'daring piece of judicial legislation', and it is difficult to regard the pronouncements on the general law of coastal waters in any other light. ('The Anglo-Norwegian Fisheries Case', (1951) *BYIL*, p. 114 at p. 169)

What I believe the above analysis shows is that, in regard to this portion of the Court's judgement as to the general law, it is less an instance of conscious judicial legislation than the confused conclusion of an argumentative elision based on premises about the particular case of Norway's coastline.

The second reason why the Court's argument here is not innocuous is that it has radically altered the basis on which the Court is conducting the case. The original basis upon which the Court was invoking its conclusion had essentially to do with Norway's "special circumstances": the possible physical impossibility of applying the method of *tracé parallèle*, and the inapplicability of the method of *courbe tangente*. This amounts to one leg of the Court's argument. But during the course of that argument, the Court has effectively dumped the appeal to special circumstances and ends up seeking a justification for its position in "general" customary law. The Court's eventual "justification" for its position on this issue is therefore unsound both in law *and* in the context of the Court's own avowed strategy for reaching its judgement.

Having come so far, the Court then continues to seek what amount to *post hoc* justifying arguments in support of its contention that Norway's system of straight baselines accords with international law. On p. 132 of its Judgement, the Court says:

> [1] The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, [2] the validity of the delimitation with regard to other states depends upon international law.

(I have again inserted two numbers as "propositional markers".) The context in which this statement is made clearly indicates that by 'international law' the Court had in mind *general* international law, i.e. a system of customary law in the manner of the Fixed-point model. The importance of the passage lies in the fact that, contrary to what the Court plainly implied, the allegedly "international" character of the act – the fact that it has consequences outside the boundaries of the state – does not entail that there is, or make it the case that, a body of rules applies against which its validity can be, or is to be, assessed. This is especially true if, as in the case of [2], those rules are deigned to have the character of *general* rules: again, the Court is incorrect in its assumption that [2] follows from [1].

What, then, is the nature of these "general" rules, and from whence do they derive? The widely held view is that the Court proceeded to lay down "general principles" in terms of Art. 38(1)(c) (see, e.g., the individual opinion of Judge Alvarez at p. 148; also Johnson, 'The Anglo-Norwegian Fisheries Case', 1(2) *ICLQ* (1952) p. 145). This is usually inferred on the basis of passages such as the following:

> In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question. (*Fisheries* judgement, p. 133)

The Court, however, never directly invokes general principles; the passage is also consistent with the Court's earlier strategy of saying, ostensibly, that it will derive (legal) principles from "conceptual necessity". The first of the criteria is the 'close dependence of the territorial sea upon the land domain' (id.): this entails [sic.] that no delimitation can depart from the general direction of the coast. The second is the relationship, and degree of relationship, between sea areas and any land formations which divide them. In this connection, the Court said:

> The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely connected to the land domain to be subject to the regime of internal waters. This idea, which is the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway. (id.)

Read in the context of the Court's previous strategy, of attempting to derive legal principles from conceptual and physical necessity, this passage is less an attempt to find and apply "general principles", than it is an example of old-fashioned judicial legislation. What the Court is doing is reasoning doctrinally, in the manner of Bentham's treatise writer: one can readily imagine a municipal court reasoning this way in relation to a problem of private law, endeavouring to find some conceptual continuity between two related areas of law, and "articulating" the principles which underlie them. Such doctrinal reasoning may or may not be a legitimate function of a municipal court; most modern lawyers would probably say that it is, (though Bentham would have disagreed). But it is emphatically *not* a juridical function of the ICJ, for the two reasons discussed earlier in this section: the radically different structure of customary law, and the position of the International Court relative to the law on which it has jurisdiction to pronounce (cf. §§ 3.2. & 3.3.).

The third consideration examined by the Court, 'the scope of which extends beyond purely geographical factors', is 'that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage' (id.). In direct contrast to the two "geographical" grounds the Court has examined, this third ground looks at first sight *not* to be the invocation of a general principle, when in fact it is. In context, it seems as if the Court is deducing this economic ground from the content of the 1935 Norwegian Decree, and other Norwegian pronouncements. In fact, the tone of the Court's reasoning is consistent with the activity merely of finding in those pronouncements *evidence* of the long usage required for the application to Norway of a rule of general international law which they embody. But since this evidence amounts to a set of claims to historic title, it is unclear why the Court should find need to dignify the Norwegian arguments (about economic realities) with the status of a general rule of international law. Why, in other words, not base the conclusion in favour of Norway upon the obvious ground of historic title, disposing of the matter of the dispute from within the confines of issues of acquiescence and opposability?

In the final leg of its judgement (pp. 134-8), the Court does exactly this. After stating, somewhat superfluously, that the Norwegian system of baselines (insofar as it is based on economic realities peculiar to the area) 'does not infringe the general law', the Court changes track and suddenly begins doing what, had it remained faithful to its averred intention *and* its original argumentative strategy, it should have been doing: namely, finding out from the claims and counter-claims of both parties what the relevant (i.e. opposable) conceptions of the law in point are. In two subsequent passages, the Court teases out its conclusions on the

basis of this data:

In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose. From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from Foreign states. (p. 138, para. break suppressed)

The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom. (p. 139)

Again, the issue of historic usage and lack of protest by foreign states is not "in any case": it *is* the case. That the Court relegated what seems to me to be the essence of the judgement to a mere subsidiary ground of argument, shows how deeply entrenched the Fixed-point is in view of international law. This is illustrated by the Court's final conclusion in the case.

The Court's final conclusion on the principles to be applied rests on three pegs: geographical necessity, "the general" law, and the historic practice of Norway combined with Britain's complicity:

The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law. (id.)

As I have argued, the first two pegs on which this conclusion rests are spurious: the first because physical circumstances do not dictate the content of legal rules (unless the additional premise of a "special circumstances" rule is appealed to); the second because the Court's references to "international law" make it seem as if the Court was appealing to a fixed body of rules by reference to which answers to individual disputes are given, when the dispute could – and, if I am correct, should – have been resolved on the ground of the law applicable as between the parties to the dispute. It is, therefore, the third ground alone upon which the

Court should have reached its conclusion, i.e. that in effect Norway's baseline system is valid against third parties on the basis of a claim to historic title over the maritime areas in question, in the face of lack of protest from other states. As the Court noted, at. p. 144 of its Judgement:

Judge Hackworth declares that he concurs in the operative part of the Judgement but desires to emphasise that he does so for the reason that he considers that the Norwegian Government has proved the existence of an historic title to the disputed areas of water.

3.5. Conclusion

This brings to an end the inquiry of this thesis into Position-I questions on the foundations of legal reasoning in international law. I have argued that, at least in many instances, it is worth abandoning the "Fixed-point" view of international law as a single system of norms which are binding upon the international community at large. This view of law is based on the picture of legal reasoning as an activity directed at a body of knowledge existing separately from that activity, wherein the primary mode of reasoning is that of addressing standards in pursuit of (if the platonist is correct) factually – though not necessarily uniquely – correct answers. This was the model seen to be at the basis of ITL. I have argued instead for a picture of international law wherein the central notion is that of opposability (of conceptions of rights, duties, obligations etc.) between states. On this view, legal reasoning is not an appeal to standards which function as the end-points of legal arguments, but is rather a path-based activity wherein norms function as "guides" during the whole process of the argument. I have, however, cautioned against seeing in this model an abandonment of the fundamental account of legal knowledge embodied in ITL. In other words, I do not think the path-definition model railroads us into the view that "there is no legal order", or that law is merely a style of argumentation. Rather, I see it as merely requiring the abandonment of law as a *single* normative framework.

The resultant picture of international law is one in which the law applicable to a dispute is not drawn from a central reservoir of normative concepts, but is derived from the *ex parte* claims of parties to the dispute. Such claims are, however, neither arbitrary nor completely subjective, but rather they are constrained by "doctrine", procedural norms and "embedded" (i.e. universally accepted) norms and shared understandings, which together with the substance of the claims advanced and the previous practice of states, effectively guide the disputing parties, perhaps through adjudication, to legally allowable solutions. International

law is therefore not a mere style of argumentation, but a complex structure of normative and power-relationships organised and made sense of through the doctrinal "stuff" which provides the criteria of "recognition" in the adjudicative sense outlined in § I above.[36] It is both "objective", in the sense of being platonistically real, and anti-realistic, in the sense that answers are manufactured rather than discovered.

How, then, does this fit in with the wider argument of the thesis? In chapter 1, I criticised the positivist account of the relationship between the international legal order and municipal systems, the central problem being a lack of justification for supposing a single theoretical framework, or model, is appropriate for all systems of law. I suggested that this difficulty – explored in greater detail in this chapter – arose from modern positivist conceptions of what legal orders are and, in particular, the foundations of the legal reasoning carried on in relation to them. In chapter 2 I argued that the Institutional Theory of Law is positivism's most sophisticated attempt to get to grips with the relevant foundational issues, but that that attempt ran into difficulties at crucial points. Chapter 3 therefore outlined a remedial strategy – the Fregean strategy – on the back of which, in chapter 4, I argued for a specifically platonist account of legal knowledge, and an anti-realist view of the structure of legal orders. In the present chapter, I have attempted to show how, in terms of the arguments in chapters 1 and 4, an alternative conception of international law is available, based on a particular way of regarding the foundations of the legal reasoning carried on in relation to international legal matters. Such a conception will, I hope, go some way towards relaxing the grip enjoyed by the Fixed-point model upon the legal mind.

Appendix I: Logic without truth?

At the end of chapter 4, I outlined a problem which exists for inferences which occur in legal argumentation: are they governed by some form of logic? There are two ways in which this claim can be investigated. The first is to look at various kinds of logic to see if any could yield a formal system which can make sense of truth-conditional semantics applied to the analysis of arguments about *norms*. The second way is to try to develop a consequence relation which does not depend on standard semantics, and which can account for the kind of non-truth-functional inferences said to be at the root of (some) legal arguments.

My response to the question whether legal reasoning is governed by logic amounts, in effect, to the bald claim that I don't see how it could be; in a forthcoming article and in the present Appendix I have attempted to clothe this stark claim in the robes of academic respectability. The article[1] deals broadly with the first method for investigating the claim. This Appendix examines a particular strategy for answering it via the second way.

1. Semantic separation

Orthodox scholarship within the field of logic treats the fact-value dichotomy as absolute. Normative sentences and descriptive statements have been taken, since the earliest times, as belonging to two fundamentally separate (i.e. non-intertranslatable) semantic types. Today, Hume's Law is still seen as a problem for any proposed formal system that purports to handle normative inference. Most philosophers –Von Wright being a prominent exception – have taken this as evidence of the impossibility of a logic of norms founded on descriptive language semantics. In a recent article, Weinberger reminds us why ('The Logic of Norms Founded on Descriptive Language' 1991 *Ratio Juris*, p. 284).

The fundamental obstacle to a descriptively-based logic of norms has its clearest statement in Jorgensen's Dilemma: (descriptive) logical forms are inapplicable to normative statements because such logic is dependent upon the ascription of truth-values which cannot sensibly be attributed to norms. On the other hand, people are generally convinced by their normative inferences and arguments notwithstanding the semantic difficulty. The dilemma is caused by the semantic separation (of norm-sentences from descriptive ones) and, of course, remains true if and only if Hume was correct to assert an absolute prohibition on inter-translation. For if any translation between semantic types were allowed, a logic grounded in one type could be permuted to allow for its use in the other.

Recently, attempts have been made to accommodate a normative logic by by-passing Jorgensen's dilemma altogether. Since that dilemma appeals, in the end, to the semantic separation thesis, some have wondered whether we cannot "go beyond" semantics and rest logic on something "more fundamental". This is the inspiration behind a recent article by Alchourron and Martino in which they propose a truthless logic which, they claim, short-circuits Jorgensen's dilemma by slipping between its two horns. In accordance with tradition, Alchourron and Martino see the dilemma as a truth-value problem, and this is correct as far as it goes. But if we are concerned to see the dilemma in its fullest context, it becomes apparent that it cannot be so easily circumvented; truth-value is the least of our deontic worries.

The inspiration for a truthless logic comes from the logico-semantic tradition of Skolem, Gödel and Tarski, and the idea that what is central to logic is not truth or falsity but simply the transmission of *any* value through the notion of consequence (Alchourron and Martino, 'Logic Without Truth', 1990 *Ratio Juris*, p. 56 n.10; as I shall try to show, there is a good deal of truth in this, but the moral to be drawn is not the one Alchourron and Martino attempt to draw – and with fatal consequences to their theory). The short-circuiting of the dilemma comes by accepting the notion of consequence, rather than truth-value, as primitive. Basically this amounts to a denial of the need for a semantic characterisation of the logical connectives ('Logic Without Truth', p. 48) – which is, they suggest, 'no great theoretical innovation' but something already present in early works of Tarski. The central thesis of their approach is that a refined axiom system for operators negates the need to define logical connectives in terms of the truth-functions of the descriptive propositions they connect; rather, the logic is characterised in terms of a purely abstract notion of consequence, beyond the realm of descriptive- or normative semantics.

Alchourron and Martino's solution to Jorgensen's dilemma stands or falls by their ability to provide a coherent account of the abstract notion of consequence, without appeal to semantic notions:

> If we leave aside the semantic notion of consequence, deontic logic will no longer face philosophical obstacles. ('Logic Without Truth', p. 48)

Assuming this is true, the central question has to be: *can* we leave aside the semantic notion, and still have something substantial enough to count as a basis for logic? Alchourron and Martino clearly think so, and moreover are keen to point out that this solution to our deontic problems has been staring us in the face for years:

[. . . .] prejudice has prevented logicians from seeing that developments in the logic of sequences have no longer made semantic assumptions indispensable for clarifying the logical notion of consequence. (id.)

This prejudice is essentially one in favour of descriptive utterances and away from other sorts of judgement (including normative judgements) as part of a tradition, derived from Frege, that grounds meaning in the idea of truth-conditions and defines the logical connectives out of the truth-values of compound expressions involving them. On this view, consequence is taken to be a truth-value function of the sentences expressed in the premises and conclusion, and truth and falsity to be the obvious point of reference (p. 49). But this loses sight of 'the other side of the history of logic' which proceeds from 'a global idea of reasoning as an intelligible whole and explains the meanings of the parts, including the connectives, by the role they perform in reasoning' (p. 50). This has led to logicians becoming preoccupied with asking themselves what the "truth-values" of those propositions could be, whilst ignoring the possibility of clarifying the precise function of *this* or *this* logic's connectives (id.).

The old logical connectives, we are first of all told, can be 'characterised by their use in relation to an abstract notion of consequence. And this notion is specified by a set of axioms which take into account the intuitive notion of consequence' (p. 57). Without pausing to question what, exactly, this form of intuition might be (this is something I shall return to later) let us get the central thesis out in the open:

If there are rules which are tied to the meaning of an operator and they can be given unequivocally and precisely, it is unnecessary for the operator to connect descriptive propositions. By changing the rules for using them we change the meaning of the operator [. . . .] This shows that the rules which define the use of connectives give "the meaning" of the connectives and not their relationship with the truth-values of the propositions in question. [Thus] it is [. . . .] possible to build a logical system assuming that the notion of consequence is a primitive and then to define the operators in the same way in which it is possible to give the sentences a meaning, by simply giving the *rules for their use.* (pp. 57-60; emph. in original)

Just as the syntactic notion of consequence comes from the corresponding semantic notion, Alchourron and Martino claim that both can be got from the "abstract notion" of consequence (p. 57).

Much of what Alchourron and Martino have to say in their paper is of great importance, not least in awakening us to the existence of an historical prejudice in the philosophy of logic, one that has over the years done a good deal of damage in theoretical accounts of legal reasoning, especially when the model taken is deontic logic. But it is important that we get our history right; it would be tragic if, through lack of care, we replaced one faulty notion with another, equally

faulty notion. Alchourron and Martino leave it that we have prioritised descriptive utterances in our accounts of logical systems, thus leading ourselves astray over the ground and scope of deontic logic. This is, however, a shallow view of the matter, and one which in turn misleads Alchourron and Martino, with grave consequences for their proposed solution to Jorgensen's dilemma. In order to tease out the valuable insights from the damaging ones, it is necessary to retrace their steps very carefully; this is especially important as the mistaken notions that lie behind Alchourron and Martino's account are, in general, those that are at the heart of most legal-theoretic misconceptions over the nature of logic and its role (if any) in legal reasoning.

The root of the difficulties is, as Alchourron and Martino rightly observe, the assumption that the point of logic is the uncovering of truth. On such a picture, logic is structured along the lines of an axiomatised theory, consisting of the minimum possible rules of inference and a recursive stipulation of what is to count as a valid formula (Dummett, *Frege: Philosophy of Language*, p. 432). So conceived, logic is about the postulation of logical truths (tautologies) and the derivation of further truths on the basis of these. That such a picture originated with Frege is perhaps surprising, but, unlike Wittgenstein, Frege was never seriously interested in the foundations of *logic*, only in resting the truths of mathematics and logic on as narrow a base as possible, localised in some "intuitively correct" axiom system. Nevertheless, this account of logic, and the associated truth-conditional account of meaning, became the very heart of the analytic philosophy of earlier this century.

Dissatisfaction with such an account, and the re-assertion of the traditional idea that logic has to do with, not *truth*, but the transmission of *consequence* between sentences, led to the increased use of so-called "valuation systems" as a framework for logical investigations (*Frege: Philosophy of Language*, p. 431). For any sentential logics, such as predicate-, modal- or deontic logic, a valuation system will be an abstract algebra F, comprising a set X of at least two members, N, a (nonempty) proper subset of X, whose elements are the *designated* elements of X, and the functions $\cap$, $\cup$, $\mapsto$, $\neg$ defined on X^2. An assignment Σ is then a function from the set S of sentence letters into X, extendible into a *valuation* Σ_V which maps the set of formulas into X as follows:

(1) $\Sigma_V(\bar{\phi}) = \neg \Sigma_V(\phi)$

(2) $\Sigma_V(\phi \wedge \psi) = \Sigma_V(\phi) \cap \Sigma_V(\psi)$

(3) $\Sigma_V(\phi \vee \psi) = \Sigma_V(\phi) \cup \Sigma_V(\psi)$

(4) $\Sigma_V(\phi \Rightarrow \psi) = \Sigma_V(\phi) \mapsto \Sigma_V(\psi)$

where ϕ,ψ are any formulas. Supposing F is such a system and Γ a set of formulas, ϕ is a consequence of Γ in F ($\Gamma \models_F \phi$) iff $\Sigma_V(\phi) \in N$ for every Σ_V such that $\Sigma_V(\psi)$ for every $\psi \in \Gamma$. Where Γ is the empty set, $\models\phi$ is a provable formula of F, and $V(F)$ is taken to be the set of all formulas under F such that $\models\phi$.

Now any sentential logic L is characterised by a derivability relation $\vdash$ in the usual way providing that certain restrictions are put in place:

(a) If $\phi \in \Gamma$ then $\Gamma \vdash \phi$

(b) If $\Gamma \vdash \phi$ and $\Gamma \subseteq \Delta$ then $\Delta \vdash \phi$

(c) If $\Gamma \vdash \phi$ and $\Delta \cup \{\phi\} \vdash \psi$ then $\Gamma \cup \Delta \vdash \psi$

Additionally, the consequence notion must obey the law of uniform substitution, namely that, where * is any substitution, if $\Gamma \vdash \phi$ then $\Gamma^* \vdash \phi^*$.

For standard first-order logic, the valuation system will of course be bivalent (usually with X taken as $\varnothing, \{\varnothing\}$), consisting of a function Σ from the set S to the set $\{T,F\}$ of truth-values, where T is the only designated value and F the only undesignated value, so that Σ assigns exactly one truth-value to each sentence letter of L. Then, for each such letter ϕ, $V_\lambda(\phi)$ is the truth-value assigned to ϕ by the Σ-structure λ. Truth-in-L (the truth definition for L) is then definable by induction on the complexity of ϕ, and will contain such clauses as: (1') $\lambda \models \overline{\phi}$ iff not $\lambda \models \phi$; (2') $\lambda \models \phi \wedge \psi$ iff $\lambda \models \phi$ and $\lambda \models \psi$. The intended *interpretation* of the values T,F is left untouched (they may take on the standard true-false reading or equally, I could have them stand for my right eye and my left eye). All we have so far is a definition of what is to count as T,F in L. It is then straightforward to define $V_\lambda(\phi)$ in terms of the consequence relation $\models$, so that $V_\lambda(\phi) = 1$ if $\lambda \models \phi$, false otherwise. A sentence ϕ is then said to be provable from $\Delta_1 \ldots . \Delta_n$ ($\Delta_1 \ldots . \Delta_n \models \phi$ ($n \geq 0$)) when, for every Σ-structure λ, if $\lambda \models \Delta_1$ and . . . . and $\models \Delta_n$, then $\lambda \models \phi$. Where $n=0$, ϕ is provable from the empty set of premises and we get the tautology $\models\phi$. This corresponds roughly to what Alchourron and Martino call the *semantic notion of consequence.*

Corresponding to the semantic notion, we require a formal proof calculus, Θ, which is a device for proving sequents in some language L. We write $\ulcorner \phi_1 \ldots . \phi_m \vdash_\Theta \psi \urcorner$ exactly when there is a formal proof in Θ of ψ from all and only the premises $\phi_1 \ldots . \phi_m$. Similarly, ψ is a derivable

formula of Θ when there is a formal proof of $\ulcorner \vdash_{\Theta} \psi \urcorner$ in Θ. This characterises what Alchourron and Martino call the *syntactic notion of consequence.*

The natural relations between a valuation system and a logic then are (following Dummett): (a) *F* is faithful to *L* if $\Gamma \models \phi$ in *F* whenever $\Gamma \vdash \phi$ in *L*. (b) *F* is strictly characteristic for *L* if $\Gamma \models \phi$ in *F* whenn $\Gamma \vdash \phi$ in *L*.

Alchourron and Martino justifiably complain that classical semantics in the Frege-Russell mold defines $V_\lambda(\phi)$ directly, and then specifies the meanings of the operators in terms of the notion of *truth-value*:

(i) $V_\lambda(\overline{\phi}) = 1 \neg V_\lambda(\phi)$

(ii) $V_\lambda(\phi \wedge \psi) = 1 \{V_\lambda(\phi)\} \cap \{V_\lambda(\psi)\}$

(iii) $V_\lambda(\phi \vee \psi) = \max \{V_\lambda(\phi), V_\lambda(\psi)\}$

(iv) $V_\lambda(\phi \Rightarrow \psi) = 1 \neg \{V_\lambda(\phi), V_\lambda(\overline{\psi})\}$

In Frege's and Russell's hands, a logic tended to receive characterisation not by its consequence relation, but in terms of the set *V(F)* of provable formulas. Hence the search for *strongly characteristic* valuation systems: (c) *F* is *strongly characteristic* for *L* if $\Gamma \models \phi$ in *F* iff $\Gamma \Vdash \phi$ in *L* ($\Gamma \Vdash \phi$ in *L* iff for every substitution * such that $\Gamma^* \subseteq V(L)$, $\vdash \phi$ in *L*, where $V(L) = \{\phi: \vdash \phi \text{ in } L\}$).

However, as Dummett has pointed out (*Frege: Philosophy of Language*, pp. 435-436), it is not strong characterisation we are after (= *F* characterises the set of provable formulas of *L*) but *strict* characterisation (= specification of the consequence relation for *L*). This seems also to be the point on Alchourron and Martino's minds when they talk about operators defined, not on the basis of truth-value functions of (descriptive) complexes, but in use. But this is not of itself enough to defeat Jorgensen's Dilemma, since the use-defined operator ⊢ still requires semantic notions contained in the valuation system. What the valuation system does is to provide a subframe for a full semantic account of each operative context *L*; so far, $\Sigma_V(\phi)$ is uninterpreted, so we still stand in need of a metalinguistic decision over how values are to be assigned to atomic sentences in *L*:

> [. . . .] to complete the semantic account of the language, we have to specify the conditions under which an atomic sentence has any one of the various specific truth-values. (Dummett, *Frege: Philosophy of Language*, p. 431)

In fact the interpretation offered need make no appeal to *truth* at all: given an abstract algebra of the appropriate kind (i.e. *F*-like) we may talk in terms of assertability-conditions (of the atomic sentences) and relativise these to more-or-less any notions we please – possible worlds, times, various states of knowledge, or trees in the park. The essential point is that without *some* such characterisation of assertability criteria, the semantic account of *L* remains incomplete. For Alchourron and Martino to have built an *abstract* notion of consequence, then, the axiomatisation must stand in need of no appeal whatever to such characterisations. Anything less simply courts Jorgensen's Dilemma in its usual form.

As noted earlier, Alchourron and Martino claim that the abstract notion of consequence comes through a generalisation of the semantic account found in Tarski. This notion turns out to be, for any particular language, '[. . . .] a function from sets of sentences to sets of sentences' ('Logic Without Truth', p. 57). The properties of such relations are set out as: AM(1) $A \subseteq Cn(A)$ [every set is included in the set of its own consequences]; AM(2) $Cn(A) = Cn(Cn(A))$ [consequences of the consequences are consequences]; AM(3) If $A \subseteq B$ then $Cn(A) \subseteq Cn(B)$ [when the premises are increased, the consequences obtained with the smaller set must be maintained] (pp. 57-58), from which, given the inference relation $\vdash$ can be got:

$\vdash: 2^S \Rightarrow S$	Relation from sets of sentences to the sentences	
AM(a) If $x \in A$ then $A \vdash x$	Reflexivity	
AM(b) If $A \vdash y$ and $A\{y\} \vdash x$ then $A \vdash x$	Cut	
AM(c) If $A \vdash y$ then $A\{x\} \vdash y$	Monotonicity	('Logic Without Truth', p. 59)

Building out from the syntactic- and semantic notions of consequence, we can say, for the abstract notion, 'an operator *Cn* is simply an operator which, when applied to *A*, identifies a set. Identifying a set means knowing when an object does or does not belong to that set. What the syntactical definition does is to identify when a sentence belongs to a set of consequences. This, therefore, is the syntactical specification of the abstract notion' (id.). In other words, the syntactic notion of consequence is a consequence notion at all 'because it satisfies the postulates of the abstract notion of consequence' (id.).

What allows us to build logics out of rules of use turns out to be *context*: context is *prior* to the meanings of the connectives, and it is only within a context of consequence (at some level) that connectives have meaning, because it is only within such contexts that it is meaningful to ask for their rules of use (p. 60). From this it follows that, apparently, once we have introduced logical symbols into the prosequent and postsequent, and we know how to operate with them in

a deductive context, we have at our fingertips all we need to know about them in terms of "meaning". So a deontic operator, say, can be specified for a given sequential calculus by introduction- and elimination-rules alone, without bothering about the truth-values of the sentences involved (id.).

The basic tenor of Alchourron and Martino's thesis is now out in the open and, as I shall try to show, it stands just at the point where the two logical traditions touched upon earlier cross; this is also where the thesis walks into trouble. That thesis starts from the plausible notion that logical connectives do not attain meaning prior to their inclusion in deductive contexts (= recursive specifications of their operation, as in (1)-(3) above). That much is incontestable; the trouble comes with the step Alchourron and Martino take next, and this appears to be a direct result of their remarkable view of axiom systems, which belongs to the very tradition Gentzen (amongst others) was anxious to refute by positing the inference-specification method in the first place.

Alchourron and Martino begin by noting that, traditionally, the logical connectives are defined in terms of the truth-values of the compounds in which they figure, so that, for example, conjunction is defined as $\ulcorner p \wedge q \urcorner$ with p,q both true. They cite Wittgenstein's later disapproval of this ("semantic") view of logic: 'This is the idea based on which we say that logic is not arbitrary as it depends on semantic correlates of the language we use in referring to the world [. . .]' ('Logic Without Truth', p. 49; quotation is from *Philosophical Investigations*, § 4.31). Russell's famous description of the same project was that 'The discussion of indefinables [. . .] is the endeavour to see clearly, and to make others see clearly, the entities concerned, in order that the mind may have that acquaintance with them that it has with redness or the taste of a pineapple' (Russell, *Principles of Mathematics*, p. xx). This means that the logical notion of consequence is something that, when flanked by descriptive propositions, says something about facts in the world. Alchourron and Martino locate the problem in the idea of truth-value; isolate this and the problem dissipates – once truth-value is removed from our picture of logic, we are free to concentrate on the axioms, and to use logic to connect or associate any propositions we please; descriptions lose their privileged status in the semantic hierarchy and deontic logic is saved. Or so it seems.

In fact the situation is not so straightforward. As mentioned earlier, the aim in constructing an abstract (i.e. non-semantic) notion of consequence is not especially the avoidance of *truth* conditions, but that of *any* semantic notions underpinning an account of the valuation system. Returning to the proposed formulation of the abstract notion (AM-(1)-(3); AM-(a)-(c)), it is obvious that AM-(a)-(c) are the same as the earlier characterisation (a)-(c) which *was* underwritten by a valuation system. But this is no less that we would expect: Alchourron and Martino regard their abstract notion as delivering up any number of syntactic specifications, and

if we are to hold any store by it at all, an isomorphism to some standard sentential logic, such as propositional logic, would have to be among them. The difficulty comes in the alleged appeal to AM-(1)-(3) as the foundation and starting-point for the syntactic specifications. To be sure, AM-(1)-(3) *are* generalisations of AM-(a)-(c), as can be easily seen. For example, $A \subseteq Cn(A)$ means that one is permitted to hold x as a consequence of A when there is an x in A, i.e. if $x \in A$ then $A \vdash x$, which is to say AM-(a). But AM-(1)-(3) still only correspond to the earlier characterisation (a)-(c). However, as noted, (a)-(c) alone are not enough for the characterisation of a logic: in addition we need an account of how it is that the formulas of the logic are to be assessed. We need, in other words, a valuation system (or *something*) to tell us how to manipulate prosequents and postsequents in the context of proof; appeal to mere inference is not enough. Now, clearly, there is nothing resembling a valuation system in Alchourron and Martino's formulation of the abstract notion of consequence; but on the other hand, there is nothing else to put in its place either. What we *do* have, in AM-(a)-(c), are prosequents and postsequents, which is what we would expect: Alchourron and Martino are perfectly clear that, when we know how to operate with the logical connectives in a deductive context, we have all we need in terms of knowledge of them. Such knowledge requires, of course, the presence of (possibly empty) sequents: otherwise we are in the absurd position of attempting to define connectives (in use) without a concept of connection. What Alchourron and Martino appear to have overlooked, however, is that the presence of sequents requires *semantic* explanation.

A syntactic specification is merely a meaningless array of symbols on the page. In order to be able to use a formal proof system, we need, in addition to the recursive stipulation of the consequence notion, to understand when we can and when we cannot assert (an element of) a sequent, that is, when we can write it down on the left or right of $\vdash$. In terms of semantic (or other) information, Alchourron and Martino leave us totally in the dark regarding how their sequents are to be manipulated. Syntax tells us only that *when* $\Sigma_V(\phi) \in N$, $\Gamma \vdash \phi$ ($\Gamma \geq \varnothing$) may be written down. To understand *how* assignments are made – how to put ϕ into N or X – an appeal to something *beyond* the characterisation of the consequence notion is necessary. Likewise, whatever entitles me to include A in $Cn(A)$ (or exclude it, for that matter) whilst keeping the specification axiomatically coherent, is going to be a recursive function so like a truth-function that the two will be too indistinguishable to make a difference.

Ultimately, it is hard to see what, other than confusion over the notion of truth, would make Alchourron and Martino want to give up a perfectly serviceable concept in favour of abstraction. It seems that, having equated functions of the type $\Sigma_V(\phi)$ with *truth*-functions (and having thereby, like Russell, pulled logic in the direction of its own standard first-order interpretation)

Alchourron and Martino assume that they are free to jettison semantic notions to leave behind a formal residue. In fact what they give us is information too slight to construct a logic; as if, having seen the truth in the assertion that meaning is not prior to axiomatic formalisation they were compelled to draw the opposite fallacy: that meanings can be introduced posterior to any information the axioms may contain.

Having foreclosed the possibility of an abstract notion of consequence, and having modified the conceptions of truth-value and of formal semantics prevalent in legal theoretic circles, I shall now focus in on the specific problems in deontic logic that prompted Alchourron and Martino's article.

2. Deontic logic

The foundations of what is now known as deontic logic emerged in some writings of Leibniz, who perceived analogies between possible classes of "normative operators" and those of existing alethic modalities. Von Wright's 1951 *Mind* article ('Deontic Logic') launched the first in a distinguished line of attempts to dispose of the problems of normative inference from within the confines of a modal semantics; ultimately, though, the attempts never moved beyond the realm of analogy, and the analogies themselves were never more than superficial, causing the system to collapse in paradox whenever the modal semantic subframe became incapable of supporting the demands deontic notions made upon it. Much later, Von Wright confessed that:

> At the time of publishing my 1951 paper I realised that something new had been started which was going to be taken up by others. But I did not anticipate [. . .] that the subject would turn out to be controversial. As a matter of fact, however, almost every formula which at the time seemed to me clear and uncontroversial has subsequently been subjected to doubts. Also, the very idea of building a deontic logic in analogy with modal logic remains open to debate. (Von Wright 1981???, p. 403)

Much of the blame for the persistence of the debate falls on the metalogical character of the postulates of non-intertranslatability. Weinberger, himself an advocate of the view that attempts to locate a normative logic within descriptive language semantics are hopeless endeavours ('The Logic of Norms Founded on Descriptive Language', p. 287), has said that:

> The distinction of two categories of sentences – norm sentences and descriptive sentences – is essentially linked with the metalogical postulates of non-deducibility, because only if non-deducibility is warranted can the categorical distinction be maintained. (p. 285)

In other words, the semantic separation thesis is correct if and only if Hume's Law is taken to be absolute – and this is something many people regard as a matter of faith; some are prepared even to doubt it. The fact that the tenets of Hume's Law – and, for that matter, of Jorgensen's dilemma – stand outside logic as such will not ordinarily worry those already persuaded of the rectitude of the semantic separation thesis; but, in fact, it should, since those tenets unsupported do not provide independent grounds for believing in non-intertranslatablity. The metalogicality of the postulates does evidently raise doubts in the minds of those insistent on the possibility of some or other logic of norms: they have nothing to lose, and everything to gain, from scepticism over the very basis of Hume's erection of his guillotine.

The problem lies in the fact that the class of possible systems of logic founded on descriptive language structures has an (in principle) unknowable extension: we can always modify existing systems to form new ones. So someone sceptical of non-intertranslatability has every right to complain that a separation postulate couched in such categorical terms seems like the product of just the sort of aprioristic intuition we wished to deny can underwrite a logic of norms in the first place, independently of mathematical evidence. And we can hardly rest our logical point on notions (like "self-evidence" or "transcendent rationality") that supposedly outrun our powers of verification – not, at any rate, without ruining the interest of the entire issue, except as a technical puzzle. For if we entertain this sort of aprioristic knowledge claim at all, we have already granted to sceptics of realist leanings all the machinery they need to insist on the validity of normative inference, notwithstanding our mathematical inability to see why. In return for such an account, we are handed a rather empty notion of legal rationality, one based on no evidence and no explanation at all – we have, in fact, ended up appealing to the very notion whose characterisation it was our original goal to supply.

All of this amounts to saying that no exhaustive inductive proof is up to the task of establishing the semantic separation thesis – a fact that neither proponents nor opponents of deontic logic can afford to take for granted. What is needed instead, from this point of view, is a computational argument proving the case for non-intertranslatability one way or the other. The character of such a proof may be reckoned to be fairly straightforward: since the semantics for standard sentential logics conform to various matrix-algebras (Boolean if the logic is classical logic, though systems such as quantum logic can rely on quasi-Boolean (orthomodular) structures), simply show that no purported "logic" containing the minimum requirements for deontic operators is capable of being mapped onto any matrix in a regular way, and you have the result you are looking for. In fact, though this is probably the most general and direct way, there are good grounds for believing that weaker, more localised proofs are closer to what we are after.

For such a general proof to work, of course, we need to know in advance just what is to count as a deontic logic, i.e. what the minimum requirements for such a characterisation *are*. But if the proof is supposed to establish that deontic notions cannot be translated into, nor are governed by, descriptive language structures, it would seem that anything beyond a syntactic quasi-specification ("any logic involving the string *Op*")[2] though perhaps not impossible, is going to be problematic when a very *general* foreclosure is what we are after. A better strategy, then, would appear to lie in the more restricted aim of showing that particular classes of purported deontic systems cannot establish coherent use-rules for their operators.

One such class would be those deontic systems alleged to rest on modal-type semantics. An analysis of the insufficiencies of the modal analogues mentioned earlier points up certain features of normative operators that seem unaccountable for in regular matrix algebra. It is common knowledge that, though $\ulcorner Np \Longrightarrow p \urcorner$ and $\ulcorner p \Longrightarrow Mp \urcorner$ are valid formulas of modal logic, their deontic equivalents $\ulcorner Op \Longrightarrow p \urcorner$ and $\ulcorner p \Longrightarrow Pp \urcorner$ must somehow be kept out of deontic logic. In fact, the modal- and deontic operators play very different semantic roles across a variety of contexts. The characteristic structure of a modal sentence is that of an operator attached to a description. For the deontic analogues to be even halfway successful (this is already presuming that some sort of truth-valued account of the atomic deontic sentences is allowed), all deontic sentences must be capable of a clean phrastic-neustic split of their contents; but this is far from being universally the case. In a great many cases – particularly where the context is legal – the symbols for the deontic operators cannot always be comfortably expressed as modal reports on the status of an attached truth-condition, and this is especially the case where the mode is imperatival, or where the condition to be expressed is that of *having* an obligation, etc. This has not so much to do with the distinctions made between "absolute", "conditional" and "subjunctive-conditional" oughts, as much as the vastly complex nature of the use of speech-acts effected in natural language sentences incorporating normative clauses. It is, more than anything, the fact that those natural language use-rules are so complex (and, partly, this complexity is the result of our dealing with, not simply descriptive utterances, but *speech-acts*) that deontic logic fails of fathomable formalisation.

In other words, we have a fundamental problem in supplying a consistent and coherent account of the introduction- and elimination-rules for the deontic operators where the analogy is modal (though Weinberger has shown this to be the case for a wide variety of analogies). Belnap's analysis of Prior's *tonk* connective[3] showed that introduction- and elimination-rules for operators must always match up; but because different occurrences of the same operator do not always

mean precisely the same thing in norm-enriched modal contexts, the task of supplying a coherent account of those rules for deontic logic is made all the harder.

The infamous paradoxes of deontic logic are a symptom of these difficulties regarding use-rules, since they mostly breed on the multiple senses made of the use of "ought" – or, rather, because that multiplicity is smoothed over in the course of formalisation. In fact, paradoxes like Ross's, or the window paradox, are more Moorean paradoxes that real ones, in the sense that they are merely unwanted results that have to be got rid of; but they do highlight one of the supreme difficulties in constructing deontic systems: in order to eliminate them, we have little choice but to make the use-rules of the operators more sophisticated, so that they reflect more accurately their use in natural language. The result is usually either a more complex axiomatisation and an eventual paradox (or unwanted result) elsewhere in the system, or a system too restricted to be of any practical use in the analysis of normative- or legal reasoning.

The lack of clarity over -I and -E rules affects not only the set of sentences we want to admit into the system, but also raises the question of the intelligibility of deontic sentences at all. This is the infamous problem of "internal complexities" of deontic sentences, which are thought to render such formulations as $\ulcorner P(p \Longrightarrow q)\urcorner$ incapable of inclusion in algorithmically defined relations centred on set-theoretic operations, since under no interpretation can they be made to answer to binary-, or even *n*-ary, valuation in a recursively defined way. In order to complete the appropriate characterisation of normative operations (including inference) it is necessary, as was seen, to underwrite the valuation system with semantic concepts sufficient to instruct us when and when not to place deontic sentences into the sets *X,N*. The major problem is not coming up with a set of such concepts that do not include *truth*: if that had been the only concern we could have furnished the valuation system with appropriately relativised assertion-criteria for the atomic sentences (or, alternatively, we could have embraced nomological cognitivism and affected not to have understood the point of Jorgensen's Dilemma in the first place). Rather, it has to do with our apparent inability to supply deontic sequents of the form ξx, $(\xi x * \zeta y)$, with intelligible detachment rules. But since such an account relies on their being an exact specification of introduction and elimination rules, we appear to be in trouble; for an exact specification of those rules is exactly what we do not have and, hence, we have no sure way of assigning valuations to our sequents. In other words, the lack of clarity over the use-rules for deontic notions, more than the apparent unavailability of a clearly formulated semantics for the valuation system, makes it impossible, in most cases, to tell what we are supposed to be assigning valuations *to*.

Von Wright's attitude to these difficulties is revealing, since he takes the view that we ought to be charitable in our readings of deontic formulas, so as to make the best sense we can of counter-intuitive results (Von Wright, p. 416). But if our formal specifications of normative

argumentation cannot keep up with the inferences we draw in practice, in what sense do we have an idea of what is "good sense" and what is not?

That the specification of deontic notions tends towards the unfathomable in this way will not disturb those of realist tendencies who anyway suppose that our normative concepts outrun our capacity to understand them in practice; on that account, our inability to supply a decent semantics for deontic logic says nothing about the state of normative inference but merely points to the limitations of our formal characterisation of it. This is not the place to go into the realist-anti-realist debate in detail, but in terms of the original goal (the analysis of legal argumentation) the realist way is surely the wrong way to look at logic. The reason for characterising a deontic logic is not so that we have a computational method that tells us how to reason, or to supply a completely deterministic account of ethics (indeed, given modern legal positivism's rejection, by and large, of the one-right-answer thesis, any deontic logic that captures faithfully the positivists' intentions would have to be intuitionistic in spirit *anyway*). Rather it is to give us a method of proper analysis of normative argumentation. From a constructive point of view, modification of our deontic concepts in the face of the paradoxes amounts to just that: laying down alternative rules for their avoidance, because their avoidance is something we want more than the original specification of the operators. The problem is that there seems to be no end of paradoxes awaiting every subsequent modification. We are, of course, perfectly free to say that our ability to analyse and assess normative arguments *just is* the current state of the art in deontic logic; if this involves imperfections, so much the worse for legal rationality. This is, in fact, quite accurate, in the sense that we are hardly able to decide on validity in any stronger way than our best efforts at explanation can give to us. Any appeal to something stronger, apart from being mere metaphysical speculation, is of no explanative value at all, and it is explanation, more than anything, that we are after. Russell once commented that the postulation of whatever we want instead of logical construction carries the same advantages as theft over honest toil; in both cases too, the disadvantage is the same: lack of explanation of how we came by our spoil.

Modal semantics is not the only way to ground deontic logic, of course, but it is by far the most widespread method used. Perhaps the reason for this is that the modal analogies, in deontic clothing, provide the best way of preserving the aura of metaphysical necessity with which we like to surround our normative judgements. Weinberger discusses other variants on deontic semantics as part of his explanation of why deontic logics cannot be made to ride on the back of descriptive language structures, and his general conclusions are supported in what has been said here. It would seem that – even leaving consistency problems aside – our natural language uses of normative notions are so complex, and (when speech-acts with a performative- or illocutionary element are involved) so semantically different from our best guesses at formalisation, there is

little hope for our coming up with a fathomable axiomatisation for deontic logic. Whether we choose to say that this means the deontic notions are, semantically speaking, radically complex or just simply unstructured, is ultimately a matter of taste.

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[1] 'The Meaning of the Logical Constants in Deontic Logic', *Ratio Juris* (forthcoming).

[2] See 'The Meaning of the Logical Constants in Deontic Logic', passim.

[3] Cf. Prior, 'The runabout inference-ticket', *Analysis* 21 (1960) pp. 38-39; Belnap, 'Tonk, Plonk and Plink', *Analysis* 22 (1962) pp. 130-4.

NOTES TO CH.1

1. 'International law and the Controversy Concerning the Word "Law" ', 22 *BYIL* (1945).

2. For more detail see Kratochwil, *Rules Norms and Decisions*, pp. 2-6, 45-68, 131-160.

3. On Hart's Rule of recognition, see Chapter 5, § 1.

4. Whether or not those criteria are within our epistemic reach is the main subject of this and the next chapter.

5. For the record I shall be offering a positive answer to the first of these questions, and to the second a much more complicated and qualified affirmative. To the third there is no easy answer. A very difficult answer will begin to take shape towards the end of the present chapter and, much more fully, in chapters 2 and 5.

6. Strictly speaking, positions I and II, as outlined, are not specifically directed towards *positivism* as such, as much as towards international law in general. However, in the broad sense in which I am using it (viz. any theory that sees law as a system of rules/principles/concepts of any sort, regardless of theoretical origin or ultimate justification) – which does not stretch the term too much – positivism captures most of the features of (theory about) international law that the sceptics are critical of, and as long as this is kept in mind, the discussion may proceed in these terms without too much distortion.

7. I shall henceforward speak generically of 'Position I sceptic'. I do not, however, intend by this proper name to denote any particular proponent of position I arguments.

6. It is worth noting that Kratochwil's argument is not directed specifically at International legal norms, but to norms of all systems of law. (See, e.g. *Rules, Norms and Decisions*, p.18: ' "The law", I argue, can be understood neither as a static system of norms nor as a set of rules which all share some common characteristic such as sanctions . . .'.) This fact shall become important later on: see §3, this chapter, and chapter 5.

9. In rejecting deconstruction, there is nothing worth adding – that is, which would make deonstruction's untenability more obvious or inescapable – to that offered in Scobbie's essay 'Radical Scepticism' ('Towards the elimination of international law: some radical scepticism about sceptical radicalism', *BYIL* 1990, p. 339). That essay gives decisive grounds for the rejection of deconstructionist theories, and, though other reasons could be advanced for rejecting deconstruction – principally, on semantic grounds – the already decisive nature of Scobbie's account renders this pointless; and so, to avoid duplication, I refer the reader to that article.

10. This issue ought to be separated from that concerning, for example, anthropological claims regarding the apparent necessity of certain institutions within various cultures: Even were a link to be established between certain facts about human groupings and law, this could not, in the relevant sense, produce an empirical ground for the recognition of law, since the concepts of law and of institution are, together with the notion of linkage, conceptual matters. Thus, one may attempt to identify law by its dynamic content (*vis a vis* religious texts or scriptures), or by the fact of its absolute position in society (*vis a vis* most ethical theories, at least in western societies). But this does not, in advance of proof that law *has* to be this way, and that no non-legal concepts or systems could ever achieve a similar status, make for an identifying criterion which could *guarantee* that legal concepts are all and only those concepts which satisfied it, and that no other concept could satisfy it and thereby appear to be of similar semantic character to legal concepts without actually being so. In other words, in order to grant that legal concepts form a separate class, it must be shown that they possess some semantic property (or mode of behaviour) which non-legal concepts do not possess.

11. See chapter 3 and, especially, chapter 4 for details.

12. The reason for this has been explored, though worth re-stating: where no distinctive subject-matter can

be delimited (i.e. one which is particular to law, in involving only legal concepts in an appropriate sense), there would be nothing to distinguish reasoning which addressed *it*, from reasoning in some other normative discipline, say, ethics, politics, or diplomacy. In that case, the notion of legal reasoning, and of law generally, would be reduced to that of a (presumably, fairly arbitrary) subset of normative concepts in a wider sense (e.g. ethical or political), with nothing significant, apart, perhaps, from a purely nominalist perspective, from the point of view of meaning, about the title "legal".

13. Though Koskenniemi's method would seem, on the face of it, to commit him to a similar thesis as Carty's "disappearance of the referent" – and there is a good deal of evidence in *From Apology to Utopia* to suggest that he *is* – his concomitant scepticism about *legal* norms as the referents of legal expressions is not matched by scepticism about norms generally. In fact, one of his earliest statements is to the effect that 'the analytical task of exposing valid norms [must not be] separated from reflexion about the sociological or normative environment of those norms [. . . .]' (*From Apology to Utopia*, p. xiv). How is it that moral-political norms escape the deconstructionist net? Scobbie regards the apparent double-standard as arising from a failure of nerve on Koskenniemi's part to accept deconstructionist dogma in the light of his critical reading of international law in the later parts of his book ('Radical Scepticism', p. 347). Whatever the truth of the matter, it is certainly the case that whatever theoretical device Koskenniemi may have used to differentiate legal- from other norm-types in this context, it is of too recondite a character for it to be identified from his text.

14. What matters for legal practice is our ability to communicate what we know or believe about the legal order we are working in and the concepts that are associated with it. Any other experience we may have of law that is incapable of linguistic expression cannot, as a result, enter into that practice since it is not manifested in any statements I could make, nor in anyone else's. As a consequence, any "knowledge" of that sort could not be attributed to me by anyone else, and I could not attribute similar knowledge to anyone else, and so it would drop out of legal practice as a useful device. (This is one aspect of Wittgenstein's private language argument, more of which shall surface later.)

15. In fact, the second of these distinctions is not strictly required by the critical thesis: what is important to that thesis is the first, namely that an intellectual wedge be driven between law and politics. Whether or not the law is morally objective (or its content wholly determined by appeal to ethics) is neither here nor there since the existence of a natural morality, and corresponding legal order, is something on which a critical theorist could in principle be strictly neutral. But it is worth remembering that, even with the second distinction intact, this position does not amount to deconstruction: that position is only adopted when Koskenniemi argued that the intellectual operations involved in all cases simply *are* the distinctions that had been argued to hold between the subject-matters (e.g. *From Apology to Utopia*, p. 1, 8).

16. In fact at p. 4 he explicitly committed himself to a classification procedure: this was done in the course of a discussion of the traditional Sorites concepts, although Hart did not clearly state that he saw *law* as a Sorites concept.

17. Realist, that is, in the lawyer's sense of this word, as in American Legal Realism, or Critical Legal Realism. This sense of realism ought not, for reasons which will become apparent, to be confused with the sense of that word as it is used in philosophy; this latter sense is the one which will, ultimately, come to be of most interest. See chapters 4 and 5 for more details.

18. i.e. reasoning which informs the questions, 'How many grains of sand constitute a heap?', 'How many hairs must a man have on his head before we stop calling him bald?', and so on: This sort of reasoning, in other words, addresses predicates that Dummett has called "indefinitely extensible" (see his 'Wang's Paradox' repr. in *Truth and Other Enigmas*, pp. 248-268).

19. Rejection of ITL as a viable option for international law – both in terms of its conceived conceptual structure and its model of legal reasoning – as a matter of fact figures more-or-less explicitly (and always highly implicitly) in all the sceptic cases in point (Koskenniemi, *From Apology to Utopia*, pp. 20-28; Kratochwil, *Rules, Norms and Decisions*, Ch.2; Carty, 'Recent Trends in the Theory of International law',

pp. 67-68), and something like ITL is clearly what the sceptics have in mind when attacking what they take to be the standard view of international law. For more on this point, see Chapter 5 of this thesis.

20. In fact, Scobbie applauds Kratochwil's *introduction* of (a certain variant of) institutional theory as a useful means of analysing international legal argumentation ('Radical Scepticism', p. 362).

21. This in fact suggests that Raz was working with rather stricter criteria than Hart had originally intended. In particular, his notion of "institution" was, though imprecisely defined, somewhat narrower than one may have expected: 'International law is a borderline case of a different sort. It meets the conditions laid down in this section [5.1] but there are doubts whether it can be regarded as an institutionalised system' (Raz, *Practical Reason and Norms*, p. 150 (ftn.)). This would seem to suggest that ordinary system-rules ("primary rules") are not counted among the institutions.

22. The usual sense given to this notion, in positivist circles, is that of characterising valid norms of the system; i.e. norms identified by system-membership tests are all and only those norms *valid* under that system. In the sense in which it is being used here, the notion is the wider one, which, as I intend to show, is the one positivists were actually operating with or, rather, the one which their accounts of legal systems requires, namely, that it is in virtue of the ability of some concepts to satisfy certain criteria that those concepts are legal ones; and it is in virtue of their failure to fulfil such criteria that other concepts are non-legal. In other words, system-membership, in this sense, does not (have to) take a stand on validity (the question whether a norm is actually a norm of some system), but on whether a concept may legitimately pass into the system *as a legal concept*, when its validity is recognised. Thus, the criteria are not, in this context, there to recognise individual laws as such, but to identify the system by establishing what sort of concept could belong to it.

23. The inserted word merely clarifies Raz's intentions here: his own terminology does not regularly distinguish between the individual criteria for membership and the set of all such criteria formed by their conjunction.

24. This semantic tendency also manifested itself in such statements as: 'The theory of ascription is concerned with the *conditions* in which blame or guilt can be ascribed to people. I prefer the term "theory of ascription" to the more familiar "theory of responsibility" since "responsibility" may be a slightly misleading term here' (*Practical Reason and Norms*, p. 12, emph. added) – presumably because "ascription" suggests the sort of conceptual grounds that Raz wished to emphasise between "normative consequences" within normative theory (id.).

25. The passage is significant: the emphasis on concepts is important, as is Raz's final remark about 'reasons', as will be seen later in this chapter.

26. This last avenue was inspired by a similar argument, in a different context, to the same effect, by Hale in *Abstract Objects*, Ch.2 (in the context of recognition of singular terms).

27. Cf. Coffa, *The Semantic Tradition from Kant to Carnap*, p. 138, where a similar argumentative strategy is employed against a theory of Russell's.

28. Now meant in the philosophical sense: see references in note 15.

29. Realism would of course strongly betoken commitment to the "one right answer" thesis, no matter what the logic of the system looked like: see infra chapters 2 and 4 for more detail.

30. Recall the statement of these criteria on p. 18, and the discussion pp. 19-22.

31. Notice that this is a thesis about *sense* and not reference. See Chapter 4 for more detail about the significance of this.

32. See Dummett, *The Seas of Language*, passim, for more information on the molecular nature of the

relations between sentences that he envisages: I do not dare attempt here to survey a thesis that Dummett has built up over many years.

33. For an account of the distinction and its fundamental import, see Frege's classic essay, 'Über Sinn und Bedeutung' [1892], repr. As 'On Sense and Reference', *Translations from the Philosophical Writings of Gottlob Frege*, pp. 56-78; Dummett, *Frege: Philosophy of Language*, pp. 81-203; Carl, *Frege's Theory of Sense and Reference: Its Origins and Scope*, passim.

34. See, e.g., Crispin Wright, 'Theories of meaning and speakers' knowledge', in *Realism, Meaning and Truth*, p. 204. Also Gareth Evans, 'Semantic theory and tacit knowledge', in *Collected Papers*, p. 322.

35. For an excellent account of the development of Cantorian set-theory see Hallett, *Cantorian Set Theory and Limitation of Size.*

36. In the same way, one can know that something is a game, without being able to characterise it in terms entirely of formal semantics.

36. Scobbie's argument deserves a further brief consideration in this regard. One of the main planks of that argument was that, as against Kratochwil, the concept of (international) law could not (on pain of disintegration) be reduced to a mere style of argumentation. The only counter to this threat therefore involved recognition of a legal subject-matter which the reasoning was supposed to address. Now in the light of the above considerations, it is just possible to read Scobbie's argument as the claim that, for the concept of international law to work (i.e. for it to be held separate from politics and diplomacy), there needs to be a *settled* subject-matter, of any character, consisting of a well-established and widely-recognised reservoir of concepts by which to decide disputes, measure and regulate conduct, and so on. In other words the requirement is not for there to be a "legal" subject-matter but merely a *recognised* one, one that is relatively fixed enough for relevant actors to make rational choices on the basis of it and to know where they stand in relation to it. In that sense, the concept of law would have moved beyond argumentative style, as it arguably must, without falling into the trap of assuming the need for "objective" (i.e. conceptual) identification. Although this squares reasonably well with Scobbie's remarks against legal platonism ('Radical Scepticism', pp. 347-348) it hardly accounts for his insistence that Kratochwil undermined his thesis by rejection of Hart's argument for system-membership as the delimitation criterion (p. 357) and the bald statement quoted earlier to the effect that legal norms must differ from others 'by some intrinsic characteristic' and not 'only [. . . .] through the process of their application'.

NOTES TO CH. 2

1. The issue of identifying criteria is relevant to foundational matters insofar as the question whether or not legal concepts form a separate general kind is in issue (in the sense as, for example, imperatives form a separate kind from purely descriptive concepts). This question is of importance to inquiries about international legal reasoning, since it has bearing on the parallel issue of how international legal concepts ought to be handled, especially *vis a vis* those of municipal law. The importance of this, in turn, may be reflected in various matters of theory, such as whether the structures of international law behave in a similar way to those of municipal law, and, accordingly, whether the reasoning procedures and their semantic bases in those spheres should necessarily be expected to be similar. This question of similarity (or dissimilarity) shall continue to be of interest in coming chapters, since the internal conceptual organisation of international law is clearly a foundational matter, in that any account of the foundations of international legal reasoning must be capable of issuing in the construction of conceptual structures of just that sort. (Cf., in particular, chapter 5.) But before an answer to that question can emerge, it is necessary to become clear about the ways in which legal structures, whatever their particular conceptual organisation, should be theorised about and handled.

2. In particular, the issue of realism regarding those conceptual structures becomes important: that is, whether or to what extent there are elements of international law which function mind-independently, or whether or not there can be said to exist (particularly, relational and inferential) properties of legal concepts or entities, about at least some features of which we possess no knowledge. I shall explore this issue fully in chapter 4.

3. The appeal to knowledge here is Weinberger's — see his 'The Logic of Norms Founded on Descriptive Language', 1991 *Ratio Juris*, p. 285). The distinction does not depend on epistemological factors, only logical ones; I shall not argue this point here, however, since it is one of the issues that shall emerge in chapter 3.

4. To be fair, both MacCormick and Weinberger seem to have a good idea of the level of agreement between them and where it lies, and they play to its strengths in their joint introduction. However, precisely because they are not unanimous over the character of institutional facts – one of the basic ontological units of the ITL universe — certain passages of that introduction suffer from unusual tensions both of formulation and of doctrine. (I am thinking particularly of the rather strained account of platonism on pp.11-12.) Any careful reading of their book would therefore do well to avoid excessive appeal to statements made therein, though the ones I cite in the text are, so far as I can see, safe in this respect.

5. On the exact meaning of this term and its import, cf. § 2.2., and, more generally, chapter 4.

6. This is, more or less, the way MacCormick puts it. This differs slightly from the standard formulation of "existence in time but not in space". Among the very good reasons for avoiding this latter version is that, in advance of a satisfactory account of the abstract/concrete distinction (which proves to be unexpectedly difficult) such an account threatens to put things like radio waves and holes in the ground in amongst the *abstract* objects, though we usually understand them as being in some sense concrete [for an extended discussion see Hale, *Abstract Objects*, and later]. At the same time, speaking in terms of *independence* of the concepts of spatial and temporal existence finds some support in (some explanations of) Heisenberg's Uncertainty Principle, considered as stating that for any measurements performed on some physical system, such as a photon, it is impossible simultaneously to gain precise values for a particle's position and its momentum (momentum being of course linked to temporal coordinates). In fact, the fundamental relation $\delta X \delta P_X \geq \frac{1}{2}\hbar$ (uncertainty in position multiplied by uncertainty in momentum must always exceed Planck's Constant) may be interpreted as directly arising out of the fact that we are incapable of saying exactly what subatomic particles are, or (in this case) how they exist. Though this account is far too brief to make the point, I think that a consideration of the problems with the concept of quantum-existence shows MacCormick's refusal to state outright exactly what he means by abstract existence to be far less of an evasion than it may at first be taken to be. [For more detail and a useful introduction to basic concepts in quantum mechanics see Gibbins, *Particles and Paradoxes*, pp. 7-83; Dalla Chiara, 'Quantum Logic', *Handbook of Philosophical Logic*, III pp. 427-428)]

7. The problem of what makes the system a *legal* one would then have to be resolved, presumably, on the basis of considerations similar to those I have advocated in § 3 of chapter 1.

8. The phrase 'action determinants', which Weinberger occasionally used (e.g. *ITL*, p. 16), suggests that his meaning lies in the relationship of norms to those elements of action which enable us to determine their legal (or ethical) status: In other words (though not Weinberger's — see the end of this section), norms as they occur in actions are what we would normally call the normative quality of actions. It might be objected that Weinberger had intended to suggest by that phrase that aspect (ii) of norms corresponds to the role such norms play in the way we conceive of such actions, i.e. that the norms are not constituents of action, but of our attitude towards action. It is true that some support can be given to this claim from other scattered remarks in Weinberger's writings on this subject; I do not, however, think that this represented his mature view — this for two main reasons.

First, this view makes it very hard to interpret the majority of Weinberger's remarks on this feature of norms. The most obvious of these is the persistent theme that "socially real" norms be strictly separated, ontologically (or at least theoretically) from their informational counterparts, which are merely "ideal entities" or "thought-objects". To insist that aspect (ii) concerns merely our (perhaps, collective) assessment of action is to miss the point that Weinberger was making: that to play any such role in our thought at all, the criteria of assessment (i.e. the norms) must be both existent in some mind-independent sense (they must, in other words, be "positive" norms subsisting at least intersubjectively) and representative of the legal or ethical quality of the action assessed. What is more, Weinberger was adamant that legal analysis aims at a 'logical reconstruction of [the law]' (see later this section). If this is true, that analysis must be a separate thing from that which is being analysed: how else may one talk of a logical *reconstruction*? This point has particular significance given Weinberger's views on the nature of logic, as we shall shortly discover.

Secondly, the suggestion that aspect (ii) of norms could be somehow a purely mind-dependent matter, in which norms are, ultimately, mental entities, is both unsustainable as a thesis and one which cuts across the avowed goal of ITL — that of explaining what talk of norms within legal practice is talk of, and of guaranteeing an ontology to match. To insist that norms are mental entities would be, in that sense, less an explanation of legal practice than a dogmatic insistance on the supposed fact of its legitimacy. As we shall see, the strategy Weinberger pursued was in fact marred by a tendency to talk in just such terms. But, strategy aside, the issue in question concerns the role Weinberger thought he was guaranteeing for norms — in other words, what it was he thought he was guaranteeing. The fact that, as I intend to show, the strategy missed the goal, is neither here nor there. (See also the revealing quotations in section II of the present chapter, particularly the text accompanying note 19.)

This general matter of the character of norms is pursued in the next three sections. For more on the notion of norms as constituents of action and "normative qualities", see the very end of this section.

9. For a clarification of this notion see Hale, *Abstract Objects*, pp. 149-193 and Dummett, *Frege: Philosophy of Language*, pp. 471-506

10. See chapter 4, §. I.

11. See note 7 and accompanying text.

12. In fact, the work of Husserl's that Weinberger cited is *not* a work of psychologism, nor, especially, of abstractionism (the deeply flawed empiricist theory of concept-formation): see Dummett, *Frege: Philosophy of Language*, pp. xlii-xliii; Coffa, *The Semantic Tradition from Kant to Carnap*, esp. pp. 102-103: Husserl temporarily renounced psychologism after Frege's damning review of his *Philosophie der Arithmetik* [1894], though he later apparently returned to it. Weinberger's views, however, *are* psychologistic, whether or not he really got them from Husserl, as I intend to show.

13. Coffa, *The Semantic Tradition from Kant to Carnap*, pp. 13-14; Coffa gives an excellent account of Kant's doctrines and their effects on 19th Century attempts to rigourise mathematical and geometric proof, and the calculus in particular, at pp. 16-112, and the very brief discussion above draws heavily on Coffa's book. Though other accounts are available — such as Carl's *Frege's Theory of Sense and Reference*, to name but one — Coffa's is by far the best and most trustworthy secondary source.

14. This translation is from Coffa, *The Semantic Tradition from Kant to Carnap*, p. 69; others may be found in *Translations from the Philosophical Writings of Gottlob Frege*, pp. 84-85 and in Dummett, *Frege: Philosophy of Mathematics*, p. 85. It is interesting to compare Berkeley's sarcasm towards Lockean abstractionism in *Defence of Free-Thinking in Mathematics*: 'Mr. Locke acknowledgeth it doth require pains and skill to form his general idea of a triangle. He further expressly saith that it must be neither oblique nor rectangular, neither equilateral or scalenum; but all and none of these at once. He also saith it is an idea wherein some parts of several different and inconsistent ideas are put together. All this looks very like a contradiction. But to put the matter past dispute, it must be noted that he affirms it to be somewhat imperfect that cannot exist; consequently the idea thereof is impossible or inconsistent.' (The relevant passage in Locke is *Essay* IV vii 9; both quoted in Jesseph, *Berkeley's Philosophy of Mathematics*, pp. 24-25; on Berkeley's attack on abstractionism generally, see pp. 9-43.)

15. That is, all properties possessed by *a* are possessed by *b*, and vice-versa. This, of course, includes the property of being *this* object (the one under consideration). This definition of identity has inevitably invited criticism from philosophers working in the field of general metaphysics as being at best co-extensive with "metaphysical" identity and not an embodiment of it. Whatever the pros and cons of that debate, there can be no doubt, from the point of view of logic, that it is a faithful rendering of what is meant by *numerical identity*, which is exactly what is in point in the discussion in question.

16. Such problems are compounded when we are forced to consider very large numbers (including infinite cardinals), and collections such as the Irrationals, Complex and Imaginary numbers. In the former case, how are we to account for the 10^6 mental acts needed to construct that number? In the latter, we cannot even conceive of where in nature we may find the roots of the exotic processes of abstraction that would lead to them. Neo-Humeans will, of course, be tempted to raise the same question vis a vis our construction of *norms*.

17. It is interesting to muse on what the abstractionist account might say about vague concepts: that there was no definite number of acts of attention? In any case, even if the number were definite it is pretty clearly false that, in the case of concepts like "Frenchman", "American" or even "Londoner", we can really be said to be capable of millions of *successive* acts of attention, i.e. of progressing up the ordinal sequence whilst still holding in mind *all* the steps that went before.

18. The abstractionist theory held concepts to be a form of "general representation" in the sense of being "proper names" which, by weakening some of their links to particular features of particular objects, could refer to more than one of their objects simultaneously. On this view, singular and general representations belong to the same semantic natural kind, with singular representations (intuitions) being basic and general representations somehow derived from them through the process of abstraction. Frege showed this to be untenable — The idea is that "singular representations" are *prior* to any act of judgement: they are given already and completely in it. Consider:

(*) Ralph is shy.

Here, 'Ralph' refers to a definite entity — Ralph. The so-called 'general representation', on the other hand, *shyness*, is given, Frege said, only *posterior* to (or derivatively from) the whole judgement, and it comes from the realisation that the consituen 'Ralph' can be removed from (*) to leave the residue '( ) is shy', or, as Frege put it, *x is shy*.

This concept is no general representation: it does not derive from Ralph's shyness or anyone else's; it derives from the act of judgement itself. The essence of its generality lies in its *predicative nature*, rather like that of a mathematical function. This does, of course, require that the notion of "object" be an unproblematic one, as it was for Frege. His objects are, as we shall see, the everyday furniture of the world of experience, the classes and numbers of mathematics, and the norms of legal dogmatics. Part of Weinberger's immediate problems is his insistence on seeing norms as, not simply objects, but complex entities which are "constituents" of action in some "real"/"ideal" hybrid state, and at the same time targets of the understanding in legal propositions. We shall see that, had Weinberger (or MacCormick) stood by their, largely Fregean, intuitions regarding the subject-matter of legal statements, all their problems would have disappeared.

19. Coffa has quite rightly pointed out that we in addition need to make a clear distinction between logical *rules* and logical *laws* before the inference is unproblematic: this standard logical practice was not common until after Whitehead and Russell's *Principia*; see Coffa, *The Semantic Tradition from Kant to Carnap*, pp. 162-166, also Kneale and Kneale, *The Development of Logic*, pp. 513-712.

20. Cf. § 2.2.

21. Although this passage comes from JI, it is a usefully concise statement of what are in effect MacCormick's views. Though both MacCormick and Weinberger would, I think, endorse the quotation as being reflective of their views, it seems to me that they would interpret the claim differently (viz., in terms of the nature of "interpretation" and its (semantic) relationship to acts of judgement and their objects), and so care ought to be taken about simply assuming such a statement can be unreflectively pasted into each account. Since the point is a minor one, and since Weinberger's account has already been examined, and MacCormick's is about to be, I shall not venture any further into this nice point, nor shall I attempt to substantiate it; it may, hopefully, in any case be seen to emerge from the line of argument.

22. Cf. my 'The Meanings of the Logical Constants in Deontic Logic', *Ratio Juris*, (forthcoming).

23. We must again remember that MacCormick was working with *undifferentiated* semantic categories. Failure to keep this point in view, will make it hard to see, in what follows, why MacCormick argued as he did.

24. Not of our *choice*, but they may yet be of our *making*. In other words, we may lay down the logic for the corresponding statements (which describe the norms and their inter-relations) and therefore determine which pattern of relations will hold between the norms described. But once we lay down the rules of inference and the logical laws which govern them, we have no *further* choice over when (or whether) the rule applies; all we can then do is describe such relationships, or else modify the rules and create new relationships.

25. This may seem incompatible with positivism, but it is not. *If* we accept that relationships between norms are characterised by some form of logic, as Weinberger and others have argued, then the fact that we do not draw the inference sanctioned by that logic, in any given case, does not defeat its validity. Given the additional assumption of the *objectivity* of the referents of legal expressions (both of norms *and* their relationships), the commitment to the existence of 'unseen' norms naturally follows. Since, according to the positivist, it is we who have laid down the logic which is to apply, however, and accordingly are free to relinquish it in favour of another at any time, the norms in question cannot be viewed as 'natural' in a sense inimical to positivism. (See also preceding note.)

26. MacCormick, *Legal Reasoning and Legal Theory*, Ch.2 passim; MacCormick there said that 'some people have denied that legal reasoning is ever strictly deductive. If this denial is intended in the strictest sense, implying that legal reasoning is never, or cannot ever be, solely deductive in form, then the denial is manifestly and demonstrably false. It is sometimes possible to show conclusively that a given decision is legally justified by means of a purely deductive argument' (p. 19). However, the fact that it is possible (if it *is* possible) to produce a deductive legal argument need not (and, in advance of a great deal of extra work, cannot) invite the conclusion that that is the *only* legally justified outcome for a given case on the basis of existing legal material. Depending on systemic context, there may be several systemically legitimate ways of reaching some one answer, or several alternative answers with more or less equal claim to be *legally justified*, since presumably *that* notion cannot intrinsically lean on logical justification, even in easy cases.

27. In fact, the point about logical priority (which concerns meaning) and that of temporal priority (which concerns the order of construction of the legal rules) are formally separate. Both, though, are valid.

28. For more detail, see Coffa, *The Semantic Tradition from Kant to Carnap*, pp. 29-33; 9 n.1.

29. At the root of this problem is the role MacCormick assigned to the notion of *vertehen*. Like

Weinberger, he radically overestimated the contribution of that notion to the meanings of normative statements. The result was that MacCormick's semantics could make out no discernable difference between *descriptions* of (external) states-of-affairs and our *access* to them, that is, between objects and objects-as-they-are-for-us.

In fact, knowledge by description is largely absent from MacCormick's semantics: his explanation of the semantic pineal gland is, in common with Weinberger's, overwhelmingly in favour of acquaintance. (That is the right word for the constitutive dimension of their *Verstehen*.) Those willing to see in MacCormick's remarks a hint of the (in)famous Kantian "construction of the concept" would do well to reflect on the immense damage inflicted by that doctrine on our picture of knowledge in the hands of Kantianism's Idealistic sequels.

30. This is, tellingly, Weinberger's choice of expression.

31. See chapter 4 for an in-depth discussion of this matter.

32. The example given in the text is of an element of customary law, which 'exists in the legal consciousness even if never explicitly articulated anywhere' (*ITL*, pp. 33-34). The reference to consciousness may be taken as indicating that such entities are still mind-dependent; however, since it is reasonable to suppose that linguistic thought exhausts *conceptual* understanding, Weinberger's remark that 'As a general principle it must be assumed that any norm once clearly understood, can always be given a linguistic expression' (p. 34) seems to require being understood as positing some faculty of intuition to non-linguistic entities.

NOTES. TO CH.3

1. Translated from the German by Coffa, *The Semantic Tradition from Kant to Carnap*, p. 204.

2. I would like to emphasise again that the account of that strategy in what follows is, at best, a reconstruction of MacCormick's (and possibly Weinberger's) argument in ITL, not a direct account of it. It represents what I take to be the correct direction for their arguments to have taken, and the direction in which their arguments (again, in my view) lead. Since the strategy is crucial to developments in Part II of this thesis, however, the question whether or not I am right on this explicatory issue is of relatively minor importance, except to note that I do not regard it as an original contribution of this thesis to the field of legal theory. (Neither however do I wish to saddle either MacCormick or Weinberger with views which they do not wish to be associated.)

3. Having thus neatly established that the platonic universe *is* tolerably ordered and is not too large, the only residual issue (in terms of the *general* credibility of the argument) is, according to Hale, that the criteria by which the objects are picked out make those objects appear to be language-relative – that is, that an object in one language, say, English, has no corresponding term to cover it in another language, e.g. Chinese, and is therefore an object in the former but not the latter. Does this not somewhat undermine the "realist" basis of the platonist position?

> Fundamentally, the challenge threatens the *mind-independence* of abstract objects; if answers to the question: *What kinds of objects are there?* Are unavoidably relative to a particular language, then, since that language, including its referential apparatus, is *of our making*, those matters must treat of mind-dependent fact. (*Abstract Objects*, p. 42)

The idea that the mind-dependence and language-relativity afflict, not the objects, but our epistemic access to them (via language-specific criteria for singular termhood), is ruled out because it would break the crucial link between those terms and the objects for which they stand. Such a move would break the backbone of the entire argument since, then, 'the availability within any particular language, of singular terms standing for objects of some kind, will not be a necessary condition of their existence' (id.). Recall MacCormick's insistence on this link: the factuality of legal institutions is, he said, guaranteed by our ability to form (true) propositions about them. Nor is there any comfort to be had in the thought that any such relativity would similarly affect *concrete* objects, since there are those (including, presumably, Quine) who maintain that ontology is in general relative to language (id.). In any case, this does not assist the Fregean argument's defence.

Hale's response to all of this was to note the similarities between this problem and that of characterising the notion of "valid inference"; in other words, that the questions:

(1) what is it for an expression to function as a singular term?
(2) how can it be recognised as such?

in an important sense run parallel to the questions:

(3) what is it for an inference to be valid?
(4) which inferences are valid, and how are we to recognise them as such?

(*Abstract Objects*, pp. 42-43). In the case of valid inference, Hale noted, the answer to (3) is straightforward and language-neutral: Valid inferences are all and only those which guarantee preservation of truth (p. 44). Although such an explanation provides no means of picking out which inferences, within any particular language, fulfil that criterion, the answer to (4) – which is to be given in terms of language-*specific* criteria regarding the truth-conditions of sentences within the language – does provide this. The reason why this does not make judgements of validity language-relative is because the answer that we (are forced to) give to (3) – necessary truth-preservation – '*regulates* the selection or construction of the specific tests for validity by means of which we recognise valid inferences couched in a particular language' (id.).

The final step in Hale's argument is straightforward. The language-neutral answer to (1) – in terms of the *role* of singular terms (which is just to identify a particular object) – though it does not provide a means of identifying the singular terms of any given language, *does* regulate the choice of language-

specific tests (such as Dummett's criteria) which would provide such a means, that is, which would provide an answer to (2) (p. 43). The need for appeal to "universal" criteria is therefore seen to be unnecessary. (p. 44).

4. In fact, if anything, the necessity of attributing to ordinary speakers a certain deceitfulness in their construction (and understanding) of sentences containing terms for abstract objects would indicate a prima facie reason for *rejecting* the reductionist's paraphrases. We would, in effect, have to hold that the grammatical form of those sentences is nothing at all like their real form, to the extent of altering ontological belief and semantic understanding. This, in concert with the institutionalists' point regarding the need for *verstehen* (or for making statements "from an internalised point of view"), is enough effectively to close off the possibility of most forms of nominalism with regard to legal orders.

5. Carty's recent critique of international law is centred on what he called the 'representational language' of state consent ('Critical international law', p. 67) Roughly speaking, Carty accused "positivists" — by which he seems to have meant anyone who upholds the traditional Westernised conception of international law — of having 'reified' legal discourse on contested points into (what amounts to) an existent normative order, i.e. a set of rules by which state action can be assessed, and to which appeal must be made by states wishing to justify legally their activities. Carty's main concern was with the removal of this misleading talk of 'a central international legal order as an impartial point to which State actors can refer' (id.). Rather, we have to accept that state actions 'have to be understood, in relation to one another, as opposing to one another very fragile, because inevitably partial, understandings of order and community'. Carty explained:

> *Referent* means the object or idea to which a word or phrase refers. A major thesis of post-modernism, very closely linked with the concept of *reification*, is that words have, to a very significant extent lost any outside referents, that concepts merely refer to one another in a process of mutual differentiation in language. (id.)

Nothing, of course, could be further removed from the Fregean argument outlined earlier which, half a century before the appearance of deconstruction, offered an infinitely superior account of meaning. (On the reasons why deconstruction is immensely implausible as a view of language, see Scobbie, 'Radical Skepticism'. As I mentioned earlier, that theory must, for reasons of space, stand outside the present inquiry.) Carty's real point is in fact that the utility derived from attempts to appeal to an "objective" normative order (i.e. positive international law) is negligible if one's goal is to understand how states behave and judge each other legally. Whether or not one agrees with this point, it is obvious that Carty's initial justification for believing its truth is unacceptable.

If the opening paragraphs of Carty's paper are to be believed, our reason for denying the (positive) international legal order is on grounds of semantic impossibility: that international legal concepts are so infused with subjective understandings that they cannot be understood by one who does not agree with the point of view they represent. This is clearly absurd: Understanding is, as the institutionalist well knows, the most basic propositional attitude of them all. The idea that concepts could be in use which could not, in principle, be understood by one who does not believe in their truth — that all meanings are inevitably partial and subjective, as Carty put it — stands the true state of affairs on its head. (Someone who believes, for example, that the meaning of mathematical statements entails recognition of mathematical truth would have to admit that they do not understand even the *statement* of Goldbach's Conjecture.) Moreover, it gives rise to the idea that legal concepts contain private meanings in the forbidden Wittgensteinian sense. The idea that there are, or could be, such meanings derives, it seems, from Carty's unwillingness to detach meaning (*Sinn*) from understanding. Indeed, it is easy to see in Carty's subjective meanings our old friends the subjective representations, or psychic episodes, which so troubled Weinberger's ITL. Carty's rejection of international law rests on a similar unwillingness to detach meaning from psychology and reference from sense.

The Fregean account, as we saw, allows us to speak of the existence of such things as normative orders exactly when the conditions imposed by that argument are fulfilled. This sense of existence is one which Carty was not in a position to make. This is, in part, because he was still unaware of (or unwilling to make sense of) what Weinberger had clearly seen: that normative existence has nothing essentially to do with positivity. It is this latter concept which was the real target of Carty's reductionist aspirations. (It ought to be emphasised that these considerations are ones which pertain to the deconstructionism at the opening of Carty's paper. The main purpose of that paper was to address the notion of state consent, in a way

which does not rest upon — or can at least be readily detached from — Carty's semantic theory.)

6. It is, however, far from clear that a *Hartian* positivist could accept the non-cognitive character of the decision as applied to (domestic) *legal* language, since acceptance of the minimum content theory, or any equivalent anthropocentric views regarding the origins of law, would seem to indicate a lack of choice regarding a "framework" for the discussion of *that* part of the law.

7. Recall the remark made in chapter 1, that an analysis of the uses to which legal language is put (including, though in a wider sense than, the way in which legal arguments are constructed) is a much better guide to legal systems and legal practice than is any argument over the characteristics of normative entities. This is precisely because, even where those entities are conceived as existing extra-linguistically or mind-independently, any knowledge we can have of them which we are capable of manifesting or communicating will be knowledge which is (capable of being) expressed in language. Any residual knowledge we may be supposed to have will be incapable of such expression, so that attribution of it to any person will be wholly unfounded on the basis of their behaviour. *A fortiori*, such "knowledge" cannot be part of the body of knowledge required for the practice or, crucially, the *learning* of law. What this means is that our knowledge of the legal order cannot in principle outrun our understanding of the sense of legal expressions, and our knowledge of how to manipulate them in the context of making meaningful assertions.

8. In future, as a matter of terminology, "realism" and "anti-realism" shall refer only to the philosophical senses of those terms; the term "realism" will not, without explicit indication, be applied to any legal-theoretic position in the usual sense.

9. Not, at any rate, until we construct one based on appropriate criteria.

10. In a sense, one purpose of this chapter is to work out exactly what these claims involve.

11. The link, of course, is internal logic: If a legal system is conceived of realistically (in Dummett's sense), then an explanation is pressing of how certain elements of the system exist in advance of their being "discovered"; or, alternatively, how certain propositions of law may be said to follow of necessity from others already endorsed as true of the system in question. In fact, it is hard to see what substance can be given to such a (realistic) existence-claim except that given in terms of the systemic links various entities of the system bear to each other, and which will find an isomorphism in the notion of internal logic. For a fuller explanation of this very difficult issue, see later this chapter, and chapter 5 passim.

12. Again, see chapter 5 for details of this.

NOTES TO CH. 4.

1. It is useful to begin with the mathematical context for a number of reasons. To begin with, although the relevant issues are necessarily applicable to all subject-matters, it was in the context of mathematics that those issues were first brought fully to light, and in which the fine detail of the resulting positions was developed. More importantly, it is in the mathematical context that the difficult issues surrounding those positions are clearest and most straightforward to grasp. Also, as noted in the prologue and in chapter 1, it is in those parts of legal reasoning which resemble mathematical investigative procedures that most interest lies. The importance of this does not lie in any supposed similarity, in terms of the rigidity or formality, of the concepts investigated, but in terms of the various modes of thought involved, and the reasons for carrying on such reasoning. Where the goal is not that of rhetorical, or court-based reasoning, but rather of the academic investigation of bodies of law, legal reasoning resembles the *kind* of investigative activity which takes place in mathematics, in terms both of the justifiying-arguments we use, and the purpose of the activity itself. Both activities, perhaps in different ways, concern the pursuit of knowledge of a body of concepts. In the case of legal reasoning, this concern is with knowledge of the legal order, its content, and, in general, with *why* commitment to the truth of certain statements about given elements of the system depend upon, or justify, certain other propositions in regard to the rest. In the case of mathematics, the concern is to show us what certain fields of mathematics are composed of, and why we are justified in placing absolute faith in paths of reasoning which purport to tell us something we did not already know on the basis of something we did.

2. This is Gödel's famous Incompleteness Theorem, which tells us that, under any intuitively correct formal system rich enough to include elementary arithmetic, there are some statements true in the intended model of arithmetic which are false in terms of its non-standard models.

3. This 'general sense' comes from the fact that the semantic theory underlying the meanings of mathematical propositions extends fairly naturally to ordinary language descriptive statements. There are, to be sure, more varieties of the latter class of statement. In legal practice in particular, we have to consider normative propositions and tensed statements, etc. The basic semantic subframe is, however, the same, and the extensions necessary may be regarded as conservative and as stemming from the same basic semantic insights.

4. The problem this raises, according to Dummett, is that the only alternative means of describing that sequence is a second-order inductive explanation, whose predicate variables range over "*all* properties" – something that, in turn, must be given a platonistic explanation. So the problem re-occurs. But what exactly is the difficulty which this raises: what is Dummett's problem? It is that of being able to identify, up to isomorphism, the "intended" model: of being able to pick out, from amid the deviant structures spawned by our attempts at formalisation, that one model we had originally intended to formalise, and, more fundamentally, to agree and to *know* that we have agreed, that that model is the model we meant. In simple terms, Dummett's problem is this: if we agree with the platonist that there is such a model, somehow given in intuition but not fully formalisable, how are we possibly to agree on what it is? How, as Wittgenstein would have put it, can we know whether *my* intuition of that model is the same as yours, or anyone else's? Because formalisations of second-order logic admit of a plurality of interpretations, how can understanding of the problem notion "all properties" be other than a private and incommunicable matter?

5. This characterisation is slightly unhappy. It is tempting (and many translators have been) to translate 'Sinn' as, simply, "meaning". This is unfortunate in that, for Frege, both Sinn and Bedeutung contribute to a statement's meaning in equal measure. Later in this chapter, I shall recall how a modern Fregean, Bob Hale, argues that expressions simply cannot mean what philosophers, including anti-realists, think they mean *unless* we assume that they signify their reference. ('Sinn' is usually given the meaning of the English "sense", or the less satisfactory "significance": if one notes that, occasionally, this latter is used to characterise 'Bedeutung', whose translation as "reference" likewise fails to capture fully the German meaning, then one begins to get a sense of the problem.)

6. In fact, it rests on knowledge only of the meanings of "=" and of variable notation, as in "$x = x$".

7. This amounts to truth at the level of model-theory. An example of necessity of the attendant variety would be where a statement asserting the existence of primes in a given interval is semantically entailed by a set of statements already accepted as true.

8. This does not, of course, mean our ability to formalise linguistic expressions in, usually, second- or higher-order logic; but rather, our practical ability to use that machinery in linguistic contexts (i.e. to be able to speak the language). This is just, in turn, to reaffirm the priorities, as outlined earlier, of the analysis of uses of normative language over investigations of norms direct, and of language over thought.

9. This is the principle generally seen as lying at the heart of Frege's philosophy of language. It states, at various places throughout his *Grundlagen*, that 'Only in the context of a sentence does a word have a meaning'. Most of the distinctive Fregean doctrines explored in chapter 3 – such as the priority in explanation of language over thought, and of the notion of "object" as the referent of a singular term – flow from this principle. I shall be concerned with corollaries of this principle throughout the rest of this section.

10. See e.g. 'The structure of appearance', *Truth and Other Enigmas*, p. 32.

11. The importance of this should not be overlooked. Hale, and Dummett on several occasions, have stressed that were it to prove impossible to identify when expressions are functioning as singular terms – and therefore that our understanding of the notion of 'singular term' (and derivatively of 'object'), is informal and incomplete – this would have catastrophic consequences for philosophy of mathematics (and other subjects). For without the Fregean "proof" that numbers are objects, it is unclear exactly what mathematical statements *mean*. It is one of the great virtues of Hale's work, both in *Abstract Objects* and, in more detail, in the paper on 'Singular Terms' that it has shed valuable light on this question. (see *The Philosophy of Michael Dummett*, pp. 17-44; also Dummett's reply, pp. 268-72).

12. The meaning of Hale's expression 'identifying thought' shall become clear in due course. It is very different from the notion, employed in chapter 1, of identifying criteria, though the former notion was responsible for my formulation, or rather sharpening, of the latter one. (The extent of the intellectual debt should likewise become obvious as I proceed.)

13. See e.g. Quine, 'Truth by Convention' (1935), reprinted as Essay 11 in his *The Ways of Paradox*, pp.77-106.

14. It is this intuitive difference to which, apparently, Hale was appealing when he said of Carnap's deflationist treatment of mathematical statements that: 'Certainly it could scarcely be claimed that free use of the 'framework' (language *plus* deductive apparatus) of classical mathematics involves no endorsement of *realist* metaphysics.' (Ch 1 n. 4, p. 248).

15. These questions arose in the light of his criticism of Frege's doctrine regarding the tension supposedly unearthed in Frege's account of abstract objects (i.e. that between "realism" and the Context Principle).

16. The fact that Hart, and others, warned against attempted *definitions* of law, as opposed to (perhaps) piecemeal characterisations, is not especially significant here: Though, e.g., numerical terms are, on the traditional account (from Frege), introduced by means of contextual definitions in the form '$\sim_x [Fx, Gx] \leftrightarrow \text{card}_x [Fx] = \text{card}_x [Gx]$', there is no reason why contextual stipulation for the case of law should not be taken at the level of entire theory. In other words, there is no reason to suppose that the sense of legal expressions cannot be conferred by the context of our thought and talk about law generally, that is, in the context of what Wittgenstein might have called the "legal language-game" (*Sprachspiel*).

17. Some further explanation may be in order. The original purpose of such equivalences was to introduce the concept of *direction* in terms of that of *parallelism*. This is so-called "contextual" definition: we are not given the new concept outright, but are told how to use it in terms of concepts with which we are already familiar. In order for this kind of definition to succeed, it must be the case that the new concept is more than just a paraphrase of the old. In other words, for such a definition to teach us the concept of

direction, it cannot be the case that the identity of *a*'s direction with than of *b* simply *is* parallelism. Were the latter the case, all we would have learned would be a new *symbol* for parallelism, i.e. 'dir(α) = dir(β)' instead of 'α // β', not a concept of "direction" with its own semantic properties. (See Dummett, *Frege: Philosophy of Mathematics*, chapter 10). For the former to occur, it must therefore be the case that something, above and beyond parallelism, is denoted by, say, 'dir(α)' i.e. *direction*. This is particularly the case in regard to legal statements: since normativity is irreducible – i.e. is not open to definitional elimination on the basis of purely descriptive statements – both sides of the bi-conditional must contain normative, and therefore presumably abstract, terms.

18. The fact that, for lawyers, particular laws will be identified relative to a system is no damaging admission. Because of the desire to keep equivalent laws in different jurisdictions separate (so that, for example, rules of the common law of a given jurisdiction are not held to be *the same laws* as rules belonging to some other jurisdiction, but only equivalent to them), the identity criteria will simply have to be formulated more narrowly: Instead of specifying, for example, that 'law(*a*) = law(*b*) iff every normative attribute of *a* is a normative attribute of *b* and vice-versa', we would have to specify that '$\text{law}_S(a) = \text{law}_S(b)$ iff every systemic consequence of *a* is a systemic consequence of *b* and vice-versa, and . . .'. What matters is whether such statements, and any others, are capable of identifying *particular* laws at all. (I ought to stress that these formulations do not represent my final view on the nature of legal identity-statements. They are designed merely to serve as examples, and nothing essentially turns on their particular formulation.)

19. I shall, for reasons of space, address Hale's argument in its general terms, since that is sufficient for present purposes, and ignore the details which largely concern the theory of classes.

20. Such questions partially relate to the foundations of legal reasoning in the "internal" sense, because answers to them depend partly upon the way in which we view semantic relations between statements, such as entailments and justifying-relations. Yet questions of this sort, as noted, can hardly be divorced from issues of reference, since there has to *be* a set of facts in terms of which a statement is true, if its truth is not wholly mind-dependent. The connection is explained as follows: entailments, implications and other, perhaps non-logical, justifying-relations are notions which rest upon semantic properties of statements alone, and not what goes on in the world. In the case of entailments, the relevant semantic properties are truth-functions, that is, functions of the semantic value of the sentences in question. Such values are, in turn, accorded to sentences on the basis of whether or not they accurately describe the facts to which they purport to refer. The ascription of semantic values (e.g. of truth and falsity) can only proceed, however, on the back of a theory of how the sentences involved discharge their semantic role – how, that is, we may speak of them as being true or false. For anti-realists, this is always a matter of verification, and so only arguments all of whose premises are known to be true can qualify as valid. In that case, the legal system will be exactly as rich as we know it to be: there are no "unseen extensions" of which we have no knowledge. Realists, on the other hand, may suppose ascription of truth to consist in procedures which do not reduce to our ability to comprehend them. In that case, true statements about the legal order may outrun the class of such statements as have actually *been* made.

In this chapter, however, it is not the "internal" questions concerning legal propositions which is of interest. At this stage, it is their objective correlates – the "actual" relations which hold between legal norms – which is of most concern. Of course, it is the internal questions which go to decide what we may say about such external relations – particularly where one is an anti-realist about legal orders – since the possibility of their existence depends upon the possibility of a semantic view of them in this sense. But for the moment, I merely want to establish the point that one *can* hold such a view without collapsing into platonic realism or scepticism.

21. Nor do I mean to suggest that positivism cannot overcome these problems. Rather, my conclusion is that I cannot see, at present, a viable explanation of them from *any* point of view. This does not mean, however, that I see the problems in question as intractable. Some of these issues are explored in Appendix I, and in my 'The Meanings of the Logical Constants in Deontic Logic', *Ratio Juris* (forthcoming).

22. At least in this phase of the Court's treatment of equity.

23. Some of the problems with such a conception are aired in 'The Meaning of the Logical Constants in Deontic Logic', op. cit.

24. This is far short of being a proof, of course. For a more fully developed argument see 'The Meaning of the Logical Constants in Deontic Logic', op. cit.

25. In fact, as Dummett noted, whilst acceptance of the semantic principles (which we might call (1') [Bivalence] and (2') [*Tertium non datur*]) usually entail acceptance of the requisite law of logic, this does not hold conversely (p. xix).

26. See Miščević, 'Computationalism and the Kripke-Wittgenstein Paradox', *Proceedings of the Aristotelian Society* vol. XCVI Part II, 1996, p. 215: 'The KW-sceptic challenges the realistic assumption that symbols of language [. . . .] carry a definite meaning. The example chosen in addition and the meaning of the sign '+' is the 'plus' function. KW-sceptic introduces a bent function, 'quus' which agrees with 'plus' up to some critical number, call it κ, and diverges afterwards. The realist should point to some fact which will determine (and make it known) that the cognizer means 'plus' rather than 'quus' [. . . .] KW-sceptic claims that no dispositional account can distinguish between a system's actually performing the plus-operation and its performing the quus-operation.'

27. I.e., in the sense of specifying when a legitimate- and when an illegitimate move has been made in the legal language-game.

28. It is so far unclear whether the semantic notions involved in *this* analysis must be logical or not. It is not, anyway, clear that they cannot, since their capacity under those circumstances to possess explanatory value will depend on the success of the target notions, thus characterised, to explain legal reasoning to our satisfaction.

NOTES TO CH. 5.

1. In regard to General Assembly resolutions, one need look no further for an example than 1969 Moratorium Resolution (on seabed mining) and the 1970 'Declaration of Principles Governing the Sea Bed and Ocean Floor, the Subsoil Thereof, beyond the limits of National Jurisdiction' (GA Res. 2574 and 2749 respectively). Both documents embodied declarations to the effect that, pending the establishment of an international regime, states and persons are bound to refrain from 'all activities of exploitation of the resources of the area of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction' (GA Res. 2574 para. (a); GA Res. 2749 para. (3)-(4)). Localised attempts among Islamic and developing countries to have the resolutions declared binding upon all states as a matter of international law failed since, though General Assembly resolutions are reputed to have some quasi-legislative effect when passed unanimously, the Moratorium achieved a majority of only 62 votes to 28 (plus 28 abstentions) and the Declaration of Principles 108 votes to 14 abstentions.

Motives lying behind such arguments must also be taken into account: this is especially true in the context of "creeping legislation", the notion that once an agreed text has been formulated, it may be possible, however unlikely, to infer customary support for its provisions in the absence of behaviour flagrantly incompatible with its terms (i.e. rather than await the outcome of a vague consensus on the basis of opinio juris in the standard way). Though such strategies, and the arguments used in their support, leave much to be desired from the point of view of rigour, they cannot be overlooked, I believe, so far as the issue of recognition of law, in our second sense, is concerned. If, at the very least, such argumentative ploys are contrasted with the true state of affairs of the law-creation process, then, insofar as there *is* a true state of affairs (i.e. a right and a wrong way of looking at the process), the knowledge required to make the distinction is part of the stock of knowledge one must have in order to recognise rules of the system — and the criteria by which one may legitimately thus recognise them — and weed out the swindlers which try to pass themselves off as such.

2. Cf. also pp. 94-95, where Hart distinguishes the rule of recognition in 'early law' which may 'be no more than [. . . .] an authoritative list or text of the rules [. . . .] found in a written document or carved on some public monument' (p. 94), from that of a 'developed' legal system, wherein, 'instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules' (p. 95)

3. See Schwarzenberger, *International Law* Vol. 1, (3 ed.), p. 26.

4. Though it should be mentioned that Kelsen's — and others' — preferred candidate for a Basic Norm in international law is the rule *pacta sunt servanda*. Cf. e.g., Fitzmaurice's remarks, *BYIL* 35 (1959) 195-6.

5. This may be seen in that none of the primary legal materials of international law are examined in Ch. X of *The Concept of Law* (though some are mentioned, in passing, by name). Moreover, the statement on p. 215 that 'The variety of types of principle which commonly guide the extension of general classifying terms has too often been ignored in jurisprudence' nevertheless is indicative of Hart's tendency to pose the issue as a definitional one: i.e., can international law be brought within a general framework or model of legal systems (including and perhaps based upon the model supplied by municipal law)? The point I made in chapter 1 was that I do not see why it should be assumed, without argument, that a *single* framework or model forms the basis of all such systems.

[6] See § 2.3

7. *Rules, Norms and Decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs*, Cambridge Studies in International Relations 2, Cambridge UP, Cambridge 1989.

8. In the new Foreword to the second edition, MacCormick suggested that predicate logic rather than propositional logic would supply the best mode of analysis. (*Legal Reasoning and Legal Theory*, p. xv.)

9. As Simmonds says, 'This amounts to the claim that all laws emanate from "sources" and that "a law has a source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people's moral views and intentions, which are necessary for interpretation, for example).

Raz uses the term "source" to include interpretative sources which assist in identifying the content of a rule.' (*The decline of juridical reason*, p. 99).

10. The text at this point reads "of" rather than "or". It is unclear to me whether this is a misprint or whether it is intentional. In any case, substitution of "of" seems to make no difference, as far as I can make out, for the gist of MacCormick's point or its conclusion, apart from reading slightly oddly.

11. In order to highlight the constructive nature of the interpretative process within MacCormick's account, it is helpful to recall that he argues (p. 95) that legal context (i.e. the way in which facts are viewed from an internal point of view) will make a difference as to whether a given problem of application is seen as one of *classification* (of facts as belonging under the rule) or *interpretation* (of the rule as being one applicable to the facts). MacCormick went on: 'just because there is not any *logical* distinction between the two types of problem, the court can decide to treat a problem of classification in the form of a problem of interpretation in order to assert its jurisdiction and take the opportunity of giving its own ruling on the point' (id.).

12. See Dworkin, *Taking Rights Seriously*, pp.82-90; *Law, Morality and Society* (Hacker & Raz eds.) pp. 59-61.

13. Authority does exist for this: see Judge McNair's remarks in the *South West Africa case* (ICJ Repts. 1950, p. 148).

14. Cf. J.L. Austin, *How to do things with words*, Clarendon Press, London, 1962

15. The doctrine of 'internal relations' is the doctrine that every relation 'essentially penetrates the being of its terms, and, in this sense, is intrinsic' (Bradley, *Appearance and Reality*, p. 347). As such, it is a hallmark of a certain form of Hegelian Idealism. As Russell explained:

> [T]he fundamental doctrine of the realistic position, as I understand it, is the doctrine that relations are "external" [. . . . A]ll arguments based on the contention that knowing makes a difference to what is known, or implies a community or interaction between knower and known, rest upon the internal view of relations. ('The Basis of Realism', *Journal of Philosophy* 8 (1911), pp. 158-160)

16. In the preceding paragraph, Kratochwil contends that 'the analytical distinctions are more appropriately made in terms of *the style and reasoning with rules and norms* than in terms of the number of distinct actors'. This strongly implies that the *former* reading is the one intended.

17. Co-operation games are those wherein two (or more) players, whose (possibly) non-identical preferences are linked, must learn to condition their responses in order to attain mutual advancement and avoid perpetual harm. For convenience, I reproduce Kratochwil's example:

> Imagine two persons placed in separate rooms without either the knowledge of the other nor the means to communicate with each other. Each of the participants [. . . .] can press two buttons that control an "outcome" for the other person: the left button delivering a reward, the right one a punishment. Ignorance of the function of the buttons and lack of communication now make it necessary that these participants "make sense" out of their situation and achieve some kind of control over it. This is done first by realising the interdependence of their choices, and then by formulation of a maxim for choice by each participant as to the appropriate decision in the next round. It can now be shown that by following a simple instruction-type rule, a stable, mutually beneficial situation arises if both parties manage to realise the interdependence of their responses.
>
> [. . . .] Person A pushes the left button and B follows suit. Given this rather accidental coincidence of responses both players are able to build a stable reward-structure, as no one will have an incentive to "defect" in subsequent trials. Now assume that A pushes "reward" while B punishes A by pressing the right button. A will now have to change in accordance with the rule and thus deliver a punishment to B. This will cause B to change also, and B will next time push the button rewarding A. A, in turn, having been rewarded, will persist in punishing B. This will cause B to change and punish A who in turn has to change and thus reward B. But B will now persist in the previous strategy which brought him a reward, and he will thereby punish A again. It is questionable [without additional norms] whether the two parties will ever be able to break these destructive cycles. (p. 74)

18. The "Prisoner's Dilemma" is actually well-known: Two prisoners, co-accused, are held in separate

cells and denied access to one another. The guard tries to extract an incriminating statement from each co-accused by falsely informing each that their co-accused is on the verge of incriminating them as sole guilty party. The dilemma is that of deciding whether to incriminate the other, thereby possibly securing freedom or another reward, or to hold fast in the belief that one's co-accused will not give in, in which case joint freedom will result. Though Kratochwil does not say so explicitly, it is clear that such a situation demands recognition of a fairly explicit norm-structure in order for respective actors to work out a "winning strategy". A winning strategy depends fundamentally on faith and trust in one's partner in crime. A "losing" strategy (i.e. the one sought by the guard) depends on fear in the first instance, and then recrimination as the incriminated prisoner implicates the incriminator in an act of revenge.

19. See also Simon Blackburn, 'Practical Tortoise Raising', *Mind* 104 (1995), p. 695, esp. at pp. 698-708.

20. Reprinted in part in Kratochwil, *Rules, Norms and Decisions*, p. 90

21. A longer version of this passage is quoted in Kratochwil's book p. 210

22. Notice, however, that the alternative rendering "Law *among* nations" does not connote the acceptance of a singular normative framework, i.e. a body of norms and rules which is both centralised and unique vis a vis the participants who make use of it. It is, in other words, consistent also with the "repository" view, of a doctrinal institution which adjudicates the legal relationships of participants who may have radically different views as to (a) the content of a given area of law; and (b) the scope and extent of obligations owed by a given participant vis a vis other participants.

23. Note that this apparently contradicts the rather vaguely drafted provision of the ICJ Statute which instructs the Court to 'apply [. . . .] international custom as evidence of a general practice accepted as law' (Art. 38(1)(b)). Because of the ambiguity of that provision, and the fact that it is, technically, a Court rule rather than a constitutional document in a wider sense, this need not of itself trouble the Fixed-point theorist.

24. The 'Restatement' does not, of course, constitute a firm basis on which to impute general acceptance of propositions (c) and (d) in international relations. It is, nevertheless, reasonable to suggest that it is a faithful account of the *opinio iuris* of reputedly the world's most powerful nation on the matter of generally accepted doctrine.

25. See Harris, op. cit.; also Mendelson, 'Formation of international law and the observational standpoint', (1986) *Proc. Am. ILA*, p. 941.

26. That Stein is searching for actual "examples" (i.e. invocations of the principle in state practice) is revealed in his remark that '[. . . .] neither the Norwegian nor the British government [sic.] provided any such examples for the Court, although they concurred on the validity of the principle' ('The approach of a different drummer', p. 460).

27. Stein, 'The approach of a different drummer', p. 462. It is worthy of note, though Stein does not go so far as to make the point, that the Fixed-point view of customary law, which I have suggested is the one tacit in his approach, leads naturally to the conclusion that the widespread majority (albeit of non-coastal states or coastal states which do not possess the technological wherewithal to effect mining) in favour of the unlawfulness, in custom, of non-regime-based mining activities results in an emerging customary consensus on the matter. Because, on the Fixed-point view, universal rules of custom can be created without the consent of *all* states, persistent objection would seem to be, on that view, the only method of opting out of the rule in question.

28. See, e.g., the United States' Deep Seabed Hard Minerals Resources Act 1980, XIX *ILM* 1003 (1980); and the British Deep Sea Mining (Temporary Provisions) Act 1981, XX *ILM* 1219 (1981). Other unilateral legislation of, e.g., France and Germany may be found in the pages of *ILM* 1982-5.

29. As Churchill and Lowe have remarked in regard to the law of maritime delimitations:

The particularity of the circumstances of each case make generalisation upon these delimitations difficult, and since they are motivated primarily by expediency and a spirit of compromise it is probably wrong in any event to attempt to infer any rules of international law from the practice which they generate. (*The Law of the Sea*, p. 154)

30. In a 1958 article, Jennings too seems to some extent to concur in the view that rules of customary law are drawn (at least in practice) not from some abstract system of norms, but from actual argumentation employed by states in the settlement of their disputes. In particular, he argued that the reason why states are reluctant to send their disputes before the ICJ is that, beyond not knowing what the final resolution will be, they do not even know which factors will be weighed in order to reach the result. ('The Progress of International Law', 34 *BYIL* (1958), p. 346). See also Stone, '*Non liquet* and the function of law in the international community', 35 *BYIL* (1959), p. 124.

31. Matters stand differently in a civilian system, where the courts are supposed to have precisely the function of *applying* the law to the parties. The logic of the civilian model in this sense puts the courts in the same kind of Archimedian position with respect to the codified law. I do not, however, think that this mitigates the terms of the argument I have advanced against the ICJ – i.e. that it can enjoy no such position wrt international law in the absence of a formal doctrine of precedent – since it is clear that international law is very far from being a codified system. (Indeed, the status of multilateral treaties is often thought to compare more favourably with municipal contract doctrine than with a civilian constitution.)

32. See *Critique of Pure Reason*, B 204: 'The mathematics of space [*Ausdehnung*] – geometry – is based upon [. . .] successive synthesis of the productive imagination in the generation of figures. This is the basis of the axioms which formulate the conditions of sensible *a priori* intuition under which alone the schema of a pure concept of outer appearance can arise – for instance, that between two points only one straight line is possible, or that two straight lines cannot enclose a space, etc.' For a detailed expert criticism and analysis of Kant's notion of pure intuition, see Coffa, *The Semantic Tradition from Kant to Carnap*, ch. 1-4

33. Columbia UP, New York, 1963.

34. *The Times*, Saturday 18 April 1998. (The answer, out of interest, is *Maple leaf.*)

35. It might be thought that Kratochwil's Wittgensteinian stance gives him ground from which to reject Fregean semantics. This is far from clear. In the first place, it is not obvious that Wittgenstein's philosophy results in a sustainable position vis a vis the need to furnish explanations of logical and mathematical validity (see Dummett's essays 'Wittgenstein's Philosophy of Mathematics', *Truth and Other Enigmas*, p. 166; and 'Wittgenstien on necessity: some reflections' in *Reading Putnam*, Clark and Hale (eds.), Blackwell, London 1994, p. 49). Secondly, Kratochwil's projected rejection of Frege's argument would stand or fall by the ability of Wittgenstein's philosophy to repudiate its central contentions. This is, once again, unclear, although the two philosophies are, to some extent, rivals from a common starting-point.

36. As recalled in the first section of this chapter, Hart had denied the existence of rules of recognition in international law. I suggested that this was not the literal case; that recognition performs two functions: (1) the "constitutional function", which defines the formal sources of law and locates the "validity-co-ordinates" of individual norms via their "pedigree"; and (2) the "juridical function", which tells judges and lawyers how to find the law (i.e. on the basis of legal doctrine). My contention has been that international law lacks (1) but does have a version of (2), so long as it is realised that (2) does not have the character of a rule or set of rules, but consists in precisely the kind of "doctrinal stuff" which a student must learn in order to understand international law. This is not the same thing as saying that international law has material- but no *formal* sources of law; clearly it has *both*. It is rather to say that international legal reasoning is not systemically- or pedigree-orientated in its approach to law-finding.

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