Origins and Challenges of a Positivist Approach to International Law

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Abstract: Positivism as a method to identify and interpret International law is nowadays often criticized. In order to better understand and evaluate the criticisms, it is helpful to trace back the origins of such an approach and reflect on its core tenets. It is maintained that, while there are issues which may not be understood through a strict positivist lens, this methodology remains today the closest to the reality of international law-making.

Keywords: International law theory – positivism – custom – States – Permanent Court of International Justice – Nuremberg trial.

I. Foreword

It is for me a great, but at the same time arduous honor to take part in the Gaetano Morelli Lectures series. I was introduced to the *Nozioni di Diritto Internazionale*[1] as a first-year law student, and it was not an easy opening encounter with international law. Nonetheless, the reasoning and categories of that handbook – once grasped – were intriguing and compelling, and had a great part in the relationship I developed with the subject. In my subsequent studies, faced with the disharmonies, conflicts, inconsistencies, developments of international relations and international law, I have often found a reassuring respite in Gaetano Morelli's approach and systemic organization.

At the world level, Morelli may be best known for his role as a judge at the International Court of Justice, and for the precision by which he identified the concept of inter-

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[1] A French translation has been published by R. Kolb, *Notions de droit international public*, Paris: Pedone, 2013.

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national dispute, as well as the distinctions between procedural and substantive issues. There is, however, much more to his work. He is, in fact, one of the most convinced and convincing supporters of positivism, as applied to international law during the 20th century.

The present lecture, therefore, is twice as challenging for the author. My – limited – goal here is to try to understand[2] to what extent positivism has been applied to international law and whether, in the 21st century, it may still be a viable tool in finding, studying and applying this body of law.

II. Positivism as a methodology applied to law

Positivism is, first of all, a philosophical approach. Developed in the mid-19th century, it aspires to be as progressive as the industrial revolution to which it is strictly associated. By emphasizing the need to look first at facts and then to link them together by identifying common patterns (laws), positivism brings a *scientific*, *objective* methodology to a highly speculative discipline. The study of cause and effect is central and induction, rather than deduction, is the fundamental process to follow. Positivists do not devote time to what they consider purely theoretical speculations about the metaphysical reasons behind those patterns; they aim to offer a *rational* picture of the world, with man at its center.[3]

In the field of law, this approach intersects the radical changes brought about by the 18th century and its political revolutions. In the 19th century, law-making is no more a sovereign, absolute and discretionary entitlement of the monarch, who receives it from higher entities. Rather, the crown – where still in some control – now shares those powers with the people/parliaments, however defined. The making of law becomes a regulated process, where various actors have a distinct role: it is clearly recognizable and a matter of *objective* study. For Austin, in this context positive law is characterized by command given by a political superior (person or body); consequent duty imposed on the subjects; and sanction following the breach of duty.[4]

The new approach involves a radical shift: there is no more room for natural law, which had thus far played a key role. A body of rules handed down through the centuries, *ius naturale* had a Roman law root and its content determined mostly by experts, according to whatever meaning they gave to *nature*, be it divinity, morality or reason,

[2] In the sense expounded by H.L.A. Hart, *The Concept of Law*, Oxford: Oxford University Press, 2012, Preface.

[3] A. Comte, *Discours sur l'esprit positif*, Paris: Carilian-Goeury et Dalmont, 1844. He is widely regarded as the founder of sociology. John Stuart Mill, Herbert Spencer, Roberto Ardigò are among those deemed most influenced by his theory. Philosophers like John Locke or Jeremy Bentham, and more generally Utilitarians, are to some extent considered forerunners of positivists. Others maintain that positivism has a much more ancient genealogy in Western philosophical history.

[4] J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, London: Murray, 1832, hereinafter quoted in the 5th edition, revised and edited by R. Campbell, London: Murray, 1885.

and identified through a deductive process. While recourse to natural law may have provided a limitation to the absolute discretion of monarchs in past ages, positivists point out the arbitrariness of this approach to make/find the applicable law, as well as its uncertainty. This is true not only for the continental tradition, which is by now based on codes and parliamentary laws, but also for common law countries.[5]

It is worth recalling here a few features of positivism as a method of identifying law, which were generally acknowledged between the 19th and 20th centuries. The following are broad statements, which do not pay their due to the complexity of an articulated debate among positivists themselves.[6] As the subject of this lecture is not a study of positivism across the board, but its application to international law, it is here necessary but also sufficient to bring to the reader's attention a few points.

The expression positivism may have different roots; in the legal discourse, *positum* is mostly understood as created by man. *Ius positum* is thus juxtaposed to natural law, which is instead thought to be immanent. In this sense, the notion of positive law is not a novelty of the 19th century; it may be traced back at least to the Middle Ages.[7]

What is new, is that by this time the State has the monopoly of *ius ponere*, of making law. Positivism then equates with State law; and because the political regimes, at this time and in the regions of the world where positivism blooms, tend towards a liberal democracy pattern, the people, through parliaments, have the power to make the law. The will of the legislators is supreme. There is theoretically no more room for a law, which is not made by the people for the people. Positivism then has the very first goal to delegitimize any discretionary rule-making outside the established, constitutional procedures, such as also leaving to a few, unelected experts the task of declaring what the applicable norm is, often – it is maintained – by way of hazy arguments. Like natural

[5] J. Austin, *Lectures*, cit., p. 251, seems to air a certain diffidence towards "that measureless system of judge-made rules of law, or rules of law made in the judicial manner, which has been established covertly by those subordinate [to the king] tribunals as directly exercising their judicial functions". However, he traces these rules back to the legislative power by noting that "when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature [...] The state [...] permits its minister to enforce them" (*ibid.*, p. 102; emphasis in the original). H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in *Harvard Law Review*, 1957-58, p. 593 *et seq.*, reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford: Clarendon Press, 1983, also available at Oxford Scholarship Online, states that "after it was propounded to the world by Austin [positivism] dominated English jurisprudence" (p. 55), as well as US jurisprudence. See, for example, O.W. Holmes, *The Path of the Law*, originally published in *Harvard Law Review*, 1897, p. 457 *et seq.*, reprinted in *Boston University Law Review*, 1998, p. 78 *et seq.*

[6] A thorough introduction to legal positivism is provided by the collected essays of N. Bobbio, *Giusnaturalismo e positivismo giuridico*, Roma, Bari: Laterza, 2011.

[7] R. Ago, *Positive Law and International Law*, in *American Journal of International Law*, 1957, p. 691 *et seq.*

law, in the European continental countries other unwritten law, such as usages, almost completely disappears from municipal legal orders.[8]

One major tenet is that one can neatly distinguish between the social, political, economic motives, which make up the reasons for having a certain rule, and the actual, legal procedure by which the rule becomes binding.[9] The two spheres are separate, or separable. The law as it is, is the area of legal studies; the law as it ought to be, is the area of political studies. Against this background, legal arguments are technical, not based on subjective, moral values. It is not the task of the jurist to express value-judgments: this is the realm of politics. Lawyers are scientists, who apply an objective method to the reading of law, as formulated by the political bodies. Also, as State-made law is written, rules are worded in such a way, as to make their scope clear. Thus, their application is predictable, and the role of judges is simply to apply the law in the specific case.[10] There is only limited room for interpretation, which consists in analyzing the text, context and premises of the law.[11] However, already Austin, for one, acknowledges that judges may have a quasi-creative role.[12]

The concept of sources of law is central. A rule becomes binding only if it is enacted according to the procedures established by the legal system, and not by itself because it is just. The direct consequence is that one may not invalidate nor discard a rule because it is biased, according to a moral judgment, but only because it conflicts with higher norms of the legal system.

The self-standing character of the juridical order is best developed in Kelsen, who may be considered, for the purposes of this lecture, an advanced positivist. According

[8] J. AUSTIN, *Lectures*, cit., p. 101 *et seq.*, considers custom as law established "by the state directly or circuitously" (p. 103), where "customs are turned into legal rules by decisions of subject judges" … the State "signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as a law to the governed" (p. 102). See also *supra*, footnote 4.

[9] This is the well-known distinction between *fonte materiale* and *fonte formale* in the Italian legal theory, as developed also by international scholars. E.g., see D. ANZILOTTI, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, Firenze: F. Lumachi, 1902, p. 30; D. ANZILOTTI, *Corso di diritto internazionale*, Roma: Athenaeum, 1923, pp. 13 e 39. H.L.A. HART, *The Concept of Law*, cit., refers to the *fonti formali* through the notion of "rules of recognition".

[10] On predictability from the point of view of common law, see O.W. HOLMES, *The Path of the Law*, cit.

[11] According to H.L.A. HART, *Positivism and the Separation of Law and Morals*, cit., p. 66, the clear-cut idea that judges only find and never make law is maintained only by those legal theorists, most concerned with the separation of powers, like Montesquieu or Blackstone. Kelsen maintains that "the creation of an inferior norm is at the same time the application of the superior norm determining the creation of the inferior norm […] Creation and application of law are only relatively, not absolutely, opposed to each other. In regulating its own creation, law regulates also its own application", H. KELSEN, *Principles of International Law*, New York: Rinehart & Company, 1952, p. 304.

[12] J. AUSTIN, *Lectures on Jurisprudence*, cit., p. 35 *et seq.*, examines among the sources two modes of making law: a "*properly* legislative mode (or in the way of *direct* legislation), or in the *improperly* legislative mode (or in the way of *judicial* legislation)" (p. 35, emphasis in the original). Austin is of course speaking about the common law tradition.

to Kelsen, every legal system finds its legitimacy in a *Grundnorm*, which is simply – from the point of view of the lawyer – assumed, presupposed. The term normativism, often employed to describe Kelsen's approach, indicates both that the value-judgment, which is involved in deciding about the making of the norm, is not taken into consideration, once the rule has become a norm according to the established legal procedures; and – here mostly lies its difference with other forms of positivism – that the method employed in the study and application of the law is neither empirical, nor inductive. Any resort to methodologies of natural sciences, which relate to facts, is unacceptable in the social science, which is the study of law. The "purely legal" method is the one which distinguishes between what it is (the reality) and what it ought to be (what the law says), and only studies the second one: "which legal condition is linked with legal consequence".[13] Kelsen's aim is "to bring the results of this cognition as close as possible to the highest values of all science: objectivity and exactitude".[14] Such objectivity leads to the conclusion that interpretation of a positive norm in a material case is but an act of will, and that legal certainty is just an illusion.[15]

Because of its detachment from a critical appreciation of the content of law,[16] legal positivism is sometimes, in a not-so-much disguised derogative sense, described as formalism,[17] or analytical jurisprudence.[18]

III. Is positivism different in international and municipal law?

The notion that only the State makes law has an immediate appeal in international law. States were and are the leading personalities both in international relations and in international law. The central role of the will of States in law-making is unquestionable.

At the same time, international law is the expression of a society very different from municipal polities. It is a society of entities *superiorem non recognoscentes*, which lacks features considered essential by Austin, like a sovereign authority and an effective sanc-

[13] H. Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (1934), translated by B.L. Paulson, S. Paulson, Oxford: Clarendon, 1997, p. 58. Kelsen critique of empirical-positivism centers on seeing the law as part of the world of fact.

[14] *Ibid.*, p. 1.

[15] *Ibid.*, p. 83 *et seq.* The conclusion is not too far, although completely differently argued, from the one reached by Austin and quote, see *supra*, footnote 12.

[16] But, in turn, for a criticism of this common appreciation, see M. García-Salmones Rovira, *The Project of Positivism in International Law*, Oxford: Oxford University Press, 2013, Ch. 4.

[17] N. Bobbio, *Giusnaturalismo e positivismo giuridico*, cit., p. 12 *et seq*.

[18] The expression, originally employed by Austin, acquired a non-complimentary nuance especially in the US realist school of the 1930s. J.L. Kunz, *The "Vienna School" and International Law*, in *New York University Law Quarterly Review*, 1933-1934, p. 376 *et seq.*

tioning system.[19] The very notion of the State is different in municipal and international law.[20]

Such a society expresses law-making processes quite different from the enactment of laws. First of all, members of the international society themselves proceed directly to create legal norms: they self-impose rules. Also, international law continues to rely upon customary rules, and not to a limited extent. Unwritten international rules had been based for centuries both on natural law and on *jus gentium*, or on one of them, or on the result of their merging, according to various authors. This recourse to Roman, private law concepts was due to the need to find general and universal rules, which might apply in the peculiar society, which had developed in Europe at least since the 16th century.[21] The concept of *jus gentium* later evolved into a customary body of rules, made up of practices followed by the different (European) States in their relationships. By the 19th century, States do not appear to be willing to give up recourse to unwritten rules in their relations. The various Foreign Affairs ministries regularly kept invoking customary rules.[22]

[19] According to J. AUSTIN, *Lectures*, cit., pp. 225-226, "[s]ociety formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant about the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another. And hence inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected". Following Austin, the qualification of international rules as law continues up to this day to be a matter of debate in the English-speaking international relations community of scholars.

[20] G. ARANGIO-RUIZ, *L'Etat dans le sens du droit des gens et la notion du droit international*, in *Österreichische Zeitschrift für Öffentliches Recht*, 1975, p. 3 *et seq.*, p. 265 *et seq.*, available at www.gaetanoarangioruiz.it.

[21] This was true even before Grotius: see M. GIULIANO, *La comunità internazionale e il diritto*, Padova: CEDAM, 1950, ch. 1; R. AGO, *The First International Communities in the Mediterranean World*, in *The British Yearbook of International Law*, 1982, p. 213 *et seq.* On the topic, see now R. LESAFFER, *Roman Law and the Intellectual History of International Law*, in *Oxford Handbook of the Theory of International Law*, Oxford: Oxford University Press, 2016, p. 38 *et seq.*; W.G. GREWE, *The Epochs of International Law*, Berlin, New York: Walter de Gruyter, 2000, Part One. The quotation that "[t]he Law of Nations is but private law 'writ large'" is from T.E. HOLLAND, *Studies in International Law*, Oxford: Clarendon Press, 1898, p. 152, now available at www.archive.org. The quotation is reproduced as a dedication, at the opening page, in H. LAUTERPACHT, *Private Law Sources and Analogies in International Law*, London: Longmans, Green and Co., 1927, latest reprint, Clark, N.J.: The Lawbook Exchange, 2013.

[22] As it is evident from even a quick perusal of the various collections of diplomatic practice, like F. WHARTON, *A Digest of International Law of the United States*, Washington: Government Printing Office, 1887, p. 3 *et seq.*; J.B. MOORE, *A Digest of International Law*, Washington: Government Printing Office, 1906, p. 8 *et seq.*; the various volumes of *British and Foreign State Papers*; Società italiana per l'organizzazione internazionale (SIOI), *La Prassi italiana di diritto internazionale*, *Prima Serie*, Dobbs Ferry, New York: Oceana, 1970.

Treaty-law is also peculiar, if confronted with statutes. It has traditionally been assimilated to contracts, to indicate that they are concluded among parties on the same formal level. Besides, States enjoy complete freedom about not only the procedure to follow, but also the content of their agreements.

These difficulties did not discourage international scholars from embracing positivism. The fact that they are, at least in the beginning, mostly German might be connected to the influence upon them of Hegel, rather than Austin.[23] A first approach connected the binding nature of international law, or of treaties, to that same will, which the State exercises by making law in its municipal order. International law is thus the result of the combination of unilateral acts of will of the State, a sort of external public law. Such combination does not result in something similar to a contract; in fact, each State is at the same time the right holder and the obligation holder. As a consequence, it may always unilaterally withdraw its previous acceptance of obligations.[24]

A different approach is developed by Triepel, followed by Anzilotti. These Authors move away from the notion that international law is but external public law; rather, they view it as an original system of law, separate and independent from the various municipal orders.[25] They point out the likelihood of conflict among the different systems. In this context, the fathers of the dualist approach to the relation between international and municipal laws considered not only that international law had its proper sanctions, such as the

[23] On this aspect, see C. FOCARELLI, *Introduzione storica al diritto internazionale*, Milano: Giuffrè, 2012, p. 307 *et seq.* J. VON BERNSTORFF, *German intellectual historical origins of international legal positivism*, in J. D'ASPREMONT, J. KAMMERHOFER (eds.), *International Legal Positivism in a Post-Modern World*, Cambridge: Cambridge University Press, 2014, p. 50 *et seq.*, draws a rich picture of the German contribution to international positivism in the 19th century and before. Hegel had no issues in considering international law as law, although in the sense later developed by Jellinek: see G.W.F. HEGEL, *Grundlinien der Philosophie des Rechts*, Berlin: in der Nicolaischen Buchhandlung, 1821, English translation A.W. WOOD, *Elements of the Philosophy of Right*, Cambridge: Cambridge University Press, 8th ed., 2003, p. 366 *et seq.*

[24] C. BERGBOHM, *Staatsverträge und Gesetze als Quellen des Völkerrechts*, Dorpat: C. Mattiesen, 1877, p. 43; G. JELLINEK, *Die rechtliche Natur der Staatenverträge*, Wien: Holder, 1880, now available at www.archive.org. For ample references to the German debate of the time, see J. VON BERNSTORFF, *German intellectual historical origins*, cit., p. 54 *et seq.*

[25] H. TRIEPEL, *Völkerrecht und Landesrecht*, Leipzig: J.C.B. Mohr, 1899. While there is apparently no translation in English, the Italian translation, *Diritto internazionale e diritto interno*, dates back to 1913 (Torino: Unione Tipografico Editrice Torinese). A French translation appeared in 1920 (*Droit international et Droit interne*, Paris: Pédone; Oxford: Impr. de l'Université, 1920) and has been later republished. Triepel delivered a course at the very opening of the Hague Academy of International Law, *Les rapports entre le droit interne et le droit international, Recueil des Cours*, 1923, vol. 1, p. 73 *et seq.* Anzilotti was first a positivist philosopher, and only later an international law scholar; his first two works were in fact D. ANZILOTTI, *La scuola del diritto naturale nella filosofia giuridica contemporanea*, Firenze: Tip. Dei Succ. Le Monnier, 1892 and D. ANZILOTTI, *La filosofia del diritto e la sociologia*, Firenze: Tip. Dei Succ. Le Monnier, 1892, now reprinted in D. ANZILOTTI, *Opere di Dionisio Anzilotti,* IV, Padova: CEDAM, 1963, respectively p. 673 *et seq.* and p. 495 *et seq.* See G. GAJA, *Positivism and Dualism in Dionisio Anzilotti*, in *European Journal of International Law*, 1992, p. 123 *et seq.*

use of force in the way of reprisals or self-defence;[26] they also challenged the very idea that only the right enforceable through sanction properly qualified as right.[27] In claiming this, they separated the "principal right" from the "secondary right", where the latter consists in the right to enforce the first one.[28] Also, the dualist perspective forced them to identify sources of law, different from the municipal ones.[29]

Triepel and Anzilotti fully adhere to the notion of sources of law. For them, agreement is the typical source of international law. It is the expression, the product of the will of States. Unlike Jellinek, however, they refuse to regard the unilateral will of the single State as internationally binding. It is only the common will of some or many States about the establishment of a certain relationship, which becomes the source of international law, which produces "objective law".[30] Such common will, once expressed in the forms provided for (*Vereinbarung*), does not belong to the single State anymore.[31] According to Triepel, there is no juridical explanation for the binding nature of treaties. "The 'foundation' of the validity of law lies outside the law", for international as well as for municipal law.[32] It is worth highlighting that this remark antedates Kelsen's theory.

As for custom, Triepel denies that plain usages can be a source of law, because they are devoid of any will. He sees in the approaches which consider custom binding in international law merely a bequest of natural law doctrines.[33] Confronted with the fact that States do indeed invoke unwritten rules in their relations, Triepel conceives them as a tacit

[26] H. Triepel, *Droit international et Droit interne*, cit., p. 104. At the time of writing (1899), limitations to recourse to the use of force were only beginning to be discussed by States.

[27] *Ibid* , p. 105 *et seq.*; D. Anzilotti, *Corso di diritto internazionale*, cit., pp. 27-29.

[28] H. Triepel, *Droit international et Droit interne*, cit., p. 106. Anzilotti, as it is well-known, developed his approach to State responsibility for wrongful acts upon the distinction between a primary and a secondary rule: D. Anzilotti, *Teoria generale della responsabilità*, cit., p. 96 *et seq.* Such an approach arrived at the International Law Commission through the work of Roberto Ago, and remains an essential feature of the 2001 codification.

[29] H. Triepel, *Droit international et Droit interne*, cit., pp. 9-10, 16, 19, 126 *et seq.*

[30] *Ibid.*, p. 31 *et seq.*; D. Anzilotti, *Teoria generale della responsabilità*, cit., p. 30 *et seq.* Anzilotti later accepted, following Kelsen, that indeed the binding force of treaties laid, itself, on the *pacta sunt servanda* rule: D. Anzilotti, *Corso di diritto internazionale*, cit., p. 27.

[31] It is not relevant here to dwell into the distinction between a contract-treaty (*Vertrag*), which according to Triepel cannot create law but only a reciprocal relationship, where the parties exchange something, and a normative-treaty (*Vereinbarung*), which instead is to be considered the only proper source of objective law. The difference consists mostly in the attitude of the second kind of agreements to establish a certain regime, producing rights and obligations, which is susceptible of being applied in an undetermined series of cases. According to Triepel, in the first case, States are subjects of law, while in the second, they are makers of law (p. 46). The distinction, which was already present in C. Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts*, cit., p. 79 *et seq.* and in the subsequent German doctrine, was accepted by D. Anzilotti, *Teoria generale della responsabilità*, cit., p. 41 *et seq.*

[32] H. Triepel, *Droit international et Droit interne*, cit., pp. 80-81.

[33] *Ibid.*, cit., pp. 30-31; as does D. Anzilotti, *Corso di diritto internazionale*, cit., p. 39.

Vereinbarung. Only when it is possible to trace in the usage followed by different States a tacit declaration of will, that custom as *Vereinbarung* may produce law.[34]

Lassa Oppenheim arrived at similar results. His *International Law*, first published in 1905,[35] has remained for over a century the textbook of reference for any English-speaking international lawyer/scholar, being subsequently updated – or should one say changed[36] – by the most eminent English international scholars.[37] One of the reasons his treatise was so successful, is his capacity to give a clear exposition of the subject, while building a system of international law. Oppenheim's extensive and varied German education[38] has him fully embracing positivism.[39] He maintains that, like any other system of law, international law also is based on common consent, in this case of States as sovereign communities.[40] However, his notion of source of law is not without ambiguities. Like other positivists, he also cautions against mixing sources and causes of law; but then maintains that "rules of law [...] rise from facts in the historical development of a community".[41] Oppenheim states categorically that both custom and treaties are sources of international law; the basis for the binding force of treaties lies in a customary rule that so provides.[42] He also maintains that such a rule is clearly existent, because it is "produced" by various causes: religion, morals, interest of States.[43]

This is not the place to dwell on the problems of tracing custom to a tacit agreement; the question was vastly discussed soon after the theory was presented.[44] It

[34] H. TRIEPEL, *Droit international et Droit interne*, cit., p. 89 *et seq.*; D. ANZILOTTI, *Corso di diritto internazionale*, cit. p. 39 *et seq.*

[35] L.F.L. OPPENHEIM, *International Law. A treatise*, I, *Peace*, London: Longmans, Green, and co., 1905, now available at www.gutenberg.org.

[36] W.M. REISMAN, *Lassa Oppenheim's Nine Lives*, in *Yale Journal of International Law*, 1994, p. 255 *et seq*.

[37] The 9th edition was published in 1994, and edited by R. Jennings and A. Watts. In 2017, a new part was added concerning the United Nations, under the editorship of Dame Rosalyn Higgins.

[38] M. SCHMOECKEL, *The Internationalist as a Scientist and Herald: Lassa Oppenheim*, in *European Journal of International Law*, 2000, p. 699 *et seq*.

[39] L.F.L. OPPENHEIM, *International Law*, cit., pp. 90-93. On the influence of earlier German authors, not only international law scholars, see M. SCHMOECKEL, *The Internationalist as a Scientist and Herald*, cit., p. 705 *et seq.*

[40] L.F.L. OPPENHEIM, *International Law*, cit., p. 16 *et seq.*

[41] *Ibid.*, p. 21.

[42] *Ibid.*, p. 21 *et seq.* More generally, he maintains that even in municipal law there is always some customary law, and that to consider that it becomes law through an indirect recognition by the State (as Austin does), is "nothing else than a fiction". *Ibid.*, p. 5.

[43] *Ibid.*, pp. 3 and 12 and L.F.L. OPPENHEIM, *Lectures on Diplomacy as Part of International Law*, unpublished manuscript, as quoted by M. SCHMOECKEL, *The Internationalist as a Scientist*, cit., p. 701, from which the expression in the text is taken.

[44] Practice throughout the 20th century has shown that new States have, sooner or later, come to terms with custom and have proceeded to influence its change and further development, without contesting anymore its way of working. The idea that custom might be conceived as a tacit agreement was never debated during the recent works of codification on the topic of customary law carried out, with the approval of States members of the United Nations, by the International Law Commission.

should only be noticed here that the tacit agreement approach was quickly adopted by new States/regimes, which make their entrance into the society of States in the 20th century – the Soviet Union first of all.[45] For them, it is a way to affirm their sovereignty, as well as their new ideology, in their relations to pre-existing States. At the same time, though, Soviet international scholars reject the understanding of the international legal system as based on a basic norm.[46]

Some of the above-mentioned international continental positivists, like Triepel and Anzilotti, at the turning of the 19th and 20th century did not dwell too much on the identity or content of the original norm to be assumed as the basis of the international legal system. They rather insisted on agreements as the only source of international law. Others, like Oppenheim, very early found the origin of the whole system in the *consuetudo est servanda*. It is, however, due to Kelsen, that the fundamental rule and its nature become central in the theoretical debate.[47] In Italy, Perassi is the first to refer to the *pacta sunt servanda* as the basic rule in international law, within a larger theoretical construction which is on the whole, but not completely, derived from Kelsen.[48] Anzilotti finds such a solution consistent with his approach.[49] Kelsen, on the other hand, within the hierarchical system of sources, which is typical of his doctrine, lays the rule *consuetudo est servanda* as the basic norm of international law.[50] He then proceeds to link the binding power of treaties to the customary rule *pacta sunt servanda* and the binding power of other acts, like judgments, to the treaty providing for those procedures or, if this is the case, for an international court.[51] Kel-

[45] G.I. TUNKIN, *Coexistence and International Law*, in *Recueil des cours de l'Académie de Droit International de la Haye*, 1958, p. 9 *et seq.*; G.I. TUNKIN, *Remarks on the Judicial Nature of Customary Norms of International Law*, in *California Law Review*, 1961, p. 419 *et seq.*; R.J. ERICKSON, *Soviet Theory of the Legal Nature of Customary International Law*, in *Case Western Reserve Journal of International Law*, 1975, p. 148 *et seq.*, available at www.scholarlycommons.law.case.edu. See also, in Italian, M. GIULIANO, *La concezione marxista del diritto*, in *Rinascita*, 1948, pp. 68-74, where the Author notes at p. 69 that "[l]a concezione marxista del fenomeno giuridico è, pertanto, innegabilmente una concezione *positivistica*" (emphasis in the original).

[46] G.I. TUNKIN, *Coexistence and International Law*, cit., pp. 38-39.

[47] Kelsen could rely on a number of previous notations on the topic: see J. VON BERNSTORFF, *German intellectual historical origins*, cit., *passim*.

[48] T. PERASSI, *Teoria dommatica delle fonti di norme giuridiche in diritto internazionale*, in *Rivista di diritto internazionale*, 1917, p. 195 *et seq*. The work by Kelsen Perassi referred to was H. KELSEN, *Hauptprobleme der Staatsrechtslehre*, Tübingen: Mohr, 1911. He also took into consideration A. VERDROSS, *Zur Konstruktion des Völkerrechts*, in *Zeitschrift für Völkerrecht*, 1914, p. 355. See F. SALERNO, *L'affermazione del positivismo nella scuola internazionalista italiana: il ruolo di Anzilotti e Perassi,* in *Rivista di diritto internazionale*, 2012, p. 29 *et seq.*, esp. p. 50 *et seq.*

[49] D. ANZILOTTI, *Corso di diritto internazionale,* cit., pp. 27, 39 and 42.

[50] Kelsen may first have identified the basic norm of the international legal system in the *pacta sunt servanda*: H. KELSEN, *Das Problem der Souveränität und die Theorie des Völkerrecht*, Tubingen: J.C.B. Mohr, 1920, 2nd reprint of the 2nd edition, Aalen: Scientia, 1981, pp. 136-137. For the later view, see H. KELSEN, *Principles of International Law*, cit., pp. 314, 319.

[51] H. KELSEN, *Introduction to the Problems of Legal Theory*, cit., p. 107 *et seq.* The question of the monistic or dualistic construction on the relationship between international and municipal laws, which accord-

sen denies that custom may be seen as a tacit agreement, because custom, as a law-creating procedure, must be provided for by another, higher norm.[52] *Consuetudo est servanda* as the basic norm of the international legal system is later accepted by many positivists, Gaetano Morelli among them.[53] He carries over the normativist approach of Kelsen about the sources of international law, while maintaining Anzilotti's basic tenets concerning separation of the municipal and international legal orders, or the content of State responsibility for wrongful acts. The positivist focus on the legal construction becomes in Morelli the search for a flawless logical system, which can accommodate all the possible variables of reality. It is a fitting task for the author, due both to his scientific profile, and the political background in Italy at the time he first writes.[54] In that task he succeeds, with an incomparable clarity and precision of language.

To sum up, there is accordance among the various views, that the basic rule is assumed and no inquiry is devoted to its nature. Some did and do not fail to notice that this appears an oxymoron, from a positivist standpoint.[55]

ing to Kelsen should be necessarily resolved in the first sense if one accepts his theory of the *Grundnorm* (p. 113 *et seq.*), will not be discussed here.

[52] Which cannot be a State norm, as the tacit agreement theory would, in his opinion, maintain, by stressing the will of each State. For Kelsen, "this so-called 'will' of the state is simply the anthropomorphic expression for the 'ought' of norms" (H. KELSEN, *Introduction to the Problems of Legal Theory*, cit., p. 118; see especially p. 122 *et seq.*).

[53] G. MORELLI, *Nozioni di diritto internazionale*, Padova: CEDAM, 1943, p. 10.

[54] G. GAJA, *Necrologio – Gaetano Morelli*, in *Rivista di diritto internazionale*, 1990, p. 114 *et seq.* G. BARTOLINI, *The Impact of Fascism on the Italian Doctrine of International Law*, in *Journal of the History of International Law*, 2012, p. 237 *et seq.*, draws a detailed picture of the standing of international law professors during Fascism in Italy. To some extent, he disagrees with what Sereni had maintained in his 1943 book *The Italian Conception of International Law* (New York: Columbia University Press), that is, that Fascism had no influence whatsoever on Italian international law doctrine. In any case, there is no evidence of any involvement of Morelli with legal theories favored by, or favoring, the dictatorship. As for Anzilotti, his dissent from some political moves by Fascism, such as the ones leading to the Corfu dispute with Greece, is well retold in O. FERRAJOLO (a cura di), *Il caso Tellini. Dall'eccidio di Janina all'occupazione di Corfù*, Milan: Giuffrè, 2005, p. 154. See also F. SALERNO, *L'affermazione del positivismo nella scuola internazionalista italiana*, cit., p. 37, and J.M. RUDA, *The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice*, in *European Journal of International Law*, 1992, p. 122.

[55] Among others, S. ROMANO, *Corso di diritto internazionale*, Padova: CEDAM, 1933, p. 25; G. SALVIOLI, *Principi generali di diritto internazionale (A proposito del* Corso di diritto internazionale *di D.Anzilotti*), in *Rivista di diritto internazionale*, 1928, p. 571 *et seq.* A thorough and critical analysis of this aspect is one of the main points made by M. GARCÍA-SALMONES ROVIRA, *The Project of Positivism in International Law*, cit. But see T. PERASSI, *Teoria dommatica delle fonti*, cit., p. 205: "[u]na teoria dommatica delle fonti di norme giuridiche è, per definizione, una teoria incapace di scovrire l'origine del diritto, ossia, più precisamente, di spiegare come un processo qualsiasi sia per sè idoneo a produrre la giuridicità di una norma indipendentemente da una norma giuridica preesistente, a cui attenga tale idoneità: essa ha per limite tale incapacità".

IV. A methodology for international law

The remarks so far sketchily carried out are necessary to understand the bases, upon which a positivist methodology lays. As should be apparent, the label positivism covers a variety of approaches; a closer look into the actual method employed by self-defined international positivists around the turn of the 19th and 20th centuries is therefore necessary.

The central role of the will of States should make it necessary to analyze international relations to ascertain whether such a will has been expressed, by which States and with what content. Such an inquiry, if not always easy, is at least clear concerning treaties; it may become much more difficult in the identification and evaluation of custom, even if understood as a tacit agreement.

In their works, continental scholars do not usually dwell upon the exposition of the practice of States; but they know it well and they assume that readers mostly do too.[56] It is interesting to remember here what Anzilotti was writing in 1902, in his book on State responsibility for wrongful acts:

> "[a]ll [...] these international disputes, whether they were the object of scholarly debate or they remained confined to the diplomatic correspondence of the various States, are very helpful in discovering the different aspects of the complex subject; so much so, that he who intends to discuss it must keep them constantly in mind, because the value of any legal theory is, ultimately, its ability to understand and explain the actual relationships".[57]

After having considered the will of States as the key element to qualify a system of rules as juridical, Anzilotti remarked in the first edition of his lectures: "[i]t is for us sufficient to note that rules produced by the common will of States with the aim to regulate their conducts without any doubt exist, in order to maintain that it is a legitimate, if not necessary, task of our subject to ascertain and study them for what they are, putting them together in a logical system".[58]

The approach advocated is, thus, inductive. Object of the research is to ascertain "whether there are rules governing the relations among States which are not mere morals or usages".[59] It is starting from the behaviors of States expressing their will, that one may conclude whether or not there is a certain rule: "[t]he essential moment for

[56] H. Triepel, *Droit international et Droit interne*, cit., p. 11 *et seq.* The book by D. Anzilotti, *Teoria generale della responsabilità dello Stato*, cit., for example, is replete with cases, which are not examined *per se*, but discussed together with the proposed theoretical approach.

[57] D. Anzilotti, *Teoria generale della responsabilità dello Stato*, cit., pp. 22-23. Translation by the present Author.

[58] D. Anzilotti, *Corso di diritto internazionale*, cit., p. 29, translation by the present author. In the 3rd edition of the *Corso*, reissued by SIOI, Padova: CEDAM, 1955, I, p. 75, Anzilotti wrote: "[è] facile comprendere come la determinazione dell'esistenza e della portata di una norma risultante dal modo di comportarsi degli Stati presenti grandi difficoltà. I dati di fatto di questa determinazione sono forniti dalla storia, specialmente dalla storia delle relazioni internazionali".

[59] D. Anzilotti, *Teoria generale della responsabilità*, cit., p. 26 (translation by the present author).

[determining] the existence of a juridical rule, is that it is the expression of a will capable to impose itself upon the single wills towards which it is directed".[60] Therefore, only acts carried out on the international level and directed to other States are relevant for discerning tacit agreements. Municipal laws, case-law and administrative acts may only be used as further proof of a tacit agreement.[61]

Perhaps the most outspoken on methodology,[62] Oppenheim's approach may also be qualified as inductive. He describes the object of study not just by reference to the will of States. It is, more generally, the practice of States, the history of the relationships among States, over the background of that common consent "which is the basis of the Law of Nations".[63] The social intercourse of States is the material to be carefully analyzed and upon which rules are based.[64] Oppenheim strongly cautions against mixing the results of the historical inquiry – the *lege lata* – and the writer's opinions or wishes *de lege ferenda*.[65] He himself offers political and moral views as well as hopes for the development of international law, but stresses that all of this is not the current law. Oppenheim gives detailed indications about the way the positivist method should be applied, not limiting himself to recommend in general terms strict adherence to the data offered by State practice, but clearly stating how to appreciate municipal case-law, arbitral awards, international legal literature, and treaties.[66] Oppenheim explicitly considered the method of natural law incompatible with the positivist one.[67]

With regard to Kelsen, the issue of methodology is central in all his work, and not limited to international law.[68] His approach does not involve, however, providing indications on how to ascertain the existence and content of international rules, whether customary or conventional, in a material case. Kelsen concentrates on the general theory

[60] D. Anzilotti, *Teoria generale della responsabilità*, cit., p. 27. See also D. Anzilotti, *Corso di diritto internazionale,* cit., p. 43.

[61] D. Anzilotti, *Corso di diritto internazionale,* cit., p. 46.

[62] But see the criticisms of M. García-Salmones Rovira, *The Project of Positivism in International Law*, cit., p. 113 *et seq.*

[63] L.F.L. Oppenheim, *International Law*, cit., p. 16.

[64] L.F.L. Oppenheim, *The Science of International Law: Its Task and Method*, in *American Journal of International Law*, 1908, pp. 313 *et seq.*, esp. p. 315 *et seq.* and p. 333 *et seq.*

[65] L.F.L. Oppenheim, *The Science of International Law*, cit., pp. 335 and 353 *et seq.* Like Anzilotti, Oppenheim refers to specific cases of practice to make a point, but does not dwell into a detailed analysis of practice. This is, in his opinion, the task of scholars addressing a specific aspect in monographs (*ibid.*, pp. 325-326). For the different view that Oppenheim's morals led him to certain conclusions, not reconcilable with the positivist method, see M. García-Salmones Rovira, *The Project of Positivism in International Law*, cit., p. 111 *et seq.*

[66] L.F.L. Oppenheim, *The Science of International Law*, cit., p. 333 *et seq.* On the cultural and political milieu to which Oppenheim's work may be traced back, see M. García-Salmones Rovira, *The Project of Positivism in International Law*, cit., chapters 2 and 3.

[67] L.F.L. Oppenheim, *The Science of International Law*, cit., p. 326 *et seq.*

[68] M. García-Salmones Rovira, *The Project of Positivism in International Law*, cit., chapters 4-6.

for those rules, and leaves to others their identification.[69] In any case, he accepts the notion of custom as composed by both a long-established practice of States, and the opinion that such a practice is obligatory, or right.[70]

Morelli adopts a similar approach. Like Kelsen, he is fully centered on the theoretical legal construction and does not stop to analyze State practice; but at the same time, whenever he feels the need to invoke final proof for his position, he recalls the standard practice of States on that issue.[71] As for custom, Morelli too requires a uniform practice and a subjective element. This last one is not, in his opinion, a manifestation of will, but rather an intellectual operation concerning the coming into being of the rule.[72] This appears, again, more a theoretical reconstruction, than an indication of a different methodology towards the identification of customary rules.

V. Traces of natural law in international law between the 19th and 20th centuries

By the second half of the 19th century, international law is considered, by some, a field of law which can greatly benefit from a systematic study carried out in an organized way by independent scholars and practitioners. The *Institut de Droit International*, born in 1873[73] with the aim to "promote the progress of international law", is the most well-known example of such spirit. Its founding statutes set out various activities to be pursued by the Institut in the development of international law. In this regard, they declare that to achieve that aim the Institut will "formulate the general principles of the subject, in such a way as to correspond to the legal conscience of the civilized world"; and will cooperate "in any serious endeavor for the gradual and progressive codification of international law".[74] The eleven founding Members, coming from different European countries as well as from the United States and Argentina, appear to be liberals with a strong international view, who believed that a collective scientific action might be more effective for peace and cooperation upon the conduct of States and generally diplomacy, than the isolated work of

[69] It is interesting to reproduce here a part of his Preface to H. Kelsen, *Principles of International Law*, reprint 2012, New York: The Law Book Exchange: "[a]s to the formulation of the norms of positive international law and their traditional interpretation I have used […] the English standard work by L. Oppenheim and H. Lauterpacht" (p. viii).

[70] H. Kelsen, *Principles of International Law*, cit., p. 307 *et seq.*

[71] E.g., G. Morelli, *Nozioni di diritto internazionale*, cit., p. 10 (about the binding power of treaties).

[72] For this reason Morelli regards custom as an international fact, and not an act (G. Morelli, *Nozioni di diritto internazionale*, cit., pp. 28-29).

[73] In 1873 Jules Verne publishes his *Le Tour du monde en quatre-vingts jours*: it may be the date of birth of globalization.

[74] Art. 1 of the *Institut de Droit International*'s Statute.

scholars in their academic roles.[75] They were mostly lawyers and high-profile academics, with an active interest in politics.[76] Their intention was to serve as an "organe à l'opinion juridique du monde civilisé en matière de droit international", by favoring the knowledge, diffusion, development and codification of international law.[77] In the public declaration which accompanied its establishment, the Institut regretted the "imperfection" of international law, as well as its lack of clear rules on some topics. These were observations aimed at stressing the need for "progress" of the law. The task of the Institut was finally thus summarized: "[i]l ne s'agit pas en effet de faire le droit mais de le chercher, dans un sentiment d'équité qui constitue la conscience commune à tous les hommes".[78] Among the founders of the Institut, there were none of the scholars mentioned above as positivists, maybe because this approach came to be discussed in the field just a little later. It seems that the conscience and opinion of the civilized world, and equity, were invoked mostly in support of the improvement of the law.

A not too different aim may be perceived in the Martens clause inserted in the preambles to the Hague Conventions of 1899-1907 on the Laws and Customs of war on land, which famously declares that

> "[u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".[79]

Keeping in mind the doctrinal debate which occurred between the end of the 19th and the beginning of the 20th centuries, it is interesting to consider how, in 1920, Art. 38 of the Statute of the Permanent Court of International Justice came to be drafted. With regard to the law to be applied by the new Court, the provision defines custom "as evidence of a general practice accepted as law", and then refers to "the general principles of law recognized by civilized nations".[80]

[75] About the ways and reasons the Institut came to be established, see M. KOSKENNIEMI, *The Gentle Civilizer of Nations*, Cambridge: Cambridge University Press, 2001, p. 12 *et seq.*; as well as A. ROLIN, *Les origins de l'Institut de Droit International 1873-1923*, available online at www.idi-iil.org.

[76] Among these last ones, Mancini, Bluntschli, Lorimer, Asser. Moynier, the successor of Dunant in the establishment of the Red Cross, was also a founding member. A biographical description of each of the founders may be found on www.idi-iil.org.

[77] A. ROLIN, *Les origins de l'Institut*, cit., p. 15.

[78] *Ibid.*, p. 73. At p. 68, one reads: "[n]otre but principal est d'arriver, par la libre action d'un nombre limité de jurists éminentes, à constater, d'une manière aussi certaine que possible, l'opinion juridique du monde civilisé, et à donner à cette opinion une expression assez claire, assez exacte pour que'elle puisse être acceptée par les different États comme règle de leurs relations extérieures".

[79] Text available at www.ihl-databases.icrc.org.

[80] No examination is here carried out of the "subsidiary means for the determination of rules of law" which Art. 38, para. 1., let. d), of the Statute of the International Court of Justice indicates in "judicial deci-

The Committee of experts designated by the Council of the League of Nations to prepare the Statute included professors of law, Ministers, legal advisers to Foreign Affairs departments and a former US Secretary of State.[81] There were no German members. One participant was the Italian Ricci-Busatti, who, while a diplomat, had also established with Anzilotti the *Rivista di diritto internazionale* in 1906 and had co-signed the program of the new review.[82]

The proceedings of the meetings of the Committee show that there was a lengthy and articulated debate about whether the future Court should apply only "positive law",[83] or whether it should also be charged "to develop law, to 'ripen' customs and principles universally recognized, and to crystallyse them into positive rules".[84] Explicit reference was made to "exigencies of justice and equity", which might suggest to the Court not to apply the law.[85] And the fear was expressed "on the possibility of the Court declaring itself incompetent (*non liquet*)", because "there might be cases in which no rule of conventional or general law was applicable".[86] Such a case was clearly excluded by Ricci-Busatti, who denied the possibility of *non liquet*, because

> "[b]y declaring the absence of a positive rule of international law, in other words an international limitation on the freedom of the parties, nevertheless a legal situation is established. That which is not forbidden is allowed; that is one of the general principles of law which the Court shall have to apply [...] it is not a question of creating rules which do not exist, but of applying the general rule which permit the solution of any question".[87]

sions and teachings of the most highly qualified publicists of the various nations". L.F.L. Oppenheim, *The Science of international law*, cit., p. 344, cautions against the "improper use of so-called authorities and to overestimate the value and importance of the mass of the literature on international law".

[81] Elihu Root. Oppenheim had died in October 1919.

[82] F. Salerno, *La Rivista e gli studi di diritto internazionale nel periodo 1906-1943*, in *Rivista di diritto internazionale*, 2007, p. 305 *et seq.* In the *Introduzione* to no. 1 of the *Rivista*, composed by Anzilotti, Ricci-Busatti and Senigallia, one reads: "[c]onvinti che al buon indirizzo e al progresso di questa disciplina giovi soprattutto di rilevare il carattere positivo delle norme, già così varie e molteplici, che governano i rapporti internazionali di ogni specie".

[83] In this sense, for e.g., E. Root in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, p. 294, available at www.icj-cij.org.

[84] B.C.J. Loder in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., p 294. The debate about the law the Court would apply took place from the 13th meeting (July 1st, 1920) through the 15th (July 3rd 1920), in *Advisory Committee of Jurists, Procès-verbaux June 16th-July 24th 1920, cit.,* pp. 293-338.

[85] A.D.G. De La Predelle in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., p. 295-296.

[86] M. Hagerup in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., p. 296.

[87] A. Ricci-Busatti in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., pp. 314-315. The same remark was later made by H. Kelsen, *Principles of International law*, cit., p. 306.

For the purposes of the present lecture, it is worth recalling the resistance put up by Mr. Root, the former US Secretary of State, to the inclusion of general principles, because such a provision would allow the Court to base "its sentences on its subjective conceptions of the principles of justice. The Court must not have the power to legislate".[88] Descamps, among others, held the opposite view that there could be no uncertainty about "the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations".[89] On the whole, it appears that the members of the Committee held different views about what was included in international law and what the general principles were. Lord Phillimore, like Descamps, held a conception close to natural law;[90] Ricci-Busatti was a positivist, in the sense explored in the previous paragraphs, as was probably Root.[91] In the end, the so-called Root-Phillimore plan, which led to the present formulation of Art. 38, emerged, on this point, as a result of mediation among quite diverse approaches.

Anzilotti, who was present as Secretary-General of the Committee during the preparatory works, declared the whole Art. 38 an "infelicissimo articolo".[92] As for the definition of custom, he considered that it is the general practice accepted as law to be custom, and that it was a mistake to identify custom as the evidence of law.[93] On his part, Kelsen was very critical of the inclusion of general principles of law recognized by civilized nations in Art. 38. He thought that such principles could only be applied if they were a part of international law, that is, if they were customary rules or provided for in treaties.[94]

[88] E. Root in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., p. 309.

[89] E. Descamps in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., pp. 310-311; see also p. 318.

[90] Particularly clear is the debate at *ibid.*, p. 318. Later on, Lord Phillimore "explained that 'by general principles of law' he had intended to mean 'maxims of law'" and that "the principles which formed the bases of national law, were also the sources of international law" (*ibid.*, p. 335). This statement should be understood keeping in mind that, as a common lawyer, he was convinced that "Generally speaking, all the principles of common law are applicable to international affairs. They are in fact part of international law" (*ibid.*, p. 316).

[91] On the relationship between Oppenheim and Root, both personal and theoretical, see M. García-Salmones Rovira, *The Project of Positivism in International Law*, cit., pp. 47, 110 *et seq.* Ricci-Busatti was very critical about mentioning the opinions of authors as a source of law (*Advisory Committee of Jurists, Procès-verbaux*, cit., pp. 332-334).

[92] D. Anzilotti, *Corso di diritto internazionale*, I, cit., p. 97.

[93] *Ibid.*, p. 100.

[94] H. Kelsen, *Principles of International Law*, cit., p. 394. In the preface to this work, Kelsen explained that he had used the word principles in the title, because he had intended not only to offer a presentation of the most important norms of international law, but also a theory of international law (vii).

VI. Positivism in the first half of the 20th century

It is impossible to carry out here a complete survey of the way international law was identified in the first decades of the 20th century, in order to assess whether and to what extent a positivist approach – or one of them – was actually followed. A limited, but meaningful brief look can however consider the work of a self-described positivist like Anzilotti, who happened to sit at the Permanent Court of International Justice throughout its lifetime. He wrote a number of separate and dissenting opinions, but many could see his handwriting on various passages of judgments too.[95]

One such case might be the *Lotus* case. In the judgment, the majority, including Anzilotti, wrote that "[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law".[96] The majority thus propounds a notion of customary law, which is the one of Triepel and Anzilotti mediated through the language of Art. 38 of the Statute of the Court.

Generally speaking, Anzilotti, while dealing in his opinions at times in a very detailed manner with the facts of the case at hand, did not offer a thorough examination of State practice in order to maintain whether a certain rule existed or not. For example, when considering the binding nature of unilateral declarations made by a Foreign Affairs Minister, he observed that

> "[n]o arbitral or judicial decision relating to the international competence of a Minister for Foreign Affairs has been brought to the knowledge of the Court; nor has this question been exhaustively treated by legal authorities. In my opinion, it must be recognized that the constant and general practice of States has been to invest the Minister for Foreign Affairs – the direct agent of the chief of the State – with authority to make statements on current affairs to foreign diplomatic representatives […] Declarations of this kind are binding upon the State".[97]

It may be true for the Permanent Court, as it is for the International Court today, that it was usually the States parties to a dispute which would present extensive analysis of practice to support a certain conception of a rule or its content. However, in the above mentioned *Lotus* case the Permanent Court had observed

> "that in the fulfilment of its task of itself ascertaining what international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law con-

[95] J.M. Ruda, *The Opinions of Judge Dionisio Anzilotti*, cit., p. 100.

[96] Permanent Court of International Justice, *Lotus S.S.* (France v. Turkey), judgment of 7 September 1927.

[97] Permanent Court of International Justice, *Legal Status of Eastern Greenland* (Denmark v. Norway), judgment 5 September 1933, dissenting opinion of judge Anzilotti, para. 91.

templated in the special agreement. The result of these researches has not been to establish the existence of any such principle".[98]

The Court referred here to elements, which appear different from those considered by Anzilotti relevant towards the identification of custom. Also, when considering the argument presented by one of the party, that the lack of a certain practice could be appreciated as "proof of a tacit consent on the part of States and, consequently, shows what positive international law is", the Permanent Court remarked that such a conclusion was not "warranted" because "only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom".[99] It is thus unfortunate not to find some more detailed reference to practice by a well-known positivist scholar/judge. Such reference could have dispelled doubts about which forms of practice were relevant, for that approach. Because custom was conceived as a tacit agreement, Anzilotti, as mentioned above, excluded municipal practice; and arbitral awards or judgments would have been excluded too.[100] But the dissenting opinion recalled above does not appear to follow this line of reasoning.

Anzilotti noticed, on another occasion, that Art. 38, in stating "the sources of law to be applied by the Court, only mentions international treaties or custom and the elements subsidiary to these two sources, to be applied if both of them are lacking".[101] In practice, he may not have recognized only a "subsidiary" role for the general principles of law. From a positivist point of view, the relevance which Anzilotti attributed to those principles is surprising. Some caution is needed with regard to the expression principle, because sometimes it appears to be used interchangeably with rule. In any case, and aside from the theoretical use of the "principle" *pacta sunt servanda* in his doctrine,[102] as a judge he in fact invoked the application of, among others, *inadimplenti non est adimplendum*;[103] the content and limits of *res judicata*;[104] the interpretation of treaties ac-

[98] *Lotus S.S.*, cit., para. 31.

[99] *Ibid.*, para. 28.

[100] D. Anzilotti, *Corso di diritto internazionale*, cit., p. 43. See G. Gaja, *Positivism and Dualism in Dionisio Anzilotti*, cit., p. 123, at p. 130 *et seq.*

[101] Permanent Court of International Justice, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, advisory opinion of 4 December 1935, individual opinion of judge Anzilotti, para. 61.

[102] D. Anzilotti, *Corso di diritto internazionale*, cit., p. 27.

[103] Permanent Court of International Justice, *Diversion of Water from the Meuse* (Netherlands v. Belgium), judgment of 28 June 1937, dissenting opinion of judge Anzilotti, para. 50.

[104] Permanent Court of International Justice, *Interpretation of Judgments No. 7 and 8 Concerning the Case of the Factory of Chorzow* (Germany v. Poland), judgment of 16 December 1927, dissenting opinion of judge Anzilotti, para. 25 *et seq.*

cording to the ordinary meaning of the words employed in their context;[105] and *qui iure suo utitur neminem laedit*.[106]

In personal notes written after 1928 for his *Corso*, in view of a further edition which was never composed, it appears that he had come to reconsider the standing of general principles of law in international law. He was evaluating whether they should be included in a larger notion of custom.[107] But Anzilotti also distinguished between general principles of international law and general principles of municipal law, and did not consider the latter to be a part of international law.[108] Maybe not too dissimilarly, in the fourth edition of the treatise, which still bore Oppenheim's name (1926-1928), McNair maintained, in contrast to Oppenheim's position, that international law must be "reinforced and fertilized by recourse to rules of justice, equity, and general principles of law".[109]

It is of course impossible to draw significant conclusions from these very limited observations about the application of a positivist method. One may only consider that, if even a strong positivist like Anzilotti admitted to have to face the issue of general principles, for which no proof of an underlying agreement, tacit or not, was sought or given, then the positivist approach had to be to some extent reevaluated.

VII. The critical moment for positivism within and outside international law: World War II

While opponents of positivism were not lacking before,[110] the moment of its crucial crisis, in Western Europe and elsewhere, arrived when totalitarian regimes came to power in the inter-war period and established themselves, through a legitimization of the respective municipal regimes. The detachment from morals propounded by positivists is seen as the vehicle for allowing any sort of tyrannies and denial of the most basic human rights. As a reaction, even former positivists now claim that fundamental principles of human morality are necessarily part of the law.[111]

[105] Permanent Court of International Justice, *Customs Union between Germany and Austria*, advisory opinion of 5 September 1931, individual opinion by judge Anzilotti, para. 60.

[106] Permanent Court of International Justice, *The Electricity Company of Sofia and Bulgaria* (Belgium v. Bulgaria), judgment 4 April 1939, dissidenting opinion by judge Anzilotti, para. 98.

[107] See D. Anzilotti, *Corso di diritto internazionale*, cit., p. 72, note 10, p. 67, notes 4 and 5, p. 108, note 5.

[108] *Ibid.*, p. 67, note 4, and p. 108, note 5.

[109] A.D. McNair, *Oppenheim's International Law*, London: Longmans, 1926, vol. I, p. 121, footnote 2.

[110] Deeply critical of the possibility of conceptualizing law, in general, through principles and within a system are realists in the US in the 1930s, following Roscoe Pound. See G. Shaffer, *Legal Realism and International Law*, in L. Dunoff, M.A. Pollack (eds), *International Legal Theory: Foundations and Frontiers*, Cambridge: Cambridge University Press, 2019.

[111] The most famous example of such a reversal of position may be G. Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, in *Süddeutsch Juristen-Zeitung*, 1946, p. 105, available in English translation in *Oxford Journal of Legal Studies*, 2006, p. 1 *et seq.* See N. Bobbio, *Giusnaturalismo e positivismo giuridico*, cit., p. 12 *et seq.*; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, cit., p. 72 *et seq.*

For international lawyers, the Second World War and its atrocities are particularly challenging. Art. 6 of the Charter establishing the International Military Tribunal, annexed to the London agreement of August 8th, 1945, concluded among the US, UK, France and the Soviet Union, and subsequently ratified by other 19 States members of the United Nations, notoriously establishes the jurisdiction of that court for crimes against peace, war crimes and crimes against humanity, against persons acting in the interest of the European Axis powers.[112] In its judgment of October 1, 1946, the Nuremberg Tribunal had to address the argument raised by the defendants, according to which they were being tried for actions which international law did not punish as individual crimes at the time they were carried out, specifically crimes against peace and against humanity. With regard to the first category, the Tribunal relied on the various treaties in force for Germany before World War II (WW2) and particularly on the Briand-Kellogg Pact of 1928, to maintain that "the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in International Law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing".[113] With respect to the objection that the Pact did not mention individual crimes at all, the Tribunal declared that it was interpreting that treaty keeping in mind

> "that International Law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law [...]. The law of war is to be found not only in treaties, but in the customs and practices of States, which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts".[114]

In another passage, the Tribunal opposed the principle *nullum crimen, nulla poena sine lege* with the principle that "it would be unjust if [the wrong of the attacker] were allowed to go unpunished".[115] The Tribunal, thus, on one side interpreted existing treaties in light of custom together with general principles, on the other reinforced its inter-

[112] Texts of the London agreement and of the Annex are available at www.avalon.law.yale.edu.

[113] International Military Tribunal sitting at Nuremberg, Germany, judgment of 1 October 1946, *The United States of America et al. v. Hermann Wilhelm Göring et al.*, para. 53 (p. 445, Part 22 of the original *Proceedings*). H. KELSEN, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, in *International Law Quarterly,* 1947, p. 156, commented: "[t]his statement implies that the Briand-Kellogg Pact, according to the interpretation of the tribunal, established individual criminal responsibility for its violation. But such responsibility can be established only by a rule of international or national law providing punishment to be inflicted upon definite individuals. To deduce individual criminal responsibility for a certain act from the mere fact that this act constitutes a violation of international law...is in contradiction with positive law and generally accepted principles of international jurisprudence". However, see *infra* in the text for the full position by Kelsen.

[114] *The United States of America et al. v. Hermann Wilhelm Göring et al.*, para. 54.

[115] *Ibid.*, para. 52.

pretation with an appeal to other principles as well as logical inferences towards asserting the individual responsibility of the defendants.[116] Perhaps the most-quoted passage of the judgment says, in fact, that "[c]rimes against International Law are committed by men, not by abstract entities, and only by punishing individual who commit such crimes can the provisions of International Law be enforced".[117]

The trials carried out in Germany in the aftermath of the war saw two highly acclaimed scholars like Kelsen and Schmitt, once again, on opposite sides. Carl Schmitt espoused a notion of sovereignty, which had led him first to criticize the Weimar Constitution and later to strongly support the Nazi regime. He had openly and repeatedly criticized Kelsen in his writings, mostly about his public law theories and in particular concerning the role of a Constitutional Court.[118] But Schmitt and Kelsen were very much apart also on their view of international law. Since the end of WW1, Schmitt had advocated against any rule limiting recourse to war, as too restrictive for the political needs of a State;[119] while Kelsen's choice of a monist theory of the relationship between international and municipal systems is openly motivated by the choice to reach a peaceful coexistence among States.

At the end of WW2, before being indicted himself, Schmitt had accepted the defense of a German industrialist accused by a US-created tribunal of financing the Nazi regime and of benefitting from the forced work of prisoners in German camps. The defense carried out by Schmitt carefully analyses the texts of the various treaties, in order to show the non-existence, at the time of the actions, of an international rule criminalizing the individual aggressor. Such a conclusion supported the invocation of the principle *nullum crimen sine lege*.[120] This has appeared to some a rather formalist/positivist

[116] On inference, see H. Kelsen, *Pure Theory of Law*, cit., ch. 58, named *The Application of the Rule of Inference to Norms*.

[117] *The United States of America et al. v. Hermann Wilhelm Göring et al.*, cit., para. 55. As for crimes against humanity, recent accounts of the different approaches followed by H. Lauterpacht and Lemkin, and their influence both on the Charter of the Military Tribunal as well on its judgment, may be found in P. Sands, *East West Street*, London: Weidenfeld & Nicolson, 2016 and O.A. Hathaway, S. Shapiro, *The Internationalists*, London: Penguin books, 2018.

[118] An overview of the debate between the two theorists through English translations of their exchanges may be found in L. Vinx, *The Guardian of the Constitution*, Cambridge: Cambridge University Press, 2015; see also D. Dyzenhaus, *Legality and Legitimacy*, Oxford: Clarendon Press, 1999. In the famous case *Prussia v. Reich*, published in German in *Reichsgesetzblatt*, vol. 138, p. 1 (also known as *Preussenschlag*), 1932, Schmitt and Kelsen were counsels for the opposite parties. According to some sources, it was Schmitt who acted for the dismissal of Kelsen from the Cologne Law Faculty based on the racial laws.

[119] O.A. Hathaway, S. Shapiro, *The Internationalists*, cit., ch. 10.

[120] Much of this defense may be read in C. Schmitt, *The Nomos of the Earth*, New York: Telos press, 2006, English translation by Ulmen, part IV, ch. 4, p. 259 *et seq.* Schmitt had had no qualms in justifying, under his theory of the state of exception, murders carried out by Nazis at various times, from 1932 on. An account of such positions, retold in a narrative way, may be found in O.A. Hathaway, S. Shapiro, *The Internationalists*, cit., ch. 10.

denial by a scholar, who had always given to politics a large role in assessing the feasibility of theories of public and international law. With regard to crimes against humanity, which he conceived as part of the crimes of war, Schmitt conceded that their *Unmenschlichkeit* was such, the he could not deny their punishment even if a positive rule thus stating was lacking.[121]

Upon request by the US Government for an opinion in view of the agreement to be concluded in London, Kelsen agreed that, while aggressive war was certainly prohibited, international law in 1945 did not "establish individual criminal responsibility for illegal resort to war".[122] However, after a careful analysis of the limits to the principle of non-retroactivity of a criminal rule in the domestic systems (*ex post facto* rule), Kelsen also considered another principle, according to which none can be prosecuted for a conduct he did not know was prohibited at the time he carried it out. He maintained that the accused Nazis knew that they were committing a violation of international law; thus, the London Agreement would only add "to the collective responsibility for an illegal action established by pre-existing International Law, individual responsibility of the perpetrators".[123] This was a limitation to the *ex post facto* rule, which the London Agreement could draw. Kelsen continued: "[s]ince the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice".[124] With regard to crimes against humanity, Kelsen thought that they were mainly actions already prohibited under municipal law; in this regard, he was more concerned about the legality of the jurisdiction of an international tribunal.[125] This notwithstanding, he felt the need to add that "they are certainly open violations of the principles of morality generally recognized by civilized peoples and hence are, at least, morally not innocent or indifferent when they were committed".[126]

[121] On this point, see E. Pasquier, *De Genève à Nuremberg. Carl Schmitt, Hans Kelsen et le droit international*, Paris: Classiques Garnier, 2012, p. 503 *et seq.*

[122] H. Kelsen, *The Rule Against* Ex Post Facto *Law and the Prosecution of the Axis War Criminals*, memorandum requested by the U.S. Government, without a date (but 1945), available online at www.lawcollections.library.cornell.edu, p. 6. After the judgment was rendered, Kelsen stated again that "[t]he rules created by this Treaty [the London agreement] and applied by the Nuremberg Tribunal, but not created by it, represent certainly a new law, especially by establishing individual criminal responsibility for violations of rules of international law prohibiting resort to war". H. Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, in *International Law Quarterly*, 1947, p. 155.

[123] H. Kelsen, *The Rule Against* Ex Post Facto *Law*, cit., p. 7.

[124] H. Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent*, cit., p. 165.

[125] H. Kelsen, *The Rule Against* Ex Post Facto *Law*, cit., p. 7.

[126] Kelsen concluded: "[i]t stands to reason that the principle which is less important has to give way to the principle which is more important. There can be little doubt that, according to the public opinion of the civilized world, it is more important to bring the war criminals to justice than to respect, in their trials,

It may be of some interest to note that in Italy international scholars who had easily embraced the positivist approach, after the war decidedly supported a different view. Perhaps the most eloquent case is the one of Roberto Ago. While in his 1943 lectures he still adhered to an international system of sources which could be logically traced back to a fundamental rule having as its content the norm-creating procedure,[127] by 1950 he firmly propounded the notion that international customary law was a body of law not created by States, but just ascertained in their conscience: a "spontaneous", as against *positum*, law.[128] As some observed, this is "the typical approach of the natural law doctrine".[129]

Undoubtedly, one cannot possibly disregard the profound moral concerns which the atrocities of the war had involved. They were such, that no positivist, not even Kelsen himself, could resolve to adhere to a strict application of the law in force. In any case, positivism did not die out; strong defenses of the approach were put up early in the aftermath of WW2.[130]

VIII. Present challenges to a positivist approach to international law

The development of international law since the second part of the XX century has shown further difficulties with the positivist methodology. A first one concerns the notion of principles.

The International Court of Justice spoke of principles early on. Emblematic is the case of genocide. Relying on General Assembly Res. 96 (I), of 11 December 1946, on the Crime of Genocide, and on the Convention of 9 December 1948, the Court concluded in 1951 "that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".[131] After hav-

the rule against ex post facto law, which has merely a relative value and consequently, was never unrestrictedly recognized". H. KELSEN, *The Rule Against* Ex Post Facto *Law*, cit., p. 8.

[127] R. AGO, *Lezioni di diritto internazionale*, Milano: Giuffrè, 1943, p. 30.

[128] R. AGO, *Scienza giuridica e diritto internazionale*, Milano: Giuffré, 1950. Giuliano (*La comunità internazionale e il suo diritto*, cit.) and G. Barile (*La rilevazione e l'integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice*, Milano: Giuffrè, 1953) are also supporters of this approach. Barile envisaged a quasi-normative role for the judge. The methodology employed for the ascertainment of the spontaneous rule does not appear drastically different from the one which Oppenheim had announced; the field of research is still the conduct of States in their international relationships concerning the existence of international rules (State practice) and the knowledge – rather than a will – by States of the existence of those rules (R. AGO, *Scienza giuridica*, cit., p. 80 *et seq.*; and M. GIULIANO, T. SCOVAZZI, T. TREVES, *Diritto internazionale*, vol. I, Milano: Giuffrè, 1983, p. 301 *et seq.*)

[129] J.L. KUNZ, *The Nature of Customary International Law*, in *American Journal of International Law*, 1953, p. 662, at p. 664.

[130] Generally, N. BOBBIO, *Giusnaturalismo e positivismo giuridico*, cit.

[131] International Court of Justice, *Reservation to the Convention on the Prevention and Repression of Genocide*, advisory opinion of 28 May 1951, in *ICJ Reports*, 1951, p. 23.

ing repeated this sentence, in the much later *Armed Activities on the Territory of the Congo* (Congo v. Rwanda) 2006 judgment the Court went on to state that "assuredly" the prohibition of genocide is a peremptory norm.[132] By 2015, in the *Application of the Convention on the Prevention and Repression of the Crime of Genocide* (Croatia v. Serbia) judgment, referring to the 1948 Convention the International Court considered "well established that the Convention enshrines principles that also form part of customary international law [...]. The Court has also repeatedly stated that the Convention embodies principles that are part of customary international law".[133] The Court then confirmed that the prohibition of genocide is a peremptory norm.

It is a reasonable proposition that the nature of the prohibition may have changed over sixty years, and transformed itself from a general principle recognized by civilized nations into a customary norm, as a jus cogens norm should be. However, to support this last statement the Court refers back to its 1951 Advisory Opinion and to the Convention, where there is no indication of custom, probably for the difficulty of proving it at the time. Additionally, the Court appears to equate a principle with a customary rule, not by reference to its development in time, but referring to the present state of the law.

The Court had already spoken of "general and well-recognized principles" in its very first case, the *Corfu Channel* judgment, this time with reference to "elementary considerations of humanity [...] the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[134] The three examples given here for principles are quite different, not only as for their content, but also as for their possible foundation in custom.

At other times, the Court appears to use the expression "principle" with regard to a characteristic feature of the international system. This is the case of the "principle of sovereign equality of States" and its corollaries, which the Court recalled in the *Jurisdictional Immunities of the State*.[135]

The emergence of principles of international law is welcomed as a sign of the development of this body of law into a proper system of law, where no *lacunae* are admissible.[136] The reference to principles of international law is today common and may be

[132] International Court of Justice, *Armed Activities on the Territory of the Congo* (Congo v. Rwanda), judgment of 19 December 2005, in *ICJ Reports*, 2006, pp. 31-32.

[133] International Court of Justice, *Application of the Convention on the Prevention and Repression of the Crime of Genocide* (Croatia v. Serbia), judgment of 3 February 2015, in *ICJ Reports*, 2015, pp. 46-47.

[134] International Court of Justice, *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania), judgment of 9 April 1949, in *ICJ Reports*, 1949, p. 22.

[135] International Court of Justice, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), judgment of 3 February 2012, in *ICJ Reports*, 2012, p. 123-124.

[136] E. Cannizzaro, *Diritto internazionale*, Torino: Giappichelli, 2018, p. 136 *et seq.*

found in case-law, treaties, scholarly writings. Their nature, though, remains an open question. While codifying the identification of customary law, the International law Commission decided to put aside the principles, thus indicating that they may not be simply considered a part of customary law. The topic "General principles of law" is currently the object of a new study by the Commission. The first works attest to the need of "an authoritative clarification of the nature, scope and functions of general principles of law, as well as the criteria and methods for their identification".[137] At this stage, the International Law Commission includes in its work principles derived both from municipal legal orders as well as international law. Following the text of Art. 38 of the Statute of the International Court, but also comments made in the Sixth Committee of the General Assembly, recognition by States is required in both cases. This might indicate that a positivist approach is maintained, to some extent, also for this source of law.[138]

Other developments of the international system are challenging the positivist view. One may mention the expansion and relevance of soft law; the role of international organizations in the creation of customary rules; the presence of other non-State actors.

Challenges notwithstanding, the positivist methodology appears in good health. Certainly, it is still the object of much criticisms in the academia, and it is often looked upon as an historical remnant, if not the lazy habit of mind of backwards scholars. But positivism answers some basic needs of the international legal system. A very first one is the insistence of States on the difference between what is law and what it is not law. Rules of recognition, the notion of source of law are crucial to address this main concern.[139] Predictability is a connected factor. Perhaps most significant of all, however, is the capacity of positivism to be a methodology through which entities with very different individualities in terms of history, ideologies, municipal systems, religion, social context, economic capacities can relate to one another and agree on rules of conduct. It is not by chance, nor by a passive reliance upon Art. 38 of its Statute, that the methodology is the one followed by the ICJ and in cases before it. It is because States would not accept another one, at least among the various proposed so far.

[137] International Law Commission, Report on the work of the seventy-first session of 2019, UN Doc. A/74/10, ch. IX, p. 330 *et seq.*

[138] The Special Rapporteur maintains that recognition, as used in Art. 38 of the ICJ Statute, with regard to the general principles is not equivalent to the *opinio iuris* necessary for custom; other members of the Commission agree: *ibid.*, pp. 332 and 335.

[139] J. D'ASPREMONT, *Formalism and the Ascertainment of Legal Rules*, Oxford: Oxford University Press, 2011.