The Function of Public International Law

Jan Anne Vos

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Foreword

Since the late 1980's international legal scholarship has been shaken up by incisive anti-foundational critiques as voiced by *inter alia* David Kennedy and Martti Koskenniemi. Following the tradition of critical legal scholarship, these critiques demonstrated the indeterminacy of foundational legal concepts in international law and the openness and reversibility of international legal arguments. The insights from critical legal scholarship provoked strong and contradictory responses. Some embraced them as tools for emancipation, that could be used to disclose the political agendas pursued in the name of an objective and neutral international legal order. International law, in this view, should be re-politicized. Others, however, regarded critical scholarship as undermining the international rule of law; as a project that may be well-developed in terms of analysis and deconstruction, but also as a project that threatens international law's independence from politics as well as its ability to civilize conduct in international affairs.

Jan Anne Vos' *The Function of Public International Law* is an ambitious attempt to transcend the terms of the debate between critical legal scholars and 'mainstream' international lawyers about the relation between law and politics. Vos basically accepts the validity of the critique voiced by critical scholarship. In terms not dissimilar to Koskenniemi's basic concepts in *From Apology to Utopia*, Vos argues that international legal argument oscillates between two mutually exclusive positions or frameworks. The first is the framework of obligation, which holds that rules of international law restrict a pre-given freedom of states. The other is the framework of authorization, which holds that international law confers upon states the normative power to act. According to Vos both frameworks suffer from the same problem: they cannot be upheld consistently. As a result, international legal argumentation has a tendency to constantly shift from one position to the other, even though both positions cannot be valid at the same time. Vos illustrates the workings of both frameworks in general theories of law, international theory, the sources of international law, the law of international organizations and concepts such as *ius cogens* and *erga omnes*.

For Vos, however, the radical indeterminacy that follows from his analysis does not mean that international law is irrelevant or overtaken by politics. On the

contrary: Vos regards the dilemma situation that results from the mutually exclusive and internally contradictory frameworks as a precondition for the proper working of international law. International law, in his view, is not a system of rules laying down standards for conduct, but rather a system which forces states (and other actors) to continually constitute and reconstitute international society through practical reasoning. Within this reformulated framework, Vos regards international law and international politics as mutually constitutive; as part and parcel of the never-ending constitution of international society. For him this is, to use the title's wording, the function of public international law.

As I stated above, the approach taken by Vos is ambitious. Vos is not afraid to turn established readings of international law and legal theory on their head nor to come up with independent and original interpretations of some classics in international law and legal theory. Moreover, he does not shy away from developing his own framework of international law and from giving examples how this framework could be (or could have been) applied in practice. The unconventional nature of Vos' approach will most likely spur debate and controversy. In a way, however, this is exactly what the book seeks to achieve. After all, the book itself is part and parcel of what it analyzes, the ongoing debate on the constitution and reconstitution of international society through practical reasoning; through argumentation, critique and counter-argumentation.

January 2013

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Introduction

1.1 Oppositions

The structure of public international law is commonly characterized in terms of its opposition to the structure of the internal law of the State. Whereas the structure of the internal law of the State is vertical, the structure of public international law, in view of the absence of authority above States, is horizontal. Within that structure, the function of public international law—the legal effect that rules of public international law have on the members of international society—is commonly understood in terms of an opposition between two frameworks: rules of public international law either limit the freedoms to act of the members of international society (limiting form) or confer powers to act on the members of international society (conferring form). These frameworks may be regarded as two forms in terms of which the concept of public international law governs relations between States.[1] In either form, rules of public international law are regarded as coterminous with the common good of international society.[2]

In the late 1980s, critical theory of public international law deconstructed the concept of public international law—in its limiting form—by identifying the opposition, informed by the liberal doctrine of politics, between the requirement that rules of public international law bind States and the requirement that rules of public international law emanate from the freedom to act of the members of international society. In order to accommodate both requirements, international legal argument must contain within itself both 'descending' and 'ascending' strands. Because those strands are mutually exclusive—a rule of public

[1] On the centrality of this definition and its attraction for reform, see Kennedy 2000, p. 343.

[2] In relation to the limiting form: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo, ICJ Reports 1951, 15, 46: 'It is an undeniable fact that the tendency of all international activity in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States.'

J. A. Vos, *The Function of Public International Law*,
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international law cannot simultaneously restrict the freedom of States to act and emanate from the freedom of States to act—international legal argument has been analyzed as incoherent and political.[3] From that point of view, the concept of public international law was regarded as unsuitable to govern, heteronomously, relations between autonomous States. While the concept of public international law may have been intended to regulate international politics, the outcome of the critical analysis is a reversal of the relationship between public international law and international politics. In order to avoid nihilism, critical theory of public international law suggested that the concept of public international law might alternatively be understood in terms of practical reasoning: a conversation about what should be done here and now in international society.[4] If the ground structure of international society is solely formed by international politics, the question remains, however, how practical reasoning differs from international politics.

Ironically, by identifying the incoherence of the concept of public international law—formed by the opposition between incompatible requirements, critical theory of public international law simultaneously created a new opposition: between itself and what it termed 'main stream' public international law. Adhering to critical theory of public international law meant equating international life with international politics. Adhering to mainstream public international law meant reconciling the concept of public international law and the concept of sovereignty.[5] Trusting the concept of public international law entailed dismissing critical theory of public international law.[6] Conversely, seeing mainstream public international law as in any event driven by international politics implied, perplexingly, regarding critical theory of public international law as idealistic.[7] Apparently, the dichotomy between mainstream public international law and critical theory of public international law could only be resolved by converging on international politics, to the detriment of the concept of public international law.[8]

It may be possible, however, to mark out a role for the concept of public international law in international society and to re-establish the relationship between the concept of public international law and international politics, by revisiting the horizontal structure of public international law and the function of public international law, which shape the opposition between mainstream public international law and critical theory of public international law. To that end, it will be argued first that the structure of the concept of law underlying the concept of public international law has always been understood as vertical rather than horizontal. This vertical structure, it will be argued secondly, has always been understood in terms of the opposition between the limiting framework and the

[3] Koskenniemi 2005, pp. 17–23, 58–69, 563–589.

[4] Koskenniemi 2005, pp. 533–561.

[5] Kennedy 2000, pp. 346–347.

[6] Scobbie 1990, pp. 339–352.

[7] Zemanek 1997, paras 5–8.

[8] Korhonen 1996, pp. 1–4, 9–22.

conferring framework. Thirdly, it will be argued that a synthesis of these frameworks can be achieved, which intertwines the concept of public international law and the concept of international politics and establishes a connection between these processes and the members of international society.

Focusing on the vertical structure of the concept of law underlying the concept of public international law involves addressing the complex relationship between law and institutions. The vertical structure of the concept of law is inseparable from the institution of the State, which produces the internal law of the State.[9] The structure of public international law is, of course, axiomatically described as horizontal, but this description is derived from the absence of authority above States.[10] From the absence of an institution like the State above States the structure of public international law is inferred. The dichotomy between mainstream public international law and critical theory of public international law is, in part, informed by this structural difference. Whereas mainstream public international law sees the structure of public international law as horizontal, critical theory of public international law relies on the vertical structure of the domestic analogy, as implied in its identification of descending and ascending strands. Moreover, describing the concept of public international law in terms of governing relations between States implies a hierarchical relationship to the extent that States are thereby characterized as subjects of public international law. It is merely to the extent that States are characterized as legislators of public international law,[11] that the structure of public international law is seen as horizontal. From the perspective of critical theory of public international law, the simultaneous characterization of States as legislators and subjects of public international law leads to an ascending strand—from States as legislators to rules of public international law—and to a descending strand—from rules of public international law to States as subjects of public international law.

Apart from critical theory of public international law, the concept of public international law has also been criticized by social idealism. Social idealism, as formulated by Allott, severed the link between law and institutions and connected the concept of law instead to the concept of society. Criticizing the concept of public international law as the law of an international 'unsociety', Allott formulated the concept of law as inherent in society and, *mutatis mutandis*, the concept of public international law as inherent in international society. At the same time, Allott drew attention to the function of (public international) law by formulating it in terms of the delegation of power-rights to the members of (international) society. This description of the function of (public international) law, it may be noted, inscribes itself within a vertical structure.

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[9] Kennedy 2000, pp. 346–347.

[10] Mahiou 2008, pp. 39–40.

[11] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo, ICJ Reports 1951, 15, 31–32.

Lauterpacht 1936, p. 54.

In order to transcend the dichotomy between mainstream public international law and critical theory of public international law, these three approaches—social idealism, mainstream public international law, and critical theory of public international law—may all be seen as situated within the vertical structure of the concept of law underlying the concept of public international law. Identifying the vertical structure of the concept of law underlying the concept of public international law allows proceeding to the function of public international law. Where mainstream public international law provided the limiting form, subsequently deconstructed by critical theory of public international law, social idealism provided the conferring form, rejected by mainstream public international law. The argument to be unfolded will consist of showing the incoherence of either form when viewed separately, and showing the possibility of their synthesis, which fuses structure and function, law and politics, as well as society and institutions.

While the perspectives of social idealism, mainstream public international law, and critical theory of public international law all seem to indicate vertical aspects of the structure of public international law, the function of public international law as such is addressed most explicitly in social idealism. There, it plays a key role, as it is directed at transforming the concept of public international law as the law of international 'unsociety' into the law of international society. According to the law of international unsociety, States, in the absence of a rule of public international law restricting that freedom to act, would have an extreme freedom to act as they please, which could even extend to a freedom to commit acts of genocide. In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ inferred, famously, from the special character and the origins of the Convention on the Prevention and Punishment of the Crime of Genocide that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[12] Subsequently, this statement informed the reasoning which identified the concept of obligation *erga omnes*[13] and the reasoning which endorsed the concept of peremptory norm of general international law (*jus cogens*).[14] It would appear that the Court was saying there that States do not have a freedom to commit acts of genocide because civilized nations have recognized the principles underlying the Convention as binding on States. This would mean, however, that, but for those principles, States would have such a freedom to act. That is the kind of freedom to act that Allott would seem to have had in view when characterizing the concept of public international law as the law of international unsociety. In the reasoning of

[12] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, 15, 23.

[13] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962; Second Phase),* Judgment of 5 February 1970, ICJ Reports 1970, 3, paras 33–34.

[14] *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002; Jurisdiction of the Court and Admissibility of the Application)*, Judgment of 3 February 2006, ICJ Reports 2006, 3, para 64.

the ICJ, that freedom to act is restricted by the recognition by civilized nations of the principles underlying the Convention as binding on States. When referring to the origins and the special character of the Convention, the Court seems to have assigned a legislative effect to General Assembly resolution 96 (I), notwithstanding the position of principle—adopted in ICJ jurisprudence—that General Assembly resolutions in themselves are not binding.[15] From the perspective of critical theory of public international law, the pertinent point is that the descending strand—the identification of the principles underlying the Convention as binding on States—is not supported by an ascending strand—the exercise of the freedom of States to act directed at the formation of those principles. Rhetorically, the Court established this link by differentiating between States and civilized nations and connecting General Assembly resolution 96 (I) to the general principles of law recognized by civilized nations. Social idealism, on the other hand, counters such an extreme freedom to act by reverting to the conferring form. From that perspective, the members of international society do not have initial freedoms to act, but may only act when public international law, as the law of international society, delegates power-rights to them. While seeing the concept of public international law as inherent in international society, however, social idealism also dissociates the concept of public international law from international society, because the function of public international law is defined as hierarchically superior to the members of international society. The opposition between social idealism and mainstream public international law essentially consists of the opposition between the conferring form and the limiting form.

1.2 Structure: The Lauterpacht View and the Lotus View

In the previous section, the three steps of the argument to be unfolded were outlined in a preliminary way. This section deals with the first step—the point that the structure of the concept of law underlying the concept of public international law is vertical. In the previous section, the vertical aspects of critical theory of public international law and social idealism were pointed out and, with respect to mainstream public international law, it was suggested that it might contain both horizontal aspects (States as legislators) and vertical aspects (States as subjects). It is important to realize, however, that both the view of States as legislators and the view of States as subjects imply a vertical structure of mainstream public international law. This may appropriately be demonstrated by analyzing the contrast between the vertical approach to the concept of public international law adhered to by Sir Hersch Lauterpacht in *The Function of Law in the International Community*

[15] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226, para 70.

and the horizontal approach to the concept of public international law adhered to by the PCIJ in the *Case of the S.S. "Lotus"*.

In *The Function of Law in the International Community*, Lauterpacht argued that the doctrine of the inherent limitations of the judicial function was inconsistent with general principles of law and with a view of public international law as a legal system. Obligatory judicial settlement should therefore be regarded as inherent in the concept of law, including public international law. Accordingly, it may be said that *The Function of Law in the International Community* was not primarily concerned with the function of law, but with the judicial function. Nevertheless, as background to his discussion of the judicial function, Lauterpacht set out his view as regards the function of law:

> The function of law is to regulate the conduct of men by reference to rules whose formal (…) validity lies, in the last resort, in a precept imposed from outside.[16]

In conjunction with his argument in favor of obligatory judicial settlement, Lauterpacht argued that the concept of law, including public international law, must necessarily be situated within the concept of community, understood in terms of the rule of law. From that perspective, Lauterpacht postulated that the initial premiss of the concept of public international law might be formulated as 'the will of the international community must be obeyed' (*voluntas civitatis maximae est servanda*), situated within a 'super-State of law'.[17]

Lauterpacht developed these views while rejecting the view of the so-called 'special character' of public international law—special in comparison to the internal law of the State—as a law of coordination as opposed to subordination.[18] The contradictory fact that in such a horizontal system States could impose themselves as judges upon other States meant, according to Lauterpacht, that obligatory judicial settlement constituted an inherent element of the rule of law within a community.[19] Furthermore, it was part and parcel of the judicial function, according to Lauterpacht, to determine when to rely on the formal completeness of the law (recourse to a residual principle of freedom in the absence of a restriction) or to derive a material solution from general principles of law so as to achieve justice.[20] Somewhat inconsistently, Lauterpacht concluded that the future development of public international law was located in its approximation to the internal law of the State.[21]

It may be inferred from this description of Lauterpacht's views that, according to Lauterpacht, the concept of law necessarily has a 'vertical' structure, which means that rules of law are situated not only outside but also, hierarchically, above

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[16] Lauterpacht 1933, part I, para 1.

[17] Lauterpacht 1933, part VI, para 19.

[18] Lauterpacht 1933, part VI, paras 13–17.

[19] Lauterpacht 1933, part VI, paras 18, 20–21.

[20] Lauterpacht 1933, part II, Chap. V.

[21] Lauterpacht 1933, part VI, para 22.

the subjects of the law and operate downwards in respect of them. This is indicated in particular by his idea of the super-State of law, which encompassed the maxim *voluntas civitatis maximae est servanda*.

Lauterpacht's approach may appropriately be contrasted with the horizontal approach to the concept of public international law famously adhered to by the PCIJ in the *Case of the S.S. "Lotus"*:

> International law governs relations between independent States. The 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 and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[22]

To what extent is this view similar to and/or different from the approach put forward by Lauterpacht? Let us first identify a similarity. The PCIJ formulated the function of public international law in terms of 'governing relations between States', which comprised 'regulating relations between co-existing communities' and 'the achievement of common aims'. Likewise, Lauterpacht formulated the function of law in terms of 'regulating the conduct of men'. It may thus be observed that both the Lauterpacht view and the Lotus view formulate the concept of (public international) law in terms of rules and regulating. The Lotus view further characterized those rules in terms of their binding quality. Both the Lauterpacht view and the Lotus view therefore depict the concept of (public international) law as hierarchically situated above the subjects of the law and operating downwards ('governing', according to the PCIJ) in respect of the conduct of men or relations between States.

Let us now turn to the difference between the Lauterpacht view and the Lotus view. The PCIJ reasoned that the rules of public international law, in the form of conventions or usages generally accepted as expressing principles of law, must emanate from the free will of States, because States are independent. While the PCIJ spoke in terms of governing and regulating, it emphasized at the same time the independence and free will of States. It never seemed to doubt that rules of public international law are hierarchically situated above States and operate downward in respect of them. Instead, it devoted its attention to the provenance of those rules, concentrating on the independence of States. In international jurisprudence and doctrine, States are commonly characterized by means of the concept of sovereignty and/or the concept of independence.[23] These concepts, moreover, imply each other.[24] In view of the sovereignty and independence of

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[22] *Case of the S.S. "Lotus"*, Judgment No. 9 of 7 September 1927, Series A.—No. 10, 18.

[23] *Island of Palmas Case*, 875; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, Dissenting Opinion Judge Alvarez, ICJ Reports 1950, 4, 13; Dissenting Opinion Judge Azevedo, 26; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion of 30 March 1950, Dissenting Opinion Judge Zoričić, ICJ Reports 1950, 65, 99–100; Dissenting Opinion Judge Krylov, 109.

States and the concomitant absence of authority above States, the structure of public international law is commonly described as 'horizontal' or in synonymous terms ('co-ordinate'; 'decentralized').[25] As a consequence of the horizontal structure of public international law, the PCIJ considered that rules of public international law binding States must—'therefore'—emanate from the free will of those States. In this way, States are commonly described as both 'subjects' and 'legislators' of public international law.[26] This characterization of the structure of public international law as horizontal, derived from the concepts of sovereignty and independence, is precisely what Lauterpacht rejected as the so-called special character of public international law.

In light of the above, the similarity and difference between the Lauterpacht view and the Lotus view may be summarized as follows. Both the Lauterpacht view and the Lotus view regard the concept of public international law as hierarchically situated above States and consisting of rules which operate downwards in respect of States. The Lauterpacht view and the Lotus view differ as regards the origin of those rules. Whereas the Lauterpacht view locates the origin of those rules in the concept of community, the Lotus view derives the origin of those rules from the sovereignty and independence of States. It is submitted, however, that both the vertical Lauterpacht view and the horizontal Lotus view about the origin of rules of public international law actually inscribe themselves within the vertical structure of the concept of law underlying the concept of public international law. This may be demonstrated as follows.

Doctrinally, the horizontal structure of public international law is commonly contrasted with the vertical structure of the internal law of the State. Whereas, by virtue of its vertical structure, the internal law of the State emanates from an established authority, rules of public international law, because of the absence of authority above States, must emanate from the free will of States. The fact that the formation of rules of public international law is dependent on the free will of States, is said, from this perspective, to be simply inherent in the horizontal structure of public international law.[27] In other words, even if there might be a

(Footnote 23 continued)
Strupp 1934, pp. 491–497; Fitzmaurice 1957a, para 3; Gilson 1984, pp. 53–58; Onuf 1994, p. 17; Carillo Salcedo 1997, pp. 583–584; Zemanek 1997, para 38; Dupuy 2002, pp. 95–96.

[24] Mahiou 2008, pp. 118–119.

[25] Weil 1992, pp. 33–39; Zemanek 1997, paras 29–31; Tomuschat 1999, Chap. I, para 23; Kolb 2006, para 52.

[26] Strupp 1934, pp. 418–421; Carillo Salcedo 1997, p. 584; Zemanek 1997, para 41; Tomuschat 1999, Chap. I, para 25; Kolb 2000, p. 106.

[27] Weil 1992, pp. 53–58, 203–225; Carillo Salcedo 1997, pp. 583–585: 'As international law is required to govern a fundamentally different society from that within the state, it therefore has specific functions adapted to the needs of that society. Indeed, alleged imperfections so often complained of in international law are for the most part only structural features inherent to the system, since they correspond to the needs of international society. (…) [T]he development and application of law depend on the nature of the social group to which it refers, and it is clear in this connection that the features of international society sharply contrast with those of the political

tension, as identified by critical theory of public international law, between the proposition that the concept of public international law governs or regulates relations between States and the proposition that rules of public international law emanate from the free will of States, such a tension is deemed to be inherent in the horizontal structure of public international law.

It is submitted, however, that this view of the horizontal structure of public international law—which reflects the Lotus view—actually involves relying on an inherent vertical structure of the concept of law underlying the concept of public international law. From the perspective of this vertical structure, elements are derived from the absence of authority above States. From this perspective, the function of public international law is characterized as governing or regulating relations between States. From this perspective, the absence of authority above State transforms itself into the requirement of consent of States to rules of public international law. Finally, from this perspective, States are regarded as having a freedom to act in the absence of a rule of public international law restricting that freedom to act. In this way, the vertical structure of the concept of law underlying the concept of public international law makes itself felt by its simultaneous presence and absence. It is present in the definition of public international law in terms of governing relations between States. It is present in the residual rule of a freedom to act in the absence of a restrictive rule of public international law. It is simultaneously present and absent in the view that binding rules of public international law must emanate, in view of the absence of authority above States, from their consent.

It would thus appear that the concept of law underlying the concept of public international law may be formulated as follows. In principle, rules of law must emanate from an authority, hierarchically situated above the subjects of the law and operating downwards in respect of the subjects of the law. Because the concept of public international law must take account of the absence of authority

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(Footnote 27 continued)
community at the state level. While the latter comprises, if only in principle, centralized and hierarchically organized social groups, international society is essentially a society of sovereign, independent states.' Kolb 1998, p. 667; Kolb 2000, pp. 104–113: 'Tout droit s'inscrit dans l'une des branches d'une alternative. *Primo*, il peut s'agir d'un droit reposant sur des structures centralisées où les pouvoirs procèdent d'un pôle de pouvoir unique. C'est une forme de droit <étatique>. Il s'agit d'un droit <non-primitif>. *Secundo*, il peut s'agir d'un droit décentralisé où les pouvoirs restent répartis sur des centres autonomes. C'est une forme de droit de <sociétés-non-étatiques>. Il s'agit dès lors d'un droit <primitif>. Le terme primitif n'est donc qu'un descripteur de toutes les conséquences qui découlent du caractère coordinatif du droit international, du fait que le sujet *uti singuli* et non la communauté juridiquement organisée détient les pouvoirs constitutionnels, du fait que la souveraineté individuelle n'a pas été expropriée. (…) S'il y a donc primitivité du droit international, c'est par rapport à l'expérience des droits étatiques centralisés. (…) C'est sur ce point empirique, dépourvu de tout jugement de valeur, qu'on peut légitimement parler de <primitivité>, en entendant par là la structure décentralisée de la société internationale et les conséquences que ce fait imprime au droit qui régit cette société.'

above States, it delegates the authority to make rules of public international law to the subjects of public international law. At the same time, those subjects of public international law are regarded as having a freedom to act in the absence of rules of public international law. As a consequence and in this way, both the freedom of States to act and the authority to restrict the freedom of States to act are imputed to States.[28]

In consequence, the contrast between the horizontal structure of public international law and the vertical structure of the internal law of the State is subsumed by the vertical structure of the concept of law underlying the concept of public international law. This 'inherent' contrast is produced by the vertical structure of the concept of law underlying the concept of public international law and the attending differentiation according to the absence or presence of authority. The concept of public international law only apparently relinquishes this vertical structure by delegating the authority to make rules of law to States and transforming, to this extent, into a horizontal structure. At the same time, the concept of public international law retains this vertical structure by understanding itself in terms of governing or regulating relations between States. Similarly, this vertical structure is retained in the assumption that the absence of a rule of public international law is tantamount to a freedom of States to act.

If the absence of authority above States is to be taken seriously, however, nothing can be inferred from the vertical structure of the concept of law underlying the concept of public international law, which presupposes the presence of authority above States. In the absence of authority above States, the concept of public international law cannot be defined in terms of governing relations between States, because that definition assumes the presence of authority. Concomitantly, in an exclusively horizontal structure, States cannot be seen as legislators, because that qualification simultaneously presumes the presence and absence of authority. By the same token, in an exclusively horizontal structure, States cannot be seen as subjects, because that would presuppose defining the concept of public international law in terms of governing relations between States. Moreover, in an exclusively horizontal structure, a freedom to act cannot be imputed to States, because such a freedom to act would simultaneously presuppose the presence and the absence of authority and result, as Lauterpacht observed, in contradiction. It is interesting to note, furthermore, that such an exclusively horizontal structure can only be observed from the perspective of a vertical structure, which reinforces the point about the vertical structure of the concept of law underlying the concept of public international law. At the same time, such an exclusively horizontal structure only

[28] *Case of the S.S. "Wimbledon"*, Judgment No. 1 of 17 August 1923, Series A.—No. 1, 25: 'The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.'

tells us negatively how the concept of public international law should not be seen. In order to arrive at a more positive notion, a vertical dimension is required. Accordingly, it might tentatively be inferred that the structure of a coherent concept of public international law must contain within itself, at least, a vertical dimension.

1.3 Function: Framework of Obligation and Framework of Authorization

If it is established that the structure of the concept of law underlying the concept of public international law is vertical and that the structure of a coherent concept of public international law must contain within itself, at least, a vertical dimension, where does this bring us? The definition of the concept of public international law in terms of governing relations between States projects the link between law and authority—law as emanating from an established authority—as axiomatic. Delegating the legislative function to States was just a partial concession to the absence of authority above States. This state of affairs implies, however, that States have not played any role in deciding whether the function of the international legal system should be cast in terms of governing relations between States and, if so, in what, limiting or conferring, form. As a matter of self-determination and in the absence of authority above States, should States not themselves determine this important constitutional matter? If that is accepted, it may tentatively be inferred that the structure of a coherent concept of public international law must also contain within itself, a horizontal dimension.

The view of the concept of public international law and the internal law of the State as inscribing themselves within a vertical structure, is consonant with the observation that the concept of public international law is built on a so-called domestic analogy.[29] According to the domestic analogy, relations between States may be compared to relations between individuals in the so-called state of nature. Just as those individuals have proceeded to build the institution of the State, States may proceed to develop the concept of public international law. In that way, States could be regarded as having created the vertical structure of the concept of law underlying the concept of public international law on the basis of the horizontal structure of public international law. It must be remarked, however, that the domestic analogy is only tenable if, in the internal sphere, it explains coherently the institution of the State and the internal law of the State as proceeding from the state of nature. If it does not, then we do not have a basis for assuming that such a movement from a horizontal structure to a vertical structure is possible and then we do not have an explanation for the vertical structure of the concept of law underlying the concept of public international law. Moreover, in social contract theory, the horizontal structure of public international law is commonly put

[29] Koskenniemi 2005, pp. 17–23, 89–94.

forward as the prime example of a permanent state of nature, which may suggest that, at the international plane, such a movement is not possible.

The view that both the concept of public international law and the internal law of the State inscribe themselves within a vertical structure also seems consonant with the concept of Global Administrative Law. Global Administrative Law has been defined as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.[30] The purpose of Global Administrative Law is to achieve accountability of the institutions of global governance. The concept of law in Global Administrative Law has been characterized in terms of the theory of law developed by Hart, complemented by general principles of public law: (i) the principle of legality; (ii) the principle of rationality; (iii) the principle of proportionality; (iv) the rule of law; and (v) human rights.[31] Global Administrative Law involves relying on a domestic analogy, which may operate both bottom-up and top-down.[32] On the basis of this description, it may be observed that the concept of Global Administrative Law appears to take as a starting point that global administrative bodies are in a position of authority above States as well as individuals; the point of Global Administrative Law is to achieve accountability of those bodies, which implies a limitation of their authority. In so far as Global Administrative Law takes a vertical structure as a starting point, it coincides with the approach adopted here. Global Administrative Law does not, however, seek to explain that vertical structure; it works within that vertical structure by reversing the hierarchy between law and authority, subjecting authority to law. In contrast, the argument developed here addresses that vertical structure itself, by focusing on the function of public international law and the concomitant function of international institutions, with a view to transforming them in terms of the constituting of international society. So in contrast to the approach of Global Administrative Law, which takes the position of authority of international administrative organs as given and subsequently seeks to limit that authority by resorting to law, the approach taken here is to problematize and reformulate the relationship between the members of international society and international institutions in terms of the constituting of international society. (For the purpose of this analysis, it is not insignificant to note that the concept of law in Global Administrative Law is oriented towards the Lauterpacht view[33] and that both Global Administrative Law and critical theory of public international law problematize the authority of international institutions.[34])

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[30] Kingsbury et al. 2005, p. 17.

[31] Kingsbury 2009, Sections 2, 3.

[32] Kingsbury 2005, pp. 53–59; Dyzenhaus 2005, p. 155.

[33] Dyzenhaus 2005, pp. 153–165.

[34] Koskenniemi 2009, pp. 7–12, 14–18.

How, then, could an analysis of the function of public international law result in a reformulation of the relationship between the members of international society and international institutions in terms of the constituting of international society? If it is accepted that the structure of both the concept of public international law and the structure of the internal law of the State should be characterized as vertical, the next step is to divide this vertical structure into two mutually exclusive functions, along the lines of the distinction between rights and obligations: the framework of obligation (previously referred to as the limiting form) and the framework of authorization (previously referred to as the conferring form). Historically, these frameworks were presented to the PCIJ by France and Turkey in the *Case of the S.S. "Lotus"*. In *Legality of the Threat or Use of Nuclear Weapons*, these frameworks were presented to the ICJ by the Nuclear Weapon States and the Non-Nuclear Weapon States. The contrast between those frameworks is also reflected in doctrine. Reacting to the framework of obligation adhered to by the PCIJ in the *Case of the S.S. "Lotus"*, Bruns argued that the concept of public international law should conform to the framework of authorization.[35] As remarked at the end of Sect. 1.1, social idealism, as formulated by Allott, may be analyzed as a reaction, in the form of the framework of authorization, to the international unsociety propelled by the framework of obligation.

In analytical terms, the framework of obligation may be described as follows: (i) According to the framework of obligation, the function of rules of public international law is to restrict the freedom of States to act. (ii) According to the framework of obligation, rules of public international law contain obligations which restrict the freedom of States to act. (iii) The framework of obligation is based on the assumption that in the absence of rules of public international law, States have a freedom to act. Within this framework, the concept of right is equated with the freedom of States to act. In terms of the differentiation between weak and strong permissions, the concept of right as used within the framework of obligation corresponds to a weak permission.[36]

Analytically, the framework of authorization may be described as follows: (i) According to the framework of authorization, the function of rules of public international law is to confer on States a power to act. (ii) According to the framework of authorization, rules of public international law contain rights by virtue of which States can act. (iii) The framework of authorization is based on the assumption that in the absence of rules of public international law, States do not have a power to act. Within this framework, the concept of right is equated with the concept of power. In terms of the differentiation between weak and strong permissions, the concept of power as used within the framework of authorization corresponds to a strong permission.[37]

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[35] Bruns 1929, pp. 9–12; Bruns 1933, pp. 459–465.

[36] Dekker and Werner 2003, pp. 14–23.

[37] Dekker and Werner 2003, pp. 14–23.

It must be observed at this point that the framework of obligation and the framework of authorization are mutually exclusive. It cannot be asserted simultaneously that the function of rules of public international law is to restrict the freedom of States to act and that the function of rules of public international law is to confer on States a power to act. Metaphorically speaking, the former have a 'narrowing' function and the latter have a 'broadening' function. Similarly, the assumption on which the framework of obligation is based and the assumption on which the framework of authorization is based cannot simultaneously be adhered to. It cannot be asserted simultaneously that, in the absence of rules of public international law, States have a freedom to act and that States do not have a power to act.

It is, furthermore, submitted that, because both the framework of obligation and the framework of authorization are situated within the vertical structure of the concept of law underlying the concept of public international law, both are incoherent. As regards the framework of obligation, it cannot be explained coherently why and how rules of public international law are binding on States. This always involves relying on an elusive assumption (such as *voluntas civitatis maximae est servanda*), within or without the concept of law. At the same time, the assumption of a freedom of a State to act is inconsistent with the equal freedom of another State to act. Although within the framework of obligation this furnishes an explanation as to the social necessity of binding rules of law (cf. the requirement of normativity in critical theory of public international law), if this assumption is inconsistent, it cannot support the necessity of that character of rules of law.

Located within the vertical structure of the concept of law underlying the concept of public international law, the framework of authorization is also incoherent. If, in the absence of rules of public international law, States do not have a power to act, States cannot be relied on to explain the formation of rules of public international law. If States are seen as the principal members of international society, it follows that there is no other basis to explain the formation of rules of public international law. Accordingly, within the framework of authorization, the formation and existence of rules of public international law remain a matter of assumption. At the same time, from the perspective of the concept of public international law and in the absence of rules of public international law, States must be regarded as not having a power to act. That perspective leaves States incapable of constituting international society by means of international politics and fails to explain the social necessity of rules of law.

Some remarks may be made at this point about the notions of incoherence and coherence that are used here. The notion of incoherence constitutes an integral part of critical theory of public international law and it is used there to denote contradiction, inconsistency. Thus, as the descending strand and the ascending strand exclude each other, they cannot both be adhered to at the same time; they pull the system in different directions. That notion of incoherence is also used here. Accordingly, it may be observed that the framework of obligation contains two assumptions, which cannot be adhered to at the same time: that rules of public international law are binding and that States have a freedom to act; these

assumptions are inconsistent. The absence of inconsistency, however, does not necessarily entail coherence. The use of the term coherence that is sought here denotes the requirement that the elements of a system must have some connection to each other, in the sense that they explain each other's existence, that they constitute each other. This may be illustrated with respect to the framework of authorization. The non-power of a member of society and the non-power of another member of society may coexist, they are consistent. But, that being so, this does not explain the need for rules of law. Furthermore, if rules of law cannot emanate from acts of the members of society, rules of law cannot be explained at all; they depend on the presumed existence of some authority. In a similar way, this notion of coherence also reflects on the framework of obligation. It remains a perennial assumption that rules of law are binding. This is not an auxiliary assumption; it is the principal assumption that permeates the whole system. On the other hand, the framework of obligation involves the members of international society in the formation of rules limiting their freedom to act but, according to critical theory of public international law, in an incoherent way. Subjacent to the argument developed here is the assumption that the members of society must have some role in the formation of the rules of their society. Otherwise, we will simply have to assume the pre-existence of some institution vested with authority. Social contract theory has attempted to do this. Social contract theory, however, presupposes what it tries to explain—the State. By explaining the institution of the State on the basis of the state of nature existing at the international plane, social contract theory already assumes the existence of the State. All the same, the argument developed here concords with social contract theory to the extent that it seeks to explain the connections between the members of society and their rules and institutions.

1.4 Reformulated Framework

The third step of the argument developed here is that the incoherence of both the framework of obligation and the framework of authorization may be turned into a reformulated framework, which comprises both. This is a paradox. How, it may be asked, can two frameworks that are both analyzed as incoherent be combined into a reformulated framework which is deemed to be coherent? The answer is that the incoherence of both frameworks results precisely from the fact that they exclude each other. Both the framework of obligation and the framework of authorization claim to occupy for themselves the whole field of public international law. That is how it has been said that rules of public international law cannot at the same time be both restrictive and permissive. That is how it has been said that the assumption that, in the absence of rules of public international law, States have a freedom to act, is not consistent with the assumption that, in the absence of rules of public international law, States do not have a power to act. Seen in this light, the framework of obligation and the framework of authorization form a dichotomy.

If, however, both frameworks are incoherent, their mutual exclusivity cannot be maintained as coherent either. If their mutual exclusivity cannot be maintained, it follows that the field of public international law may comprise both frameworks. This leads to a complex constellation. It follows that the field of public international law then contains, within itself, opposites. It includes within itself the assumption that rules of public international law must be restrictive and the assumption that rules of public international law must be permissive. It includes within itself the assumption that, in the absence of rules of public international law, the members of international society have a freedom to act, and the assumption that, in the absence of rules of public international law, the members of international society do not have a power to act.

Finally, it must be seen that these elements constitute extremities of a resulting, reformulated, framework. Rules of public international law cannot be only restrictive or permissive, but must always be both at the same time. In the absence of rules of public international law, the members of international society cannot be characterized as having a freedom to act or as having no power to act, but must be characterized as having a power to act which is not an unlimited freedom to act. This reformulated framework consists, in other words, of opposites which encompass the field of public international law. The field of public international law where the constituting of international society actually takes place, is where these opposites interact with each other. This may seem similar to the pattern of descending and ascending strands identified by critical theory of public international law, but it is dissimilar in two respects. First, the structure of the reformulated framework is not exclusively vertical or horizontal; vertical, horizontal, and diagonal movements are possible. Second, the function of public international law has been transformed; it is no longer a question of limiting the freedom of States to act; it has become a question of the constituting of international society by the members of international society by means of restrictive/permissive rules of public international law, on the basis of their dilemma situation of having a power, but not an unlimited freedom to act.

In overview, this reformulated framework may be described as follows. Within the reformulated framework, the function of rules of public international law is neither exclusively to limit the freedoms of the members of international society to act, nor exclusively to confer on the members of international society powers to act; instead, the function of rules of public international law is to be both restrictive and permissive at the same time. Accordingly, rules of public international law must simultaneously be both enabling and disabling. Concurrently, those rules of public international law must be regarded neither as exclusively containing obligations nor as exclusively containing rights; instead, those rules must be regarded as containing rights/obligations in respect of each member of international society at the same time. Concomitantly, in the absence of rules of public international law, States can neither be regarded as having a freedom to act nor as having no power to act. Instead, in the absence of rules of public international law, States must be regarded as having a power to act which is not an unlimited freedom to act. These three layers, the function of public international

law, the content of rules of public international law, and the situation of the members of international society in the absence of rules of public international law, are directed at each other. The function of rules of public international law corresponds to the dilemma situation of the members of international society of having a power, but not a freedom to act. By virtue of those rules, the members of international society can move so as to exit that dilemma situation (enabling aspect); at the same time, those rules canalize those movements (disabling aspect). From the perspective of their dilemma situation, the members of international society must resort to these rules of public international law, because they allow them to move so as to exit their dilemma situation and guide those movements.

Described metaphorically, the power of States to act, which is not a freedom of States to act, may be characterized as the power of States to constitute international society. The members of international society constitute international society in the form of rules of public international law, which are both enabling and disabling at the same time. The enabling aspect consists in the movement out of the dilemma situation of the members of international society of having a power to act which is not a freedom to act. The disabling aspect consists in the crystallization of these movements of the members of international society into a particular pattern. That crystallization is disabling in so far as the members of international society do not have an unlimited freedom to act so as to circumvent the rules of international society. Outside the rules, the dilemma situation persists. On the other hand, those crystallized patterns remain susceptible to change; change, however, must likewise be approached from the dilemma situation of the members of international society. In this way, the reconstituting of international society is indistinguishable from the constituting of international society. The reformulated framework incorporates, in this manner, both stability and change.

The process whereby the members of international society constitute international society is, it is submitted, practical reasoning. In order to move out of the dilemma situation of having a power, but not a freedom to act, the members of international society must have recourse to practical reasoning. They are compelled to do so because all members of international society have such a power to act and because all these powers to act must be regarded as equivalent. The purpose of the process of practical reasoning is to allow the members of international society to turn their powers to act into a workable international society. It cannot be assumed that those powers are complementary; there may be friction. Nor can it be assumed that those powers conflict; there may be cooperation. The point of the process of practical reasoning is to turn those elements of cooperation and friction into a common good of international society, consisting of fruitful relationships between the members of international society. That process is propelled toward the common good of international society by the initial and recurrent dilemma situation of the members of international society of having a power, but not a freedom to act. On the basis of pluralism, the process of practical reasoning about the common good of international society may give rise to diverging approaches to that common good. Against the background of the dilemma

situation, those diverging approaches must be directed at turning the common good into a coherent whole, defined by elements of cooperation and friction.

The process of practical reasoning, directed at the common good of international society and forming the vehicle whereby the members of international society constitute international society, may appropriately be characterized by reference to the work of Kratochwil. Kratochwil has described the process of practical reasoning as differing in five respects from our ordinary scientific discourse: (i) while natural phenomena are analyzed in terms of necessity, human action is understood in terms of free will; (ii) the finding of the relevant premises, or starting points, is of decisive importance; (iii) the process is informed by assent to practical judgments (for example, 'more is better than less' or 'quality is better than quantity'); (iv) the process is also informed by procedural requirements, which aim at the equitable participation of all members of international society; and (v) specialized techniques justify exclusions and therewith lend persuasive force to a final decision.[38]

Within the reformulated framework, the requirement that the process of practical reasoning be directed at the common good of international society also informs international politics. As thus situated, the concept of public international law and the concept of international politics converge on the common good of international society and may be characterized as two perspectives on that common good: while the concept of public international law must be directed at the coherence of the common good of international society, the concept of international politics must be directed at the formation of that common good. Within the reformulated framework, the field of public international law and the field of international politics may thus be seen to constitute each other. In contrast, critical theory of public international law saw mainstream public international law as eclipsed by the concept of international politics. The notion of international politics relied on by critical theory was undifferentiated and undirected, consisting of freedoms of States to act which presupposed the applicability of the framework of obligation. Within the reformulated framework, as developed here, the concept of public international law and the concept of international politics both inform, from different angles, the constituting of international society.

In the light of this description of the reformulated framework, it may be explained how incoherence can be turned into the common good of international society. As analyzed by critical theory of public international law, incoherence is a matter of contradiction between opposites. It has been seen that the reformulated framework contains within itself the opposite elements of the framework of obligation and the framework of authorization. These opposites do not, however, necessarily lead to contradiction. Coherence may be understood as a middle ground between those opposites, just as, for example, different shades of gray are constituted by black and white. It may perhaps be said that these different shades of gray reflect different proportions in which white is superior to black and black is

[38] Kratochwil 1989, pp. 34–43.

superior to white; in other words, this singular relationship is composed of a double relationship. This form of coherence also contains within itself incoherence, because the proportion may be taken apart and be substituted by a different proportion. Along these lines, incoherence does not entail arbitrariness, but provides starting points for the reconstituting of international society. The reason why incoherence is transformed in this manner, is that the reformulated framework transforms the function of public international law. It is no longer a matter of having to impose obligations so as to limit freedoms of States to act. The process of practical reasoning does not operate top-down, from the institution of the State, via the internal law of the State, to the members of society. The process of practical reasoning forms the vehicle by which the members of (international) society constitute (international) society. It is directed, in the form of international politics, at the formation of the common good and, in the form of the concept of public international law, at the coherence of that common good. That coherence may be any shade of gray. The important thing is that the process of practical reasoning is guided by the black and the white that the reformulated framework contains. Since coherence also contains within itself incoherence, the process of practical reasoning may likewise be directed at the reconstituting of international society.

Since the argument developed here focuses on the function of public international law and therewith on the vertical structure of the concept of law underlying the concept of public international law, it seems appropriate to indicate its position in respect of other works which have dealt with the structure of public international law. In 1964, Friedmann identified, in *The Changing Structure of International law*, a developing law of cooperation grafting itself onto a law of coexistence. In 1987, Kennedy identified, in *International Legal Structures*, objective and subjective elements of international legal discourse, analyzing international legal discourse as informed by elements taken from justice and elements taken from consent. Two years later Koskenniemi, in *From Apology to Utopia – The Structure of International Legal Argument*, from within, deconstructed those elements into contradiction and incoherence. In 1990, Allott, in *Eunomia – New Order for a New World*, from without, criticized the concept of public international law as the law of international unsociety and transformed it into the law of international society. In the age of globalization and global governance, the concept of Global Administrative Law takes a vertical structure of the concept of public international law as a starting point and aims to limit authority by means of concepts taken from administrative law. At about the same time, Spiermann, in *International Legal Argument in the Permanent Court of International Justice – The Rise of the International Judiciary*, took up the distinction between a law of cooperation and a law of coexistence and argued that international legal argument contains a double structure, consisting of a law of cooperation and a law of coexistence.

The difference between the argument developed here and in the work of Spiermann is that Spiermann's work sees the two substructures, the law of cooperation and the law of coexistence, as existing separately, the law of cooperation superposed on

the law of coexistence. The law of cooperation, as Spiermann sees it, coincides with mainstream public international law as analyzed by critical theory of public international law. The law of coexistence, which arises from the coexistence of States, is endowed by that coexistence with a degree of binding force. It might thus be said that there is some similarity between Spiermann's work and the argument developed here, because the dilemma situation of the members of international society, as having a power to act which is not a freedom to act, is inferred from their coexistence. In the approach developed here, this aspect is not associated with a separate structure, but as indicating, so to speak, that the law of cooperation, which approximates the framework of obligation, and the law of coexistence, which approximates the framework of authorization, should be joined within the reformulated framework. In this way, the law of cooperation and the law of coexistence to which the PCIJ referred when it propounded the Lotus view, are drawn onto each other. Out of the coexistence, the dilemma situation of the members of international society, arises not merely the faculty of cooperation, but the practical necessity of constituting international society.

The reformulated structure has been derived from the incoherence of two vertical structures. Proceeding in this manner reveals the complex problem of the relationship between a structure and the acts done pursuant to that structure. The reformulated structure, as identified here, indicates that a structure cannot be explained solely on the basis of the acts of the members of international society; it is in part given. On the other hand, it cannot be regarded entirely as given, because that would leave the members of international society no role in the constituting of international society and imply seeing the concept of public international law purely in terms of natural law. Accordingly, the solution which imposes itself is that both, structure and acts, imply each other. An act directed at the constituting of international society implies the existence of a structure; at the same time, that structure is not immutable and susceptible to change pursuant to the acts of the members of international society. In other words, the acts of the members of international society inscribe themselves into and, at the same time, constitute the structure of international society. The constituting of international society is thereby always both about the constituting of the structure of international society and about the constituting of international society within that structure. In this way, the two ways of knowing and demonstrating identified by Artistotle—by means of archai/axioma or by means of topoi[39]—may ultimately be regarded as interdependent.

Finally, as a methodological point, the argument put forward here aims to provide, as a matter of practical reasoning, a perspective on the concept of public international law. It is not intended here to refute the concept of public international law in the sense that critical theory of public international law has taken mainstream public international law apart. It has not been so difficult for proponents of mainstream public international law to point out incoherence in critical

[39] Kolb 2006, para 18, footnote 67.

theory of public international law.[40] Critical theory of public international law has by and large acknowledged its ineffectiveness in respect of mainstream public international law.[41] For critical theory of public international law to achieve its objective, its spears would have had to be stronger than its object—and, if everything is relative, it could never have been so. Does it follow that mainstream public international law is immutable? That would mean that the mainstream concept of public international law has a kind of self-explanatory existence, whether in the form of the framework of obligation or in the form of the framework of authorization. By the approach taken, the perspective sought to be provided here is simultaneously both descriptive and prescriptive of the framework surrounding the concept of public international law. It is descriptive, because it seeks to describe the incoherence of the framework of obligation and the framework of authorization and to show how a reformulated framework can be derived from suppressing their mutual exclusivity. It is prescriptive, because, thereby—and to that extent, it seeks to prescribe the inferred transformation of the function of public international law. In this way, the approach adopted here is simultaneously both deductive and inductive.[42] It is deductive, because the reformulated framework is derived from two metaphysical models. It is inductive, because the reformulated framework is inferred from how these models operate 'on the ground'.

1.5 Outline

This is the short of the argument. The long of the argument is contained in the succeeding eight chapters, which are organized into three parts. Part I contains Chaps. 3–5. Chapter 3 is, firstly, intended to describe the provenance of the idea that the vertical structure of the concept of law underlying the concept of public international law can be subdivided into the framework of obligation and the framework of authorization. Both frameworks were considered by the PCIJ in the *Case of the S.S. "Lotus"* and by the ICJ in *Legality of the Threat or Use of Nuclear Weapons*. Secondly, it will be argued that the objective structural framework described by Judge Shahabuddeen in his Dissenting Opinion in *Legality of the Threat or Use of Nuclear Weapons* approximates the reformulated framework described in Sect. 1.4. Subsequently, Chap. 4 will deal with two aspects of theory of law. Firstly, it will be argued that the institution of the State and the internal law of the State cannot be explained by social contract theory. This is important because, at the international plane, it then follows that the vertical structure of the concept of law underlying the concept of public international law presupposes the

[40] Scobbie 1990, pp. 339–352.

[41] Koskenniemi 2009, p. 8.

[42] Kratochwil 1989, pp. 40–43.