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From Apology to Utopia

The Structure of International Legal Argument

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Epilogue

1 A retrospective

I have always found writing a messy affair. It has never proceeded according to plan. Starting on a text, I seldom possess more than the roughest skeleton of an outline for the argument I wish to make or the sections through which it might unfold. Reconstruction of what I now think *From Apology to Utopia* is about, cannot, therefore, hope to bring to light any very sharply defined programme I had when I wrote it in 1989. That programme developed in twists and turns during the work and my own view of it has not been unaffected by the passage of time. But it now seems right to say – although I would probably not have put it in this way at the time – that the book was conceived in order to articulate and examine two types of unease I had about the state of international law as a professional practice and an academic discipline. First, existing reflection on the field had failed to capture the experience I had gained from it through practice within Finland’s Ministry for Foreign Affairs, especially in various United Nations contexts. In particular, I felt that none of the standard academic treatments really captured or transmitted the simultaneous sense of rigorous formalism and substantive or political open-endedness of argument about international law that seemed so striking to me. Second, there seemed to me no good reason why the “field” of international law or the ambition of the international lawyer (matters which are of course not unconnected) should be limited intellectually or politically in the way they were. After all, the profession had historically developed as a cosmopolitan project that had dealt with enormously important questions of international justice, peace and war, the fate of nations and the lives of individuals and human groups. Transmitted to its practitioners in the 1980s when this book was conceived, it had become a bureaucratic language that made largely invisible the political commitment from which it had once arisen or which animated its best representatives. I wanted to resuscitate the sense, or even the

unavoidability, of that commitment for a meaningful international legal practice.

There was, in other words, both a descriptive and a normative concern somewhere behind this book. As I now recapitulate them in this retrospective, my interest is not autobiographical. Instead, I wish to provide an intellectual framework within which *From Apology to Utopia* situates itself and within which, I think now as I did then, any assessment and critique of its achievement should take place. Although the book was conceived and written some time ago, the two concerns have not gone away. It is true, of course, that much about the world has changed since then. In the early 1990s international law experienced an enthusiastic revival, and after 2001 a period of sober disillusionment. The hopes and disappointments have been reflected not only in professional publications but also increasingly in the public media and debates within civil society. Institutional activities within human rights and the environment, international criminal law, and the economic field have significantly increased. While the scope of international law has widened, a deeper-seeming functional specialization has set in. But the basic doctrines, approaches and – above all – tensions and contradictions that have structured the field since the late 19th century have not changed markedly. In the language of what follows, although it has become possible to say new things in the law, the *grammar* which one uses to say those things has remained largely unchanged. This suggests to me that the descriptive and the normative concerns of *From Apology to Utopia* remain as important as they were at the end of the 1980s. The ascendancy of a new “imperial” rhetoric in world politics – sometimes in a moral tone, sometimes through classical *realpolitik* – may even have highlighted the need to think about international law’s role anew. In the following sections I will reformulate those projects in a language that might hopefully respond to some of the criticisms that have been made about this book and provide an initiation as well as a research agenda for new readers who, like I did when I first wrote the book, feel trapped in a professional language that always somehow fails to deliver its seductive promise.

2 The descriptive project: towards a grammar of international law

My descriptive concern was to try to articulate the rigorous formalism of international law while simultaneously accounting for its political open-endedness – the sense that competent argument in the field needed

to follow strictly defined formal patterns that, nevertheless, allowed (indeed enabled) the taking of any conceivable position in regard to a dispute or a problem. Existing academic works seemed to me too focused on either the formal or the substantive without suggesting a plausible account of the relations between the two. On the one hand, they discussed rules and principles, legal subjects and legal sources – in short, the various textbook topics – as if these were unconnected with the ways of using them in argument in the institutional contexts in which international lawyers worked. I was unhappy with the way much of the relevant literature portrayed international law as a solid formal structure whose parts (rules, principles, institutions) had stable relations with each other; and also, where this did not seem to be the case, with the view that it was the task of doctrine to (re-)create such relations. I was particularly frustrated by attempts to fix the meaning of individual rules, principles or institutions in some abstract and permanent way, irrespective of the changing situations in which legal interpretations were produced.

On the other hand, if these writings fell on the side of excessive formalism, I was equally disappointed by “political” treatments according to which international law was best seen as an instrument for more or less shared “values” or “interests” or its significance lay in whether it made nations “behave” towards some postulated end-state. Little seemed to be gained by thinking about international legal argument as being “in fact” about something other than law. Had I responded to my superiors at the Ministry when they wished to hear what the law was by telling them that this was a stupid question and instead given them my view of where the Finnish interests lay, or what type of State behaviour was desirable, they would have been both baffled and disappointed, and would certainly not have consulted me again. Reducing international law to its objectives or likely consequences would have given no sense whatsoever of what it was to produce a legal opinion, or of the significance of the legal service for people who continued to think of it as not only a distinct, but also an apparently valuable, service.

In other words, fulfilment of my first ambition – to describe international law in a way that would resonate with practitioner experience – necessitated that I resist the pull of either excessive “formalism” or excessive policy-oriented “realism”. In the course of writing, however, I began to realize that this way of stating the problem also contained the seeds of its resolution. The objective could not be to find some ingenious “third way” – a novel vocabulary or technique – to impose on the

practice or theory of international law. Instead, I needed to think about my own experience as far from idiosyncratic and to examine the contrast between “formalism” and “realism” as an incident of the *standard experience of any international lawyer* in the normal contexts of academy or practice. It was not to be done away with, but exploited as a key insight in a reconstruction of what international law was about, in particular when examined from the *inside* of the profession – instead of from the outside as political theorists, international relations scholars, philosophers or sociologists did. For the latter, international law’s hesitant and dichotomous nature was always a “problem” in need of resolution before it could assist them in making whatever political or academic point they wished to make. It was *they* who needed to think of international law as a solid system of preferences, and to them that its complex fluidity remained so frustrating: “What do you mean ‘on the one hand/on the other hand’? Can’t you just tell me what the law *is!*”¹

For international lawyers, however, the contrast between “formalism” and “realism” was, I realized, merely another case of the oscillation between normativity and concreteness, utopia and apology that defined the very problem-setting of their discipline. It was that dichotomy that explained the fluidity and open-endedness of the discipline while also accounting for its formal rigour – the sense that arguments had to be presented strictly in accordance with the conventions of professional culture and tradition in order to be heard. What I needed to do was not to do away with this opposition but to make it my central theme, to think of it as the very basis or – to put it philosophically – the *condition of possibility* of there being something like a distinct experience of international law in the first place. To do that, I began to think of international law as a language and of the opposition as a key part of its (generative) grammar.

¹ This is today seen most strikingly in the enthusiasm of political scientists for compliance studies. Attempts to find out whether or not States comply with their commitments presume, of course, firm knowledge of what there is to comply with. For a lawyer, however, a “compliance problem” turns regularly into a puzzle about the relevant obligations – perhaps this type of “compliance” was never foreseen, perhaps alternative forms of compliance were also provided, or perhaps compliance was conditioned by some fact that has failed to materialize, maybe circumstances have changed, etc. – speculation that is bound to make the non-lawyer despair.

2.1 *What a grammar is*

Imagine that you wanted to learn a new language and that you were told that this consisted of learning all the words in that language. You would be surprised, no doubt, and the task would seem truly monumental. Yet, of course, that is not how languages are taught, or learned. A language is not merely a large (indeed truly enormous) mass of words, and the competence of the native language-speaker does not reside in the kind of word-mastery that this image presumes. Nevertheless, this is how the professional competence of an international lawyer is often (implicitly) understood. In thousands upon thousands of pages, textbooks offer a huge number of rules for the student to learn. These rules are grouped by subject-areas (territory, use of force, law of the sea, etc.) which organize the field often by reference to larger “principles”. But surely the competence of the international lawyer is just as little about knowing all those rules or principles as the competence of the native language-speaker is about mastery of a large vocabulary. Words are only raw material that the language-speaker uses in order to formulate sentences and grasp meanings transmitted as part of the social life of native language-speakers.

In the same way, “competence” in international law is not an ability to reproduce out of memory some number of rules, but a complex argumentative practice in which rules are connected with other rules at different levels of abstraction and communicated from one person or group of persons to another so as to carry out the law jobs in which international lawyers are engaged. To be able to do this well, such connecting has to take place in formally determined ways. As we go through law school, we gradually receive an intuitive grasp of how this takes place. We develop an ability to distinguish between competent arguments and points put forward by lay persons using the same vocabulary but doing that in ways that – whatever one may think of the substance of these points – somehow fail as *legal* arguments.² Public debates during great crises such as the Kosovo intervention in 1999 or the Iraq war in 2003 often manifest this. Whatever their political position, lawyers often feel uneasy when bits of legal discourse are thrown about in journalist or partisan discourses; and even when they do not

² See also my Letter to the Editors of the Symposium, in Steven R. Ratner and Anne-Marie Slaughter, *The Methods of International Law* (Washington, American Society of International Law, 2004), pp. 109–125.

mind this, they are still able to recognize – and hold important – the distinction between professional and non-professional uses of legal words.³

The descriptive thesis in *From Apology to Utopia* is about such intuitions. It seeks to articulate the *competence* of native language-speakers of international law. It starts from the uncontroversial assumption that international law is not just some haphazard collection of rules and principles.⁴ Instead, it is about their use in the context of legal work. The standard view that international law is a “common language” transcending political and cultural differences grasps something of this intuition. So do accounts of the experience that even in the midst of political conflict, international lawyers are able to engage in professional conversation in which none of the participants’ competence is put to question by the fact that they support opposite positions.⁵ On the contrary, lawyers may even recognize that their ability to use rules in contrasting ways is a key aspect of their competence – reflected in popular caricatures of lawyers as professional cynics.⁶ Whatever our

³ This is why we instruct students or younger colleagues to learn by following up closely what legal institutions – courts in particular – and respected members of the profession do or have done in particular cases, how they have connected rules to each other so as to produce complex arguments that we recognize as exemplary in their power, their ability to create or contest some suggested meaning. We tell students to read cases and pleadings so as to be able to reproduce the kinds of argumentative patterns that the profession has learned to recognize as aspects of its specific character instead of, say, parts of a political or moral discourse or manifestations of some other competence, for example that of a sociologist or geographer.

⁴ The sense that international law forms a “system” is so deeply embedded in legal thinking that H. L. A. Hart’s famous description of it as a set of primary (treaty) rules unconnected with each other has never been accepted by international lawyers. Cf. *The Concept of Law* (Oxford, Clarendon, 1961), ch. 10. The fact that there has been no general agreement about what the “systemic” nature of international law means gives expression to the fact that systemic theories, too, are an aspect of international legal discourse, amenable to the play of utopia and apology. To view international law as *language* is, of course, another attempt to account for its systemic character.

⁵ Thus Sir Robert Jennings, for instance, wrote: “in this culturally, ideologically, and economically divided world, it is international law itself which provides a common language, the language in which these very differences are described and defined, explained, and the different aspirations propagated”, “International Courts and International Politics”, Joseph Onoh Lecture 1986, David Freestone et al., *Contemporary Issues in International Law* (The Hague, Kluwer, 2002), p. 26.

⁶ I have discussed this tension in my “Between Commitment and Cynicism: Outline for a Theory of International Law as Practice” in: *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations, 1999), pp. 495–523.

view about the moral status of the profession, however, that status is not an aspect of a person's quality as a "native language-speaker of international law". Or to put this in another vocabulary, international law is not necessarily representative of what is "good" in this world.

This is why the linguistic analogy seems so tempting. Native language-speakers of, say, Finnish, are also able to support contrasting political agendas without the question of the genuineness of their *linguistic* competence ever arising. *From Apology to Utopia* seeks, however, to go beyond metaphor. Instead of examining international law *like* a language it treats it *as* a language.⁷ This is not as exotic as it may seem.⁸ No more is involved than taking seriously the views that, whatever else international law might be, at least it is how international lawyers argue, that how they argue can be explained in terms of their specific "competence" and that this can be articulated in a limited number of rules that constitute the "grammar" – the system of production of good legal arguments.⁹

But why concentrate "only" on the competence of a small and marginal group of legal professionals? Why not speak directly to the legal rules and principles, the behaviour of States, the stuff of law as a part of the international social or political order? *From Apology to Utopia* assumes that there is no access to legal rules or the legal meaning of international behaviour that is independent from the way competent

⁷ In this, as perceptive commentators have noticed, it resembles the systems-theoretical perspective on sociology of Niklas Luhmann. For Luhmann, society *is* communication. This enables him to deal with the paradoxes and aporias of social systems not as functional mistakes that should be "corrected" but as necessary aspects of communicative systems that are self-referentially validated. See especially Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Frankfurt, Suhrkamp, 1992), and, Luhmann, *Law as a Social System* (Transl. by Klaus A. Ziegert, ed. by Fatima Kastner, Richard Nobles, David Schiff and Rosamund Ziegert, Oxford University Press, 2004). For an introductory application of Luhmannian systems-theory in international law, see Gunther Teubner, "Globale Zivilverfassungen: Alternatives zur staatszentrierten Verfassungstheorie", 63 *ZaöRV* (2003), pp. 1–28 and Andreas Fischer-Lescano, "Die Emergenz der Globalverfassung", 63 *ZaöRV* (2003), pp. 716–760.

⁸ For example, Martin Loughlin has recently defined public law as a "vernacular language", thereby highlighting its nature as a complex practice that resists reduction to general principles or procedures. Instead Loughlin sees it as "an assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition and sustain the activity of government". *The Idea of Public Law* (Oxford University Press, 2003), p. 30.

⁹ The "goodness" of those arguments, it must be stressed, is not a function of one's view of the moral or political merits of the position being defended. Colleagues may well admire the skill of a lawyer arguing for a case they know he or she is bound to lose.

lawyers see those things. Imagine someone suggested setting aside the language which physicists use to describe the physical world, or that we should begin to talk of human health independently of how medicine views it. The suggestion would seem strange, and surely unacceptable. No doubt there exists a physical or a physiological reality that in some sense is independent of the way competent professionals see it. But there is no more reliable *access* to those worlds than what is provided by the languages of physics and medicine, as spoken by the competent language-speakers of *those* disciplines. In this sense, law is what lawyers think about it and how they go about using it in their work.

This insight may be defended by various philosophical arguments, and I made some of them in the introduction. But philosophy does not set the book's horizon. Instead, *From Apology to Utopia* seeks to articulate practitioner experience as against doctrinal accounts of the field. One of these was the experience that competent lawyers were always able to support opposite sides with good legal arguments. To describe such argumentative oppositions in terms of one side being right and the other wrong seemed hopelessly naive – after all, that seemed to put to question the competence of the side that was “wrong” or “lost” the case. “Winning” or “losing” seemed always less connected to the intrinsic worth of the arguments than the preferences of the institution before which they were made.¹⁰ It was not “winning” or “losing” but ability to take on opposite sides in *any* international controversy that was the key to professional competence. Mainstream doctrine described the field in terms of rules and principles with a stable meaning that would always privilege some policies or institutions over others. This suggestion seemed to me astonishingly blind to the way professionally rigorous argumentation could be invoked to support whatever one needed to support. Were the lawyers defending the lawfulness of the Iraq war of 2003 simply incompetent lawyers? Surely the problem was elsewhere. Of course, the intuitions and preferences of international lawyers are often quite predictable. Arguments are grouped in typical ways, reflecting mainstream positions as familiar as the minority positions routinely invoked to challenge them.¹¹ Majority and minority positions develop

¹⁰ I discuss the question of institutional or structural bias in section 3.3 below.

¹¹ The way the disciplinary vocabulary of international law has developed between the end of the nineteenth century and today by grouping into a “mainstream” and a “counterpoint”, moving through periods of “consensus and renewal” on the one hand, and “anxiety and disputation” on the other, is usefully depicted in David Kennedy, “When Renewal Repeats: Thinking against the Box”, 32 *New York University Journal of*

slowly, like literary styles. We can sometimes survey their being engaged in a spiral-like movement in which yesterday's challengers ("decolonization", for instance, or "human rights") become today's mainstream and are in turn challenged by new vocabularies ("failed States" or "free trade") without a clear prospect of *Aufhebung* or even a "reasonable balance" providing closure. Nothing about those positions is produced by law – though they are all equally amenable to being dressed in it.

This experience captures, as I explained in chapter 1, the famous distinction between discovery and justification, or the sense in which legal arguments do not *produce* substantive outcomes but seek to *justify* them. As a language of justification, international law is a means to articulate particular preferences or positions in a formal fashion, accessible to professional analysis: the movement of armed personnel across boundaries becomes "aggression" or "self-defence", an official act a matter of "sovereignty" (or "immunity") or a "human rights violation".¹² The law constructs its own field of application as it goes along, through a normative language that highlights some aspects of the world while leaving other aspects in the dark.¹³ Whether a particular justification then seems plausible and the position defended is accepted depends on how it fits with the structural bias in the relevant institutional context. Two patterns emerge: one is the formal style in which arguments must be made in order to seem professionally plausible; the other is the substantive outcome that appears to satisfy the structural bias.¹⁴

The legal justifiability of a decision is not the same as a causal account of why it was taken. The latter has to do with things legal realists have always referred to: ambition, inertia, tradition, ideology and contingency. The UN Charter did not cause the Security Council to enact a sanctions regime against Iraq in 1990 or the launch of "Operation Desert Storm" the following January. But the question of the legal justifiability of those activities could only be answered in terms of the law of the UN

International Law and Politics (2000), especially pp. 340–397. Kennedy has told a similar story concentrating on the development of international law in the United States in "Tom Franck and the Manhattan School", 35 *New York University Journal of International Law and Politics* (2003), pp. 397–435.

¹² See further my "Theory: Implications for the Practitioner", in Philip Allott et al., *Theory and International Law: An Introduction* (London 1991), especially pp. 35–45.

¹³ This is the basis of the recent "constructivist" interest in the law as an instrument for structuring the field of political contestation. But it is equally reflected in the "realist" complaints against judicial settlement: law reduces a conflict to sometimes irrelevant particularities, failing to account for the historical context.

¹⁴ For the latter, see in more detail section 3.3 below.

Charter and the use of force. Whether, again, it seems at all useful to pose the question of legal justifiability depends on the institutional context. How is a culture of formalism viewed there? If the predominant concerns are those of instrumental effectiveness, or “governmentality”, then formalism may seem beside the point or even counterproductive.¹⁵ But if what seems important is institutional contestability, then the absence of aspects of that culture – predictability, transparency, accountability – will always appear a scandal. The relative value of these two cultures cannot be decided in an absolute way – each has a beneficial as well as a dark aspect – and it is not difficult to see them as political adversaries in particular situations.¹⁶ International lawyers’ professional bias has not unnaturally been to a culture of formalism. The grammar that *From Apology to Utopia* sketches may thus also be read as an analysis of the possibilities and limits of political contestation through the adoption of a culture of formalism in a particular institutional environment.¹⁷

Standard studies link international law’s political role to the way in which its rules and principles can be associated with, and advance, normative ideas taken from some more or less fixed extralegal world. Here, however, the meaning of legal language is derived from what point is being made by it in a particular context, in regard to what claim, towards which audience. What interests are being supported, what opposed by it?¹⁸ This is the politics of law for which the existence of a grammar is absolutely crucial but which is not exhausted by mere grammar-use. The politics of international law is what competent international lawyers do. And *competence is the ability to use grammar in order to generate meaning by doing things in argument*. Thus, for instance,

¹⁵ The understanding of “governmentality” as a purely instrumental attitude to the activity of “governing” in which rules have (at best) a tactical role derives from Michel Foucault and is often articulated as a critique of recent American unilateralism. See, for instance, Judith Butler, *Precarious Life. The Powers of Mourning and Violence* (London, Verso, 2004), especially pp. 93–100. For the original statement of the position, see Michel Foucault, *Naissance de la biopolitique. Cours au Collège de France 1978–1979* (Paris, Gallimard, 2004). I have used this in e.g. “Global Governance and Public International Law”, 37 *Kritische Justiz* (2004), pp. 241–254.

¹⁶ This is the theme of chapter 6 (“Out of Europe”) of my *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001).

¹⁷ For a discussion, see my “The Place of Law in Collective Security”, 17 *Michigan Journal of International Law* (1996) pp. 455–490.

¹⁸ This point has been powerfully made by Quentin Skinner. See e.g. the essays in his *Visions of Politics I* (Cambridge University Press, 2003). Similarly, Reinhard Koselleck, “Begriffsgechichte and Social History”, in *Futures Past. On the Semantics of Historical Time* (Columbia University Press, 2004), pp. 75–92.

“sovereignty” cannot be grasped by examining the “idea of sovereignty” somehow floating autonomously in conceptual space but by studying how that word is invoked in institutional contexts so as to make or oppose particular claims. An account of “sovereignty” in international law must show the ways it is being used in the relevant professional contexts and how some uses have stabilized and then again been challenged by alternative uses. Such shifts of meaning take place in a conceptual universe that is always in principle open for contestation and polemics.

This is what I mean in chapters 4 to 6 as I point out that there is always a “pure fact” argument to counter a “legal” argument when the vocabulary of “sovereignty” is invoked; a point about “consent” to be made to challenge the adversary’s point about “justice” when “sources” are debated; or a notion of the “*opinio juris*” to make doubtful the inference one’s opponent has made of the meaning of State practice as “custom”. As I further illustrate in those chapters, what “sovereignty”, “treaty” or “customary law” mean is not determined by philosophical reflection about the way facts turn to norms or justice links to consent but how those expressions are used by lawyers in particular situations. It may be a part of professional training that one learns to theorize about “sovereignty”, “sources” or “custom” and that training may add direction and complexity to one’s arguments. Indeed, it would be strange if legal training would not do precisely that. But it does not lead practitioners any closer to the *ideas* of “sovereignty”, “legal source” or “custom”, firmly fixed in some conceptual or historical bedrock. It makes them more effective language-users and the fact that it does so is the only unchanging criterion through which its success may be measured – after all, it would be a bad excuse for medicine to stop curing people in order to concentrate on creating a philosophically sophisticated theory of human health.

By sketching the rules that underlie the production of arguments in international law, *From Apology to Utopia* seeks to liberate the profession from its false necessities. Although international law is highly structured as a language, it is quite fluid and open-ended as to what can be said in it. For example, each of the four types of doctrine discussed in chapter 3 accommodates aspects of its adversary. “Realism”, as political scientists have often pointed out, is based on an “idealism”¹⁹ and

¹⁹ On the “idealism” of a political realist such as Hans Morgenthau, see my *Gentle Civilizer*, *supra*, note 16, pp. 468–471. See likewise, Richard Ned Lebow, *The Tragic Vision in Politics. Ethics, Interests, Orders* (Cambridge University Press, 2003), pp. 275–284 and *passim*.

vice-versa,²⁰ while “rules” and “processes” are ultimately indistinguishable and, pressed upon by argument, turn into each other: a rule is created by and interpreted in process, a process is defined as rule-observance. As the subtle distinctions between doctrinal positions are lost in argument, it becomes evident that they do not embody fundamentally contradicting theories or approaches, but are better understood as aspects of a general system – a language – whose parts are interdependent not by way of logic or causality but through what – for want of a better word – could be called “style”.²¹ As arguments about consent turn out to be (or rely upon) arguments about justice, points about State sovereignty turn into arguments about national self-determination, facts transform themselves into rules, and each such opposition turns around once again, the language of international law forms stylistic paths in which we can recognize fragments of liberal political theory, sociology, and philosophy. By focusing on those moves, *From Apology to Utopia* instructs international lawyers in the nature of what they intuitively recognize as their shared competence. In particular, it shows them that nothing of this competence requires commitment to particular political ideas or institutional forms. Future horizons need not be limited by past ambitions.

2.2 *The grammar articulated: sovereignty and sources*

The grammar that emerges from the analyses in *From Apology to Utopia* takes its starting-point from the tension between concreteness and normativity that structures all (competent) international legal speech. Any doctrine or position must show itself as concrete – that is, based not on abstract theories about the good or the just but on what it is that States do or will, have done or have willed. A professionally competent argument is rooted in a *social concept of law* – it claims to emerge from the way international society is, and not from some wishful construction of it.²² On the other hand, any such doctrine or position must also show

²⁰ As Hersch Lauterpacht noted in his polemic against E. H. Carr. Lauterpacht, “Professor Carr on International Morality”, in *International Law. Being the Collected Works of Hersch Lauterpacht* (Elihu Lauterpacht ed., vol. II, Cambridge University Press, 1978), pp. 67–69.

²¹ See my “Letter to the Editors”, *supra*, note 2.

²² For an overview (and critique) of the variations of the “social concept” in modern law, see Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001).

that it is not just a reflection of power – that it does not only tell what States do or will but what they *should* do or will. It must enable making a distinction between power and authority and, in other words, be normative. The more concrete an argument is, the less normative it appears, and *vice-versa*. This tension structures international law at various levels of abstraction.

It is expressed, for example, in the way it is possible to give a full description of international law from the perspective of what I call *doctrines of sovereignty* and *doctrines of sources*.²³ The former start from the assumption that international law is based on sovereign statehood, the latter derive the law's substance from the operation of legal sources. Thus, after an initial section that seeks to historicize the subject (and to underwrite the social concept of law), textbooks or general courses at the Hague Academy and elsewhere always begin discussion of the law's substance with a chapter either on "sovereignty" (a discussion of "subjects") or on "sources" (often by reference to Article 38(1) of the Statute of the International Court of Justice).²⁴ These become the foundation for the rest of the law in the subsequent chapters, explained from a particular perspective, sometimes a bias or a style. The story about international law's basis in statehood is a "hard", historically inclined narrative that assures the reader of the law's suave realism, its being not just a compilation of the author's cosmopolitan prejudices. Thinking of international law being generated by "sources" opens the door for a "softer", cosmopolitan vision focusing on the present "system"

²³ In philosophical language, it is possible to proceed from either statehood or rules about statehood as the law's transcendental condition.

²⁴ For texts that open up the law's substance by "sources", see e.g. Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, London, Routledge, 1997), pp. 35–62. At the outset of his *Principles of Public International Law* (6th edn, Oxford University Press, 2003), Brownlie observes that "the sources of international law and the law of treaties . . . must be regarded as fundamental: between them they provide the basic particulars of the legal regime", p. 3. To the same effect, see Patrick Daillier and Alain Pellet, *Droit international public* (7th edn, Paris, LDGJ, 2002), who start the substance of the law from "La formation du droit international", p. 110. For a few examples that start from statehood, see e.g. Antonio Cassese, *International Law* (Oxford University Press, 2001), pp. 3, 46, Pierre-Marie Dupuy, *Droit international public* (4th edn, Paris, Dalloz, 1998), p. 25 and especially his "L'Unité de l'ordre juridique international. Cours général de droit international public", 297 RCADI (2002), p. 95. Brierly is straightforward: "as a definite branch of jurisprudence the system which we now know as international law . . . for its special character has been determined by that of the modern European states-system", *The Law of Nations* (6th edn by C. H. M. Waldock, Oxford University Press, 1963), p. 1.

constituted by treaty texts, UN resolutions, peremptory norms or general principles. Where diplomacy provides the professional horizon for the former, the latter's focus is often on a formal "system" or notions of "community": where the former appears "ascending", the latter seems "descending" in the image of this book.

Both approaches are correct; each has resources to ground and explain the law. Yet each is vulnerable to criticisms from its opposite: sovereignty seems too servile to power to become a reliable basis for a normative system, while sources fail to give a good account of where the law emerges if not from concrete State power and policy. Much of 20th-century international jurisprudence may be described as tidal fluctuations of emphasis between sovereignty and sources, sociological approaches and formalism: the mainstream may have been grounded in a humanitarian ("sources") critique of sovereignty – but that critique has been always followed by a sobering rejoinder about the continued centrality of state power ("sovereignty"). For every Hans Kelsen, a Carl Schmitt has been waiting around the corner, for every Lauterpacht, a Brierly. Each Georges Scelle has had his Charles de Visscher and every Manley Hudson his Myres McDougal. As the century grew old, a pragmatic eclecticism set in.²⁵ The two merged into each other: what "sovereignty" means and when what it creates amounts to "law" can only be determined through an external criterion – sources; what "sources" are and how they operate must depend on what is produced by "sovereignty". A reservation, after all, cannot be incompatible with the object and purpose of a treaty – but what that object and purpose is, must remain for each State to decide.²⁶ And so finally, in the new millennium everyone is both "idealist" and "realist", in favour of "rules" and "facts" simultaneously, learning with every position also the critique of that position.²⁷ As "sovereignty" and "sources" merge into and yet remain in tension with each other, their relationship will ensure the endless generation of international legal speech – and with it, the continuity of a profession no longer seeking a transcendental foundation from philosophical or sociological theories.

²⁵ See the epilogue of my *Gentle Civilizer*, *supra*, note 16, pp. 510–517.

²⁶ See chapter 5.5.2 above.

²⁷ Because of the way in which "realism" and "idealism" have each learned the lesson they receive from each other, it has begun to seem impossible to distinguish the two from each other: as lawyers and human rights activists today embrace the language of military power, nobody is more serious about law and humanitarianism than military officials. See further David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton University Press, 2004), pp. 266–272.

As sovereignty and sources remain the two grand trajectories through which lawyers come to legal problems, each is internally split so as to allow the articulation of any adversity as opposing legal claims.

2.2.1 Sovereignty

The grammar of sovereignty is constituted by the oscillation between fact-oriented and law-oriented points as explained in chapter 4. Sovereignty must reflect some actual authority over territory. State failure is at least in part caused by the “sudden swing from effectiveness to legality” that decolonization meant – moral concerns trumping actual (imperial) power.²⁸ And yet, the eventual general acceptance of the Baltic “continuity thesis” in 1991–1992, for example, testifies to the sense that even where power is firmly established, it may still not turn into law if it seems egregiously unjustified.²⁹ *Ex facti non jus oritur*. None of the successor States in the former Yugoslavia could expect to be recognized by seizing as much territory as possible. But as international recognition conditioned Balkan sovereignty upon normative criteria it also reproduced the danger of imperialism against which the “pure fact” view was once created. The contrast between the strict declarativism of Opinion 1 of the Arbitration Commission of the Yugoslavian Peace Conference and the refusal by the members of the European Communities (as they then were) to treat new Balkan entities as States unless they complied with humanitarian demands testifies to the vitality of sovereignty doctrines as discussed in chapter 4.³⁰ Abstract standards (such as self-determination) justify recognition policies that create the reality they purport to reflect – with the result that effective power sometimes fails to bring about statehood (not only in Southern Rhodesia or Taiwan but also in Abkhazia and Serbian Krajina) whereas

²⁸ Gerard Kreijen, *State Failure, Sovereignty, and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa* (The Hague, Nijhoff, 2004).

²⁹ See Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (The Hague, Nijhoff, 2003). I have discussed the continuity problem in Martti Koskenniemi, “The Present State of Research”, in Pierre Michel Eisemann and Martti Koskenniemi, *La succession d’Etats: La codification à l’épreuve des faits/State Succession: Codification Tested against the Facts* (The Hague Academy of International Law, Nijhoff, 2000), pp. 119–125.

³⁰ See Opinion 1 of the Arbitration Commission, 31 ILM (1991), pp. 1494–1497 and the EU Declaration on the Recognition of New States in Eastern Europe and the Soviet Union, 16 December 1991, *ibid.* pp. 1485–1487. See further the discussion in Martti Koskenniemi, “National Self-Determination Today: Problems of Legal Theory and Practice”, 43 ICLQ (1994), pp. 241–269.

non-effective power does so (not only in Burma or Lebanon in the 1970s but also in Georgia and Moldova in the 1990s).³¹

As before, it is possible to attack established power with the argument that it is unjustified and defend it with the argument that at least it is there to prevent “fratricidal struggles” (*uti possidetis*).³² The law here defers to views about justified power which are, *on the law’s own premises*, matters of political choice. Hence the move into context, deformalization: any problem seems amenable to decision only on the basis of the circumstances. It is possible to see a structural pattern in any series, over a period, of such choices. If that pattern is towards letting sleeping dogs lie (i.e. in favour of the *uti possidetis*), then we can perhaps attribute it to the policy of prudence on the part of a profession that has learned to think of territorial change as inherently dangerous.

Some of this may be illustrated by the increasingly fact-focused territorial jurisprudence of the ICJ in the 1990s. That the Court has been able to hold a party in *contra legem* occupation may reflect the fact that the disputes have been between Third World States or dealt with claims by an international pariah (such as Israel).³³ Many of the cases have been about the interpretation of colonial treaties and the determination of the weight of colonial or post-colonial *effectivités*. No determining criteria have emerged to assess the parties’ actions on the ground and any such activities by one party should be paired with acquiescence on the other party’s side.³⁴ The basic position is the “legal” view: *effectivités* cannot replace pre-existing title. This, however, does not apply where “the *effectivité* does not co-exist with any legal title”, in which case “it must invariably be taken into consideration”.³⁵ But the initial position may be made even weaker by first contesting the self-evidence of the

³¹ Davic Raic, *Statehood and the Law of Self-Determination* (The Hague, Kluwer, 2002), pp. 372–393, 402–438.

³² ICJ: *Burkina Faso–Mali Boundary Case*, Reports 1986, p. 565 (para. 20). For a useful discussion of the twin images of boundary drawing as giving effect to geographical “facts” and as an instrumentality in the context of self-determination claims, see Vasuki Nesiiah, “Placing International Law: White Spaces on a Map”, 16 *LJIL* (2003), especially pp. 22–34.

³³ E.g. ICJ: *Chad–Libya Territorial Dispute*, Reports 1994, p. 6; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Reports 2004, especially paras. 70–78.

³⁴ ICJ: *Case Concerning the Land, Island and Maritime Frontier*, Reports 1992, p. 565 (para. 347). See further Malcolm Shaw, “International Court of Justice. Recent Cases”, 42 *ICLQ* (1993), pp. 931–933.

³⁵ ICJ: *Burkina Faso–Mali Boundary Case*, Reports 1986, p. 587 (para. 63) referred to in the *Bakassi Peninsula Case*, Reports 2002, p. 353, para. 68.

meaning of the relevant treaty and then invoking *effectivités* as *evidence* for the correct meaning. This leaves the argumentative positions open and the grammar of sovereignty may start its work so as to produce the contextual jurisprudence we have today.

For example, in the *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (2002), Indonesia based its claims on a British–Dutch Treaty of 1891, Malaysia on a series of agreements through which the Sultan of Sulu, the alleged original ruler of the islands, had transferred them to successor States and finally to Malaysia. None of these old instruments was decisive. Instead, the Court repeated the “pure fact” justification (see section 4.7 above), according to which title required both “intention and will to act as sovereign” and “some actual exercise or display of such authority”. There was, however, no single rule on how to measure this. As in *Eastern Greenland*, it needed to weigh the *effectivités* invoked by the two sides *vis-à-vis* each other and held that very little – namely “measures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve” by Malaysia – sufficed as relevant facts.³⁶ As these were unaccompanied by protest on Indonesia’s side, the resulting judgment could be received from Malaysia’s action (“concrete”) without violating Indonesia’s will (“normative”).³⁷ By contrast, in the *Kasikili/Sedudu Island Case* (1999), also having to do with the silence of an original colonial treaty, the undisputed presence of the members of the Masubia population in what is now Namibia as well as military patrolling by South Africa in the disputed area were dismissed as evidence of title owing (unlike the collection of turtle eggs) to what the Court saw as absence of *animus occupandi*: indigenous agriculture was not exercised *à titre de souverain* and lacked the “necessary degree of precision and certainty”.³⁸

Finally, in the *Cameroon–Nigeria Land and Maritime Boundary (Bakassi Peninsula) Case* (2002), the Court did find a series of applicable colonial treaties that left the disputed territories in the Lake Chad and Bakassi Peninsula region to the Cameroons. The approximately 20-year

³⁶ ICJ: *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*, Reports 2002, pp. 682 and 684 (paras. 134 and 145).

³⁷ *Ibid.* p. 685 (para. 148).

³⁸ ICJ: *Kasikili/Sedudu Island Case*, Reports 1999, pp. 1105–1106 (paras. 98–99). It is striking to what extent this argumentation resembles the points made by late-19th century lawyers characterizing the forms of “native” authority in Africa so as to divest it of legal force. See further my *Gentle Civilizer*, pp. 136–155 and Jörg Fisch, *Die europäische Expansion und das Völkerrecht* (Stuttgart, Steiner, 1984), pp. 297–314.

presence of Nigerians in those regions, including regular acts by health and education authorities, were in the Court's view such as "could normally be considered to be *à titre de souverain*".³⁹ But such acts could not override treaty-based title. Nor did the Court find any acquiescence by Cameroon in giving up title in favour of Nigeria. However, here as well as in the, in some respects similar, *Libya–Chad Territorial Dispute* (1994), the Court made clear that this result could be received from the consent of the occupying State, too. When consulted at its independence and in its contacts with neighbours, Nigeria had never claimed that its frontier remained undelimited. Because in 1961–1962 "Nigeria [had] clearly and publicly recognized Cameroon title to Bakassi", its activities therein could not have been *à titre de souverain*.⁴⁰

And yet, it was impossible to uphold such a clear-cut opposition between "title" (law) and "*effectivités*" (fact): "the established modes of acquisition of title under international law . . . take into account many other variables of fact and law".⁴¹ Though consolidation (i.e. the "facts" invoked by Nigeria) was ruled out as an independent basis of title, it was presumed to be *included* in title, there being little else other than acts of "consolidation" parties may invoke to support their claims for the accepted reading of the treaty. This is why Nigeria could hold Cameroon's argument "question-begging and circular".⁴² As the Court itself has put it: "In fact, the concept of title may also, and more generally, comprehend any evidence which may establish the existence of a right, and the actual source of that right."⁴³

The relationship between "title" and "*effectivités*" is a transformation of the basic opposition between "law" and "fact" in the grammar of sovereignty. Though the two are not identical (but are in some sense antithetical), they also depend on each other: law can only be accessed through fact: a behaviour receives meaning when it is understood as (for example) "subsequent practice". Although *effectivités* cannot overrule "title", the latter cannot show itself reliably without some reference to

³⁹ ICJ: *Cameroon–Nigeria Land and Maritime Boundary (Bakassi Peninsula) Case*, Reports 2002, p. 353 (para. 67).

⁴⁰ *Ibid.* p. 416 (para. 223). See also *ibid.* pp. 341–342, 343–344 (paras. 52, 54–55). Likewise, in the *Qatar–Bahrain Maritime and Territorial Dispute*, the Court was able to rely on a colonial act (a British decision of 1939) in view of its being satisfied that the parties had consented to it, Reports 2001, pp. 83 (para. 137) and 85 (para. 148).

⁴¹ *Ibid.* p. 352 (para. 65). ⁴² *Ibid.* p. 351 (para. 64).

⁴³ ICJ: *Burkina Faso–Mali Boundary Case*, Reports 1986, p. 564 (para. 18).

what has taken place on the ground. Whether one relies on “*effectivités*” (*Pulau Ligitan and Pulau Sipadan*) or “title” (*Bakassi Peninsula*) is a matter of pure choice: if the latter seemed crucial in *Bakassi Peninsula* and *Aouzou Strip*, we may surmise that this might have been because the Court did not wish to reward aggression by a regional hegemon. When that concern is not there – as it was not in the decision by the *Ethiopia–Eritrea Boundary Commission* (2002), *effectivités* could even override existing title: “eventually, but not necessarily so, the legal result may be to vary a boundary established by a treaty”.⁴⁴

These examples illustrate the grammar at work under sovereignty doctrines: when one party says “law” (e.g. a treaty-based “title”) the other says “fact” (e.g. possession, *effectivités*). At this stage, both have a good critique of their adversary’s position but neither is secure in its own. Hence each will occupy its adversary’s original ground: *effectivités* are invoked to defend “title”; previous case-law and doctrine (i.e. “law”) are invoked to defend a particular reading of *effectivités*. The debate can continue interminably. The more stress is on “facts”, the easier it is for the other party to invoke the “Baltic defence” – those facts are illegal! And whatever “legal” arguments a party may bring, it must at some point ground them on something actually going on “in fact”. As neither of the avenues can be followed as a matter of *general preference*, any closure will always be based on an ad hoc decision whose rightness resides in the fact that it *feels so*.

This is what we have witnessed in maritime delimitation. In the *Jan Mayen Case* (1993), for instance, the Court pointed out that in drawing a single maritime boundary it could rely both on Article 6 of the 1958 Continental Shelf Convention and on customary law on the delimitation of the fishery zones. Each provided for drawing an equidistance (median) line, followed by an assessment of whether “special” or “relevant” circumstances justified a deviation.⁴⁵ This led to a balancing

⁴⁴ *Ethiopia–Eritrea Boundary Commission* (2002), para. 3.29, reported in 106 RGDIP (2002), p. 702. The Commission defined *effectivités* precisely in the above way, as “activity on the ground tending to show the exercise of sovereign authority by the Party engaging in that activity”, *ibid*. But there is no reason why *effectivités* would only be reduced to evidence of title. For “[i]t is quite possible that practice or conduct may affect the legal relations of the Parties even though it cannot be said to be practice in application of the Treaty or to constitute an agreement between them”, *ibid*. para. 3.6,

⁴⁵ ICJ: *Jan Mayen Case*, Reports 1993, pp. 61 and 62 (paras. 51 and 53). As the Court pointed out, rules over the continental shelf and fishery zones were “closely inter-related”. ICJ: *Qatar–Bahrain Maritime and Territorial Dispute*, Reports 2001, para. 231. Thus, “[f]rom a delimitation of the maritime zones beyond the 12-mile line it will first

standard – “to determine ‘the relative weight accorded to different considerations’ in each case”⁴⁶ – that has left the Court free to *modify* the median line by “geographical equity” (for example, by taking account of the difference in the length of the coastlines), or by the need to ensure access to fishery resources,⁴⁷ as well as to *follow* the median line and to dismiss all suggested deviations from it.⁴⁸ The well-known problems with “equity” are only in part obscured by routine references to previous jurisprudence.⁴⁹ “One has to conclude that the application of the law pertaining to maritime delimitation remains as mysterious as ever.”⁵⁰

Though this type of “*justice transactionnelle*” has also come under criticism, it is hard to see what could – or should – be done about it.⁵¹ It would be wrong to interpret it as somehow more arbitrary than recourse to straightforward “rules”. For the mystique is only relative, as competent lawyers who usually have a fair idea about the structural bias know. In the *Great Belt Case* (1991), for instance, Finland withdrew its case in large part because of the expectation that the Court would follow its “sovereignty” jurisprudence and juxtapose Finland’s right of passage with the Danish (sovereign) right to conclude what had been the largest single industrial project in Danish economic history. This might have led the Court to hold that Denmark was obliged to modify the bridge plan while Finland would be called upon to participate in the resulting costs. In the Finnish assessment, any such payments would, however, have exceeded the economic interest in continuing passage by oil rigs unchanged. Therefore, it decided to agree to a settlement.⁵²

The deformalization of sovereignty doctrines extends beyond territorial jurisprudence to the law concerning shared natural resources,

provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line”, *ibid.* para. 230.

⁴⁶ ICJ: *Jan Mayen Case*, Reports 1993, p. 63 (para. 58).

⁴⁷ See especially *ibid.* pp. 67, 72 (paras. 65 and 76).

⁴⁸ ICJ: *Qatar–Bahrain Case*, Reports 2001, pp. 111–115 (paras. 232–249).

⁴⁹ It is noteworthy, for instance, that the Court could now dismiss the socio-economic factors invoked by the parties by a rather brief reference to its having done so in the *Tunisia–Libya Case* (thus conspicuously omitting reference to the *Anglo-Norwegian Fisheries Case* of 1951), *Jan Mayen Case*, Reports 1993, p. 74 (para. 80).

⁵⁰ Malcolm Evans, “The Law of the Sea”, in: Malcolm Evans (ed.), *International Law* (Oxford, 2003), p. 649.

⁵¹ See Georges Abi-Saab, “Cours général de droit international public”, 207 RCADI (1987), pp. 267, 269.

⁵² See generally Martti Koskenniemi, “Case Concerning Passage Through the Great Belt”, 27 *Ocean Development and International Law* (1996), pp. 278–279.

uses of international watercourses, environmental protection, as well as prevention and liability for transboundary damage.⁵³ In each field, the relevant law is framed in contextual terms, such as expressed in arbitral jurisprudence, for example, that holds nationalization of natural resources sometimes lawful, sometimes not, sometimes allowing full, sometimes less than full (“equitable”) compensation,⁵⁴ as well as in framework treaties that define the applicable standard as an equitable balance of interests, perhaps supplemented by a set of non-exhaustive “criteria” plus a procedure for notification, negotiation and “soft” dispute settlement.⁵⁵ Even where there are apparently “hard” rules – such as the provisions for emission reduction under Article 2 of the 1987 Montreal Protocol on the Protection of the Ozone Layer – their effect is moderated by thinking of failure to carry out the required reductions in terms of “non-compliance” rather than breach of treaty.⁵⁶ This turn from (hard) rules to (soft) standards is perfectly understandable. It would be as unrealistic to lay down a rule of “sovereign freedom” as it would be to enact a rule on “no pollution” to govern transboundary harm. Where an entitlement to pollute (e.g. in the form of the so-called “Harmon principle”) may seem reasonable in view of the benefits that industrial activities bring to local populations (especially in developing States), any such generalized entitlement would also be a recipe for environmental disaster. But a general prohibition against causing transboundary harm would be equally unacceptable as it would hurt the most vulnerable economies in a disproportionate way. For each State, full prohibition is both desirable as it relates to the activities of its neighbours and threatening as it curtails its own activities.

The law of State succession is another example of the way in which the grammar of sovereignty produces a fully contextualized normativity. The Vienna Conventions of 1978 and 1983 contain a large number of

⁵³ See further my “The Limits of International Law: Are There Such?”, *Might and Right in International Relations*, XXVIII *Thesaurus Acroasiarum* (1999), pp. 19–50.

⁵⁴ See chapters 4.5 and 7.2 above. See also Tuomas Kuokkanen, “International Law and the Expropriation of Natural Resources”, XI FYBIL (2000), p. 348.

⁵⁵ A typical example is the ill-fated Convention on the Non-Navigational Uses of International Watercourses, A/RES/51/229 (8 July 1997). For a theorization of this whole branch of law in terms of a search for contextual equity, see Eyal Benvenisti, *Sharing Transboundary Resources. International Law and Optimal Resource Use* (Cambridge University Press, 2002).

⁵⁶ See further, Martti Koskenniemi, “Breach of Treaty or Non-Compliance? Reflexions on the Enforcement of the Montreal Protocol”, 3 *Yearbook of International Environmental Law* (1992), pp. 123–162.

detailed provisions on State succession in regard to treaties (1978) and State property, archives and debts (1983). According to the main rule in the former, treaty rights and obligations continue for the successor State unless otherwise is agreed or appears from the context. The latter is based on the principle of territoriality, again modified in regard to what seems reasonable. A study carried out by the Hague Academy of International Law on the various cases of State succession in the 1990s concluded that it was not possible to determine what their effect had been as all the variations could be explained as “observance” of the deformalized provisions of the treaties.⁵⁷

In conclusion, the grammar of sovereignty shifts between assuming the full rights of States (concrete) and their complete submission to a binding law (normative). Closure is attained by balancing formulas such as “reasonable” or “optimal” use, “equitable utilization”, or, simply, by agreeing to seek agreement in a local or otherwise situation-specific context.⁵⁸ Deformalization is a product of a legal grammar that insists that the law must reflect the society that it is expected to regulate while remaining autonomous from a society it is supposed to transform.

2.2.2 Sources

Whereas “sovereignty” explains the law by reference to its basis in the world of State behaviour, “sources” start from the opposite end. They enable us to assess the normative meaning of State behaviour (legal/illegal) using autonomous criteria.⁵⁹ However, just like “sovereignty”, sources, too, are internally split by contrasting ways to explain their origin and significance. This was discussed in chapters 5 and 6 through the opposition between will-based and justice-based understandings that reflect the liberal theory of political obligation.⁶⁰ On the one

⁵⁷ Pierre Michel Eisemann and Martti Koskenniemi (eds.), *La succession d'États: La codification à l'épreuve des faits/State Succession: Codification Tested against the Facts*, (The Hague, Nijhoff, 2000).

⁵⁸ For a recent example, see the Draft Principles on the Allocation of Loss in the case of Transboundary Harm Arising out of Hazardous Activities, adopted by the International Law Commission in first reading in 2004, in Draft report of the ILC on the Work of its Fifty-Fifth Session, A/CN.4/L.656 (22 July 2004).

⁵⁹ On the various understandings of the notion of “source” of international law, and the argumentative trajectories produced by them, see my “Introduction”, in Martti Koskenniemi (ed.), *Sources of International Law* (Aldershot, Ashgate, 2000), pp. xi–xxvii.

⁶⁰ One of the incidents of the abandonment of theoretical ambition by international law is the fate of the debates on the “basis of obligation” that flourished from Georg Jellinek’s

hand, any obligation must derive its force and meaning from beyond the State will. As Hersch Lauterpacht put it,

an obligation whose scope is left to the free appreciation of the obligee, so that his will constitutes a legally recognized condition for the existence of the duty, does not constitute a legal bond.⁶¹

On the other hand, any obligation must also be referred back to such will – for otherwise it would appear as an objective morality, existing outside consent and thus indefensible in liberal-democratic terms.⁶² The grammar of sources is received from the fashion in which it leads us to understand formal sources (treaty-texts, consistent behaviour) by reference to a substantive “intent” underlying them while simultaneously interpreting that “intent” by what it is that those formal sources say on their surface, suggesting that what they say should accord with that which is “reasonable”, in accordance with “good faith”, “effet utile” or some other such context-sensitive standard.

Chapters 5 and 6 contained many examples of this double oscillation (consent/justice, form/substance). The fact that little can be added to it results from the way the grammar reflects a familiar understanding of politics and society: social meaning is generated through individual psychologies, while what those psychologies produce is conditioned by the material conditions in which they are formed. Understanding will depend on what it might seem good to think people *should* will in view of everything we know about their material situatedness. In the *Tadić* Case (2003), the International Criminal Tribunal for the Former Yugoslavia (ICTY) interpreted its statute by reference to “the humanitarian goals of the framers of the Statute” that endowed it with a wide notion of “crimes against humanity” – one that did not contain the criterion of

work in the 1880s to the writings of James Brierly in the 1930s. As noted in chapter 5.1 above, this ended with the doctrine’s inability to break through the positivism/naturalism fix and its integration of both “consent” and “justice” strands within itself. Since then, the theoretical debate has reappeared on the agenda of International Relations where it is often treated in terms of questions about the “legitimacy” of international law, almost unexceptionally conceived in an instrumentalist way. My view of this can be gleaned in “Legitimacy, Rights, and Ideology. Notes towards a Critique of the New Moral Internationalism”, 7 ASSOCIATIONS (2003), pp. 349–373.

⁶¹ Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon, 1933), p. 189.

⁶² The double-sidedness of liberal legal theory is famously articulated in Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und den demokratischen Rechtsstaats* (Suhrkamp, 1992), especially pp. 166–237.

“discriminatory intent”.⁶³ Yet, why would *that* be the correct interpretation? Would not regular principles of criminal law rather have spoken in favour of a more limited standard – *in dubio pro reo*? Surely the Tribunal framed its interpretation not by wishing to follow standard techniques of criminal law – after all, very little about the ICTY was “standard” – but in view of the bias to guarantee as wide a scope for international prosecutions as possible. Again, the point is not that this was “wrong” or “political” – the opposite interpretation would have been no less so – but that the interpretative choices remain just that – choices – that refer back to formal sources and techniques of interpretation that seek to canvass a plausible notion of what people (such as the framers) may “intend” but which remain undetermined by them.

A similar pattern was visible in the *Qatar–Bahrain Case* in the 1990s in which Bahrain had denied that the “agreed minutes” of a 1990 meeting between the Qatari and Bahraini ministers constituted an international agreement. The Bahraini foreign minister insisted: “at no time did I consider that when agreeing to the Minutes I was committing Bahrain to a legally binding agreement”.⁶⁴ The Court compared the 1990 Minutes with an agreement of 1987 whose validity was not in doubt and overruled this by the (objective) “nature of the texts”. The minutes not only were written as a record of the meeting but enumerated a set of commitments and “thus create rights and obligations under international law for the Parties”. Read together with that earlier agreement, the 1990 Minutes only constituted a “reaffirmation of commitments previously referred to”.⁶⁵ The decision was based both on intent on the side of Bahrain, in particular the non-problematic intent of 1987, and on the non-intent-based point about the way the Minutes had been written and the “nature of the texts”. Each strand in the argument could be challenged by pressing it further: how did the Court arrive at its interpretation of the 1987 agreement? How does one assess the “nature” of a text irrespective of what the parties “intend” to say? But there is no more closure to the critiques than there was for the Court’s decision. The only test of the decision is the pragmatic one: did the parties settle? Did the problem “go away”?

The *Chad–Libya Territorial Dispute* (1994) falls into the same group in the Court’s territorial jurisprudence as *Temple* and *Bakassi Peninsula*,

⁶³ *Prosecutor v. Tadić (Appeal against Conviction, Case IT-94-1-A)*, 124 ILR (2003), p. 176 (paras. 284, 285).

⁶⁴ ICJ: *Qatar–Bahrain Case*, Reports 1994, p. 121 (para. 26). ⁶⁵ *Ibid.* (para. 25).

with treaty interpretation central and no attempt to strike a balance.⁶⁶ Libya lost its case, and it can only be speculated to what extent this was influenced by its status as diplomacy's *enfant terrible*. Here, however, the case is instructive of the way (objective) form and (subjective) consent interact so as to enable the Court to bring about the appearance of argumentative closure. The Court declined to follow Libya to the history of that contested territory. The issue of sovereignty was conclusively resolved by the 1955 Treaty of Friendship and Good Neighbourliness that referred to earlier delimitation instruments concluded between the colonial powers – in particular a 1919 Agreement between France and Italy. The Court found the place of the boundary from those agreements practically where Chad suggested it should lie. That this did not violate Libya's sovereignty was guaranteed by showing how Libya itself had consented to that boundary by its behaviour and statements during the negotiations to the 1955 treaty: "the Libyan Prime Minister expressly accepted the agreement of 1919", while just what had been left open had been the demarcation of the boundary in implementation of that agreement.⁶⁷

Libyan consent here was (with express reference to the *Temple Case*) drawn from a number of inferences, including from the (non-consensually binding) principles of ordinary meaning of the treaty text, its object and purpose, as well as the non-treaty principle of the stability and finality of frontiers. In other words, it was held that Libya had consented. In the pleadings, Libya attacked this understanding of "justice" by drawing attention to the unequal relationship between Libya and France in the negotiations that led to the 1955 Treaty. As a developing State that had only recently gained its independence, it was at a disadvantage, lacking the technical knowledge needed to carry out a complex boundary negotiation.⁶⁸ It never pursued this line, however – possibly in view of what it might have encountered from Chad's side had the pleadings seriously turned to a relative weighing of the injustices the two may have suffered.

⁶⁶ For an extended analysis, see my, "L'affaire du différend territorial (*Jamahiriya arabe libyenne c. Tchad*). Arrêt de la Cour internationale de justice du 3 février 1994", XL AFDI (1994), pp. 442–464.

⁶⁷ The Court expressly noted that it need not have examined the *travaux préparatoires* to confirm its interpretation. Technically, this is quite true. It did this only to protect Libya's consent, to show that it had, in fact, agreed to Chad's position. ICJ: *Chad–Libya Territorial Dispute*, Reports 1994, p. 28 (para. 56) and generally pp. 26–28 (paras. 53–56).

⁶⁸ *Ibid.* p. 20 (para. 36).

The *Kasikili/Sedudu* Case (1999), too, was largely based on sources, in particular on the interpretation of an 1890 spheres of interest agreement in East Africa between Britain and Germany. This produced no embarrassment, however, as the will of the parties was not conceived in terms of their colonialist plans but from “objective” points about normal meaning and functional arguments about needs of navigation as important then as today.⁶⁹ It is not necessary to base Botswana’s victory on the Court’s undoubted reluctance to use South African military acts as justifications of Namibian sovereignty. The circumstances were taken account of by the Court’s careful emphasis on a communiqué from 1992 between the presidents of Namibia and Botswana in which they promised that existing economic and navigational activities could continue unhampered.⁷⁰ The Court construed this as an agreement binding on both parties, and constituted a regime of boundary activity that was derived from the consent of the parties and within which formal delimitation in favour of Botswana was acceptable.⁷¹

But the most striking example of *justice transactionnelle* is surely the *Gabčíkovo–Nagymaros* Case (1997). The Court found both Slovakia and Hungary in breach of the original 1977 Treaty that provided for the construction of a series of locks in the Danube frontier region. Hungary, which had repudiated the Treaty in 1992, claimed that the Treaty had lapsed owing to a fundamental change of circumstances, ecological necessity and Slovakia’s prior breach. For the Court, none of this undermined the binding force of the original treaty, however. Hungary had violated the Treaty, which continued to remain in force.⁷²

But Hungary’s arguments did pile up in an informal fashion so that they – in particular the environmental arguments – then became key parts of the “territorial regime” or the “joint regime” that the Court understood the Treaty to have created and which now needed to be “restored”.⁷³ The Court even used the language of sustainable development, pointing out that “vigilance and prevention are required on

⁶⁹ ICJ: *Kasikili/Sedudu Island* Case, Reports 1999, p. 1074 (para. 45).

⁷⁰ *Ibid.* pp. 1106–1107 (para. 102).

⁷¹ See especially the way the Court constructed subsequent practice as independent confirmation (objective) of the binding force of its construction of the 1992 agreement (subjective) – an indication that “the Parties have undertaken to one another” to uphold free navigation on the basis of equality and non-discrimination, *ibid.* pp. 1107–1108 (para. 103).

⁷² ICJ: *Gabčíkovo–Nagymaros* Case, Reports 1997, pp. 57–68 (paras. 89–115).

⁷³ See especially *ibid.* pp. 71–72, 79 (paras. 123, 144).

account of the often irreparable character of damage to the environment".⁷⁴ And, in a manner that resembled the *Nuclear Tests Cases* discussed in chapter 5.3 above, it reconciled party "consent" with what seemed to be required by "justice":

the intentions of the parties . . . should prevail over its literal application. The principle of good faith obliges the parties to apply it in a reasonable way and in such a manner that its purposes can be realized.⁷⁵

The Court first rejected the *rebus sic stantibus* – but then also held that it was impossible to overlook the fact that parts of the Treaty had been "overtaken by events".⁷⁶ It read the Treaty functionally and concluded that the objectives of the treaty relationship "must be attained in an integrated and consolidated programme" that the parties were to develop on the basis of the indications in the judgment. They were to make sure that the "use, development and protection of the watercourse is implemented in an equitable and reasonable manner".⁷⁷

Gabčíkovo illustrates how sources arguments rotate around the poles of "consent" (the 1977 Treaty) and "justice" (environmental concerns) and then find a resolution in a pragmatic accommodation of *de facto* considerations. An attempt to canvass a law binding on sovereigns succeeds only on condition it is based on the consent of sovereigns. But a consensual law is not really binding unless what "consent" means is interpreted from the perspective of what it might be *just* to mean – thus giving rise to the problem of how the Court might justify its notion of "justice" (or good faith) and impose it on a non-consenting party. The points about consent and justice, form and content reappear in competent legal argument as a kind of preparation for the final anti-formal choice. That choice is, of course, always risky. Do colleagues understand the practical wisdom of deciding in this way? Might the parties feel the decision biased? Are outsiders satisfied by the care with which it has been made clear that nothing of this individual case will prejudice their positions in the future?

2.2.3 Conclusions on grammar: from rules and processes to decisions

From its initial division into "sovereignty" (concreteness) and "sources" (normativity), the grammar of international law splits each of these

⁷⁴ *Ibid.* p. 78 (para. 140). ⁷⁵ *Ibid.* p. 79 (para. 142). ⁷⁶ *Ibid.* p. 77 (para. 136).

⁷⁷ *Ibid.* p. 80 (para. 150).

argumentative trajectories into further contrasting strands – fact/law; consent/justice – in which each polar opposite is read by reference to the other. The relevant “fact” is that which “law” identifies as such; the applicable “law” is what emerges from the appropriate “fact”. The only “just” base to hold States bound is the degree to which they have “consented”, while what “consent” means is determined by what seems (contextually) “just”. The process of institutional decision-making consists of a competent making of these moves. Failure to make them will immediately invoke a critical response from the professional audience. But though the moves build up a defensible argument, they do not “produce” the decision. The argumentative architecture allows *any* decision, and thus also the critique of any decision without the question of the professional competence of the decision-maker ever arising. Participants and observers will continue to disagree on the particular interpretations of the facts and the law, but the disagreements will remain internal to the profession and invoke the same argumentative moves the Court itself made. They are matters of “feel” and choice; they are the politics of international law. This does not mean that decisions would be random or difficult to predict (as shown by *Great Belt*, among other cases). Competent lawyers are aware of patterns and tendencies. In any language, some expressions are used more than other expressions. This is not a function of the grammar, however, but of the social and cultural context in which native speakers act.

The descriptive project of *From Apology to Utopia* was to reconstruct the argumentative architecture of international law in its many variations so as to produce an account of it as a language and a professional competence. But though this is a complex architecture, and novel variations of the basic moves are constantly invented, it is not an account of how legal decisions are made – it is about how they are *justified* in argument. A grammar is not a description of what native language-speakers say in fact – it is an account of *what it is possible to say* in that language. In order to proceed beyond language as a structure of possible speech acts, and into the social pragmatics of performative speech, a change of focus was needed.

3 The normative project: from grammar to critique

The other ambition in *From Apology to Utopia* looked beyond description. It was to provide resources for the use of international law’s professional vocabulary for critical or emancipatory causes. That this

was the more difficult task was reflected in three types of distinct, though related, responses the book has received from its critics. One of them focuses on the semantics of the linguistic analysis contained herein, another on its pragmatics. According to these two responses, whatever critical virtue the book may have is only due to its claims being wildly exaggerated. Although it may have some bite in marginal or extreme situations, it has no such effect in the routine administration of the law. A third criticism is a more fundamental attack on the normative pretensions of this book.

3.1 *The nature of indeterminacy*

The articulation of the experience of fluidity in *From Apology to Utopia* has sometimes been misunderstood as a point about the semantic open-endedness or ambiguity of international legal words. This has occasioned the criticism that the book overstates its case, that in fact the meanings of legal words are more stable and create more predictable behavioural patterns than the argument would allow. Legal hermeneutics, it has been pointed out, routinely distinguishes between “core meanings” on which professional lawyers agree and peripheral meanings that may be subject to political controversy, and the former suffice to give rise to a solid legal practice.⁷⁸ But the claim of indeterminacy here is not at all that international legal words are semantically ambivalent.⁷⁹ It is much stronger (and in a philosophical sense, more “fundamental”) and states that even where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors’ preferences remain unsettled. To say this is not to say much more than that international law emerges from a political process whose participants have contradictory priorities and rarely know with clarity how such priorities should be turned into directives to deal with an uncertain future. Hence they agree to supplement rules with exceptions, have recourse to broadly defined standards and apply rules in the context of other rules and larger principles. Even where there is little or

⁷⁸ See e.g. Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (Munich, Beck, 2001), pp. 211–217, and Jason A. Beckett, “Behind Relative Normativity: Rules and Process as Prerequisites of Law”, 12 *EJIL* (2001), pp. 643–647.

⁷⁹ I tried to make this point originally in chapter 1.2.2 where I stated that the theory of “relative indeterminacy” was in fact parasitical upon the acceptance of “determinacy”.

no semantic ambiguity about an expression in a rule – say, about “armed attack” in Article 51 of the UN Charter – that expression cannot quite have the normative force we would like it to have. It cannot because it is also threatening – what about an imminent attack? The same reason that justifies the rule about self-defence also justifies setting aside its wording if this is needed by the very rationale of the rule – the need to protect the State. And because no rule is more important than the reason for which it is enacted, even the most unambiguous rule is infected by the disagreements that concern how that reason should be understood and how it ranks with competing ones: what is it, in fact, that is necessary to “protect the State” and how does that reason link with competing ones such as those of “peaceful settlement”?⁸⁰

It follows that it is possible to defend *any* course of action – including deviation from a clear rule – by professionally impeccable legal arguments that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards. The important point I wish to make in *From Apology to Utopia* is not that all of this should be thought of as a scandal or (even less) a structural “deficiency” but that indeterminacy is an absolutely central aspect of international law’s acceptability.⁸¹ It does not emerge out of the carelessness or bad faith of legal actors (States, diplomats, lawyers) but from their deliberate and justified wish to ensure that legal rules will fulfil the purposes for which they were adopted. Because those purposes, however, are both conflicting as between different legal actors and unstable in time even in regard to single actors, there is always the risk that rules – above all “absolute rules” – will turn out to be over-inclusive and under-inclusive. The rules will include future cases we would not like to include and exclude cases

⁸⁰ I have discussed the need to set aside clear formulations of rules by reference to the (contested, political) reasons behind those rules, e.g. in “The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law”, 65 *Modern Law Review* (2002), especially pp. 163–168, and (by reference to human rights) in “The Effect of Rights on Political Culture”, in Philip Alston (ed.) *The European Union and Human Rights* (Oxford University Press, 1999), pp. 99–116. For the “paradox of good law producing a bad result”, and a reference to contextual jurisprudence, see Thomas M. Franck, *Recourse to Force* (Cambridge University Press, 2002), pp. 174–178.

⁸¹ I would say “legitimacy”, were it not that the vocabulary of “legitimacy” itself tends to turn into a politically suspect claim about the existence of a meta-discourse capable of adjudicating the claims unresolved in its object-discourses and, thus, inaugurating legitimacy experts as a kind of world-tribunal. See my “Legitimacy, Rights and Ideology”, *supra*, note 60, pp. 349–373.

that we would have wanted to include had we known of them when the rules were drafted. This fundamentally – and not just marginally – undermines their force.⁸² It compels the move to “discretion” which it was the very purpose to avoid by adopting the rule-format in the first place.

This is easiest to illustrate by reference to the rules concerning the use of force. For example, Article 16 of the Covenant of the League of Nations committed the members to take immediate economic and, if necessary, military action against a member that had gone to “war” in breach of its obligations under the Covenant. This provision failed to include “police action” (and thus allowed Japan to consolidate its occupation of Manchuria in 1931–1932 before effective League action could be undertaken) but would have included a duty on all members to retaliate against Italy after its attack on Abyssinia in 1936 – and thus would have forced a consolidation of the Hitler–Mussolini axis at a moment when the most important task of European diplomacy was to prevent just that. Article 16 did not fail because it was open-ended. It failed because it was not open-ended enough. Hence, of course, the flexible formulation of “threat or use of force” in Article 2(4) of the Charter and the wide discretion of the Security Council under chapter VII. But now it is precisely that discretion that seems responsible for the scandals of selectivity and partiality that have appeared to undermine the UN’s collective security system. In order to end that scandal, debates on humanitarian use of force since the 1990s have always commenced with a search for “clear (formal) criteria” so as to check possible misuse by Great Powers. But the more clear-cut and “absolute” such criteria would be, the more daunting the problems of over-inclusiveness and under-inclusiveness. From the perspective of preventing discretion and political misuse the best criterion would be a numeric one – say, intervention is allowed if “500” are killed. And yet, this would be unacceptable because it would allow intervention against the practice of abortion

⁸² Although this language may sound awkward in an international law context, the demonstration of the simultaneous over-inclusiveness and under-inclusiveness of (formal) rules is a key part of the American legal realist critique of rule-formalism. For a (very didactic) contemporary discussion, see Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 1996), pp. 130–135. It has also been widely used in Critical Legal Studies. See especially Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987), pp. 40–63. The problems with clear-cut “idiot rules” have also been usefully outlined in Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990), pp. 67–83 and *passim*.

in the secular West (over-inclusive) but prevent military action when “only” 499 are tortured to death (under-inclusive). In order to avoid such problems, any criterion will necessarily have to include a contextual assessment of the seriousness of the situation – that is, to open the door of discretion that it was the point of the exercise to close.⁸³ It is for this same reason that the definition of “aggression” will always either fail or end up as a long list of examples, with the proviso for analogous situations and reasonable use of discretion.⁸⁴ Although everyone would wish there to be a binding definition to constrain future adversaries, nobody would wish to be hampered in their own action by such definition when action appears necessary.

“Trap for the innocent and signpost for the guilty” – this famous quote from Anthony Eden is one way to point to the dangers of over-inclusiveness and under-inclusiveness.⁸⁵ The ICJ did not give a direct answer to the question about the *Legality of the Threat or Use of Nuclear Weapons* in 1996 precisely because it could not exclude the possibility of an extreme danger for the very existence of a State where the limited use of tactical weapons – if they were the only means available – might be not only reasonable but even fully in accord with the purpose of the Charter as a system for protecting States.⁸⁶ Any prohibition is always also a permission (of what is precisely not prohibited) and the clearer the prohibition, the more unexceptionable the permission. To believe in the absoluteness of the words “if an armed attack occurs” in Article 51 of

⁸³ For two carefully formulated (and thus necessarily open-ended) sets of criteria, see e.g. Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects* (Copenhagen, 1999), pp. 103–111; Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, 2001), pp. 32–37. See also the “five criteria of legitimacy” in the Report of the UN High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2 December 2004), pp. 57–58 (para. 208). For one of the more useful discussions of this problem – shunning domestic analogies – see Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, 2001), pp. 226–232.

⁸⁴ See UNGA Res 3314 (XXIX), 14 December 1974.

⁸⁵ For a critique of the exercise, see Julius Stone, *Conflict Through Consensus. UN Approaches to Aggression* (Sydney, Maitland, 1977). See also Ian Brownlie, *International Law and the Use of Force* (Oxford University Press, 1963), pp. 355–358. Brownlie thinks it possible and desirable to have such definitions. And maybe it is – not least owing to the *Bildung* effects of any negotiating process. Yet the point is that any definition *must* remain open-ended or else it might strike at the wrong States at the wrong moment – but that the open-endedness maintains all the problems associated with the use of discretion by those in powerful positions.

⁸⁶ ICJ: *Threat or Use of Nuclear Weapons*, Reports 1996, p. 263 (paras. 96–97).

the Charter would be to authorize States to destroy each other by economic boycotts or by triggering natural catastrophes where the only way to prevent this would be first use of armed force. If – as it is conventional to argue – international law is not a suicide pact, then provisions on the use of force must be read by reference to their reasonable purpose. If that purpose is to protect the State then surely we cannot interpret the provisions so as to bring about just that result. The ICJ's treatment of the right to life, environmental protection and humanitarian law in the *Legality of the Threat or Use of Nuclear Weapons* is an exemplary case of the Court trying to avoid being caught in absolutism: every rule invoked before the Court was subjected to a contextual assessment of “arbitrariness”, “proportionality” and “relative effect”. Nothing depended on semantic ambivalence – it was the ambivalence of the facts (namely what *are* the actual effects of nuclear weapons? When might their use be the last alternative available?) and not the law that necessitated the indeterminacy of the Court's response.⁸⁷

This same logic affects all the debates about the need to “define” legal notions such as “terrorism”, “self-defence”, “freedom of speech”, etc. It is not that such definitions would be impossible – they are *undesirable* in view of the complexity of the international social world.⁸⁸ And that complexity is not only about our ignorance about the facts of the future – it reflects our contrasting assessments of those facts: How should we understand the difference between “terrorist” and “freedom fighter”? Where is the line between dangerous “pre-emption” and understandable “prevention”? When might it be right to ban a publication because its content violates the right of privacy of a public figure? Such questions are matters of changing political assessment. They cannot be resolved by legislation *in abstracto*. Or better, they cannot be resolved by legislation *in abstracto* when the need to regard

⁸⁷ *Ibid.* p. 240 (para. 25), “arbitrariness”; p. 241 (para. 26), the need to take into account “the circumstances specific to each case”; p. 245 (para. 42), “proportionality”. I have analysed both the deformatization at work in the Court's opinion and its dangers in “Faith, Identity and the Killing of the Innocent. International Lawyers and Nuclear Weapons”, 10 LJIL (1997), pp. 137–162 and “The Silence of Law/The Voice of Justice”, in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice, and Nuclear Weapons* (Cambridge University Press, 1999), pp. 488–510.

⁸⁸ On this problem, particularly in regard to the definition of “terrorism”, see further Franck, *The Power of Legitimacy*, *supra*, note 82, pp. 69–71, 86–89; Jarna Petman, “The Problem of Evil and International Law”, in Jarna Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism* (The Hague, Nijhoff, 2003), pp. 128–133.

some group as terrorists, the need to take self-defence action *now*, or to prohibit the damage to a person's private life outweighs the benefit that abstract law-obedience would bring. In domestic societies we can usually live with the inevitable over-inclusiveness and under-inclusiveness of rules because the benefits of generalized obedience weigh so much more heavily than the occasional injustices brought about by such obedience. When rules regulate matters of routine – thousands upon thousands of cases – then the resulting stability removes the insecurity and fear of misuse of authority that would accompany the absence of clear-cut rules. This, we normally think, seems much more valuable than the occasional injustice produced by the rule's blindness to individual situations.⁸⁹ But when a rule seeks to regulate a rare case of some importance we are automatically thrown back to assess the compliance pull of the rule in its empty form against the need to act decisively *now*, whatever the rule might say. Whichever way our decision would go, everything would depend on that *decision* – and not the rule.

The indeterminacy treated in *From Apology to Utopia* is then not about semantic openness of legal speech. There is nothing necessarily unclear about “if an armed attack occurs” or “territorial inviolability” or “right to life”. The indeterminacy is about the relationship of those expressions to their underlying reasons and to other rules and principles that makes it sometimes seem necessary to deviate from a formally unambiguous provision in view of new information or a new circumstance, to sacrifice a smaller good (abstract legality) in view of realizing a larger one.⁹⁰ The deformalization of international law that we have surveyed in the preceding pages points to the apparent necessity of applying the *reason* for the rule over the empty form of the rule (e.g. allowing self-defence even where no prior armed attack has occurred) or finding a pragmatic balance between the various rules and principles and other normative materials (most frequently “rights”) and choosing between rules and exceptions. It points to the apparent paradox that

⁸⁹ This presumes, of course, that social stability itself is not seen as the problem. If that is the case, then we are in what can only be called a revolutionary situation. I have restated these points in many places and in regard to many types of legal substance. See, in regard to the use of force, “The Lady Doth Protest too Much”, *supra*, note 80, pp. 159–175 and, in regard to human rights law, “The Effect of Rights on Political Culture”, *supra*, note 80, pp. 99–116. See also my “The Turn to Ethics in International Law”, IX *Romanian Journal of International Relations* (2003), pp. 15–29, and “Solidarity Measures. State Responsibility as a New International Order?”, 72 *BYIL* (2001), pp. 337–356.

⁹⁰ A useful discussion of the unavoidable of “decisionism” in this sense is in Duncan Kennedy, “A Semiotics of Critique”, 22 *Cardozo L. R.* (2001), pp. 1165–1167.

even a “literal” application is always a choice that is undetermined by literality itself. There is no space in international law that would be “free” from decisionism, no aspect of the legal craft that would not involve a “choice” – that would not be, in this sense, a *politics of international law*.

3.2 *Grammar and the social world: the role of antagonism*

The other challenge to *From Apology to Utopia* focused on the social pragmatics of the legal profession. The point has been made that owing to its concentration on adversarial procedures, the book has come to exaggerate the role of conflict in international law. Had the focus been on legislation instead of adjudication, what would have emerged would have been a “movement towards consensus as the governing principle of international law”.⁹¹ In this regard, the book is too “abstract” or “theoretical” and “rel[ies] on derivational logic to construct these seemingly awesome problems”.⁹² Modern international law, so this argument goes, no longer relies on absolutes but always seeks to balance between extremes. No plausible theory about international law’s binding force is today either naturalist or positivist or relies simply on “rules” or “facts”. No treaty is defended either in terms of the consent of the parties or the justice of its outcome. In all spheres, the plausible positions are situated in the middle-ground where the world of legal rhetoric is immensely richer than the straw-man portrayed in *From Apology to Utopia*. It is only because the standard of determinacy is set so high – exorbitantly high – that indeterminacy may seem to constitute a problem. But if legal argument is understood as a pragmatic rhetoric, then indeterminacy would be nothing but the normal condition of all argumentative activity. Instead of a mindless “relativism”, there would be healthy “pluralism”.⁹³

However, nothing in the foregoing chapters seeks to deny the existence of what Vaughan Lowe has called “a constant move to reconciliation” or his point that, “after all, the system works for most of the

⁹¹ David J. Bederman, book review of *From Apology to Utopia* in *23 New York Journal of International Law and Politics* (1990), p. 225.

⁹² Rosalyn Higgins, *Problems and Process. International Law and How We Use It* (Oxford, Clarendon, 1994), p. 15.

⁹³ Friedrich V. Kratochwil, “How do Norms Matter?”, in Michael Byers (ed.), *The Role of Law in International Politics. Essays in International Relations and International Law* (Oxford University Press, 2000), pp. 43–51.

time”.⁹⁴ Of course many judgments rendered by international courts remain unchallenged. Many settlements reached through the language of the law lay the basis for peaceful relations. Many doctrinal constructions attain a solid professional consensus. Precisely because the extreme positions are vulnerable to obvious and well-known objections, convergence towards the centre must indeed become a key aspect of legal practice. The claim of *From Apology to Utopia* is not that no middle-ground is ever found but that *the process of seeking and maintaining the middle-ground is a terrain of irreducible adversity*. Consensus is, after all, the end-point of a hegemonic process in which some agent or institution has succeeded in making its position seem the universal or “neutral” position. There is no “centre”, no pragmatic meeting-point existing independently of arguments that seek to make a position seem “central” or “pragmatic” while casting the contesting positions as “marginal” or “extreme”. All law is about lifting idiosyncratic (“subjective”) interests and preferences from the realm of the special to that of the general (“objective”) in which they lose their particular, political colouring and come to seem natural, necessary or even pragmatic. This is why law-making and consensus-building are so hugely important. They enable political victory without having to fight to the death.⁹⁵

When Kratochwil writes that rule-scepticism dissolves “as soon as we leave the atomistic world of the single speaker and take more seriously the notion that language is an intersubjective practice”,⁹⁶ I can only agree. Hermeneutics is right in that intersubjectivity is important. But it is wrong to reduce the professional context to one that “operates on the basis of common understandings and shared beliefs”.⁹⁷ In fact we know virtually nothing of “understandings” or “beliefs”: the insides of social agents remain irreducibly opaque. The interpretative techniques lawyers use to proceed from a text or a behaviour to its “meaning” *create* (and do not “reflect”) those meanings. Perhaps consensus was produced by

⁹⁴ Vaughan Lowe, book review of *From Apology to Utopia* in 17 *Journal of Law and Society* (1990), p. 386.

⁹⁵ This is of course true of all universalizing languages, pragmatic or non-pragmatic, and my discussion has not been unaffected by points such as made in E. H. Carr, *The Twenty-Years' Crisis 1919–1939* (2nd edn, London, Macmillan, 1946). The idea of law (that is, legal ideology) as a universalizing project is also usefully discussed in Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press, 1997), pp. 39–70.

⁹⁶ Kratochwil, “How do Norms Matter?”, *supra*, note 93, p. 52.

⁹⁷ Ian Johnstone, “Treaty Interpretation: The Authority of Interpretive Communities,” 12 *Michigan Journal of International Law* (1991), p. 449.

coercion, perhaps the other party acted out of ignorance or in order to deceive. We cannot know. In its innocent search for a “moment” of “meeting of horizons” hermeneutics remains blind to the way it forces the unity of meaning on an otherwise unknowable world. Hermeneutics, too, is a universalization project, a set of hegemonic moves that make particular arguments or preferences seem something other than particular because they seem, for example “coherent” with the “principles” of the legal system. Of course, making such arguments is an intrinsic part of legal practice. But they offer no more of an authentic translation of the “raw” preferences of social actors into (universal) law than do alternative techniques such as legal positivism or natural law, for instance. In fact, consensus-seeking (like appeals to love) may often hide a subtle authoritarianism. It does not have the same meaning to the one who can live without consensus as it has to the one who must purchase it by giving up everything else. Describing this as romance instead of struggle only adds insult to injury.

The fact that people (and States) sometimes agree is as much a sociological fact as that they often disagree, and political scientists spend much energy in explaining why they do. A number of factors are relevant here: time, interest, money, ambition, power.⁹⁸ But such factors are irrelevant as responses to the *normative* question about the justifiability of a particular consensus. In the search for justifiability, again, every argument is vulnerable to the logic of apology and utopia. Of course, no argument can continue interminably. At some point, it is better to agree than to fight, and the competent lawyer is constantly keeping an eye on that point. But there is no *legal* criterion that will say when it has been reached. And even when it has been reached, the law will always possess resources for re-opening the debate, undoing the settlement, attacking the (“unjust”) hegemony of the mainstream.

The binarism of *From Apology to Utopia* presumes that the lawyer comes to a normative problem always from some perspective, to defend a client, an interest, a theory. This is why the field of legal argument is

⁹⁸ Liberal legal theory resorts to devices such as the “reflective equilibrium” or “incompletely theorized agreements” to describe the pragmatic middle-ground between abstract theories (on which people disagree) and brute facts within which most people are able to accept a common course of action. See e.g. Sunstein, *Legal Reasoning*, *supra*, note 82, pp. 35–61. To this, decisionist critique only adds the gloss that this is so not owing to the constraining force of the decision process but out of a maxim of strategic action that suggests that it is almost always useful to compromise. See Kennedy, “A Semiotics of Critique”, *supra*, note 90, p. 1166.

constructed in an adversarial way: a defence is meaningful only as a defence *against* something, perhaps against a formal adversary in court or a political development that might go against one's interest or undermine something one holds "right". The adversarial nature of (international) law is not, however, an anthropological or sociological datum about it – even less an essentialist claim about its "nature". It is an internal, constitutive presupposition of legal argument itself. For under the liberal theory of politics, as we have seen, the point of law is to lead society away from politics, understood as an effort to move from a state of contestation and conflict into one governed by rational rules, principles and institutions. Antagonism is embedded in the *raison d'être* of the law itself and carried within it as the endlessly repeated rejection of its "other" ("discretion", "politics", "power", "violence", "corruption", etc.). In a world of angels, tyrants and technocrats, no law would be needed.

This is why most international lawyers share the intuition that the paradigm of their profession lies in arguing in front of a court, in favour of a client and against an adversary. To describe this as an unacceptably antagonistic image of the profession is to have little understanding not only of how the profession "feels" about itself but also of the dynamics of the legal grammar. This is not to say that lawyers should be understood as aggressive manipulators, constantly poised to "find a problem for every solution". Nor is it to say that different aspects of the legal craft would not be differently affected by the presence of adversity: the contrast between hard and soft law and the development of informal, non-adversarial dispute-settlement mechanisms illustrate aspects of the law that claim to rely on shared meanings and consensus. As law increasingly meshes with social processes, so the description of society moves from a stark Hobbesian nightmare to a more "communitarian" image. The background idea is something like this: as society becomes more integrated, the (artificial) egoism of individual actors cedes more room to their (natural) altruism so that the need of law diminishes until at some imaginary point ethics and natural love allow the (now fully integrated) community to govern itself without formalism. Until that point, however, it is useful to remember what E. H. Carr wrote about moments of international history that imagined themselves as particularly "ethical" but in which "the whole ethical system was built on the sacrifice of the weaker brother".⁹⁹

⁹⁹ Carr, *Twenty-Years' Crisis*, p. 49. The sense that one person's "authentic, informal dialogue" is another's "exercise of brute power" – and a critique of the (old) CLS critique of the

3.3 *Structural bias*

But the articulation of the experiences of indeterminacy and hegemonic conflict amounts only to a weak critical thesis.¹⁰⁰ For it states only that no decision is “compelled” by the legal structure and that the judge or the lawyer could always decide otherwise. This links to the most-often quoted sentence in the book, namely that “international law is singularly useless as a means for justifying or criticizing international behaviour” (p. 67 above). Taken out of its context, this is wrong – for international law *is* constantly used to justify or criticize international behaviour. In the context where it appears, however, its point remains valid: although international law has justifying or critical force, that force is inexplicable by the liberal political theory that is invoked as its foundation. If we take liberalism seriously, then international law can only seem an abysmal fraud.

The weak thesis bears two corollaries. First, it goes some way towards undermining the liberal doctrine of politics by suggesting that it cannot have the kind of justifying or legitimating power it claims to have. That critique is only “weak”, however, because little seems to depend on it. For, as I have later realized, international law is not a theoretical discipline. Its “basis” or core does not lie in theory but in practice – it works – and, notwithstanding a few exceptions, seeking an abstract grounding has never been its strength, or even a characteristic part of it. This is the inherent weakness of internal or “immanent” critique – a demonstration that a practice does not live up to its justifying explanations has no force when the practitioners themselves do not take those explanations seriously.¹⁰¹ Though it is possible to describe this in terms

pernicious effects of formal rights – is well articulated in Patricia Williams, *The Alchemy of Race and Rights. Diary of a Law Professor* (Harvard University Press, 1991). The paradoxes of “leftist legalism” are discussed in Kennedy, *Critique of Adjudication*, *supra*, note 95, pp. 327–376. For a useful discussion and criticism of association of law with informal social practices see also Simon Roberts, “After Government? On Representing Law without the State”, 68 *Modern Law Review* (2005), *supra*, note 95, pp. 1–24.

¹⁰⁰ Many academic lawyers have made this point in different ways. One of them is Vaughan Lowe, for whom legal concepts come in “particular pairs or groups of norms appropriate for application to particular kinds of factual situation” and represent “competing approaches to the analyses of those situations”: “The Politics of Law-Making”, in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford University Press, 2000), p. 214. For a discussion of the (legal realist) view of legal rules and principles always coming in contradictory pairs, see also Kennedy, *Critique of Adjudication*, *supra*, note 95, pp. 83–85.

¹⁰¹ This is the point made with great force in Peter Sloterdijk, *Critique of Cynical Reason* (Minnesota University Press, 1987).

of the profession acting in bad faith, this would presume an excessively ambitious view of theory. The critique of pragmatism is not that practice is not “based on” a well-articulated set of abstract statements about the world – perhaps no such foundation can be constructed. Pragmatism is vulnerable to critique as it offers no vocabulary that would distance the practitioner from daily work in order to enable its critical evaluation, including by reference to alternative (but imagined) practices. In such situations, practice becomes ideology, its continuing pursuit the sole criterion for its success.¹⁰²

The other corollary of the indeterminacy critique is that it highlights the “gap” between the available legal materials (rules, principles, precedents, doctrines) and the legal decision. By drawing attention to that “gap”, *From Apology to Utopia* draws attention to international law’s political nature, or, as I put it above, describes the practice of law as a “politics”.¹⁰³ This is a rather classical form of ideology critique whose point is to undermine the feeling of naturalness we associate with our institutional practices.¹⁰⁴ This critique, too, is only “weak”, however, as it merely points to the “political” nature of law but says nothing about why this would be a problem. “All right, so all this involves a choice; but what is wrong with that?” In particular, nothing in this book suggests that there should be a turn towards a “more political” jurisprudence. It is not only that “political jurisprudence” (by which we usually mean deformalized styles of legal argument) may serve many different types of interest and, though it is today often linked with the Left, this has not always been the case.¹⁰⁵ If the law is already, in its core, irreducibly

¹⁰² This is how Herbert Marcuse assessed the legitimating force of American “democracy studies” in the 1950s: “the criteria for judging a given state of affairs are those offered by (or, since they are those of a well-functioning and firmly established social system, imposed by) the given state of affairs. The analysis is ‘locked’; the range of judgment is confined within a context of facts which excludes judging the context in which the facts are made, man-made, and in which their meaning, function, and development are determined”: *One-Dimensional Man. Studies in the Ideology of Advanced Industrial Society* (with a new introduction by D. Kellner, London, Routledge, 1994 [1964]), pp. 115–116.

¹⁰³ I have summarized this in “The Politics of International Law”, 1 EJIL (1990), pp. 4–32.

¹⁰⁴ The various ways in which critique works are usefully outlined in Susan Marks, *The Riddle of All Constitutions. International Law, Democracy, and the Critique of Ideology* (Oxford University Press, 2000), especially pp. 18–29.

¹⁰⁵ Deformalized and political jurisprudence is associated with the politics of the Right (even extreme right) in Christian Joerges and Navraj Ghaleigh, *Darker Legacies of*

“political”, then the call for political jurisprudence simply fails to make sense. The critique is only “weak” as it is not about the political perversion or moral corruption of legal decision-making. It only shows the inevitability of political choice, thus seeking to induce a sense that there are more alternatives than practitioners usually realize, that impeccable arguments may be made to support preferences that are not normally heard; that if this seems difficult through the more formal techniques, then less formal techniques are always available – and the other way around: in a thoroughly policy-oriented legal environment, formalism may sometimes be used as a counter-hegemonic strategy.¹⁰⁶

So it is perhaps no wonder that, to some readers, *From Apology to Utopia* appeared “fundamentally acritical”, especially if compared to the writings of proponents of institutional transformation, presenters of grand blueprints.¹⁰⁷ In their view, the book was “rather vague in its normative visions of the international community” or outright failed “to commit to an affirmative image of international law’s role in the world order”.¹⁰⁸ From a Marxian perspective, its linguistic orientation appeared as an “idealism”, lacking an explanation for why its categories remained indeterminate and why indeterminacy would be such a problem.¹⁰⁹ Although there has been little serious criticism of the analysis and exposition of the “grammar”, the last chapter of the book – “Beyond objectivism” – has been seen to offer “pretty weak medicine for what it

European Law. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions (Oxford, Hart, 2003).

¹⁰⁶ This is how the political aspect of Hans Kelsen’s formalism is depicted in Jochen von Bernstorff, *Der Glaube an das Universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (Baden-Baden, Nomos, 2001).

¹⁰⁷ Ian Scobbie, “Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism in International Law”, LXI BYIL (1990), p. 352. The contrast Scobbie has later made is in particular to the writings of Philip Allott. My own view of Allott’s important work can be gleaned in “International Law as Therapy. Reading the Health of Nations”, 16 EJIL (2005), pp. 329–341.

¹⁰⁸ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law. A Feminist Analysis* (Manchester University Press, 2000), p. 35; similarly Hilary Charlesworth, “Subversive Trends in the Jurisprudence of International Law”, ASIL Proceedings 1992, p. 127. For the latter quote and a lengthy analysis, see Nigel Purvis, “Critical Legal Studies in Public International Law”, 32 Harv.ILJ (1991), pp. 116 *et seq.* and (with special reference to the nihilism charge) pp. 121–127.

¹⁰⁹ China Miéville, “The Commodity-Form Theory of International Law: An Introduction”, 17 LJIL (2004), pp. 272–275 *et seq.* My own thoughts about the relationship of Marxism and “deconstruction” are now recorded in “What Should International Lawyers Learn from Karl Marx?”, *ibid.* pp. 236–242.

advertized as such a dread disease".¹¹⁰ Critics made typically two points. Some claimed that the utopian sketch of a "foundationless" conversation in chapter 8 was undermined by everything in the foregoing seven chapters.¹¹¹ Others suggested that the proposal fell on the side of the apologetic: to advocate only incremental change ("normative in the small") was to capitulate to the enemy.¹¹² Privately and publicly, colleagues have suspected that the last chapter remained internal to the liberalism indicted by the book and could escape from the criticisms in the foregoing chapters only by assuming an aesthetic posture of tragic conflict and incommensurability or by taking (postmodern) delight in an endless repetition of paradoxical formulations.¹¹³

The fact that there is no alternative institutional blueprint in this book is not an incidental oversight. Readers have been right to suggest that the first seven chapters made it impossible to engage in institution-building. Indeed, it made institution-building seem, as David Kennedy would say, "part of the problem".¹¹⁴ Since its inception towards the end of the 19th century, modern international law has understood itself as above all an institution-building project. The more suspicious the profession has become of its theories or its abstract doctrines, the more important it has seemed to it to rescue respectability by proposing institutional schemes for the international "governance" of this or that problem. Today, it often seems that academic work in the field is justifiable only if it ends up in a proposal for institutional reform. From the perspective of *From Apology to Utopia*, however, the offer of policy-relevance by engaging in institution-building was a poisoned chalice. As soon as one engaged in *those* debates, two consequences would follow.

¹¹⁰ Bederman, book review of *From Apology to Utopia*, *supra*, note 91, p. 228.

¹¹¹ See e.g. Ulrich Fastenrath, book review of *From Apology to Utopia* in 31 Arch.VR (1993), p. 184.

¹¹² Anthony Carty, "Liberalism's 'Dangerous Supplements': Medieval Ghosts of International Law", 13 *Michigan Journal of International Law* (1991), p. 171. This is also the sense of the criticism by Scobbie, "Towards the Elimination of International Law", *supra*, note 107.

¹¹³ See Outi Korhonen, "Silence, Defence or Deliverance?", 7 EJIL (1996), pp. 1–29. The paradoxical effort to be "the last objective writer" involved in this is pointed at by David Kennedy in his book review in 31 Harv.IJL (1990), pp. 387–389. However, Purvis, delightfully, includes Kennedy among those "New Stream purists" who have "produced what can be understood as the last modernist text of international law", in "Critical Legal Studies in Public International Law", *supra*, note 108, p. 127.

¹¹⁴ See especially Kennedy, *Dark Sides*, *supra*, note 27.

First, all the rest of what one had to say would then be simply written off as a prologue to the institutional proposal and relevant only to the extent that the proposal seemed pragmatically realizable or otherwise appropriate. Even if one did not wish to enter the terrain of the pragmatic adversary, this is how everyone would read the text henceforth: “Oh yes, of course, those analyses are pretty clever – but see how banal his politics are, how vulnerable his contribution to the betterment of the human condition to all those problems we know so well from our own practices.” If it is true that the main target of *From Apology to Utopia* is a culture of pragmatic instrumentalism as transmitted through the language of international law, then far from being an oversight, avoiding that type of conversation was a matter of intellectual and political life and death.

But second, it also followed from the indeterminacy analysis itself that matters of institutional design were far less relevant for the distribution of material and spiritual values in the world than was commonly assumed. An institution is a set of rules and procedures. If it was true that rules and procedures did not have essential meanings, but that what they meant was dependent on the decision-making practices that took place within them, then the possibilities of political transformation were much more widely open than was usually assumed – but no institution, whatever its past or its ideology, could claim to be “naturally” working towards the political good. Institutions, much recent critical writing suggested, were in themselves indeterminate. On the one hand, societies did not possess homogenous or well-defined functional needs or interests that could be met by legal institutions. In fact, different groups reacted differently to their situation and formulated different and often contradictory institutional projects to affect their situation. On the other hand, the same institutional structure might have opposite effects in different social and cultural environments.¹¹⁵ Free markets, just like socialism, produce wealth *and* poverty, and it was a complex and indeterminate set of causalities that intervened to distribute these between different social groups.¹¹⁶

¹¹⁵ In addition to the sources in the Introduction and chapter 8, see especially Guyora Binder, “Beyond Criticism”, 55 *University of Chicago Law Review* (1988), pp. 888–915 and Kelman, *Guide to Critical Legal Studies*, *supra*, note 82, pp. 242–268.

¹¹⁶ See e.g. Kerry Rittich, *Recharacterizing Restructuring. Law, Distribution and Gender in Market Reform* (The Hague, Nijhoff, 2002), pp. 132–143.

When chapter 8 of *From Apology to Utopia* refrained from proposing new institutional structures, instead calling upon the imagination of new institutional practices, this gave voice to the insight that progressive legal work was available in a number of different professional environments. It was possible, as generations of international lawyers had done, to imagine the United Nations as the constitution of the world and thereby to try to push for increased decision-making powers for *those* institutions. But how might that affect the distribution of spiritual or material values in the world? The Security Council as a “Temple of Justice”?¹¹⁷ The Commission on Sustainable Development or the review of the activities under the UN’s Millennium Declaration were hardly adequate as platforms for advocating beneficial political change. It seemed often much more important to describe the UN in terms of the unending bureaucratic wrangling between member States and different parts of the organization itself, a bastion for privilege and an obstacle for change. Progress towards just distribution might be much more efficiently reached through work in a national administration, a transnational economic organization or even a multinational company. This, however, few colleagues were ready to hear. International law came with a firmly entrenched prejudice in favour of public-law-governed institutions with diplomatic representations, nationalist rhetoric and scarce resources. That prejudice, it seemed to me, constituted a wholly arbitrary and counterproductive limitation of the profession’s horizon.¹¹⁸

In fact, the principal object of the criticisms of *From Apology to Utopia* is not international law as a form of argument or a professional competence – after all there is no other professional grammar (of “international relations”, say, or “political theory”) in which the world’s problems would have been resolved in a more satisfactory way. The main concern is the a priori commitment by the profession to certain institutional models – especially the reading of multilateral diplomacy as an incipient form of a public-law-governed world federation.¹¹⁹

¹¹⁷ Martti Koskenniemi, “The Police in the Temple. Order, Justice and the UN; A Dialectical View”, 5 EJIL (1995), pp. 325–348.

¹¹⁸ This accounts for the move to private international law, comparative law and “general jurisprudence” in much recent critical writing.

¹¹⁹ This is the view – or better, strategy – I associate with the reconstructivist scholarship of the inter-war, and especially with the work of Hersch Lauterpacht. The latest version of the argument is in “Hersch Lauterpacht 1897–1960”, in Jack Beatson and Reinhard Zimmermann (eds.), *Jurists Uprooted. German-Speaking Emigré Lawyers in Twentieth-Century Britain* (Oxford University Press, 2004), pp. 601–662.

My intuition was – and remains – that the most serious problems of the international world are related to its sharp division into a relatively prosperous and peaceful North and an impoverished and conflict-ridden South¹²⁰ (it is not necessary to take these descriptions in their original geographical sense¹²¹) and that our practices, institutions and conceptual frameworks somehow help to sustain it. Undoubtedly international law may be used for valuable purposes – for challenging aspects of the international political or economic system, for instance. In practice, however, it is constantly directing attention away from important problems by defining them as “political” or “economic” or “technical” and thus allegedly beyond the law’s grasp. The profession’s obsessive focus is on great crises, war and civil war, terrorism and political collapse, the actions of the UN Security Council, the doings of international public-law institutions.¹²² This focus is accompanied by an astonishing insensitivity to the permissive role of legal rules – the way they liberate powerful actors and reproduce day by day key aspects of the world that, although they are contingent and contestable, have begun to seem natural or unavoidable. Why is it that concepts and structures that are themselves indeterminate nonetheless still end up always on the side of the status quo?¹²³

These intuitions lead me to what I now think is the main political point of *From Apology to Utopia*. For the “weak” indeterminacy thesis to turn into a “strong” one, it needs to be supplemented by an empirical argument, namely that irrespective of indeterminacy, *the system still de*

¹²⁰ For useful sociological descriptions of the structuring effect of the centre/periphery divide on the globalized world, see Boaventura de Sousa Santos, *Towards a New Common Sense. Law, Science and Politics in the Paradigmatic Transition* (London, Routledge, 1995). The importance and intensity of that divide is perhaps best described within Luhmannian sociology. See Luhmann, *Law as a Social System*, *supra*, note 7, pp. 292–304. See also Hauke Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (Berlin, Suhrkamp, 2002), pp. 153–217.

¹²¹ The internalization of boundaries – including that between the “developed” and the “developing” States within nations, even individuals – is a theme in Etienne Balibar, *Politics and the Other Scene* (London, Verso 2002).

¹²² See Hilary Charlesworth, “International Law: A Discipline of Crisis”, 65 *Modern Law Review* (2002), pp. 377–392. For a sustained argument about the implication of the international system (and thus its non-neutrality) in the injustice of global wealth-distribution, see also Thomas Pogge, *World Poverty and Human Rights* (Cambridge, Polity, 2002) and *idem*, “The Influence of the Global Order on the Prospect of Genuine Democracy in the Developing Countries”, 14 *Ratio Juris* (2001), pp. 326–343.

¹²³ This question is of course at the heart of Kennedy, *Dark Sides*, *supra*, note 27.

facto prefers some outcomes or distributive choices to other outcomes or choices. That is to say, even if it is possible to justify many kinds of practices through the use of impeccable professional argument, there is a *structural bias* in the relevant legal institutions that makes them serve typical, deeply embedded preferences, and that something we feel that is politically wrong in the world is produced or supported by that bias.¹²⁴ This is not difficult. As pointed out above, the fluidity of international law does not deny the fact that there exists at any one time a professional consensus or a mainstream answer to any particular problem. Although, logically speaking, all positions remain open and contrasting arguments may be reproduced at will, in practice it is easy to identify areas of relative stability, moments where a mainstream has consolidated or is only marginally threatened by critique. Professional competence in international law is precisely about being able to identify the moment's hegemonic and counter-hegemonic narratives and to list one's services in favour of one or the other.

Thus it may be observed, for example, that though both free trade and social regulatory objectives are written into the WTO treaties, the former are always taken as the starting-point while the latter have to struggle for limited realization, or that though every exercise of sovereign privilege affects peoples' lives, only the exercises of sovereignty by Third World governments call for intervention by the "international community", or that while the self-limitation to "public" or "sovereign" activities that marks international law's field of application does treat all the world equally, it creates an "empire of civil society" within which private power can be used to create and maintain a system of (especially economic) constraints.¹²⁵ It might even be suggested that since its inception in the sixteenth century, international law has been used to facilitate European expansion and to discipline and subordinate

¹²⁴ See Kennedy, *Critique of Adjudication*, *supra*, note 95, pp. 59–60.

¹²⁵ The general form of the argument is available e.g. in Justin Rosenberg, *The Empire of Civil Society. A Critique of the Realist Theory of International Relations* (London, Verso, 1994). That public law regulation makes invisible the way it authorises private constraint can be gleaned e.g. in Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003). The argument that focus on military interventions by the West describes the interveners as "knights in white armour" while leaving invisible the constant, overwhelming intervention by Western economic and financial institutions is made in Anne Orford, *Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003).

non-European peoples.¹²⁶ But discussions of structural bias need not move at such abstract levels of international law's sociology or its history. Useful work may be done by a close analysis of the application of particular doctrines. A typical demonstration of structural bias would describe extraterritorial jurisdiction, for example, so as to show that while domestic courts in the West sometimes extend the jurisdiction of domestic anti-trust law, they rarely do this with domestic labour or human rights standards, though nothing in the standards themselves mandates such distinction.¹²⁷ A similar demonstration in the context of the "terrorism" debate might show how bias depends on "Orientalist" images of violence and perceptions of "threat" current in the Western imagination.¹²⁸ A discussion of a human rights or a good governance regime might show how those, in principle open-ended, standards end up in supporting different policies depending on the hierarchy of institutional priorities.¹²⁹ In any institutional context, there is always such a structural bias, a particular constellation of forces that relies on some shared understanding of how the rules and institutions should be applied. That itself is not a scandal. The recent discussion of the conditions of "self-defence" by the International Court of Justice, for instance, tends to strengthen the position of militarily less active powers.¹³⁰ But when the bias works in favour of those who are privileged, against the

¹²⁶ See especially Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005). This is supported by the reading of "humanistic" international jurisprudence from the early seventeenth century in Richard Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (Oxford University Press, 2000). See also my *Gentle Civilizer*, ch. 2.

¹²⁷ Robert Malley, Jean Manas, Crystal Nix, "Note. Constructing the State Extra-Territorially: Jurisdictional Discourse, the National Interest, and Transnational Norms", 103 Harv. LR (1990), pp. 1273–1305.

¹²⁸ Ileana Porras, "On Terrorism. Reflections on Violence and the Outlaw", in Dan Danielsen and Karen Engle (eds.), *After Identity. A Reader in Law and Culture* (Routledge, 1995), pp. 294–311. In this regard, the perspectivist approach to the definition of "threats" taken by the UN High-Level Panel on Threats, Challenges and Change quite usefully points to the political biases involved in the contrast between different threat-perceptions and, as a consequence, the determination of priorities of institutional policy. UN Doc A/59/565, especially pp. 15–50.

¹²⁹ For the latter, see Samuli Seppänen, *Good Governance in International Law* (Helsinki, Erik Castrén Institute Research Reports, 2003).

¹³⁰ See e.g. ICJ: *Oil Platforms* case, Reports 2003, pp. 25–35 (paras. 45–72) and *Legal Consequences of the Construction of a Wall*, Reports 2004, paras. 138–139. On the other hand, repeated uses of force may take place in the law's shadow as long as their aim appears to be not to violate anybody's "sovereignty". See Christine Gray and Simon Olleson, "The Limits of the Law on the Use of Force: Turkey, Iraq and the Kurds", 12 FYBIL (2000), p. 387 and further references there.

disenfranchised, at that point the bias itself becomes “part of the problem”. That is when the demonstration of the contingency of the mainstream position can be used as a prologue to a political critique of its being an apology of the dominant forces.¹³¹

This gives sharper focus also to the debates concerning the proliferation of international institutions – a process that will now appear as being precisely about challenging embedded biases. The emergence of a special “human rights law” with its own institutions will then appear as an effort to challenge the positions taken by traditional law-applying organs. Human rights would never have risen to a “constitutional” status in the European legal system had not the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg started to think of them in “constitutional” terms, thus reversing priorities in regard to the law on legal subjects as well as the manner of interpreting reservations and the competence of law-applying organs.¹³² The same considerations apply to the creation of special and a fortiori “self-contained” regimes in trade law and environmental law, international criminal law or indeed in regional legal systems. Through “fragmentation”, new institutions take upon themselves new tasks, sometimes in order to collapse old preferences (e.g. the replacement of the standard of “effective control” in foreign involvement in civil wars by the stricter “overall control”), sometimes to create firm exceptions to those preferences (e.g. reservations regimes to human rights treaties) or then just to articulate confrontation between differing preferences (e.g. trade and environment).¹³³ One should not think of this as a new phenomenon of a particularly confused moment. When Hersch Lauterpacht wrote that there are no intrinsic limits to the jurisdiction of international tribunals and suggested that they should routinely pronounce on as many incidental questions as possible, he was undertaking a subtle (“hegemonic”) manoeuvre to embolden those (judicial) institutions whose biases he shared to declare them as universal preferences.¹³⁴

¹³¹ For one overview of relevant literatures, see Deborah C. Cass, “Navigating the Newstream”, 65 *Nordic Journal of International Law* (1996), pp. 341–383.

¹³² See Martti Koskenniemi and Päivi Leino, “Fragmentation of International Law? Postmodern Anxieties”, 15 *LJIL* (2002), pp. 553–579.

¹³³ For this frame of analysis, see my “Function and Scope of the *Lex specialis* Rule and the Question of ‘Self-Contained Regimes’”, Preliminary Report 2004, UN Doc. ILC(LVI)SG/FIL/CRD 1 and Add 1. See also *Report of the ILC on the Work of its Fifty-fifth Session* (2003), A/58/10, pp. 270–271 (para. 419).

¹³⁴ See Hersch Lauterpacht, *The Development of International Law by the International Court* (2nd edn, London, Stevens, 1958).

If the politics of international law is largely a debate about the jurisdiction of particular institutions, this reflects the realization that once one knows which institutions will deal with a matter, one already knows how it will be disposed of.

Now most of *From Apology to Utopia* is devoted to the demonstration of the indeterminacy thesis. As immanent critique, it shows that the justifying principles of international law – the liberal doctrine of politics – in fact fail as justifying principles. In contrast to the demonstration of the indeterminacy thesis which is made at a *general* level, structural bias must be shown by reference to *particular* institutions or practices. How are values or benefits distributed by existing legal institutions? Some of my later writings have sought to show how biases emerge and operate in the law of force,¹³⁵ the law of the sea,¹³⁶ human rights law¹³⁷ and through “fragmentation”.¹³⁸ These studies complement the indeterminacy thesis by drawing attention to the politics of international law in action – the way the generality of legal language is used to buttress particular policies or preferences.¹³⁹ They seek to show that out of any number of equally “possible” choices, some choices – typically conservative or *status quo* oriented choices – are *methodologically privileged* in the relevant institutions. Their power, however, depends wholly on the expectation that once structural bias has been revealed, many people will link it to what they feel are unacceptable features in the international system. In case one does not feel the system unjust, or fails to perceive the connection between the bias and the injustice, then the critique will seem either pointless or wrong.

In principle, international lawyers should be particularly responsive to this technique. After all, international law emerged as a professional

¹³⁵ “Police in the Temple”, *supra*, note 117, pp. 325–348.

¹³⁶ “The Privilege of Universality. International Law, Economic Ideology and Seabed Resources” (together with Marja Lehto), 65 *Nordic Journal of International Law* (1996), pp. 533–555.

¹³⁷ “Effect of Rights on Political Culture”, *supra*, note 80, pp. 99–116, and “Human Rights, Politics, and Love”, *Mennesker & rettigheter* (*Nordic Journal of Human Rights*, 4/2001), pp. 33–45.

¹³⁸ “Fragmentation. Postmodern Anxieties”, *supra*, note 132, pp. 553–579.

¹³⁹ I have articulated this process in terms of a theory of “hegemony” in “International Law and Hegemony: A Reconfiguration”, 17 *Cambridge Review of International Affairs* (2004), pp. 197–218, as well as in “Legal Universalism: Between Morality and Power in a World of States”, in Sinkwan Cheng (ed.), *Law, Justice and Power: Between Reason and Will* (Stanford University Press, 2004), pp. 46–69.

practice in the late 19th century not out of enthusiasm for, but from a *critique of, the political world of Great Power primacy*, as part of a social project to spread domestic liberal reform and internationally to support peace, disarmament, human rights, the civilization of “Eastern” nations, as well as economic and social progress.¹⁴⁰ From the outset, international institutions were conceived less in terms of routine administration than progressive transformation of the international system.¹⁴¹ One of the discipline’s great names, Alejandro Alvarez, for example, was able to preach the turn to a “new international law” in virtually unchanging terms from the first decade of the twentieth century until the late 1950s.¹⁴² He was not alone. All the discipline’s great names, from Walther Schücking to Hermann Mosler in Germany, Georges Scelle to René-Jean Dupuy in France, Hersch Lauterpacht to Philip Allott in Britain, as well as contemporary non-European jurists such as P. S. Anand, Mohammed Bedjaoui or Yasuaki Onuma, have preached the message of global solidarity and fundamental change. A typical international law work is still animated by the idea of the great transformation (perhaps understood as “constitutionalization” of the international system, even federalism) in favour of human rights and environmentalism, indigenous causes, self-determination, economic redistribution and solidarity – often against Great Powers.¹⁴³ But something happened to international law during those long years. The effort to streamline it with the utopias of political, economic and technological modernity failed to advance in the expected way. Periods of enthusiasm and reform were followed by periods of disillusionment and retreat.¹⁴⁴ The ebb and flow between optimism and pessimism has now made it exceedingly hard to take in full seriousness Kant’s liberal projection of “universal history with a cosmopolitan purpose”.¹⁴⁵ If the language of beneficent transformation remains an

¹⁴⁰ See my *Gentle Civilizer*, *supra*, note 16, ch. 1.

¹⁴¹ I discuss this in connection with Hersch Lauterpacht in chapter 5 of *Gentle Civilizer*, *supra*, note 16, pp. 357 *et seq.*

¹⁴² See Alejandro Alvarez, *La codificación du droit international – ses tendances, ses bases* (Paris, Pedone, 1912); *idem*, *Le droit international nouveau dans ses rapports avec la vie actuelle des peuples* (Paris, Pedone, 1959).

¹⁴³ Martti Koskenniemi, “Repetition as Reform. Georges Abi-Saab’s Cour Général”, 9 *EJIL* (1998), pp. 405–411. See also Anne Orford, “The Destiny of International Law”, 17 *LJIL* (2004), pp. 441–476.

¹⁴⁴ See Kennedy, “When Renewal Repeats”, *supra*, note 11, pp. 340–397.

¹⁴⁵ Immanuel Kant, “Idea for a Universal History with a Cosmopolitan Purpose”, in Hans Reiss (ed.), *Political Writings* (Cambridge University Press, 1991), pp. 41–53.

intrinsic part of international legal rhetoric, it is rarely articulated with a great deal of confidence.

To understand the depth of this experience it should be noted that being an international lawyer has not just involved taking a “critical” attitude towards the international system but doing so from the perspective of the idea of law as the expression of the “social”.¹⁴⁶ Most 20th-century international lawyers were advocates of an anti-formalist, sociological jurisprudence, calling for the adaptation of the law to history’s evolutionary scheme.¹⁴⁷ Clichés about internationalization, harmony of interests, interdependence and globalism were thrown against “Realists” who persisted in stressing the importance of the unchanging laws of *Realpolitik*. But just like in domestic legal systems, the turn to sociology as an *Ersatz* moral foundation to political life failed as it transpired that the “social” was not a uniform datum out of which one could extract normative consequences.¹⁴⁸ It turned out repeatedly to be impossible to read a single direction or purpose into social change, and different States and groups of people have continued to be differently poised in regard to the changes they see around themselves. It was this experience, above all, that marked the turn towards pragmatism in the discipline in the 1950s and split it in two. On the one side were European lawyers directing their attention to regional construction and taking an extremely formal view of international law and especially of the UN Charter – an attitude they could never have taken in regard to their domestic institutions. On the other side were lawyers from the United States, suspicious of institutional formality and claims of sovereign equality and reconceiving international law – including the UN – from the perspective of its instrumental usefulness. In the novel political constellation of the 1990s and the new millennium, the promise of progress often moved from international law to amorphous systems of functionally specialized “governance” of international problems.

¹⁴⁶ See especially Duncan Kennedy, “Two Globalizations”, 36 *Suffolk University Law Review* (2003), pp. 648–674.

¹⁴⁷ For examples of this type of approach, see also Kelman, *Guide to Critical Legal Studies*, *supra*, note 82, pp. 244–253.

¹⁴⁸ Apart from the article cited above (“Two Globalizations”), see also Duncan Kennedy, “The Disenchantment of Logically Formal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought”, 55 *Hastings Law Journal* (2004), pp. 1031–1076. See further my *Gentle Civilizer*, *supra*, note 16, ch. 4.

Indeed it does not seem possible to believe that international law is automatically or necessarily an instrument of progress. It provides resources for defending good and bad causes, enlightened and regressive policies. Some have found this suggestion insupportable. They have wished to see international law as always *already containing their ideal of the good society* so that it would suffice, outside political choice, to commit oneself to international law so as to ensure oneself of the rightness of what one does.¹⁴⁹ But if the view of legal indeterminacy is right, then such a “heroic” image cannot be sustained. Political choices cannot be grounded on law. It may of course be sometimes right to share the bias of one’s institution. But it is certainly always necessary to be aware of that bias and its character as such – a choice – as well as its consequences. How does it affect the distribution of material and spiritual values? What does it *do* to its practitioners?

The traditional way to respond to this has been to insist on international law’s marginality from international life and the hardness of the struggle for a “Rule of Law”. This prefaces the old project of bringing law to bear on the darkness of politics. But, as German inter-war jurisprudence from Kelsen to Lauterpacht and even Carl Schmitt and Hans Morgenthau suggested, there is no such opposition between “law” and “politics”. It is in fact possible (and follows from indeterminacy) to describe all of the international world as *already regulated by the rules of law* – perhaps by the technique of the “exclusion of the third” (Kelsen) or by accepting the postulate of material completeness (Lauterpacht). Both Schmitt and Morgenthau held it impossible to distinguish law from politics by any general rule – whether something was dealt with as a “legal” or a “political” problem was a matter of strategy: which institution would be best placed to deal with it?¹⁵⁰ In a somewhat similar vein, David Kennedy has suggested that lawyers and human rights activists should conceive themselves as men and women of power, managing a system of rules and concepts and institutions that has no intrinsic limits and that is always already “there” permitting or authorizing aspects of the world that otherwise seem as if they were areas of free, political choice. Very few people, including diplomats, or political and military leaders, ever think of

¹⁴⁹ Martti Koskenniemi, “Between Commitment and Cynicism: Outline for a Theory of International Law as Practice”. In: *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations, 1999), pp. 495–523.

¹⁵⁰ See my *Gentle Civilizer*, *supra*, note 16, ch. 6.

themselves as “free” in any substantive, existentialist sense. There is always a professional vocabulary or a technical adviser that will dictate this or that solution outside “politics” for the politician to grasp.¹⁵¹

From this perspective, international law might be altogether central in structuring the way in which the political and economic world appears, constructing the field of opportunities open for participants and determining their relative bargaining power in a formally egalitarian system of concepts and institutions. It is international law that tells us who qualifies as a “member” of the international community and what such membership entails. It is international law that defines the basic forms of interaction between the members (diplomacy, treaties, intergovernmental and non-governmental organizations, transnational private activities, contracts, etc.), defines the objectives towards which they may hope to be acting (“ownership”, “jurisdiction”, “authority”) and thus also, what it is that may emerge as objects of desire in the first place (“right”, “self-determination”, “territorial possession”, etc.). Here the law would show itself not as a limiting but an *enabling* device. One need not be Talleyrand or a student of the League debates on the Spanish Civil War in order to realise that even non-intervention is intervention – namely intervention on the side of the *status quo*. And there is no essential limit for such a reading of international law as a set of wide-ranging authorizations for the use of power and privilege – in fact, this is the most traditional (though of course contested) reading of the law as it emerges from the case of the *SS Lotus*.¹⁵²

Thinking about international law in this way not only throws light on aspects of international law’s involvement in the construction and maintenance of an international political and economic system (for instance, on its responsibility in the creation of international economic and political crises and not just in their mitigation)¹⁵³ but also follows logically from the combination of the critique of indeterminacy and structural bias. If international law is indeterminate, then there is no limit to the extent it can be used to justify (and of course, to criticize)

¹⁵¹ Kennedy, *Dark Sides*, *supra*, note 27, pp. 327–357. This view of a transformation of Western modes of governance (“governmentality”) from the use of the “jurisdiction” of law to “veridiction” by expert systems managing “truth regimes” is powerfully articulated e.g. in Foucault, *Naissance*.

¹⁵² See chapter 4 *supra*.

¹⁵³ This is shown in Anne Orford’s argument about the “international community’s” pervasive involvement in East Timor and Bosnia from a point in time much earlier than its highly publicized military “interventions”. See her *Reading Humanitarian Intervention*, *supra*, note 125.

existing practices. If there is a structural bias, then international law is always already complicit in the actual system of distribution of material and spiritual values in the world.¹⁵⁴ From this perspective, the task for lawyers would no longer be to seek to expand the scope of the law so as to grasp the dangers of politics but to widen the opportunity of political contestation of an always already legalized world.

And yet, such contestation may also be carried out through the grammar of international law. Sometimes internalizing the language of international law may mean also internalizing a structural bias. Biographically, what starts out as commitment may turn to indifference, even cynicism, as the institutional practice becomes an end in itself, a brick in the wall of a structure of preferences. At that point, transformative action becomes necessary, a new bias needs to be set up, a new interpretation adopted, an unorthodox choice made. It is an important moment of enlightenment when it becomes evident that this can be done in a professionally plausible manner. But again, nothing of our ability to challenge the bias is grounded in the law itself. The choice will be just that – a “choice” that is “grounded” in nothing grander than a history of how we came to have the preferences that we have and what we know of the world and our relationship to it. “Theory” may be needed to create awareness of the origin and consequences of our choices – perhaps a theory of “justice” or of economic efficiency – but those theories do not fully justify our choices. A “gap” will remain between all such languages and what it is that we choose, whether the bias, or its contrary. The existence of this “gap” is not insignificant for professional practice. If the practice is not determined by an anterior structure or vocabulary, then it cannot be reduced to an automatic production of such a structure or vocabulary either. The decision is made, and its consequences are thus attributable not to some impersonal logic or structure but *to ourselves*.

4 Conclusion

International law is what international lawyers make of it. To commit oneself to international law is to allow its grammar to enter as one’s

¹⁵⁴ The international legal system’s complicity in poverty through its allocation of borrowing rights and natural resource privileges to formal elites in the Third World is discussed in Pogge, *World Poverty and Human Rights*, *supra*, note 122, pp. 91–117. See also Paul D. Ocheje, “Refocusing International Law on the Quest for Accountability in Africa – The Case against the ‘Other Impunity’”, 15 *LJIL* (2002), pp. 749–777.

second nature but still to maintain the position of choice – at a minimum a choice to work with colleagues with certain preferences in institutions with a certain bias. Those may be the right preferences, of course, but they are not produced or even strongly supported by legal argument – that is, any more strongly than opposite preferences. Legal work will require choice. None of the available alternatives can pretend to be controlling. Formalism and anti-formalism, positivism and natural law, as well as any alternative legal vocabularies, may be associated with cosmopolitan liberalism as well as conservative nationalism. Nor do particular legal–institutional choices have pre-determined legal consequences. Whatever effects one’s formalism or one’s anti-formalism will have for one’s legal practice, just like whatever effects the legal institution one imports will have on one’s target society, can only be contextually determined. Situationality, as Outi Korhonen has put it, is a key aspect of legal practice.¹⁵⁵

The virtues and vices of international law cannot be discussed in the abstract. What might its significance be today, for the choices that men and women of law now have to make? Recently, I have argued in favour of a “culture of formalism” as a progressive choice. This assumes that although international law remains substantively open-ended, the choice to refer to “law” in the administration of international matters – instead of, for example, “morality” or “rational choice” – is not politically innocent. Whatever historical baggage, including bad faith, such culture entails, its ideals include those of accountability, equality, reciprocity and transparency, and it comes to us with an embedded vocabulary of (formal) rights. Although these notions and vocabularies are again indeterminate so that we might see conservatives and liberals, market theorists and socialist agitators all have recourse to them, as parts of a distinct professional tradition they are biased both against moral vocabularies of imperial privilege and economic techniques underwriting privatized *de facto* relationships. Whatever virtue a culture of formalism might have must be seen in historical terms. The call for “constitutionalization” we hear in Europe today may give direction to an anti-imperial Left political programme – but it may equally well consolidate types of authority that seek to perpetuate Europe’s comparative advantage.

¹⁵⁵ Outi Korhonen, *International Law Situated. An Analysis of the Lawyer’s Stance Towards Culture, History and Community* (The Hague, Kluwer, 2000).

From Apology to Utopia should be read with both its descriptive and its critical ambition in mind. I still find myself constantly using its central theses to analyse recent developments in international law. I continue to read international cases by reference to the framework provided by the tension between normativity and concreteness as elaborated in *From Apology to Utopia*. I have used that framework to argue both for the need of law to remain silent so that what needs to be articulated outside law can be so articulated, as well as for the use of law to give voice to claims or to indict violations that otherwise would seem matters of political strategy or preference.¹⁵⁶

Perhaps there is a certain repetitive, even reductionist tone in these arguments – though I have tried to play it down by choices of substance and style. In lectures and private conversation I find myself often speaking of the “machine” that this book sketches for the production of competent arguments in the field. It was precisely in order to take distance from the cool structuralism of *From Apology to Utopia* that a few years ago I published an intellectual history of the profession in the years of its prime.¹⁵⁷ The purpose of that book was not to repudiate anything written in the foregoing pages but to show how individual lawyers, both as academics and practitioners (this is a contentious distinction – after all, academics, too, practise the law, and it is only the context in which they do so that makes them special), have worked in and sometimes challenged the structure sketched there, how they have acted in a conceptual and professional world where every move they make is both law and politics simultaneously and demands both coolness and passion – a full mastery of the grammar and a sensitivity to the uses to which it is put.

¹⁵⁶ “Faith, Identity and the Killing of the Innocent”, *supra*, note 87, pp. 137–162 (silence), and “What Should International Lawyers Learn from Karl Marx?”, *supra*, note 109, pp. 244–246 (voice).

¹⁵⁷ *Gentle Civilizer*, *supra*, note 16.