

# THE INTERNATIONAL LEGAL SCHOLAR IN PALESTINE: HURLING STONES UNDER THE GUISE OF LEGAL FORMS?

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*This paper is the written transcript of the author's exchange of views with Martti Koskenniemi and Mudar Kassis on the occasion of a debate organised by the Institute of Law at Birzeit University (Palestine). The paper explores the origin of international lawyers' frustrated expectations when it comes to the role of international law in the Middle East. More specifically it argues that the disenchantment of international lawyers is the upshot of three well-entrenched beliefs. It then elaborates on three attitudes, which can help international lawyers make sense of the role of international law in general and, particularly, the context of the Israeli–Palestinian conflict. Attention is paid to the place of compliance in studies about international law, the role of legal forms and, finally, the role of international legal scholars in a conflict like the Israeli–Palestinian conflict.*

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## I INTRODUCTION: INTERNATIONAL LAW IN THE MIDDLE EAST AND A STORY OF DISENCHANTMENT

In legal discourses pertaining to the Israeli–Palestinian conflict, the idea is rife that international law is undergoing a crisis because of repetitive blatant violations and its misuse by the belligerents. Indeed, either international law is

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simply ignored and set aside by the belligerents, or international law itself becomes the site of the conflict, with each belligerent engaging in systematic lawfare tactics<sup>1</sup> through unilateral reinterpretations geared towards ex post facto conduct-legitimation. These two phenomena have been bemoaned, as has the disdain for international law that such attitudes allegedly manifest from. Seen in this light, the story of the role of international law in the Israeli–Palestinian conflict is thus a story of disenchantment.

The fact that international law is the fountainhead of some disenchantment is certainly not new. Yet, in the context of the Israeli–Palestinian conflict, this disenchantment is particularly bitter. Indeed, here at least, on the Eastern side of the Green Line, everyone remembers that early battles on the street did not work out. On the contrary, hurling stones proved rather counterproductive when it came to improving the life of human beings living on the Eastern side of the Green Line. As a result, many participants in the conflict decided to revise their methods of combat by bringing the struggle under the umbrella of international law. In particular, they decided to continue to fight for justice from law faculties and research institutes. International law has accordingly been seen as a narrative providing legitimacy and authority to various claims heard in the context of the Israeli–Palestinian conflict. In the same vein, it was also expected that fighting on the side of (and on the basis of) international law would help convince third parties (the ‘international community’ and, above all, the strategic allies) that one’s fight was just and legitimate.

Yet, as we know, practice did not deliver on all the promises raised by such a retreat to international law. Indeed, international law provided a title (self-determination)<sup>2</sup> but no statehood. The law of belligerent occupation did not bring about a peaceful and stable status quo under which decent conditions of living could be achieved, nor did it put an end to foreign domination.<sup>3</sup> At the same time, enforcement mechanisms faltered, as is illustrated by the principle of

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<sup>1</sup> The concept of lawfare is said to have been coined in Charles J Dunlap, ‘Lawfare Today: A Perspective’ (2008) 3(1) *Yale Journal of International Affairs* 146. I have elsewhere made a distinction between lawfare and wordfare: see Jean d’Aspremont, ‘Wording in International Law’ (2012) 25 *Leiden Journal of International Law* 575, 578–9.

<sup>2</sup> Palestine’s entitlement to self-determination is uncontested: see *Declaration of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15<sup>th</sup> sess, 947<sup>th</sup> plen mtg, Agenda Item 87, UN Doc A/RES/1514(XV) (14 December 1960); *Principles Which Should Guide Members in Determining whether or Not an Obligation Exists to Transmit the Information Called for under Article 73E of the Charter*, GA Res 1541 (XV), UN GAOR, 15<sup>th</sup> sess, 948<sup>th</sup> plen mtg, Agenda Item 38, UN Doc A/RES/1541(XV) (15 December 1960); *The Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA Res 2649 (XXV), UN GAOR, 25<sup>th</sup> sess, 1915<sup>th</sup> plen mtg, Agenda Item 60, UN Doc A/RES/2649(XXV) (30 November 1970). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136. For some critical thoughts on unilateral exercises of advisory opinion for dispute settlement purposes, see Eric de Brabandere, *The Kosovo Advisory Proceedings and the Court’s Advisory Jurisdiction as a Method of Dispute Settlement* (27 September 2010) The Hague Justice Portal <<http://www.haguejusticeportal.net/eCache/DEF/12/076.html>>.

<sup>3</sup> On some problems arising in the connection to the application of the law of belligerent occupation to the occupied territories, see Jean d’Aspremont and Jérôme de Hemptinne, *Droit international humanitaire: thèmes choisis* [International Humanitarian Law: Selected Topics] (Editions A Pedone, 2012) ch 6.

universal jurisdiction<sup>4</sup> or the Palestinian declaration under art 12(3) of the *Rome Statute of the International Criminal Court*.<sup>5</sup> It is not only that the use of international law did little to secure any advantage in the pitted battle between the warring parties. It also is that all belligerents started to engage in systematic lawfare. As a result, international law is now relied on by everyone in the Israeli–Palestinian conflict with a view to justifying and legitimising any of one’s (sometimes obviously wrongful) behaviours. In that sense, the retreat to international law by one belligerent has come with a reverse effect by providing ammunition to all the other warring parties, even those that had long shrugged it off completely. It is because all parties now engage with it that international law is no longer, as Michael Kearney artfully describes it, a site of resistance for those who had originally found solace under its legitimising and comforting umbrella. It has now turned into a site of the conflict.<sup>6</sup> International law is simply the continuation of war with the same sneaky and insidious tactics.<sup>7</sup> Combatants now receive essential legal support of the ‘lawriors’<sup>8</sup> from the corridors of chancelleries. Convincing public opinion that the enemy is a war criminal is now as much as a strategic objective as the destruction of its ammunition supplies.

Playing within the interpretative windows left open by law’s indeterminacy is as old as international law. Because law is expressed through ordinary language, it is necessarily replete with loopholes. We all know that. International law — and even more so international humanitarian law<sup>9</sup> — does not prescribe any bright line on the basis of which a behaviour is clearly bad or wrong. It is susceptible to extremely divergent interpretations and can legitimise radically opposed behaviours. As the story which we know so well goes, such loopholes have allowed even the highest judicial authorities to engage in some subtle balancing calculations, especially under the name of proportionality.<sup>10</sup> Such

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<sup>4</sup> For some critical thoughts on unilateral exercises of universal jurisdiction, see Jean d’Aspremont, ‘Multilateral versus Unilateral Exercises of Universal Criminal Jurisdiction’ (2010) 43 *Israel Law Review* 301.

<sup>5</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002). Among an abundant literature, see for example: Malcolm N Shaw, ‘The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law’ (2011) 9 *Journal of International Criminal Justice* 301; Alain Pellet, ‘The Palestinian Declaration and the Jurisdiction of the International Criminal Court’ (2010) 8 *Journal of International Criminal Justice* 981; Yaël Ronen, ‘ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities’ (2010) 8 *Journal of International Criminal Justice* 3; Yuval Shany, ‘In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen’ (2010) 8 *Journal of International Criminal Justice* 329.

<sup>6</sup> Michael G Kearney, ‘Lawfare, Legitimacy and Resistance: The Weak and the Law’ (2010) 16 *Palestine Yearbook of International Law* 79.

<sup>7</sup> David Kennedy, *Of War and Law* (Princeton University Press, 2006) 132.

<sup>8</sup> David Luban, ‘Carl Schmitt and the Critique of Lawfare’ (2010) 43 *Case Western Reserve Journal of International Law* 457.

<sup>9</sup> See generally d’Aspremont and de Hemptinne, above n 3.

<sup>10</sup> On the balancing by the Israeli Supreme Court and an analysis of its recent case law, see Martti Koskeniemi, ‘Occupied Zone — “A Zone of Reasonableness”’ (2008) 41 *Israel Law Review* 13. See also Galit Ragan, ‘Adjudicating Armed Conflict in Domestic Courts: The Experience of Israel’s Supreme Court’ (2010) 13 *Yearbook of International Humanitarian Law* 61.

calculations are no longer politely ignored by international lawyers; we are all legal realists nowadays.<sup>11</sup>

But lawfare goes one step further than playing with interpretative openings. It is not only about exploiting the loopholes and indeterminacy of law. It really is about recasting international law in a unilateral and self-legitimising manner. It is about hijacking the law for self-justificatory purposes.<sup>12</sup> Certainly, such an instrumentalisation of international law is not new. The so-called War on Terror had long provided a stage for a similar lawfare.<sup>13</sup> In that sense, the lawfare witnessed in the context of the Israeli–Palestinian conflict is not groundbreaking. Yet, seen from this Palestinian side of the separation barrier, such lawfare comes with extra bitterness. If the street did not work and if international law now provides ammunition for all belligerents, what is left to hope for?

The following modest observations are premised on the simple — and probably uncontroversial — idea that disenchantment originates in unfulfilled expectations. The narrative about the role of international law in the Middle East is thus a narrative about dashed expectations. It is this narrative of international lawyers' expectations when it comes to the Israeli–Palestinian conflict which I wish to discuss in this brief paper. This narrative, as you may guess, exceeds the framework of this conflict. It actually is a story about international law itself and the epistemic community that has been built upon it. In that sense, the international legal discourse about the Israeli–Palestinian conflict mirrors some of the structural epistemological dynamics and interrogations of the entire discipline.

This paper will be structured as follows. I will start by sketching out the origin of international lawyers' frustrated expectations when it comes to the role of international law in the Middle East. More specifically I will argue that the disenchantment of international lawyers is the upshot of three well-entrenched — though in my view misguided — beliefs. I will not, however, end this paper with such a deconstructive narrative. In the second part of my intervention, I shall try to come up with — more constructive — insights on three attitudes which I believe can help international lawyers make sense of the role of international law in general and, in particular, in the Israeli–Palestinian conflict. I will especially discuss the place of compliance in studies about international law, the role of legal forms and, eventually, the role of international legal scholars in a conflict like the Israeli–Palestinian conflict.

## II RECIPES FOR DISENCHANTMENT

The following paragraphs intend to depict the threefold origin of the abovementioned disenchantment. In particular, they elaborate on three — rather mundane — beliefs held by international lawyers, especially when confronted by the realities of the Israeli–Palestinian conflict.

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<sup>11</sup> Brian Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' (1997) 76 *Texas Law Review* 267, 267–8.

<sup>12</sup> See Kearney's argument about the reshaping of international law so as to legitimise military policies that disregard the core international humanitarian law principles of distinction and proportionality: Kearney, above n 6, 104.

<sup>13</sup> John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press, 2006).

A *A General Belief that International Law Needs to Be Upheld to Preserve its Raison d'Être*

Compliance is one of the most deeply ingrained tenets of our understanding of international law. It infuses most of our approaches to international law. It is an idea so deeply entrenched that it is often unconscious. Compliance has become one of our strongest (and most suppressed?) obsessions.<sup>14</sup> I shall just discuss a few examples.

Austinians would say that if international law comes without enforcement mechanisms, it cannot be law.<sup>15</sup> This is what is traditionally called the 'Austinian imperatival handicap'.<sup>16</sup> International relations realists and international law neo-realists would say that international law only exists to the extent it is applied by states.<sup>17</sup> For his part, Hart would say that although law is the aggregation of primary and secondary norms and requiring that the latter be lived up to by law-applying authorities, it nonetheless requires some elementary abidance by law addressees. Hart acknowledges that (the display of) obedience by the people to the primary rules — irrespective of their motives — is an important element for the system's viability as a whole, but he claims that the existence of the legal system itself does not hinge on the obedience of the people.<sup>18</sup> This is why we must ensure that law meets the minimum content of natural law (a part of Hart's theory often seen as a concession to natural lawyers and that has itself been the object of much misinterpretation).<sup>19</sup> Modern natural lawyers would say (and

<sup>14</sup> See generally Jean d'Aspremont, 'The Use of Force as Enforcement of the International Legal Order?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2013) (forthcoming).

<sup>15</sup> See John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (Hackett, first published 1863, 1998 ed) 152:

International law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another. And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

Also of interest are Austin's criticisms of Von Martens, who had considered international law as positive Law: at 161.

<sup>16</sup> See Jean d'Aspremont, *Herbert Hart and the Enforcement of International Law: Substituting Social Disability to the Austinian Imperatival Handicap of the International Legal System* (29 January 2012, Social Science Research Network) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1995041](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995041)>.

<sup>17</sup> Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005). For a criticism of Goldsmith and Posner's conception of law, see Alexander Somek, 'Kelsen Lives' (2007) 18 *European Journal of International Law* 409. For an empirical criticism of their work, and on the contemporary theories of compliance: see Michael P Scharf, 'International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate' (2009) 31 *Cardozo Law Review* 45.

<sup>18</sup> On Hart's famous distinction between efficacy and effectiveness of law, see Gerald Postema, 'Conformity, Custom, and Congruence: Rethinking the Efficacy of Law' in Matthew H Kramer et al (eds), *The Legacy of H L A Hart: Legal, Political and Moral Philosophy* (Oxford University Press, 2008) 45.

<sup>19</sup> On Hartian theory and the question of enforcement in international law, see d'Aspremont, *Herbert Hart and the Enforcement of International Law*, above n 16.

much of the Hart–Fuller debate is a scholarly construct because they are in fact claiming the same thing) that we do not need enforcement mechanisms, we just need international law to convey a sense of justice to ensure that it is complied with. Once we have ensured that it enshrines some elementary principles of justice, compliance will follow.<sup>20</sup> International constitutionalists and American liberal scholars would ask: how can we ensure the legitimacy of international law? Let us build a ‘good’ international law with a systemic and substantive unity and show that international law rests on global values of dignity and justice. Only Kantian and Grotian conceptions of international law can endow international law with the legitimacy necessary to ensure its compliance.<sup>21</sup> Even rational choice theorists and all those who seek to establish how and the extent to which international law impacts the behaviour of actors recognise, in their own way, the importance of compliance. If it were not important, there would be no reason to seek to explain and evaluate (non-)compliance.<sup>22</sup>

I do not conceal that the foregoing is a bit impressionistic and betrays the use of a rather broad brushstroke. Leaving aside such an over-generalisation, it nonetheless seems reasonable to claim that all of these scholars, in their own particular way, elevate compliance into a necessary condition of international law’s possibility of existence. To many scholars — irrespective of the political project each of them assign to it — international law, if not complied with, is stripped of its *raison d’être*. In other words, below a given threshold of compliance, international law cannot achieve any of the political projects assigned to it.

If applied to the Middle East, it is easy to see how such an obsession may easily bring us to some disillusion. Clearly, against the backdrop of the Israeli–Palestinian conflict, it is hard to deny that rules of international law have been barely observed while being simultaneously the object of abusive

<sup>20</sup> See Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 125. See also Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2007) 4, 16, 21, 66, making the distinction between moral theory and naturalism.

<sup>21</sup> For some classical examples of constitutionalist theories of international law: see, eg, Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century — General Course on Public International Law’ (1999) 281 *Recueil des Cours* 9; Hermann Mosler, ‘The International Society as a Legal Community’ (1974) 140 *Recueil des Cours* 1. See also Jost Delbrück and Ursula E Heinz (eds), *New Trends in International Lawmaking: International ‘Legislation’ in the Public Interest* (Duncker & Humblot, 1997); Jost Delbrück, ‘Prospects for a “World (Internal) Law?”: Legal Developments in a Changing International System’ (2002) 9 *Indiana Journal of Global Legal Studies* 401; Erika de Wet, ‘The International Constitutional Order’ (2006) 55 *International and Comparative Law Quarterly* 51; Erika de Wet, ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’ (2006) 19 *Leiden Journal of International Law* 611; Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structure’ (2006) 19 *Leiden Journal of International Law* 579. For a criticism of that dimension of constitutionalist theories, see Jean d’Aspremont, ‘The Foundations of the International Legal Order’ (2007) 18 *Finnish Yearbook of International Law* 219; Richard Collins, ‘Constitutionalism as Liberal-Judicial Consciousness: Echoes from International Law’s Past’ (2009) 22 *Leiden Journal of International Law* 251. Such a value-sceptic position is classically construed by modern natural lawyers as being that of a moral minimalist: see, eg, Buchanan, above n 20, 38.

<sup>22</sup> See Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008).

interpretations justifying the state of exception. This disillusion — which often transforms itself into utter scepticism towards international law — is magnified by another equally well-entrenched belief: the idea that international law prescribes a solution to (for example) the Middle East conflict, to which this paper now turns.

B *A Belief that International Law Prescribes a Solution to the Middle East Conflict and Can Be a Vector for Justice*

There are very good reasons to fight our battles under the banner of international law (be it, in the context of the Israeli–Palestinian conflict, self-determination, human rights or international humanitarian law). Indeed, international law bestows some authority to one’s argument and thus one’s cause in the battle. If it were limited to that, such a use of international law would be utterly normal. However, the international legal discourse pertaining to this conflict is simultaneously permeated by a widespread belief that international law is the vector for justice in the conflict.<sup>23</sup> There is even more than that. International law is commonly seen as the source of the solution to all problems in the Middle East. Indeed, General Assembly Resolutions 1514 (XV), 1541 (XV) and 2649 (XXV) entitle Palestine to be its own state in the name of the principle of self-determination, an interpretation confirmed by the International Court of Justice (‘ICJ’) in its 2004 advisory opinion.<sup>24</sup> The way in which Security Council Resolutions 194 and 242 are used and referred to further convey the impression that international law provides for a settlement based on a two-state solutions with the 1967 boundaries. These legal texts often constitute what international lawyers construe as the handbook of conflict-settlement.

Use of the ICJ advisory mechanism in 2003–2004 partly contributed to the reinforcement of this belief. While also amounting to an instrumentalisation of the ICJ procedure for political and symbolical objectives — but any judicial proceeding is so<sup>25</sup> — the resort to the ICJ in this case also conveyed the idea that international law can provide a framework for the solution to the conflict. As we all know, the solution allegedly prescribed by international law has, however, not turned into reality. Indeed, as was said, international law has not been upheld and, as a consequence of this, the solution to the conflict has been kept at bay. The promise carried by international law has not been honoured and this has constituted a source of further disappointment.

C *A Belief that International Law Has Failed in the Middle East*

There is a third — particularly complex — belief which is not entirely alien to the two previous assumptions. It is often said that the political project behind international law — in the particular context of the Israeli–Palestinian conflict of devising a solution to the conflict — has been foundering. It is not simply an

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<sup>23</sup> Preserving the ability of international law as a positive force for justice seems to be one of the ambitions of Kearney: see generally Kearney, above n 6.

<sup>24</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

<sup>25</sup> The advisory opinion in the case of Kosovo was not different in this respect: see de Brabandere, above n 2. See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403.

occasional mishap. It is more seriously, in this perspective, a structural failure. That feeling is widespread and I shall not elaborate on that.

In my view these are the three most common beliefs at the heart of the disillusion felt by international lawyers confronted with this distressful conflict. There are probably many others. Albeit intricate, those I have mentioned are rather mundane and it is not my intention to dwell upon them. It suffices to say that taken together, these beliefs are conducive to the general disenchantment in the eyes of the observers of the role of international law in the Middle East.

### III RECIPES FOR A (POSSIBLY) MEANINGFUL INTERNATIONAL LEGAL SCHOLARSHIP (IN THE MIDDLE EAST)

Undoubtedly, if we were to uncritically embrace these three abovementioned beliefs, we would inevitably end up in radical scepticism — some would say nihilism.<sup>26</sup> In other words, if we were to believe the above ideas, there would be no reason for academics to stay in cosy rooms, conversing about the use of international law in the context of the Middle East. How could we remain comfortably seated here while settlements are being built a few yards away, families separated, civilian houses bombed and distress and pain are rampant in the whole region? Saying this more radically: why refrain from taking to the streets and hurling stones and why continue to try to apprehend this conflict in legal terms?

This is surely not the point I want to make. Certainly my argument is not to make us depressed and disillusioned. There is much sense in continuing to reflect upon international law. Yet, to make sense of international law itself as international legal scholars in the context of the Israeli–Palestinian conflict, we need, in my opinion, to repudiate the three abovementioned beliefs. Doing so is, however, not as easy as it may sound. It requires that we find an answer to three fundamental questions, namely about:

- (i) the place of compliance;
- (ii) the role of legal forms; and
- (iii) the role of scholars.

Each of these questions mirrors a specific — but more implicit — question about the struggle in which each of us is engaged:

- (i) which struggle do we need to carry out?;
- (ii) how to carry out the struggle?; and
- (iii) in which capacity should legal scholars partake in this struggle?

This is the object of the second part of my paper, which will grapple with each of these three questions. As the foregoing indicates, the following considerations only pertain to international legal scholars, that is, those

<sup>26</sup> Like Martti Koskeniemi, I think the word is often misconstrued: see Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) 533–48. It should be recalled that, for Friedrich Nietzsche, the submission to a ready-made set of values or ideologies constitutes, in itself, nihilism: see generally Gregory Bruce Smith, *Nietzsche, Heidegger, and the Transition to Postmodernity* (University of Chicago Press, 1996); David Detmer, ‘Heidegger and Nietzsche on “Thinking in Values”’ (1989) 23 *The Journal of Value Inquiry* 275. See also d’Aspremont, ‘The Foundations of the International Legal Order’, above n 21.

international lawyers engaged in research about international law, whether in the framework of education or research institutions. It is not a question here to reflect on the role of the many other international lawyers who are confronted with the Israeli–Palestinian conflict. Their way of making sense of international law in this conflict radically differs from how their counterparts in research and education institutes meaningfully construe their function. In that sense, the exercise that ensues is nothing more than what András Jakab insightfully described as the function of the ‘self-reflective’, that is, the one who theorises about law and legal scholarship for other legal scholars.<sup>27</sup>

A *Which Place for Compliance? (Or Which Struggle Do We Need to Carry Out?)*

Is compliance (and hence the resulting effectiveness of law) a question which international lawyers should be concerned with? It surely matters to the authors (policy-makers) and those allegedly protected by rules that they be abided by. Yet, does it matter for international legal scholars that international legal rules are complied with?

Several decades ago, traditional continental (positivist) European scholars would probably have said that compliance is not a matter worthy of scholarly study by international legal scholars; international legal scholars do not need to care for it. Nowadays, however, it is hard to deny that the international legal scholar’s mindset has undergone a deep change. As a result of international relations scholars seizing the topic of compliance, international lawyers have felt obliged to claim some ownership of the topic as well. Compliance has been elevated to a new agenda for international legal scholars. This is a problem which they ought to be concerned with, because, as was said, short of compliance, there is no *raison d’être* for international law.

This new research agenda has had a few offspring. It has opened new areas of research for international lawyers. The most important of them has been the legitimacy agenda. Legitimacy of international law — and with it the legitimacy of law-making procedures and the legitimacy of law-makers — has turned into one of the cornerstones of the 21<sup>st</sup> century agenda of legal scholarship. The new scholarly mindset has been revolving around the conviction that we do need to care about legitimacy and that we do need to work toward a more legitimate international law. The agenda of the Columbia and Manhattan Law Schools (Liberals) as well as European Constitutionalists have been just that: ensuring a greater legitimacy for international law, thereby triggering better compliance (as well as shoring up the appeal of international law). Aiming at (re)shaping international law in a way that preserves its legitimacy and, thus, compliance, presupposes that compliance is something which international legal scholars need to care for.

This is as rosy as the story can be. Indeed, in my view, this concern for compliance by legal scholars comes at a high price which we are not always aware of. Leaving aside the dangerous ‘proliferation of international legal

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<sup>27</sup> András Jakab, ‘Seven Role Models of Legal Scholars’ (2011) 12 *German Law Journal* 757. See especially at 777–82.

thinking' to which it can lead,<sup>28</sup> caring about compliance with international law inherently makes international legal scholars accomplice to the (sometimes bad) political project that is served by international law. It amounts to a normative posture whereby you endorse the political project pursued by the law-maker and the rules in which the latter has translated the former. In other words, it is tantamount to saying that international law is necessarily good.<sup>29</sup> But is it really?

Like Martti Koskeniemi, I resent the belief that international law is necessarily good, or at least better than no law at all. If international law is neither necessarily good nor the automatic embodiment of justice (and if it does not in itself prescribe the solution to the Israeli–Palestinian conflict), why should we run the risk of making ourselves the acolyte of the law-maker and the accomplice to their political project? Can we not study international law without necessarily espousing the political project pursued by those making the law? That surely does not mean that international legal scholars do not pursue a political project of their own. The mere way we understand international law rests on a political choice.<sup>30</sup> The way we think about international law is political. This is something we learned from critical legal studies — which extended to a similar critique made by legal realists with respect to the way law is applied by courts. However, the political projects we make in terms of understanding international law are not the same as the political projects whose fulfilment is aimed at legal rules. We can still be politically engaged in the thinking of international law without being accomplice to the political project conveyed by the rules themselves. This is why, in my view, one can think about international law — and devote one's entire life to the study thereof — without necessarily feeling the need to fight for compliance with it.

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<sup>28</sup> Jean d'Aspremont, 'La Doctrine du droit internationale face à la tentation de la "Juridicisation" sans limites' [The Doctrine of International Law Faced with the Temptation of 'Juridicisation' without Limits] (2008) 118 *Revue Générale de Droit International Public* 849, 852 [author's trans]. See also Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony d'Amato' (2009) 20 *European Journal of International Law* 911.

<sup>29</sup> On the various dimensions of this enthusiasm for the international, see David W Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow' (1994) 4 *Transnational Law & Contemporary Problems* 329, 336. See also Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, 2003) 146.

<sup>30</sup> See generally Liam Murphy, 'Better to See Law this Way' (2008) 83 *New York University Law Review* 1088; Liam Murphy, 'The Political Question of the Concept of Law' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press, 2001) 371. See also Liam Murphy, 'Concepts of Law' (2005) 30 *Australian Journal of Legal Philosophy* 1; Uberto Scarpelli, *Qu'est-ce Que le Positivisme Juridique* [What is Legal Positivism?] (Bruylant LGDJ, 1996) 57; Fred Schauer, 'Positivism as Pariah' in Robert P George (ed), *The Autonomy of Law: Essays of Legal Positivism* (Oxford University Press, 1996) 31; Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford University Press, 2001) 411; Jason A Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 *European Journal of International Law* 627, 648; Jason A Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL' (2005) 16 *European Journal of International Law* 213, 214–19.

### B *Which Role for Legal Forms? (Or How to Carry Out the Struggle?)*

If we do not need, in my view, to care for compliance, do we need to care for legal forms? This brings me to a point where over the years I have grown increasingly in agreement with Koskenniemi. Although I am going down a different path, I share Koskenniemi's endeavour to preserve legal forms — an endeavour that distinguishes him from other scholars of his generation who have drawn inspiration from deconstructivism and critical legal studies.

Koskenniemi's plea for a 'culture of formalism' is well-known.<sup>31</sup> Because it is, to a large extent, ironic, it has been the object of much speculation by other scholars. For instance, such a plea has been perceived as an endeavour to soften some of the effect of deconstruction.<sup>32</sup> It must be acknowledged that not all aspects of Koskenniemi's culture of formalism are easy to fathom. Indeed, in his published work, Koskenniemi has always remained rather terse and concise when it comes to the specifics of that notion. I must thus resist the temptation of (mis)reading his words so as to make them fit the argument defended here. Nonetheless, from Koskenniemi's own work and the interpretations thereof,<sup>33</sup> this culture of formalism can be understood as a 'culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it'.<sup>34</sup> In particular, this culture of formalism, while still premised on the idea of the impossibility of the universal, represents the possibility of universal legal argumentation as it avoids the dangers of imperialism by remaining empty while seeking to preserve the possibility for alternative voices to be heard and make claims about the deficiencies of the law. In that sense, it is opposed to formalism in legal argumentation and must be construed as a 'regulative ideal'<sup>35</sup> or a necessarily unattainable 'horizon'.<sup>36</sup> According to Koskenniemi, this culture of formalism necessarily accompanies the 'critique' of

<sup>31</sup> See the famous pleas of Koskenniemi for a culture of formalism: Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002) 502–9; Martti Koskenniemi, 'What is International Law For?' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 57, 69–70. See also Martti Koskenniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, 2000) 17, 32–3.

<sup>32</sup> He has been categorised as a mild 'critic' for attempting to domesticate deconstruction. On the distinctive aspects of Koskenniemi's critical legal project: see, eg, Jason A Beckett, 'Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project' (2006) 7 *German Law Journal* 1045, 1065. Such attempts to domesticate deconstruction have long been the object of criticisms in general legal theory: see, eg, Pierre Schlag, "'Le Hors de Texte, C'est Moi'" — The Politics of Form and the Domestication of Deconstruction' (1990) 11 *Cardozo Law Review* 1631, 13–14.

<sup>33</sup> See, eg, Jochen von Bernstorff, 'Sisyphus was an International Lawyer — On Martti Koskenniemi's "From Apology to Utopia" and the Place of Law in International Politics' (2006) 7 *German Law Journal* 1015, 1029–31; Beckett, above n 32, 1045; Nicholas Tsagourias, 'Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*' (2003) 16 *Leiden Journal of International Law* 397, 398–9. See generally Ignacio de la Rasilla del Moral, 'Martti Koskenniemi and the Spirit of the Beehive in International Law' (2010) 10(2) *Global Jurist* <<http://www.degruyter.com/view/j/gj.2010.10.2/gj.2010.10.2.1335/gj.2010.10.2.1335.xml?fforma=INT>>.

<sup>34</sup> Koskenniemi, *The Gentle Civilizer of Nations*, above n 31, 500.

<sup>35</sup> Koskenniemi, 'What is International Law For?', above n 31, 70.

<sup>36</sup> Koskenniemi, *The Gentle Civilizer of Nations*, above n 31, 508.

law, for it is what protects the critique from being hijacked by those who previously instrumentalised the law in order to conceal their political goals, while preserving the possibility of a universal debate. This is why the culture of formalism is a cornerstone of Koskenniemi's project, as it invites international lawyers, once they have laid bare the subjectivity of their claim, to focus on the universality of all legal claims.

Koskenniemi's culture of formalism is not a tool that dictates the outcome of legal reasoning or provides ready-made solutions for political questions to which the law is applied. It is, rather, a practice or a communicative culture, which aspires to the universality of legal arguments for the sake of equality and openness. It would only be valid to those legal claims which we could also hold against ourselves. The culture of formalism is thus an 'interpretative safeguard'.<sup>37</sup>

I also believe in the power of legal forms, although my take is radically different and definitely less ironic. This is what I have been trying to explain elsewhere.<sup>38</sup> I personally bemoan the sweeping retreat from formal international law-ascertainment and I think we should strive to preserve the distinction between law and non-law by virtue of legal forms. Legal forms are definitely insufficient to delineate the whole phenomenon of law — and especially the flux of dynamics at the origin of the creation of legal rules, the content thereof or the sense of obligation therein — or to describe the operation of international law. However, they are absolutely crucial in terms of distinguishing law from non-law and ascertaining international legal rules. In my view, short of any formal indicators about what is law and what is not law, international law and international legal scholarship are bound to suffer from the following predicaments. I shall mention only three of them: faltering normativity and a correlative diminished authority of international law; a severe tendency of international legal scholars to talk past each other; and frustration of the possibility of a critique of law as the latter can no longer be sufficiently identified. Needless to say, preserving legal forms in the theory of sources surely means defending art 38 of the *Statute of the International Court of Justice* and the mainstream theory of sources associated with it. The formalism behind it is entirely a sham and a counterfeit. To take but one example, there is nothing more fallacious than to call customary international law and treaty law a formal source of law.<sup>39</sup>

It is my belief that Koskenniemi's culture of formalism, despite the irony that lies at its heart, does not collide with such use of formal indicators in the sources of international law. Indeed, the use of such formal indicators does not prevent the debate about — and the critique of — law and allow alternative voices to be heard. In fact, the formalism I advocate equally aspires — although via a radically different path — to the making of international legal claims through a common platform. If understood along the lines suggested here, formalism in the theory of the sources of international law simply allows these debates to take place by ensuring that they are conducted on the basis of a shared — albeit

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<sup>37</sup> Beckett, above n 32, 1070.

<sup>38</sup> See generally Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press, 2011).

<sup>39</sup> *Ibid* 162–70.

formal — vocabulary. It is thus instrumental in the existence of an open political debate about law and, ultimately, power.

Legal forms can only be preserved, however, to the extent that we can provide them with some elementary meaning. Ensuring meaningful legal forms, that is, legal forms that are not beset by radical indeterminacy, probably constitutes one of the most central and foundational questions of international legal theory.<sup>40</sup> It is also a question which has fuelled some of the greatest controversies among international legal theorists. In this respect, I do not believe that one can objectively reconstruct the convergence between the communitarian semantics among law-applying authorities that generate the meaning of the secondary rules of international law.<sup>41</sup> Indeed, I am aware that the identification of those participating in (and contributing to) the social practice — and thus the way this social practice is cognised and constructed — constitutes the most daunting intellectual challenge, which the argument made in this paper leaves us with. This challenge does not only point to the question of how to construct law in legal scholarship. It also raises questions pertaining to the political choices about who is empowered to generate practice conducive to the emergence of social practice determinative of law-ascertainment criteria. In my view, this certainly is the most central question, for the way in which one understands the concept of ‘law-applying authority’ — and thus the corresponding social/practice generative processes — will be determinative of the criteria that allow distinguishing between law and non-law. This however is a question for another day and one which I shall not tackle now.

In sum, should we care about legal forms? Yes, we should. On this point, I trust that Koskenniemi and I, albeit in very different ways, will concur with one another. Legal forms are necessary to preserve a common platform for our discussions as well as for our critique. Short of legal forms, we cannot simply argue with one another and we cannot appraise the virtues and drawbacks of the law — whatever our standard of assessment may be.<sup>42</sup>

C *Which Role for Legal Scholars? (Or in Which Capacity Should We Carry Out the Struggle?)*

Thus far I have contended that, whilst we probably do not need to care for compliance, we need to be concerned with legal forms. It is true that we are all militants of our own arguments and necessarily engaged in a struggle for argumentative and semantic authority — what I have called elsewhere ‘wordfare’.<sup>43</sup> This inevitable self-militantism does not, however, condemn us to be advocates of compliance. According to my understanding of the function of a researcher, we do not necessarily need to grab the banner, play the drums and start marching for to gain further respect for international law.

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<sup>40</sup> Ibid 141.

<sup>41</sup> See Jean d’Aspremont, ‘The Ruins of the Sources Theory and the Garden of Eden: A Rejoinder to Carlos Esposito and Philip Allott’ on *EJIL: Talk!* (14 December 2012) <<http://www.ejiltalk.org/the-ruins-of-the-sources-theory-and-the-garden-of-eden-a-rejoinder-to-carlos-esposito-and-philip-allott>>.

<sup>42</sup> This is a point I have also made in Jean d’Aspremont, ‘Reductionist Legal Positivism in International Law’ (2012) 106 *American Society of International Law Proceedings* 370.

<sup>43</sup> d’Aspremont, ‘Wording in International Law’, above n 1, 576.

At this stage, I acknowledge that my argument, if not further substantiated, may sound slightly paradoxical. On the one hand, I say that we should not care for compliance unless we are militants of our own projects (or acolytes of the legislator). On the other, I claim that we need to look after legal forms. Does it not mean that we should fight for the respect for legal forms? Said differently, does not our concern for legal forms transform us into militant scholars in our own (formalistic) way? This apparent paradox makes it necessary to highlight that caring for legal forms does not transform legal scholars into militants. I contend that legal forms and militant legal scholarship are two different operations, which are not necessarily incompatible but which should not be conflated. In that sense, I am making the argument that legal scholars can choose to turn themselves into militants, but they should not do so in the name (or under the guise) of legal forms. This obviously presupposes that we can keep both roles separate. But can we? I shall address that central question from two different sides. I shall examine: (1) whether legal scholars can be seen as militants of legal forms; and (2) whether they can afford to be militants disguised in grammarians.

### 1 *The Grammarian as a Militant of Legal Forms?*

Martti Koskenniemi would say that we are all militants in that we all pursue a political project. This is hard to deny. Whether one seeks to streamline, revamp, unearth, develop, devise or even abolish legal forms, he or she is pursuing a political project. Legal forms constitute a political endeavour in themselves, that of preserving the possibility of a language. Yet, that does not in itself make legal scholars defenders of legal forms themselves. Whether actors actually resort to legal forms is not a question which we should directly be concerned with. That would be falling back into a naïve form of naturalism, elevating legal forms to a new absolute dogma, a new morality.

Whilst arguing that we should not care for compliance with legal forms themselves, I nonetheless contend that we should strive to make use of legal forms possible. More particularly, our vocation should be to make legal forms meaningful, accessible, wieldy and universal. Our concern for compliance with legal forms should thus only be indirect. It is true that if we were to put forward unwieldy legal forms, they would probably not be picked up at all. Yet, we should not care for compliance with legal forms themselves. We are here to understand, decipher and streamline legal forms. That includes the development of instruments and tools to unravel the politics behind legal forms. These tools can in turn be used to unravel the politics of international law as a whole. One of the possible roles of international legal scholars is thus to allow the dialogue and the critique. From a linguistic perspective international legal scholars are the grammarians giving meaning to the language of the debate. Legal scholars are those surface-managers of the fighting arena. They make sure the arena is clean and flat for the gladiators to fight fairly and equitably. The political project of legal forms is to allow a fair struggle.

### 2 *The Militant Disguised as a Grammarian?*

The foregoing undoubtedly manifests a conception of the role of international legal scholars as administrators of the language of law enabling the fair

struggle.<sup>44</sup> Such an account accordingly falls short of endowing the legal scholar with the mandate to enter into the dialogue and the critique, simply with that of allowing it — the language of law gives specific meaning to a debate and if you believe in the potential of legal forms then the debate shall be satisfactory.

Being the grammarian of the language used for the battle may surely sound (too?) modest to many of us. Indeed, some of us may wish to do more with their own lives. Whilst I do not think that our task as grammarians should be underestimated, I can come to terms with the fact that some legal scholars — especially in the context of the disenchantment generated by the Israeli–Palestinian conflict — find it too limited a role and aspire to have a greater impact on the struggle outside academic circles. That could be seen as keeping us too far away from the worldly realities of the region and, in particular, the settlements, the killings, the destruction of civilian houses and all the pain and distress on each side.

Surely, an academic scholar would not like to be sidelined that way, especially when confronted with injustice, distress and pain. Nor do we actually stay at bay in the conflicts we witness and with which we deal. Our role as legal scholars is never — consciously or unconsciously — neutral. Who would dare to question this nowadays? We all take part in the dialogue, the debate and the critique of any conflict we comment upon. We inevitably engage with it. Even those, like me, who want to think that legal scholarship should do away with naive militantism,<sup>45</sup> cannot deny that even such an allegedly agnostic position boils down to some kind of passive militantism. We have dreams and these dreams cannot be entirely refrained. Because law is not fully determinate, we cannot help but project our political views onto the interpretation thereof. This is an old story. As was said above, we are all legal realists today. That amounts to accepting that we — albeit to a large extent unconsciously — project our political views in our interpretation of law.

Yet — and this is the final argument that will conclude this paper — I believe that we should, as far as it is consciously possible, limit the pursuit of our ethical projects — be it justice or anything else — to our studies of the rules of conduct, that is, primary rules according to the vocabulary of Hartian jurisprudence.<sup>46</sup> Our expertise about legal forms — and thus our studies of the language designed by the secondary rules of international law — should not be the platform through which we pursue such ethical ambitions. That means, in other words, that we should keep the political project that goes with our role as administrators of legal forms distinct from the political project we may be — consciously or unconsciously — pursuing. It is true that such a distinction of role is in itself a policy. However, such a policy should be vindicated whereby

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<sup>44</sup> To some extent, this corresponds with the role that has been portrayed as that of the ‘oracle scientist’: see Jakab, above n 27, 758–65.

<sup>45</sup> For instance, I have advocated an approach to international law stripped of promoting allegedly global values: see generally d’Aspremont, ‘Wording in International Law’, above n 1.

<sup>46</sup> See generally Jean d’Aspremont, ‘Herbert Hart in Post-Modern International Legal Scholarship’ in Jean d’Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press, 2013) (forthcoming); Jean d’Aspremont, ‘Hart and Post-Modern International Legal Scholarship’ (2009) 113 *Revue Générale de Droit International Public* 635.

a distinction is made between fighting for justice through law and the political project associated with the preservation of legal forms of which we are a simultaneously expert. Doing otherwise would not only be vain and useless, it would also be unsustainable, counterproductive and harmful for the entire discipline.<sup>47</sup>

In the particular context of the Israeli–Palestinian conflict, such a conflation of roles could take the form of a lawfare based on secondary rules of international law readjusted to allow the pursuit of one’s ethical project. This is, for instance, the attitude behind the contemporary attempts to lay bare post-occupation obligations for the former occupying power in Gaza<sup>48</sup> or the attempts to elevate to customary international law all those rules of the *Geneva Conventions*<sup>49</sup> with a view to make them binding upon all parties in the conflict that are not party to these Conventions.<sup>50</sup>

It may well be that other professions of international law — being government advisers, lawyers with NGOs, practising lawyers and so on — make use of legal forms in carrying out their function. Yet this is a step which, in my view, international legal scholars should not take. Indeed, as far as international legal scholars are concerned, I am very strongly of the opinion that militating should not be carried out through deceit, duplicity and fraud. In my view, legal forms should not be the smokescreen to lure our opponents and make our arguments. That would be as much a perversion as an abuse of our role as grammarians. The militant disguised as a grammarian is no different from the Taliban insurgents in Afghanistan in an International Committee of the Red Cross outfit.

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<sup>47</sup> This is also a point I have made in d’Aspremont, ‘Wording in International Law’, above n 1, 580.

<sup>48</sup> See Sari Bashi and Kenneth Mann, *Disengaged Occupiers: The Legal Status of Gaza* (Gisha: The Legal Center for Freedom of Movement, 2007) 89–91.

<sup>49</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

<sup>50</sup> For some attempts to generalise the customary character of the Geneva Conventions: see, eg, *Prosecutor v Norman (Decision on the Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment))* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-14-AR729E, 31 May 2004) [20]; *Prisoners of War — Ethiopia’s Claim 4 (Ethiopia v Eritrea) (Partial Award)* (Eritrea Ethiopia Claims Commission, 1 July 2003) [30]–[33]; *Prisoners of War — Eritrea’s Claim 17 (Ethiopia v Eritrea) (Partial Award)* (Eritrea Ethiopia Claims Commission, 1 July 2003) [15]; *Central Front — Ethiopia’s Claim 2 (Ethiopia v Eritrea) (Partial Award)* (Eritrea Ethiopia Claims Commission, 28 April 2004) [15]; *Western Front, Aerial Bombardment and Related Claims — Eritrea’s Claims 1, 2, 3, 5, 9–13, 14, 21, 25 & 26 (Eritrea v Ethiopia) (Partial Award)* (Eritrea Ethiopia Claims Commission, 19 December 2005) [12]; *Western and Eastern Fronts — Ethiopia’s Claims 1 & 3 (Ethiopia v Eritrea) (Partial Award)* (Eritrea Ethiopia Claims Commission, 19 December 2005) [16]; *Civilians Claims — Eritrea’s Claims 15, 16, 23 & 27–32 (Ethiopia v Eritrea) (Partial Award)* (Eritrea Ethiopia Claims Commission, 17 December 2004) [28]; *Civilians Claims — Ethiopia’s Claim 5 (Ethiopia v Eritrea) (Partial Award)* (Eritrea Ethiopia Claims Commission, 17 December 2004) [24].

It is true that the temptation to make use of our cap as grammarians (and the authority that accompanies it) when stepping into the fray is hard to resist. Using expertise in legal forms endows the militant with a greater force of persuasion, at least temporarily. He or she can claim to be disinterested, remote from the political stakes and merely the mouth-piece of the, allegedly, objective science of law. The scientific authority gives him or her a strategic advantage in the struggle, which makes the abuse of legal forms very tempting for any of us wishing to militate. However, abusing legal forms for a strategic gain in the fight is like prescribing antibiotics to all your patients. It provides a very short-lived advantage. At the end of the day, it does not work anymore and new products must be devised. The problem is that devising new product (for example, devising new legal forms that allow the existence of a language for argumentation) is a protracted and costly process, as is illustrated by the history of international law. In that sense, militating in the name of legal forms corrupts legal forms themselves and undermines their ability to fulfil their function as a shared and flat surface (or platform) for argumentation. That would be tantamount to using the same deceitful and sneaky tactics — bemoaned by so many international lawyers — as those warring parties in the Israeli–Palestinian conflict who instrumentalise international law to justify and legitimise all their deeds.

The argument made here does not surely mean that international legal scholars cannot militate for justice and make international law one of the driving forces of such an ethical project. Nothing precludes international legal scholars from simultaneously engaging in some militancy. The argument made here is simply a call for honesty by international legal scholars. Honesty, in this context, means some transparency as to the cap he or she is wearing. Without denying the political project inherent in legal forms, international legal scholars should make sure to keep their various political projects separate. If they start hurling stones against an illicit occupier, they should not so do in the name — and under the guise — of legal forms. They should, rather, publicise their taking to the street and disclose their militancy. Such transparency is not only conducive to the ability of legal forms to be a transparent platform for debates. In the context of a general and systematic lawfare by all parties, it is also indispensable if we want the legal discourse about the Israeli–Palestinian conflict to cease being hijacked and abused by all parties.