International Law in a Post-Realist Era

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Work in international law has been connected with an ethos both internationalist and reformist. Professors of international law, like those of us who have practised it in foreign offices and international organisations, have been thought to share—and in fact have shared—an in-built preference for the international over the national, integration over sovereignty. In addition, our discipline has implied a program for reforming the present international structures, perhaps to reflect better the "interests of the world community", the needs of a global environment, an interdependent economy or of a humanitarian ethic. Often we have seen ourselves among the *avant-garde* of liberal modernity—against conservative nationalism, sovereignty and power politics; in favour of the international, the competence of international organisations and universal human rights.

The international and the reformist strands of our ethos have been inseparable. Our preference for the international has not meant a preference for any particular international *status quo*, and most certainly not the present global distribution of wealth or power. Some of the discipline's most visible enthusiasts have been among the harshest critics of the prevailing "international" strand. Our internationalism has been for the future: perhaps for a "common law of mankind", with Wilfred Jenks in the 1950s; for "changing structures of international law" with Wolfgang Friedmann in the 1960s; for a more just world order with Richard Falk in the 1970s and for the interests of future generations with Edith Brown Weiss in the 1980s—today perhaps for "fairness" and "democracy" with Thomas M Franck and James Crawford.[1]

Yet, it is remarkable how little effect this disciplinary spearhead has had among mainstream colleagues or on the public at large. I participated in a Congress of International Law at the United Nations Headquarters recently to celebrate the middle of the "UN Decade of International Law". The event brought together a large number of today's great names in international law from academia and from foreign offices. Overt enthusiasm about the new role international law could play in a post-Cold War international order was mixed

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1 At the same time, our extradisciplinary fixation has shifted from sociology and functionalism to economics to environmentalism and most recently, perhaps, to political theory.

with the most traditional and formalist discussions of the law's role as a handmaid to statist diplomacy. A paradoxical contrast emerged between the inflated global rhetoric of the speeches and the complete irrelevance with which the Congress was treated by the political centre. Globalist rhetoric: marginal practice—and none of us was surprised, indeed, nobody expected otherwise. Granted that we are not professional cynics, this gap between our presumptuous rhetoric and our timid self-image needs explaining.

Now I want to suggest that our reformist internationalism is being challenged by recent developments in doctrine and practice. The internationalism of UN diplomacy falls short of the global; its reforms no longer enlist enthusiasm but are somehow beside the point. The formalism so prevalent in the Congress in fact marks a retreat to postures that could not have been sustained within the United Nations only a few years ago.

Thinking about the Congress in its historical place, a double movement seems to me to be taking place. First, there is the sense that the Cold War ended in a Western victory. Neither the United Nations nor its international law need any longer be seen as places for confrontation, or even coexistence. From an expression of politics, law is being transformed to a means for its *implementation.* Hence its formal outlook, its obsessive concentration on the techniques of interstate dispute-settlement and collective response. Politics is being replaced by problems of effectiveness and coordination for which the correct responses are technological, bureaucratic ones, typically relative to the delimitation of institutional jurisdictions.

But while politics is being undermined in statal diplomacy, and replaced by ever more technically complex, diversified and streamlined structures of dispute-settlement, it seems nonetheless to be constantly re-emerging outside those structures. No longer essentially concerned with disagreements between sovereigns, politics now seems to be about the re-imagination of the structures of sovereignty itself: Integration or differentiation? Liberal internationalism or functionally specialised transnationalism? Tired of petty problems relative to sovereign boundaries, politics now draws new—conceptual—frontiers and blurs old ones: economics meets the environment; integration meets human rights; gender meets ethnicity; public meets private. Universal norms buttress special interests under national and international procedures.

Nothing of this re-imagination, the site of today's politics and struggle for power, was visible in the Congress. Beyond the occasional call for a larger role for "peoples", there was no sign of an awareness that international law might participate in this restructuring, not only as a formal technique, to be employed at the service of diplomacy, but as the very site for the expression of new ideas, identities or strategies.

Prompted by the apparent anachronism of a turn to formalism at the UN Congress of International Law I would like to discuss what may seem to be a turn to a "post-realist era" within our discipline. I shall first outline, briefly and superficially, the familiar structure of our reformist internationalism, trapped in what seems like a constant movement between formalism and realism. I shall then discuss some recent challenges to "realism" and give examples of the

formalistic turn from international practice. At the end, I shall make some reflexions about a post-realist, post-formalist international legal culture that might engage us in the politics of re-imagining the structures of world order.[2]

I

Let me start out by sketching the outlines of modern international law, sharing the reformist-internationalist ethos.[3] It builds upon *two* assumptions, one scientific, the other political. The *scientific* assumption tells us that we must *know* the content of international law in an impartial—"objective"—way before we can legitimately use it. The law should not be thought of in terms of utopian principles, emanating from God's will, a moral truth. These are unverifiable speculations. We must know international norms in some way that is independent from any particular political, religious, ethnic or other such background. We can receive this kind of "view from nowhere" only by applying the methods of observational science in our scrutiny of international norms. We must think of our human communities as "facts"—albeit special, social facts, amenable to external scrutiny.[4] In short, our scientism compels a *social conception* of law.

If we accept treaties and custom as sources of the law, this is precisely because they represent, as it were, the external face of international social facts. They provide the jurists with a special technique for grasping what, in the hard reality of social life, emerges as norms. A norm is *jus cogens*, we think, not because it was so decreed by God, or because according to this or that theory it is necessary for the survival of the human species. It is *jus cogens* if and inasmuch as, to quote Article 53 of the Vienna Convention on the Law of Treaties, it "is a norm accepted and recognised by the international community of States as a whole". *Jus cogens*, like any other norm, emerges from social life,

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2 See also Kennedy D, "A New World Order: Yesterday, Today, and Tomorrow" (1994) 4 *Transnational Law and Contemporary Problems* 329.

3 My characterisation applies to *modern* doctrine. This might be contrasted with a classical view that assumes a normative world exists "out there" and that it is the law's task to seize it and to bring it, in as authentic fashion as possible, into political society. This pre-social order might be characterised as a set of independently normative principles (God's will, natural law) or a scientifically graspable reason or fact (the nature of legal development, the stage of the society, the laws of the economy etc).

4 This is a particularly "modern" view about human society. Its modernity lies in two key urges. First is the quest for objectivity, impartially verifiable (foundational) knowledge about ourselves and our societies. The second is the quest for order to replace chaos in both our perception and management of society. For the former, see Koskenniemi M, "The Normative Force of Habit: International Custom and Social Theory" (1990) 1 *Finnish Yearbook of International Law* 77, reprinted in Koskenniemi M (ed), *International Law: The International Library of Essays in Law and Legal Theory* (Areas No 5) (1992), pp 213–21. For the latter see Bauman Z, *Modernity and Ambivalence* (1991), esp pp 18–52.

the observable interaction between States, the meeting of their wills and interests. To believe otherwise is unscientific illusion.

The *political assumption* tells us that from what is, cannot be inferred what ought to be. If there is any heritage our shared modernity has brought from the Enlightenment, it is surely that the present is never sacred because it is there but that it is always a legitimate object of reformist struggle. If a great military power starts to extract a toll from ships passing through an international strait, this fact should not, by itself, be regarded as law-creative. The mere fact that fishery vessels succumb in front of gunboats is not conclusive evidence that they have a duty to do so. There must be some distance between fact and the law. In this respect, all law must participate in a politics of redemption, of transforming the present to realise ideals in the future.

Now the problem is that the scientific and the political assumptions tend to cancel each other out. The more we insist on the verifiability of our law on the facts of State practice—in a word, on its concreteness—the less we are able to demonstrate its independence from the power and policy of the strongest States. The more we insist on its critical nature—its normativity—the less able we are to prove its substance by reference to what goes on in the international world. In the one case, we have a factually strong but an uncritical doctrine—in the other case, a biting criticism that seems, however, utopian in its lack of closeness to the world of facts.

I cannot here undertake a full survey of the strategies whereby we have managed the tension between scientific hopes and political ideals.[5] Generally speaking, such strategies have privileged one over the other. We have either chosen a formalism that insists on the law's validity and binding nature irrespective of its distance from the world of political facts—or we have become realists and stressed the law's dependence on political facts and ridiculed "binding force" as a formalist fiction.

Over the past fifty years, formalism and realism have not, however, been equally balanced against each other. Local variations and exotic exceptions aside, most of us have internalised a critique of formalism as the critique of the utopian nature of the legal–institutional constructions of the inter-war era. This critique has set up a distinct preference for realism, concreteness over normativity, as the professional mainstream of our discipline. This is the social conception of the law, a conception shared and actively propagated by each of the lawyers in the disciplinary *avant-garde* that I mentioned at the outset.

If the formalism of the UN Congress is evidence of any tendency in our discipline, it is surely that a policy-oriented reformism no longer seems an adequate professional posture. In some ways, there is a wish to turn (back) to a more classical conception of the law, one insisting on the specificity of the legal as against the political, one focusing on rules, and the judicial process—black robes, wigs and all—as the core of the legal.

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5 See Koskenniemi M, *From Apology to Utopia: The Structure of International Legal Argument* (1989), pp 154–91.

II

Thinking about the marginality or isolation of international law I leafed through a recent book by Professor Rosalyn Higgins, recently elected as the first female judge at the International Court of Justice. Her work struck me with its methodological self-confidence and its optimistic pragmatism, so different from the speeches at the UN Congress. Yet somehow the abstract (theoretical) articulation of the book's policy-oriented realism seemed thin and old-fashioned. Its methodological statement, its insistence on the closeness of law and policy, seemed constantly to be collapsing back into formalism. As a practice, it simply called for the making of intelligent policy-choices from officials vested in authoritative positions. Might this be a reason for our disillusionment with policy-oriented realism? Either it becomes its own worst enemy or silently transforms into a bureaucratic technique?

Professor Higgins sets out the realist credo in her first sentence: international law is not rules. (This is a curiously suspicious sentence in the era of the repressed supplement, the exorcised "other"—indeed, for a post-Freudian or a post-structuralist literary critic it almost reads as if whatever international law might not be, at least it bases itself on the existence of "rules".) Now why is it not "rules"? There are two reasons. First, rules are conservative. They are only "accumulated past decisions".[6] If international law were only such decisions, it would be too static to contribute to a changing world. Secondly, rules are indeterminate: there is always choice and policy in the application of rules. For Professor Higgins, rule-formalism is conservative policy in disguise. It is conservative because it relies on past decisions instead of "values we seek to promote and objectives we seek to achieve".[7] It is policy—and not law—because of the inevitable (though hidden) fact of value-choices in interpretation. The strength of Professor Higgins' own position now seems to lie in its acknowledgment of the fact that law manifests power[8] and her honest readiness to make the necessary value-choices openly and in a systematic way.[9]

However, these arguments seem vulnerable to the standard formalist charge that though they may be able to set up a concrete-looking doctrine of international law, they can only do this at the cost of minimising the law's constraining, normative character. If law were merely what those in law-applying positions "choose", it would be just as irrelevant as if it were a set of stone-carved rules which everyone kept ignoring.

Professor Higgins' answer to this well-rehearsed problem is puzzling. She retorts that there are *some* "trends of decision" (that is to say, rules) that common interest dictates to be absolute. (The word is hers). True, we may not be able to determine that absolute by an inter-individually valid method of

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6 Higgins R, *Problems and Process: International Law and How We Use It* (1994), p 3.
7 Ibid, p 10.
8 Ibid, p 4.
9 Ibid, p 5.

verification: "each and every one of us has to test the validity of legal claims".[10] The absolute is the relative. We are reminded of the World Court's equally Delphic statement concerning the acceptability of reservations in the *Reservations* case.[11] But there is a consolation. If only the (inevitable, now rather threatening) policy-choice is "properly made", then we shall end up with a juridically—as well as politically—compelling conclusion. This feels very weak. Realism seems somehow to have made a fatal concession by responding to the charge of political arbitrariness by a reference back to rules (even "absolute" ones) and something like a shared professional ethic. It now stands on the shoulders of the formalism against which it first constructed its identity.

This kind of realism is thorough-going internationalist reformism. The first chapter of the book is termed "nature and function" of international law but in fact these turn out to be the same. The functions of international law are its nature. Its nature is expressed in what it *does*:

> Without international law, safe aviation could not be agreed, resources could not be allocated, people could not safely choose to dwell in foreign lands...The role of law is to provide an operational system for securing values that we all desire.[12]

Yet, we seem surprised at *this* being her revolutionary message. Can anything be more commonplace than to say that law seeks to secure values? Would any sane-minded formalist disagree? Surely he or she would agree but insist that the best way to "contribute to today's problems" is precisely by applying the rules that the legislatures—States in our case—have set. Indeed, Sir Gerald Fitzmaurice—the formalist *par excellence*—observes that rules have to be held separate from politics precisely because of the law's functional character:

> By practicing this discipline and these restraints, the lawyer may have to renounce, if he has ever pretended to it, the dominance of the rule of lawyers in international law, but he will have established something of a far greater importance to himself and to the world—the Rule of Law.[13]

In fact, formalism and realism both share the view that law emerges from society and is directed at achieving social ends. Where the two differ is in their assumption concerning how we can receive knowledge about the society to transform it into a program of action. Formalism seemed credible as long as faith in rules seemed secure. This faith never survived the realist offensive. Yet, enthusiasm for realism and process in the 1990s is an anachronism. "Social reality", "values" and "interests" now seem just as opaque, just as open to interpretative controversy and vulnerable to manipulation as rules once were. This is why Professor Higgins needs her puzzling reference back to rules—howevermuch that may conflict with her theoretical self-positioning. Indeed, it is hard to see how she could act in her capacity as a judge at the International

10 Ibid, p 7.

11 ICJ Rep 1951, p 15.

12 Ibid, p 1.

13 Fitzmaurice G, "The United Nations and the Rule of Law" (1953) 38 *Transactions of the Grotius Society* 149.

Court of Justice without in some way recognising the centrality of "rules" for her new professional identity.

It is this weakness of realism as a theory in its own right (instead of as a critique of formalism) which explains why the rest of the book takes on a pragmatic, problem-solving aspect and fails the expectations that the abstract opening (the bold rejection of "rules") has created. But pragmatism can hardly sustain an enthusiastic reformism. Pragmatism is the genre of institutional management, not of renewal; necessary but deeply insufficient as a psychological or social context for reform.

I detect here the beginnings of an explanation for the duality of the Congress. The discipline's enthusiasm and practice are out of step: the globalist rhetoric—the marginal practice. But it is not only that. We have the sense that transformative language—democracy, interdependence, solidarity, shared values—is mere decoration, in fact useless for participation in or understanding of practice. Reformist abstraction is an overture to a spectacle that is there to evoke a sense of the loftiness of the law's social purpose. But even if it may reassure us, the players, it has no convincing force whatsoever for an outsider, someone in the audience who is not already—for professional or academic reasons—committed to the truth of the spectacle.

But the solution is not the simple one of merely adjusting theory so that its predictive or explanatory force would be enhanced. Another interesting and challenging recent book by Professor Monique Chemillier-Gendreau from the University of Paris-VII looks at international law from a perspective completely contrary to the optimistic pragmatism of Professor Higgins.[14] Through interdisciplinary references and a broad historical sweep the author paints a picture of international law as a dark collaborator of power. Its practice is condemned as partial, illegitimate and supportive of relations of domination. This professor quite expressly asks whether international law can be used as an element of resistance, and of hope, in the otherwise chaotic sequence of global events. She is, however, able to do this only by finally appealing to a sense of communal solidarity whose very possibility seems denied by the sociology she has sketched. Her theory is strong and appealing: yet, it grounds no practice beyond perhaps the practice of tragic resistance, noble but condemned to fail.

Neither of the two realist strategies—pragmatism and revolution—can sustain a credible reformism. One seems too weak; the other too bold. In both cases, disappointment seems to be produced by the strategies themselves, by a discrepancy between what they put forward as theory and as practice. It is not that the two books contain equally confident—yet conflicting—descriptions of the international world that makes them seem suspect. Both assume that the social world can be squeezed into a single descriptive box—"reality", or "value", or "policy"—that will guarantee the correctness of the author's particular approach. It is one thing to declare the end of realism as a disciplinary outlook or a stylistic choice and quite another to declare the end of reality as the

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14 Chemillier-Gendreau M, *Humanité et souverainetés: Essai sur la fonction du droit international* (1995).

single, solid reference-point for the truth of one's normative conclusions. That, however, seems precisely our shared professional experience.

III

Now there could scarcely have been a more striking demonstration of the indeterminacy of social reality than that offered by international developments since 1989. Not only were political commentators and theorists, sociologists and lawyers unable to predict the coming of the political transformation in Eastern Europe, or its pace and intensity once they saw it, they have been equally unable to foresee its short-term social and economic consequences in those societies and disagree on its long-term political effects. "Democracy" rings as hollow as a description of the Russian society after Chechnya as it always did in respect of South Korea, Brazil or Algeria. Nobody realised the depth of the crisis of African political systems before we had mass starvation and genocide on our hands. As the United Nations finally left Somalia, or never really arrived in Rwanda, we were left with the melancholy choice of either abandoning our liberal hopes or redefining them by reference to a social Darwinism incompatible with that liberalism itself.

We might perhaps believe that the transformations of the post-Cold War era have to do with changing "values" and that if only we could grasp such values—"freedom", "self-determination", "communal care"—correctly, we would be able to devise a credible reformism. This is the suggestion underlying Professor Higgins' call for "value-choices". It is also a standard idealist position for understanding politics, and vulnerable to equally standard objections regarding the fabricated character of what we think of as our values (their being conditioned by the social facts under which we live). But even if we ignored Marx, Freud, and theories of false consciousness, we still cannot organise our reformism by reference to people's values. We have recourse to legal rules precisely because organising social life directly on values turned out to be impossible: values are too general as policy guidelines when formulated so that all would agree. If transformed into concrete reforms, they will inevitably overrule some interests in favour of other interests and seem thus no longer reflective of the society as a whole. In fact, "[m]orality is the last refuge of Eurocentrism".[15]

If "value" is not a privileged analytical tool for understanding society, what about "interest"? Even if we agreed on the need to understand the international in terms of interests, we would have difficulty in identifying the subjects whose interests count. Is it States, or perhaps "peoples", human beings or the global "community"? Even traditional statist analyses are puzzled about whether *opinio juris* is to be found in statements of presidents, foreign ministers, military leaders, parliaments, supreme courts? Theorists of international customary law

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15 Enzensberger HM, *Civil War* (1993), p 59.

despair over the correct identification of the relevant normative voice. The question of the voice is not an observational one but relative to politics, as feminists always insisted: who do we privilege as speakers?

Often "interests" are not, however, more than a sweeping nod towards an understanding, present since Vattel, about States acting in accordance with their self-interest. But even "self-interest cannot be an unproblematic concept if the self is conceived as a set of constructed identities that need not be stable over time".[16] Take self-defence, for instance, that grounds an exceptional right to use armed force. What is a threat to the "self"? This depends on what we see as a State's identity. Now such identity might be based on:

(1) the idea of the State (national, historical or ideological justiciation);

(2) the institutions of the State (its government, form of government), or

(3) physical base (territory, population).[17]

Our conclusions about what might constitute intervention by another State or under Article 2(7) of the UN Charter are dependent on assumptions about which of these criteria are relevant for understanding statehood. Look at State succession. Whether the Russian Federation is a successor to, or identical with, the Soviet Union depends on whether what we believe essential in the latter was its geographical space, its form of government, its historical continuity or whatever. Prevailing disagreement on this point focuses quite directly on the importance of Communism for the identity of the Soviet Union.[18]

Another track might be to insist upon the law's dependence on "consent", the assumption that the actual (social reality) is turned into the ideal (ought-sentences) by what people actually "will". This would dispense with ambiguous policy-science notions such as "value" and "interest" and accord with standard voluntarist legal theory. But quite apart from the difficulty in determining whose consent is to count, real, psychological consent is usually either lacking, unclear, irrelevant, based on mistaken premises, or simply unjust. We must protect stability of contracts, legitimate expectations, reasonableness and justice, not real, psychological will—though we find it hard to do this without referring to a consent which, however, remains presumed, tacit, hypothetical or absent.

Moreover, to believe that the world is naturally composed of States, acting as unitary actors, with uniform identities in the pursuit of monolithic national interests, expressed in what they have "consented" to, is simply poor sociology—howevermuch it constituted the credo of "realism". Interests transgress national boundaries. People live in States, but we also live as men and

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16 Price R, "A Genealogy of the Chemical Weapons Taboo" (1995) 49 *International Organization* 88.

17 See Buzan B, *People, States & Fear: An Agenda for International Security Studies in the Post-Cold War Era* (2nd ed, 1991), pp 57–107.

18 See Koskenniemi M and Lehto M, "La succession d'Etats dans l'ex-URSS, en ce qui concerne particulèrement les relations avec la Finlande" (1992) 38 *Annuaire français de droit international* 183; and Schweisfurth T, "Vom Einheitsstaat (USSR) zum Staatenbund (GUS): Juristische Stationen einer Staatszerfalls und einer Staatenbunbdsentstehung" (1992) 52 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 636.

women, as academics and workers, Serbs and Croats. Modern sociology insists that inasmuch as our identities are no longer determined by homogenous national backgrounds, we have come to live with partly conflicting, partly overlapping functional identities.[19] Increasing individualisation of our life-choices has offered us the possibility of choosing to participate in professional, sporting and other societies overlapping national boundaries and forming "interlocking communities" with interests, values and consent not reducible to those of any formal State.[20] While States and sovereignty remain in the centre of the international, they are also constantly challenged by communitarian claims and cosmopolitan values. These challenges are not simply directed at the policies of existing States but put into question the very form of the State as the territorial or spatial *locus* for the deployment of legislative reason.[21] Is the world usefully described by reference to acts by so-and-so many States—or perhaps by reference to economic, military, environmental or ideological structures? Here it seems impossible to distinguish political hopes from sociological description.

IV

Power, interests, consent, statehood...Each category through which realism tries to grasp the normative sense of the present turns out to be less than transparent. Each is amenable to interpretation—moreover, each can be used only when it has already been interpreted in some sense that itself is external to the observation that it claims to offer: Power and interests: yes, but whose? States: yes, but what are they? Consent: yes, but where do we find it? And so on. The interpretations invoke competing frameworks of understanding that cannot be privileged by anything like a scientific, even less legal, method.

Our international reformism has come to its final frontier in our loss of the firm foothold, in the experience of the uneradicable plurality and ambivalence of experience, textual as well as factual and, by extension, normative. Our early formalism was undermined by a suave realism, the insight that rules and procedures are powerless to constrain the sovereign. Realism sought to co-opt sovereignty by basing its law on the sovereign's observable attributes. Now realism is undermined by the experience that the sovereign is not observed but is constructed by reference to contested, political background theories about what is relevant in the mass of actions and events that we see. Our reformist programs have no prestige exceeding that of our background theories. These theories,

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19 See Bauman, n 4 above, pp 95–96; Beck U, "The Reinvention of Politics: Toward a Theory of Reflexive Modernization" in Beck U, Giddens A and Lash S, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (1994), pp 13–23.

20 See Thompson J, *Justice and World Order* (1992), pp 168 *et seq*, 182–87.

21 See Koskenniemi M, "The Wonderful Artificiality of States" (1994) 88 *American Society of International Law Proceedings* 22.

again, cannot be verified by observation because they condition observation. There is an infinite regress: either you agree with me or you do not. But there is no impartial—even less empirical—standpoint from which to solve our controversy. No wonder that a turn to formalism may seem an honourable alternative: if not effective it is at least a consoling last bow to the audience of our universalising moral beliefs.

V

As the balancing strategy of the Cold War that privileged a political realism against a formalist legalism turned out to be unworkable, jurists have responded by a turn back to formalism, general rules and judicial processes, a formalism which, however, had always been latent in realism itself. Let me give some examples.

Enthusiasm about judicial review abounds. Few cases at the International Court of Justice have raised as much juristic debate as the *Lockerbie* case.[22] May the Security Council's definition of what counts as a "threat to international peace and security" be challenged by a judicial pronouncement? In case the concept of "security" really covers economic, ecological and humanitarian well-being,[23] the suggestion that its limits should be drawn by a Court emanates from a radical, fighting formalism that brings into mind Kelsen's insistence on statehood as a mere bundle of competences, allocated by and constantly dependent on the fluctuations of an overriding legal order.

We have expressed enthusiasm about war crimes tribunals, *ad hoc* and permanent. We hope to replace the insufficiency of our politics—our *angst*—by recourse to formal rules and processes. Never mind that the trials will be largely symbolic: it is the very symbolism through which we seek to restore order and structure in the chaos of our professional lives. An even more striking formalist move are the two requests for advisory opinion from the ICJ regarding the acceptability of the use, or threat of use, of nuclear weapons. Here the whole politico-military structure of deterrence is put to trial. Again, never mind the prospects for implementation of any foreseeable decision. In some ways even raising the question of implementation may seem beside the point, or cynical. It is the statement that counts, that reaffirms the orderly character of our universe, no longer guaranteed by the Cold War division.

Similar developments are taking place in Europe. The formalism of the Stockholm Convention of the Conference (now Organization) on Security and Cooperation in Europe (C/OSCE) on the peaceful settlement of disputes is highlighted by the largely shared assessment that the bodies established in the

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22 *Lockerbie (Libya v UK)* case, ICJ Rep 1992, p 3.

23 As suggested by the Summit Meeting of the UN Security Council, S/23500 (31 January 1992).

Convention have no real business to tackle;[24] not unlike the setting up of the International Tribunal for the Law of the Sea. The curiously inconsequential decision by the CSCE to set itself up as a formal Organization is another example.[25] The European Union's new Balladur plan is an almost exact equivalent to the minority policies of the League that hoped to contain (primitive) nationalist passion by technically sophisticated rules and balancing processes.[26] Nor should we forget the expansion of the legislative and administrative realm of the European Union to geographical and substantive areas formerly beyond the reach of its bureaucratic structures, or the "return" of the Luxembourg Court from its "dynamic" legal policy to a more careful, conservative position regarding the competence of the Union.[27] Even international trade relations are being "constitutionalised", that is moved away from the realm of foreign policy by an understanding of the results of the Uruguay Round as a true (however rudimentary) legally determined and judicially enforceable trading system with uniform rules and dispute settlement procedures.[28]

Let me finally note the distinctive feature of the newest example of UN reformism, the Report of the Carlsson Commission on *Global Governance* that came out only this year. I will skip over most of it. But what is interesting, and different from the reports of the Cold War era, is the stress given to strengthening international law. "Respect for the rule of law is...a basic neighbourhood value" the Report states and calls for strengthening it. Yet, it is hard to conceive a more traditional, formalist approach to the law. International rules, the Commission states, "derive from State practice" and are "usually self-enforced".[29] It is as if the interminable discussions regarding the proliferation of the subjects of the law, the legislative processes and its regulative base had never existed. Out of the 30 pages devoted to strengthening the rule of law, more than half (16 pages) is devoted to the International Court of Justice, as if a review of its chamber procedure and the increased use of its advisory functions—the two points of focus in the Report—were the jurists' appropriate response to the millennium.

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24 For the Convention see (1993) 32 ILM 551.

25 Organization for Security and Cooperation in Europe, The Budapest Document: "Toward a Genuine Partnership in a New Era" (1994), Decision I: Strengthening the CSCE.

26 See Berman N, "Modernism, Nationalism, and the Rhetoric of Reconstruction" (1985) 4 *Yale Journal of Law and the Humanities* 351.

27 As manifested in eg its Opinion No 1/94 on Community competence in respect of agreement on the WTO and especially on agreements on services and the protection of intellectual property of 15 November 1994, [1994] ECR p 5267.

28 Ernst-Ulrich Petersmann makes the link between constitutionalisation of trade relations (that is, freedom of trade) and individual rights, justiciable by international as well as national courts, quite explicit in a programmatic article, "The Transformation of the World Trading System Through the 1994 Agreement Establishing the World Trade Organization" (1995) 6 *European Journal of International Law* 161.

29 *Our Global Neighbourhood: The Report of the Commission on Global Governance* (1995), pp 303–05.

Such turns to formalism constitute a response to the prevailing frustration with realism's tendency to replace legal rules by values, interests, power and policy. Sociology did not turn out to be a foundational discipline for law. In fact sociology—and with it, realism—seemed normatively grounded, though unaware of it. We can no longer be realists because the Cold War is over. Yet, though formalism does have its usefulness, I doubt whether that door still remains open. The critique of legal indeterminacy remains valid. People will continue to disagree not only on whether the ICJ's decision to dismiss the Portuguese claim in the *East Timor* case against Australia was politically justifiable but also, and crucially, whether it constituted a correct application of existing law. [30]

VI

So I look at theory and practice and wonder about the iron law that seems to compel realism as well as formalism, while simultaneously providing a devastating critique of both. Is the antinomy exhaustive, or can it in some way be overcome without resort to facile syncretism? In a larger work I have discussed a variant of this problem through the opposition of concreteness and normativity, or apology and utopia.[31] I there suggested we leave aside all attempts to theorise or to act by reference to one single epistemological foundation, solid and universalisable in the scientific, technical sense that has been a part of our Western cultural heritage. I proposed the development of a context-sensitive legal practice that would aim at the re-imagination of the intellectual structures under which that practice takes place: a movement, if you wish, between the concrete and the abstract (practice and theory) more than the taking of a position in either one. What seemed then—and still seems to me—useful to recognise in the midst of all the familiar post-modern uncertainties is that as academics or diplomats, we always act in concrete circumstances, faced with a limited number of alternatives, and limited time, and that our actions do bear consequences for other people and that something that might be called "responsibility" is an unavoidable part of any normative description of our relations with others.

Many people, even though perhaps impressed by the critique, have been disappointed with this suggestion. Some had hoped to see a synthesis emerge as a coherent structure of thought and policy from the original dichotomy—perhaps in the spirit of Kelsen's transcendental hypothesis, providing for a pure law between the moral and the sociological. Others have assumed that even this much construction must ultimately remain vulnerable to the original critique

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30 *Case Concerning East Timor (Portugal v Australia)*, ICJ Rep 1995 (not yet published).

31 See n 5 above.

itself.[32] I can only say that I share the idealistic hope in the former position as well as support the unrelenting consistency of the latter. I am not too disturbed by this conflict. In some ways I see it (as the opposite of calm certainty) as the core of my own work, reflecting tensions in my life as a practitioner doing international law, and an academic thinking about it.

Experience and thought are rarely consistent in the way that we might hope and do not give much support for globally applicable policy suggestions. There is, of course, pain and evil in the former Yugoslavia, Rwanda, Australia and Finland. Yet no one rule, principle or policy seems adequate to cover all these locations. This is not only a function of limited resources, or of the incompatibility of what moral theorists call human goods, or even of our inability to grasp the situations in terms of their causes, though we ignore such problems only at our peril. The consequences of any policy we may come up with will remain uncertain and our solutions will become sources of new problems, unforeseen, more daunting. I remain puzzled about those who see only nihilism and negativity in a recognition of this fact. We do recognise suffering, or a noble act, when our focus is close enough. In such circumstances, responsibility is triggered in abstraction from any rule or policy, by the communal bond constituted by the sharing of this experience as it were, from opposite sides, immediately or through empathy. The wider the focus, however, and the more generalisable and theoretical these experiences become, the more interpretative controversy will arise about practical courses of action. The more there is then reason to suspend moral certainty and to engage in a dialogue with those—others—who are directly involved.[33]

I wonder too about our need to deal with genocide, nuclear weapons, or massive suffering in terms of a universalising language of human rights, treaty obligation, legal rules and principles. To formalise such experiences in a legal language and "method" involves a banalisation that makes available all the routine defences, excuses and exceptions and triggers a technical debate which may end up by paralysing our ability to act and undermining our intuitive capability to empathise and thus also the condition for entering into a rudimentary communal relation with others. For "when concepts, standards and rules enter the stage, moral impulse makes an exit".[34] Surely our lack of certainty about whether or not rape is covered under some definition of "crimes against humanity" can be no argument against taking all available measures to

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32 See eg Scobbie I, "Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism" (1990) 61 *British Yearbook of International Law* 334 at 346–47; Purvis N, "Critical Studies in Public International Law" (1991) 32 *Harvard International Law Journal* 81 at 123–27; Carty A, "Critical International Law: Recent Trends in the Theory of International Law" (1991) 2 *European Journal of International Law* 81; Pål Wrange, "Från domstolssession till jamsession eller Martti Koskenniemi och juridikens slut" (1994) 64 *Retfaerd* 3 at 17–19.

33 As suggested eg in Carty A, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986), esp pp 108–31.

34 Bauman Z, *Postmodern Ethics* (1993), p 61. For a discussion of one catastrophic example, see Bauman Z, *Modernity and the Holocaust* (1989), esp pp 169–200.

prevent or punish it. Certainty is not the product of a single "method" but a cultural convention defining who we are. Who would wish to identify with a people uncertain about the illegality of rape but confident of their mastery of some interpretative canon?

As a theoretical discipline, law seeks a focus as wide as possible, distancing us from our particular contexts of life and work, community and empathy. Both formalism and realism are theoretical precisely in this way—and disappointing for this reason. My wish is to reverse the perspective. In the realm of theory, I try to look back at the distancing eye, examine the limits of its gaze, its distortions and blind spots. In the realm of practice and doctrine (that is, academic practice) I hope to allow for intimacy (placing certainty sometimes on "subjective" intuition—the illegality of rape, or the unacceptability of nuclear weapons, for instance) and conversation (to meet others' arguments at a political, even emotional level, however impeccable their expression in legal language).[35] This is not because of any naturalistic attempt at capturing some "authentic" level of human existence, the essence of social life. Indeed, distancing and neutrality are often socially necessary[36] and sometimes may provide the initial condition from which communal empathy may develop.[37] However, the permanent silencing of the moral urge and of political engagement that have been a part of the profession's official self-image, and its constant, yet embarrassed deference to morality and politics on every conceivable occasion, cry out for a conscious reversal of perspective. The one question that remains is: how to do this if not by recourse to high principles or grand programs? I shall return to that in a moment.

What I am after is reflexivity, a movement between theory and practice, and between distance and intimacy. I like to think of my own situation, years of oscillation between the foreign office and the university, as a useful context for the former: to look at practice from the perspective of theory, and vice-versa, and not to think of the two as strategies for dealing with a separate third entity, "international law". The theory and the practice *are* international law, either as (political) thought or (political) action.

Thinking of the relation between theory and practice as a movement, and not as a choice between fixed professional roles (teacher/lawyer) makes it possible to use it for the purpose of attaining the simultaneous operation of distancing/intimacy as well. Where intimacy involves a complete and spontaneous fusion of official role and engagement, the uniting of objective and subjective in thought and action, distancing focuses on that very mechanism.

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35 See eg Koskenniemi M, "The Pull of the Mainstream (Review of Theodor Meron, Human Rights and Humanitarian Norms as Customary Law)" (1990) 88 *Michigan Law Review* 1946 at 1961–62 and Koskenniemi M, "The Police in the Temple. Order, Justice and the UN: A Dialectical View" (1995) 6 *European Journal of International Law* 348.

36 See n 22 above.

37 See Koskenniemi M, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 42 *International and Comparative Law Quarterly* 241.

The theory/practice divide is familiar to traditional perspectives. But I believe that the distancing/intimate duality has also been a part of received approaches—sometimes occasioning the cry that "it *is* only a camouflage for politics". The profession's dramatic overprivileging of distance to intimacy, abstraction to engagement, however, is what I find an objectionable consequence of its scientific and political pretensions. Those pretensions have precluded the profession from dealing with its distancing/intimate duality, a duality for which it is admittedly difficult to find other ways of expression than metaphor or irony. By contrast, some of the best new international law writing has taken precisely that movement in focus, examining from a distance (not devoid of irony) the unreflective, yet fragile and uneasy fusion of role and engagement that takes place within conventional legal theory and practice.[38]

So if I have a "project", it is contextually embedded (how could it be otherwise?) in the situation of an international law that has lost its politically and intellectually engaging force and which keeps repeating itself through its reliance on the twin assumptions of descriptive neutrality and global reformism. Both emanate from a distancing, theoretical occupation, the sense that there is one single structure of "international law" that is external to its practitioners and employed as a technique on the otherwise chaotic world of power and policy.

George Kennan—a realist *par excellence*—once characterised international law as having "the unobtrusive, almost feminine, function of the gentle civiliser of national self-interest".[39] This I find a wonderfully adept statement. Of course, Kennan meant it as a diplomatic turn of phrase to argue international law into the margins of policy, away from where power and interest should reign. But if in fact the centre is empty (as I argued in Sections III and IV), the truth of Kennan's irony is revealed in a new light. To think of international law as a "gentle civiliser" opens a door towards a legal practice and a theory that looks beyond realism and formalism, process and rule. It brings into focus the spirit in which lawyers and diplomats meet and negotiate and leaves aside the problem of the "firm foothold". It may be used to think of international law not as an abstraction, a utopian project or a reflexion of State practice but as a culture and practice, even a community, sharing a language and often a professional commitment.

The realist and the formalist have shared a universalising spirit. They were enchanted by the metaphoric image of the world as a single, pyramidical structure at the top of which, in a controlling position, stands governmental power and diplomacy. We have seen our task as the solidifiers of that structure, in some ways its architects. Today the bricks lie scattered all over the Sahara.

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38 See Kennedy D, "Spring Break" (1985) 63 *Texas Law Review* 1377 (an examination of the practice of human rights law); Kennedy D, "An Autumn Weekend: An Essay of Law and Everyday Life" in Danielsen D and Engle K, *After Identity: A Reader in Law and Culture* (1995), pp 191–209 (discussing law and political engagement in respect of East Timor); Kennedy D, "The International Style in Postwar Law and Policy" (1994) *Utah Law Review* 7 (a study of doctrinal moves and possibilities).

39 Kennan GF, *American Diplomacy 1900–1950* (1951), p 54.

We agonise over the fate of the United Nations but find no other means to grapple with our agony than still more reform. In a recent article Richard Falk seeks to revive enthusiasm for the international by asking "how to make the Organization better serve the needs of people of the world".[40] I find this project equally unconvincing, and unappealing, as the formalism of the UN Congress. Let me counter it by summarising the idea of international law as "gentle civiliser".

I do not think of international law as the application of one unified method on the world but as social practice and a professional culture, a conversation about the right thing to do in particular circumstances, constantly harking back to the political, the intimate and the subjective. This culture offers professional roles to practitioners and academics while constantly putting us in situations where those roles seem insufficient for carrying out the tasks associated with them. Engagement and empathy are needed not only to sleep well but to master professional technique. At its best, the discipline allows both temporary distance and engagement in a way that avoids the non-reflexive, repetitive weakness of traditional doctrine, formalist or realist, and the timid self-image created by a silent deferral to others' policies.

From this perspective, international law has no given focus or centre from which it may not deviate without ceasing to be itself. Sometimes it appears usefully as rules, sometimes as practices. In the most comprehensive sense, however, it is what international lawyers do and how they think about what they are doing. But received categories of legal thought carry no essential value: they are not "right" or "wrong" in any sense that can be derived from beyond the legal culture itself. Making use of this insight, many lawyers have sought to rethink the discipline's constitutive boundaries. They have, for instance, argued about the perverse consequences of the public/private distinction that excludes from the law's ambit economic, religious, inter-personal or ethnic relations that are realised outside the structures of the sovereign State. Others have retorted that there is no *a priori* reason to reject sovereignty either, as it may be invoked to protect local values.[41] Such debates are useful re-imaginations of the international world itself, of the possibilities international law may offer for politics.

Other limits share this contingency. The boundaries between international law on the one hand, and private international law, European Community law, economic law and even private law on the other, are not fixed. Community law may incorporate international treaty obligations to create enforceable rights to

40 Falk R, "Appraising the UN at 50: The Looming Challenge" (1995) 48 *Journal of International Affairs* 646.

41 See eg Romany C, "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" (1993) 6 *Harvard Human Rights Journal* 97 et seq; Engle K, "After the Collapse of the Public/Private Distinction: Strategizing Women's Rights" in Dallmeyer DG, *Reconceiving Reality: Women and International Law* (1993), pp 143–56.

individuals even in an otherwise dualistic national legal system.[42] Nationally limited pollution damage caused by private industry may be contested under an international human rights regime.[43] National procedures may be used by citizens' organisations to enforce international obligations on individual companies and the territorial State.[44] In fact, the very drawing and blurring of conceptual—just like physical—boundaries by international law seems one the most important fields of post-realist research.[45] Boundaries provide information on the mechanisms whereby international legal culture (as patterns of thought and action) moves certain topics, values, interests and people into focus, overshadowing others. Knowing these mechanisms is important both for being able to apply legal technique in a professional way as well as for reflecting critically on that technique's social role and consequences.

Such "re-imaginings" accept the ambiguity and openness of the social and rely on our capacity to look beyond conventional roles, accepted general rules or interpretations. They are, in this sense, profoundly post-realist. This is not, however, an incident of their cynicism or lack of concern about politics and power—the "real world". To the contrary, they involve a "re-enchantment" with the world while opening areas to critical study from which politics had been closed off as they had been held foundationally certain. The insight that there is no natural direction or morality in history—for instance "increasing interdependence" or moving towards more or less "freedom"—which the law should seize or become anachronistic, liberates legal study to reflect critically on prevailing institutional and political agendas from a variety of angles.[46]

It follows that international reformism can no longer be sustained in quite the same way in which it had existed in the past. The international is not necessarily the *avant-garde* of progressive modernity against various parochialisms. It may in fact turn out to be the *arrière-garde*, defending a totalising uniformity against the pluralism of human experience, or it may be more ambiguous than we think: sometimes calling for interventionism and public policy, sometimes advocating absence of control and free markets.[47] Post-realist sensitivity is as alien to suggestions about developing public structures of global "governance" as it is about leaving the "international" as a playing field of market forces. It recognises that we all participate in politics

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42 See eg ECJ Case 104/81 ("Kupferberg"), [1982] ECR p 3641, at paras 18–27; 192/89 ("Sevince"), [1990] ECR p 3461, at paras 14–26.

43 See ECHR, *López Ostra v Spain* (1994, not yet published), esp paras 47–58.

44 See Russbach O, *ONU contre ONU: Le droit international confisqué* (1994), pp 256–80.

45 See eg the study of the delimitation and use of the notion of "terrorism" in international consciousness in Porras IM, "On Terrorism: Reflexions on Violence and the Outlaw" (1994) *Utah Law Review* 119. For feminist "reimaginings" of the discipline's conceptual structures, see Dallmeyer DG, *Reconceiving Reality. Women and International Law* (1993).

46 For an impressive total criticism, see Allott P, *Eunomia: New Order for a New World* (1992).

47 See Kennedy D, "Receiving the International" (1994) 10 *Connecticut Journal of International Law* 1; Brown C, "The Idea of a World Community" in Booth K and Smith S, *International Relations Theory Today* (1994), pp 100–05.

from some particular, local angle or position and that even "international" is only a name for a number of conflicting, highly idiosyncratic positions. As a conceptual and institutional principle for organising power, it has no claim to intrinsic preference.

Nor can reform be quite what it was. For it is not the case that the only acceptable moral or political arguments are those which treat all people as if they shared the same preferences. In fact people do not hold the same preferences and the fact they do not is not a sign that some are ahead while others are behind.[48] That we should expect all people would wish to be treated like we wish to be treated derives from a Kantian universalism which sets impossible moral demands on us and ultimately undermines our ability to honour the special obligations we may have towards our own communities and the most vulnerable of any communities.

To go beyond the opposition between truth and relativism is hardly child's play. However, it is precisely what I suggest post-realism should seek to achieve by giving up the sort of universalising rhetoric and the search for a firm foundation that have characterised modern international law. Where traditional international law attempted to constitute itself in opposition to the local, partial and subjective—and of course failed—post-realist law would seek both to embrace these perspectives and subject them to critical scrutiny. It would hope to attain this by developing a professional culture that would be characterised by a constant movement between distance and intimacy, reflexion and engagement. As a gentle civiliser, it would invoke more subtle, yet more concrete distinctions than those of traditional law: secrecy versus openness, hegemony versus fairness; dogmatism versus sensitivity; tyranny versus accountability. These are matters neither of pure logic nor of technique. If they become the focus of a new professional culture of international law, the burden that it may be difficult to secure an invitation to the next Congress of International Law at the UN headquarters will be light to bear.

48 And in any case, the doubt is never easily dispelled that "there is more than one conception of universal morality, and that which of them prevails is relative to the strength of the powers that claim and hold the right to articulate it", Bauman (1993), n 34 above, p 42.