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## ARTICLES

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### **International Law After Postmodernism: Towards Renewal or Decline of International Law?**

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**Keywords:** deconstruction; globalization; legal theory; liberalism; positivism; postmodernism.

**Abstract.** Along with “globalization” and ideas of a “new world order,” the last 20 years have witnessed the emergence of an (anti-)foundational critique of international law which may be associated with the postmodernist turn of philosophy. In addition, globalization has questioned some of the basic assumptions of international law, especially the primordial role of states. The article analyses several answers postmodern international legal theory has given to the challenges for international law – despair, politicization, history, subjectivism(s), democratic experimentalism, and a return to positivism. It argues that postmodern theory fails to provide a concept for the future of international law but that this is exactly what is needed to save international law from politics and irrelevance. The author comes to the conclusion that a “middle-of-the-road”-approach steering a course between positivist objectivism and the subjective responsibility of the lawyer might be the most promising avenue for the future of international law.

*Wer mir Dekonstruktion ans Herz legt, und auf Differenz besteht,  
steht am Anfang eines Gesprächs, nicht an seinem Ziele.*

Hans-Georg Gadamer<sup>1</sup>

#### **1. INTRODUCTION: GLOBALIZATION AND THE POSTMODERN CRITIQUE OF INTERNATIONAL LAW**

In the 10 years after the end of the Cold War, the world has witnessed two parallel, sometimes contradictory developments: Whereas, after the

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1. “Who puts forward deconstruction to me, and insists on difference, is situated at the beginning of a conversation but has not reached its goal.” (my translation), H.-G. Gadamer, *Destruktion und Dekonstruktion*, 2 *Gesammelte Werke*, 2nd ed., 361, at 372 (1993).

second Gulf War, a “New World Order” was proclaimed,<sup>2</sup> this optimism has soon waned. Still, liberal optimism may point to developments like the imminent establishment of an International Criminal Court or the *Pinochet* affair for arguing that the realization of a human rights-oriented international order is just around the corner. In this vision, international institutions and non-state actors work hand-in-hand towards the protection of human rights, the prosecution of offenders against international humanitarian law, and the limitation and control of state power.

Secondly, however, ‘globalization’ has curbed the belief in the benefits of institution-building and, as the by now conventional wisdom goes, rendered both states and classical international organizations more and more inapt to provide the structures needed for coping with the injustices and inequalities in the contemporary world.<sup>3</sup> New recipes rely on non-governmental organizations and international business rather than governments. Even the United Nations enlists international business for support,<sup>4</sup> and the United States accepts a grant by media tycoon Ted Turner to pay its UN dues.<sup>5</sup> However, the alleged decline or retreat of the state and the concomitant rise of non-governmental organizations of all kinds is not entirely benign. Non-state actors are even less accountable for their actions and less controllable by legal means than states. Indeed, as the horrendous terrorist attacks on the United States have shown, terrorist actors, the scourge of our age, may even attack the world’s only superpower in a way no state army would be able to do. The often invoked Pearl Harbour comparison is thus telling in both the parallels – the unpreparedness and unawareness of both the US Government and public – and the differences – whereas, in Pearl Harbour, the aggressor was clearly defined and could be defeated in a battle between regular soldiers of the two states involved, the aggressor against the World Trade Center and the Pentagon was as effective as he is elusive. Thus, the use of the label ‘war’ for the terrorist attack and of the term ‘self-defence’ for the US response does not capture the fuzziness of both the enemy to beat and the means to fight. Whereas Article 51 of the UN Charter allows self-defence against the ‘armed attack’ of another state, it is far less clear whether and how this is to be applied to non-state terrorists although they may well enjoy

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2. See Address by the President of the United States, 6 March 1991, 137 Cong. Rec. H1451-02, S2769-01 (1991); Presidential Statements of 11 September 1990, 29 January, 13 April 1991, 2 Pub. Papers 1219 (1990); 1 Pub. Papers 79, at 366 (1991); for a critique see G. Abi-Saab, *A ‘New World Order’? Some Preliminary Reflections*, 7 Hague Yearbook of International Law 87 (1994).
  3. From a rich literature, see, e.g., F. Kratochwil, *Globalization and the Disappearance of “Publics”*, in J.-Y. Chung (Ed.), *Global Governance: The Role of International Institutions in the Changing World* 86 (1997); S. Strange, *The Retreat of the State: the Diffusion of Power in the World Economy* (1996).
  4. For the ‘Global Compact’ between UN and international business, see <http://www.unglobalcompact.org> (last visited 17 September 2001).
  5. S. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AJIL 392 (2001).

the more or less active support of this or that state. Even if the International Court of Justice ('ICJ') has dealt with the use of armed groups by a state,<sup>6</sup> in the case of terrorists, it is rather the non-state actor who uses the state and not *vice versa*. International law, in the very sense of the term, seems ill-prepared for such a situation.

But international law is not only threatened by developments in the real world. Following the grounds prepared in the 1980s,<sup>7</sup> a powerful critique of international law has emerged which questions liberal optimism and points to the inherent contradictions of international law and its potentialities for abuse. Indeed, it seems that international law serves no purpose but its abuse for the ideological purposes of the strong, that is, in Marxian terms, as *Überbau* (superstructure) of the interests of the powerful. This critique mainly relies on postmodern philosophy, which seems to put into question traditional notions of objectivity and progress. It also points to the changes brought about by globalization which are not duly reflected in international law.<sup>8</sup> Much of this writing has concentrated on the critique of international law and the approaches of international lawyers, both in the present and in the past.

Nevertheless, this article holds the view that neither external developments nor the internal critique render international law helpless or superfluous. Instead, the hardest of all cases, the terrorist attacks against New York and Washington, is proof to the fact that international law may be in need for a reconceptualization. But that does not mean that international law is less useful, and less necessary, for both the development of new modes of inter-cultural and inter-individual understanding and for the limitation of the ends and means of political action.

11 September 2001 marks both the end of an uncritical modernism or even late-modernism, with its belief in the progress of international law and unproblematic inter-cultural understanding, and of a postmodernism that believes in the purity of critique without trying to bridge the conflicts of seemingly incompatible subjective beliefs and religions. The combination of irrational suicide and murder of thousands of innocent people on the one hand and the sophisticated abuse of the means of modern travel and communication, on the other, demonstrates that rationality alone does not lead to the solutions of inter-cultural (or even inter-civilizational) conflicts. However, the terrorist attacks may serve as a portent that it is not enough to emphasize difference but that there is a desperate need for

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6. See *Military and Paramilitary Activities in and against Nicaragua*, 1986 ICJ Rep. 14, at paras. 109–116; *cf. also* *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, 38 ILM 1518, at para. 88 *et seq.* (1999). It may well be that International Criminal Tribunal for the Former Yugoslavia did not have to expressly discard Nicaragua to arrive at its conclusion, *see* Separate Opinion Judge Shahabuddeen, *id.*, at 1611 *et seq.*

7. A. Carty, *The Decay of International Law?* (1986); D. Kennedy, *International Legal Structures* (1986); M. Koskenniemi, *From Apology to Utopia* (1989).

8. D. Kennedy, *The Disciplines of International Law and Policy*, 12 LJIL 9, at 131–132 (1999).

minimum understandings and background rules that enable cross-cultural dialogue and that lead beyond the mutual recognition of difference to recipes for the defence against those who act to destroy these procedures and basic principles.

Neither the liberal expectation of an “end of history”<sup>9</sup> has materialized, nor is the “clash of civilizations” inevitable. The postmodern criticism of Fukuyama’s thesis of the “end of history”<sup>10</sup> has been revealed largely unnecessary – not because it was unjustified but because his predictions simply turned out to be wrong. On the other hand, Huntington may well have been right that something like a cultural or even civilizational clash is going on<sup>11</sup> – but as self-fulfilling prophecy, his warnings would lead to disaster if accepted as inevitable.

What follows is not an attempt to exhaustively and comprehensively ‘map’ postmodern approaches to international law or to give a more or less complete account and critique of them.<sup>12</sup> The described approaches or avenues are neither complete nor mutually exclusive. Neither does the article intend to ‘reify’ or pigeon-hole the new approaches. (A single hole would not do it anyway.) By taking the postmodern critique seriously, it rather tries to engage a debate between postmodernists and more ‘mainstream’ international lawyers on the future of the discipline.<sup>13</sup> In the conclusion, the author tries to put forward some modest proposals how a critical practice of international law may take up some of the insights of ‘postmodernist,’ ‘critical,’ or ‘new stream’ approaches without giving up the bindingness of international law or its relevance for the politics of globalization altogether.

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9. See F. Fukuyama, *The End of History and the Last Man* (1992); F. Fukuyama, *The End of History?*, 16 *National Interest* 3 (1989).

10. See, especially, S. Marks, *The End of History? Reflections on Some International Legal Theses*, 8 *EJIL* 449 (1997).

11. S. Huntington, *The Clash of Civilizations*, 72 *Foreign Affairs* 22 (1993); S. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996).

12. For this purpose, see, with various grades of exposition and critique, A. Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 *EJIL* 66 (1991); D. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 *Nordic Journal of International Law* 341 (1996); Kennedy, *supra* note 8; J.H.H. Weiler & A.L. Paulus, *The Structure of Change in International Law*, 8 *EJIL* 545, at 552–554, 560–561 (1997). For critical evaluation, see N. Purvis, *Critical Legal Studies in Public International Law*, 32 *Harv. Int’l L. J.* 81 (1991); I. Scobbie, *Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism*, 61 *BYIL* 339 (1990). For earlier criticism by the present author see Weiler & Paulus, *supra*, at 551–553, 561–562; B. Simma & A.L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in International Law: A Positivist View*, 93 *AJIL* 302, at 305–308 (1999); A.L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* 210–217 (2001).

13. Cf. the call by T. Skouteris in an Editorial of this Journal: *Fin de NAIL: New Approaches to International Law and Its Impact on Contemporary International Legal Scholarship*, 10 *LJIL* 415–420 (1997).

## 2. INTERNATIONAL LEGAL THEORY AFTER POSTMODERNISM

One may describe the common denominator of postmodernist approaches as the term is used here in the rejection of modernity as an “objective” point of view, as a neutral account of human history determined by continuous progress towards the realization of liberal values.<sup>14</sup> According to the much cited definition by François Lyotard,

[e]n simplifiant à l’extrême, on tient pour ‘postmoderne’ l’incrédulité à l’égard des métarécits. [...] À la désuétude du dispositif métanarratif de légitimation correspond notamment la crise de la philosophie métaphysique.<sup>15</sup>

The belief of a clear direction of history, the idea of “progress” itself, is discarded; diversity and subjectivity are celebrated.<sup>16</sup>

It is hardly necessary to retrace the story of the arrival of a critical perspective informed by ‘postmodern’ views in the theory of law in general and international law in particular.<sup>17</sup> David Kennedy seems to be the first to have applied the ‘postmodern’ critique to international law. Both his and Martti Koskenniemi’s seminal work *From Apology to Utopia*<sup>18</sup> stand at the beginning of a wide array of writings on international legal matters from ‘postmodern’ perspectives in the widest sense of the term. With considerable superficiality, again, one may distinguish two main strands of such ‘postmodernist’ criticism, which are raised jointly or separately: An ‘internal’ critique unveils the internal inconsistency of ‘mainstream’ international law, an ‘external’ critique points towards the ideological and political bias of supposedly ‘neutral’ legal rules.<sup>19</sup>

In the view of the ‘internal’ critique, the indeterminacy of rules and the arbitrariness of the application of principles and values preclude a definite outcome of legal analysis – the very definiteness legal language needs for claiming neutrality and objectivity. This critique culminates in

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14. N. Luhmann’s and G. Teubner’s project of “autopoietic law” may also be called postmodern. See, e.g., the essays in G. Teubner (Ed.), *Autopoietic Law* (1987). The following identifies postmodernism in international law more or less with the strand which has taken its insights from French postmodernist philosophy and the American Critical Legal Studies Movement. On the history of this movement, see M. Kelman, *A Guide to Critical Legal Studies* (1987).

15. English translation (by the author):

simplifying in the extreme, ‘postmodern’ is to be understood as the disbelief towards metanarratives. [...] The crisis of metaphysical philosophy corresponds to the desuetude of the metanarrative device of legitimation.

J.-F. Lyotard, *La condition postmoderne: Rapport sur le savoir* 7 (1979).

16. Z. Bauman, *Intimations of Postmodernity* 189–196 (1992); Lyotard, *supra* note 15, at 8–9.

17. For the relationship between French deconstructivism and Critical Legal Studies see D. Kennedy, *A Semiotics of Legal Argument*, III(2) *Recueil des cours* 309, at 350 *et seq.* (1992). For a perspective of law from the angle of postmodern philosophy, see J. Derrida, *Force de loi. Le ‘fondement mystique de l’autorité’* (1994).

18. See *supra* note 7.

19. Weiler & Paulus, *supra* note 12, at 551–552, with extensive references.

Koskenniemi's often cited – but by the author, as far as I can see, in that form never repeated – remark

that international law is singularly useless as a means for justifying or criticizing international behaviour. Because it is based on contradictory premises it remains both over- and underlegitimizing: it is overlegitimizing as it can be ultimately invoked to justify any behaviour (apologism), it is underlegitimizing because incapable of providing a convincing argument on the legitimacy of any practices (utopianism).<sup>20</sup>

At the same time, the indeterminacy enables the (ab)use of international law for political purposes hidden under the alleged objectivity of legal analysis, a process often termed “reification.”<sup>21</sup> Whereas, in the ‘internal’ critique, international law is presented as lacking determinate content, the external critique regards international law as a powerful tool for the attainment of political objectives or the preservation of male or imperialist meta-structures.

From a related viewpoint, feminism and international race theory have criticized the gendered and racist bias of allegedly ‘objective’ legal categories,<sup>22</sup> advocating a more subjective approach to international law which takes into account the social and gendered pre-conditions of law. The gender bias of international law is hidden in legal distinctions between “public” and “private,” excluding women’s concerns from the ambit of international law.<sup>23</sup> In a somewhat similar fashion critical race theory and latino critical legal theory are

grounded on the central premise that all international law must be defined in terms of its impact on peoples of color globally, as well as locally in individual states. [...] It generally holds that the liberation of peoples of color is essential to the durable realization of all other international policy objectives in a world community.<sup>24</sup>

In the same vein, Third World Approaches to International Law (‘TWAIL’)

understand the historical scope and agenda of the dominant voice of international law and scholarship as having participated in, and legitimated global processes of

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20. Koskenniemi, *supra* note 7, at 48 (footnote omitted). Similarly, D. Kennedy, *Theses about International Law Discourse*, 23 GYIL 353, at 376 (1980): “international law discourse is a conversation without content – a ritualized exchange which avoids confronting the very question it purports to address.”

21. See Carty, *supra* note 12, at 67, n. 1.

22. See, e.g., H. Charlesworth, C. Chinkin & S. Wright, *Feminist Approaches to International Law*, 85 AJIL 613 (1991), exposing “the gender bias of apparently neutral systems of rules.”

23. *Id.*, at 627. Cf. also K. Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women’s Rights*, in D.G. Dallmeyer (Ed.), *Reconceiving Reality: Women and International Law* 146 (1993).

24. H.J. Richardson III, *To the Co-Editors in Chief*, 94 AJIL 99 (2000). As far as Richardson relies on the New Haven School, however, his definition might not be shared by some of the other exponents of critical race theory.

marginalization and domination that impact on the lives and struggles of Third World peoples.<sup>25</sup>

Even if not so outspokenly “subjectivist” as feminist scholars, TWAIL and critical race theorist emphasize the subjective element of international law: the impact of allegedly objective and neutral norms on specific groups of the ‘international community.’ Just as the emphasis of feminists is on the ‘gendered’ nature of international law, TWAIL scholars<sup>26</sup> uncover the Eurocentric origin of rules and institutions of international law which are incommensurable with non-European experiences.<sup>27</sup>

Both the ‘external’ and the ‘internal’ critique seem to render futile any traditional, positivist outlook on international law. A “Pure Theory of Law”<sup>28</sup> cannot be maintained because it presupposes the very neutrality and objectivity of international law which postmodern analysis has proven to be unfounded. On the other hand, more openly political approaches, such as the New Haven School or the ‘neoliberal’ ‘dual agenda’ which advocates the merger of international law with a certain branch of international relations theory,<sup>29</sup> cannot benefit any more of a superior ‘legal’ character. They are, just as much as traditional theory, “power politics in disguise.”<sup>30</sup> Other, ‘process’-based approaches do not fare much better.

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25. *Vision statement* adopted on TWAIL’s first Conference, 7–8 March 1997, in J. Gathii, *Foreword, Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 Harv. Int’l L. J. 263, at 273, n. 46 (2000).
  26. The term “Third World” is preferred – here as within TWAIL writing – to the UN label “developing countries.” See J. Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 Michigan Law Review 1996 (2000), reviewing B. Roth, *Governmental Illegitimacy in International Law*, at 1997 (1999): “My antihegemonic critique could very well be referred to as constituting a *third-world approach*. Third-world because it is neither American nor European, and because it is intended as a counterweight to the overwhelming dominance of American and European academia in the production of knowledge about international law.” For the differences among TWAIL scholars, see Gathii, *supra* note 25, at 274–275.
  27. See Gathii, *supra* note 25, at 265; J. Gathii, *International Law and Eurocentricity*, 9 EJIL 184 (1998). But see C.G. Weeramantry, *Keynote Address*, 41 Harv. Int’l L. J. 277 (2000), at 281, emphasizing the multicultural background of international law: “So let us look upon international law not as a western construct, but rather, as a global construct. It is the product of many civilizations and many traditions, [...]” It is no coincidence that this is the voice of another, the first generation of third world international lawyers, see Gathii, *supra* note 25, at 265; distinguishing between “weak” and “strong” strands, see Gathii, *International Law and Eurocentricity*, *supra*, at 187, 195 *et passim*.
  28. H. Kelsen, *Reine Rechtslehre* 1–2 (1932), translation 1st ed. (1932): B.L. & S.L. Paulson, *Introduction to the Problems of Legal Theory* (1992); translation 2nd ed. (1960): M. Knight *Pure Theory of Law* (1967).
  29. See A.-M. Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205 (1993); see also K.W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 Yale Journal of International Law 335 (1989); A.-M. Slaughter, A. Tulumello & S. Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AJIL 367 (1992); A.-M. Slaughter, *International Law and International Relations*, 285 RdC 9 (2000).
  30. The quotation is taken from the realist critique of positivism; see G. Schwarzenberger, *The Frontiers of International Law* 24 (1962).

Indeed, 'substance' and 'process' are said to refer to each other not in order to determine outcomes, but to veil the emptiness of both substance and process. In David Kennedy's terms: "The variety of references among these discursive areas [sources, process, and substance] always shrewdly locates the moment of authority and the application in practice elsewhere."<sup>31</sup> Devoid of either substance or formal procedure, international law falls prey to political abuse and to the self-illusion of the lawyers.

Even if the 'newstream' critique of international law is varied and multifaceted, its disavowal of the mainstream practice is unanimous. It seems less certain, however, what the critique implies for the future of international law, if there is to be one. Have international lawyers – as a group, a profession, a 'college'<sup>32</sup> – anything to say on how to order the world of today or tomorrow, on globalization, the in- and exclusion of women or the so-called 'Third World,' on war crimes and poverty, terrorism and peace? Or are they simply the priests of a sect, hiding from the believers the arbitrary nature of their revelations? If so, can there be a future for international law, or do we simply have to abandon that project altogether?

In the following, I distinguish several answers from authors which one may loosely associate with the 'postmodern' critique of international law. Neither are these responses mutually exclusive, nor is the list intended to be complete in any possible sense. Indeed, as the openly subjective character of postmodern analysis implies, the perspectives on the future of international law will vary widely.

## 2.1. Despair

The first, and obvious, response is despair. Already in Koskenniemi's celebrated book, in the above cited passage on the uselessness of international law, we find ample evidence of this reaction. In an article with the telling title "New International Law: Silence, Defence or Deliverance?", Outi Korhonen analyses this position as follows:

[S]ilence [...] is perhaps best manifested in those post-modern approaches that are most keenly devoted to deconstruction. [...] The post-modern critique results in the Death of Man just as the modern Enlightenment critique resulted in the Death of God for the occidental tradition. [...] In the post-modern conception of law, there is no foundation. The argumentative oppositions continue to deconstruct the foundations of one another infinitely. [...] The tragedy of the post-modern and anti-foundational approaches is that they cling to the critical method as though it was the ultimate universally valid method.<sup>33</sup>

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31. Kennedy, *supra* note 7, at 293.

32. O. Schachter, *The Invisible College of International Lawyers*, 72 Northwestern University Law Review 217 (1977).

33. O. Korhonen, *New International Law: Silence, Defence or Deliverance*, 7 EJIL 1, at 16–17 (1996) (footnote omitted).

The death of the legal foundations implies the impossibility of distinctly 'legal' responses. Legal argument may continue, however without any claim to authority. But this also implies that political actors have no reason at all to listen to it. The death of the foundations leads to the end of the prescriptive character of the law, and, ultimately, to the silence of law altogether. However, silence of law results in an ultimate deference to unfettered, unprincipled politics. If rules do not mean anything, if legal discourse amounts to nothing but rhetorical devices for selfish ends, the result is brute power.<sup>34</sup>

To be fair, under one condition this option is preferable to any other: if the belief in the possibility of the constraint of power by legal means is unfounded, power without the legal disguise might be preferred to power in a legal disguise. When international political actors cannot any more defend their choices by arguing that they did not have any other 'legal' alternative, the critique of international law opens up space for political debate which would not be replete with 'false necessities' stemming from a mistaken belief in the prescriptive character and determinate result of legal inquiries.

The ultimate result of radical criticism of international law is Realism. Law results in Politics. And it is thus not by accident that many critiques of the international legal project sound rather similar to the beginning of modern international relations theory in the inter-war period.<sup>35</sup> However, as the postmodern critique does not share the scientific optimism of the founders of international relations theory, they will not – and cannot – provide an alternative. And as politics follows power, despair ultimately supports the powerful.

## 2.2. The politicization of international law

In spite of the radical criticism of the possibility of law, there is an alternative to despair: The open pursuit of political projects. If the lawyer cannot claim any additional legitimacy than her individual preferences, she must openly become part of the political process – as a voice of moderation, even of reason, certainly, but also as a conscious social actor. Even in the absence of legal guidance, the task of the lawyer is to contribute to reach acceptable solutions for social problems:

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34. Cf. the critique of postmodernism by J. Habermas, *Der philosophische Diskurs der Moderne* 11–13, 279 *et seq.* (1985). See also C. Brown, *International Relations Theory: New Normative Approaches* 218, 237 (1992). This argument is of course not alien to Koskenniemi, see Koskenniemi, *supra* note 7, at 479.

35. Cf. Hans Morgenthau's famous reckoning with international law, written after the beginning of World War II, *Positivism, Functionalism, and International Law*, 34 *AJIL* 260 (1940). See also E.H. Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations*, 2nd ed., 170–219 (1946). It may be no accident that the author was acquainted with these critiques in the teachings of Martti Koskenniemi and David Kennedy. For a 'post-realist' critique of international law, see M. Koskenniemi, *International Law in a Post-Realist Era*, 16 *Australian Yearbook of International Law* 1 (1995).

[T]he character of normative problem-solution [...] [is] a *practice* of attempting to reach the most acceptable solution in the particular circumstances of the case. It is not the application of ready-made, general rules or principles but a conversation about what to do, here and now.<sup>36</sup>

In spite of his critique of this approach,<sup>37</sup> David Kennedy also proposes to regard

international law not as a set of rules or institutions, but as a group of professional disciplines in which people pursue projects in various quite different institutional, political, and national settings.<sup>38</sup>

There is David Kennedy's insistence on unveiling the silences of traditional international law, of revolting against the acceptance of the background conditions of international society by an international law which "serenely treat[s] the everyday divisions of wealth and poverty, the background norms for trade in arms and military conflict as part of the global *donnée*."<sup>39</sup> In this interpretation, globalization has exacerbated the problem by

reinforcing the invisibility of background norms and private arrangements and taking important areas of political contestation out of the internationalist's vision at precisely the moment a turn to the market and a disaggregation of the state makes these norms and institutions potentially the most significant sites for international contestation and struggle.<sup>40</sup>

Against the juridification of politics dominant in Western political thinking Kennedy argues for the politicization of law. "The challenge before us [...] is to embrace, to manage this transition without transforming political, economic, or military questions into technical matters which narrow our political options and naturalize inequalities."<sup>41</sup> In his call for politics, Kennedy is interested in material outcomes, not in the processes they come about.

However, beyond the recognition of identity and culture and the turn to economic resources, no political programme is visible, and even less so a process how to bring it about. The celebration of subjectivity and diversity does not lead to new designs how such a politics might be possible. Indeed, it is anything but obvious which outcomes are to be preferred. Kennedy's is a methodological argument eschewing methodological argument:

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36. Koskenniemi, *supra* note 7, at 486 (emphasis in original).

37. D. Kennedy, *Book Review*, 31 Harv. Int'l L. J. 385 (1990).

38. Kennedy, *supra* note 8, at 83.

39. D. Kennedy, *The Nuclear Weapons case*, in L. Boisson de Chazournes & P. Sands (Eds.), *International Law, the International Court of Justice and Nuclear Weapons* 462, at 472 (1999).

40. Kennedy, *supra* note 8, at 132.

41. *Id.*, at 132–133.

Ask not whether we prefer *formal or antiformal* legal structures, *substantive or procedural* legal rules, or how much *discretion* is optimal. Ask how we wish to transform the distribution of power, status and authority in society, and speak about winners and losers, about gains and losses.<sup>42</sup>

To call the desired outcomes “progressive” presupposes a superior knowledge of what is meant by this term. A political space is opened – but its content is as indeterminate as it gets. The question of the lawyer’s legitimacy – democratic or otherwise – is absent.

Again, the critical enterprise is reminiscent of political Realism: It was the New Haven School which looked to the ‘decision-maker’ and asked the lawyer to provide her with a ‘scientific’ analysis about ‘what to do, here and now’<sup>43</sup> and which embraced “the conscious, deliberate use of law as an instrument of policy.”<sup>44</sup> The belief in the ‘scientific’ character of such political counselling may have waned – but the political expectations towards the lawyer remain the same. Her role changes from a rule-applier to a policy-maker. Normativity is projected into the future instead of into the past. The lawyer has been transformed into a social engineer, a mediator between the parties, a manager of conflicts without a script and a method to follow. The emphasis is on critique, not reconstruction. According to Anthony Carty,

[i]t is not the ambition of the critical international lawyer to substitute another pseudo-impartial legal order, but to facilitate the development of the process of inter-state/inter-cultural dialogue and understanding which *may* allow a coming together, however temporary and fragile.<sup>45</sup>

### 2.3. The move to history

Closely related both to the criticism of a traditional reading of international law and a certain desperation concerning the future of the discipline is a move current in ‘critical’ literature: the move to history.<sup>46</sup> The new historical writing rejects a traditional reading of international legal history as a history of progress from anarchy to order, from politics to law. Such a ‘Whig interpretation of international law’ is accused of celebrating the advent of the ‘end of history’ where a liberal international order under

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42. D. Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, Manuscript in the possession of the author.

43. See Koskenniemi, *supra* note 7, at 490.

44. H. Lasswell & M.S. McDougal, *Jurisprudence for a Free Society* xxii (1992).

45. Carty, *supra* note 12, at 67 (emphasis in the original).

46. See, e.g., N. Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 8 *Wisconsin International Law Journal* 51 (1988); D. Kennedy, *The Move to Institutions*, 8 *Cardozo Law Review* 849 (1987); D. Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 *Nordic Journal of International Law* 385 (1996); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002).

international law is successfully established, instead of an understanding of history as an ongoing struggle between incompatible social forces without a clear and unequivocal direction or goal.<sup>47</sup>

But it seems to me that this is not the only reason why historical writing abounds in new approaches-literature. A discipline without a future turns to the past to understand why the international legal project has failed. It turns to the people who apparently did not suffer from the nagging self-doubts of the contemporary discipline. And there is also intellectual curiosity involved: If the project of international law is dismantled, it remains a mystery why so many intelligent people could pursue it. What have been their ideas, their motivation, the reasons of their activity?

There is another strand of historical writing in the New Approaches literature, particularly in TWAIL: Uncovering the colonial and biased origins of modern international law, postmodern criticism has proven its incapability for the solution of contemporary problems beyond repair.<sup>48</sup> However, "tainted origins" can be found for almost any human enterprise. The central question for today is what to do about them, whether those structures can, in spite of their problematic origins, be useful in the contemporary world and may even help to undermine the very results of colonialism and suppression which we find unacceptable.<sup>49</sup>

This does not imply that historical work is unimportant, redundant, uninteresting. Just the opposite. Historical writing informed by a 'critical' perspective has indeed considerably contributed to a better understanding of the 'culture' of international law and the people dealing with it. It has 'situated' international law in historical reality and thereby enhanced our understanding of the relationships between law and culture, law and history, law and society. It has illuminated lasting problems of the transfer

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47. See, e.g., P. Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EJIL 435 (1997); O. Korhonen, *Liberalism and International Law: A Centre Projecting a Periphery*, 65 Nordic Journal of International Law 481 (1996); Marks, *supra* note 10.

48. See, e.g., A. Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 Social & Legal Studies 321 (1986); A. Anghie, *Sovereignty and Colonialism in International Law*, 40 Harv. Int'l L. J. 1, at 5, 8 (1999) ("My argument is that central elements of nineteenth-century international law are reproduced in current approaches to international law and relations"), at 80 ("because sovereignty was shaped by the colonial encounter, its exercise often reproduced the inequalities inherent in that encounter"); see also Gathii, *International Law and Eurocentricity*, *supra* note 27, at 185, arguing that the historical origins and a pluralist present of public international law are contradictory; O.C. Okafor, *After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa*, 41 Harv. Int'l L. J. 503 (2000).

49. For a strong version of this argument, see B. Roth, *Governmental Illegitimacy and Neocolonialism: Response to Review by James Thuo Gathii*, 98 Michigan Law Review 2056, at 2057 (2000):

The danger is that a fantasized radicalism will lead scholars to abandon the defense of the very devices that give the poor and weak a modicum of leverage, when defense of those devices is perhaps the only thing of practical value that scholars are in a position to contribute.

of European concepts to other cultures and civilizations that accentuate the necessity of adjusting international law to the needs of a universalized world.

The lawyer can be committed to guarding the law [...] better when she investigates the cross-influencing relationship of the law, her situation, and the world. Both commitments work against alienation, nihilism, and mystification of justice.<sup>50</sup>

Legal history has shown the contingency of supposedly 'objective' legal standpoints, the personal side behind the 'veil of ignorance' of much of the legal literature. And indeed, as any historian will confirm, history belongs to human culture. Even if it were proven that 'we' cannot and do not 'learn' from it, knowledge of the past is part of the personal aspect of human culture and the formation of human identities.

However, as important as history is for an understanding of ourselves, of international law, and the personal identities of those pursuing it, does history in any way exhaust the current possibilities of practising international law? Is it not sometimes an escape of sorts from the exigencies of our own time? Indeed, if there is to be an international law after the post-modern critique, a contemporary reconstruction is required.

#### 2.4. The turn to subjectivity

From the beginning of the 'critical' project, some authors have put their faith not so much in the pursuit of 'law,' but in the 'lawyer' in her social role. In Koskenniemi's words, his writing aims at "re-establishing the identity of international law by re-establishing that of the international lawyer as a social agent."<sup>51</sup> When the reconstruction of another objective system fails or is not even envisaged, the remaining possibility is a highly personal style in which the person of the lawyer, and not the law, is in the central position. In a recent article, Outi Korhonen has embraced the view that "there may be good reason to re-examine the profession from the lawyer's perspective and thus a 'turn to the lawyer' may be at hand."<sup>52</sup>

Nevertheless, the analysis of the subjectivity of the lawyer, of her embeddedness in culture, history, community, in short, her 'situationality'<sup>53</sup> does not suffice for finding responses to contemporary problems. It is one thing to recognize that legal opinions and decisions are contingent on the concrete situation at hand and the subjective predispositions of the actors, it is quite another to recommend radical subjectivity as recipe for

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50. O. Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* 14 (2000).

51. Koskenniemi, *supra* note 7, at 490.

52. O. Korhonen, *International Lawyer: Towards Conceptualization of the Changing World and Practice*, in J. Drolshammer & M. Pfeifer (Eds.), *The Internationalization of the Practice of Law* 373 (2001).

53. Korhonen, *supra* note 33, at 4–9; Korhonen, *supra* note 50, at 8 *et seq.*

the practice and future of international law. What is the lawyer without the application of 'the law'? In David Kennedy's view, the recognition of subjectivity may lead to "an internationalism based on a global politics of identity, a shifting sand of cultural claims and contestations among constructed and overlapping identities about the distribution of resources and the conditions of social life."<sup>54</sup> The appeal to a general and abstract law valid for all is replaced by identity politics. Indeed, the Kantian insistence on the necessity of general and abstract rules is rejected: "Our Kantian ethics invites us to assume that everyone wishes to be treated like we would like. This is rubbish."<sup>55</sup>

The alternative to historicism and despair consists in the very celebration of subjectivity so despised by traditional doctrine. If the objectivity and neutrality claimed for international law is to be regarded as a myth, the pursuit of individual agendas becomes imperative. The subjectivist becomes an activist, not pushing for the abolition of international law but using it for her 'political' purposes.

#### 2.4.1. *The feminist agenda*

Prominent for this approach to the future of international law is feminist analysis. Just as postmodernists, feminist writers begin with the analysis of the male bias of international law. In the analysis, the substantial bias only hides the formal one from view. In the words of the two leading feminists in international law in their recent manual-style account:

At a deeper level, the very nature of international law has made dealing with the structural disadvantages of sex and gender difficult. The realities of women's lives do not fit easily into the concepts and categories of international law. [...] [I]nternational law is constructed upon particular male assumptions and experiences of life where 'man' is taken to represent the 'human'.<sup>56</sup>

However, the activist is not so much troubled by international inconsistencies or arbitrariness of the law but by its content. For instance, in a critique of *jus cogens*, Hilary Charlesworth and Christine Chinkin argue that:

The very abstract and formal development of the *jus cogens* doctrine indicates its gendered origins. What is more important, however, is that the privileged status of its norms is reserved for a very limited, male centered, category. *Jus cogens* norms reflect a male perspective of what is fundamental to international society that may not be shared by women or supported by women's experience of life.<sup>57</sup>

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54. Kennedy, *supra* note 8, at 133.

55. M. Koskenniemi, *The Police in the Temple. Order, Justice and the UN: A Dialectical View*, 6 EJIL 325, at 343 (1995).

56. H. Charlesworth & C. Chinkin, *The Boundaries of International Law. A Feminist Analysis* 17 (2000).

57. H. Charlesworth & C. Chinkin, *The Gender of Jus Cogens*, 15 Human Rights Quarterly 63, at 67 (1993).

Note that the principled critique of the category of *jus cogens* is supplanted by the critique of the content of *jus cogens*, privileging male against female interests and values. Would a *jus cogens* reflecting women's concerns be more acceptable? It seems so: "[I]f women's lives contributed to the designation of international fundamental values, the category would be transformed in a radical way."<sup>58</sup> For the activist, there is no contradiction between the rejection of the male character of law and its use as an instrument for the realization of a feminist agenda: Law as such is not her concern and law's coherence has no value as such – it is the substance that counts. Thus, feminists criticize the 'crits' for their lack of substantive interests:

This type of critical approach, built on limited explicit substantive commitments, cannot deal adequately with the complex forms of structural disadvantage encountered by women all over the world.<sup>59</sup>

To further the causes of women, various methods are welcome. Substance goes over form:

The silence of international law with respect to women needs to be challenged on every level and different techniques will be appropriate at different levels of the excavation. For this reason we adopt the method described by Maragare Radin as 'situated judgment' – using a variety of analytic strategies rather than a single feminist theory.<sup>60</sup>

But whose subjectivity is the good one? Why choose, say, the Third World over the First, women over men, the human rights activists over the white (or black) supremacist, or even the superpower over the terrorist?

#### 2.4.2. *The use(lessness) of law for overcoming subjectivism*

Martti Koskenniemi has expressly articulated that postmodern theory excludes both imperialism and totalitarianism and such rejects any fundamentalist ideology.<sup>61</sup> However, as Koskenniemi argues, this result is so self-evident that it need not be put into legal language:

It is inherently difficult to accept the notion that states are legally bound not to engage in genocide, for example, only if they have ratified and not formally denounced the 1948 Genocide Convention. Some norms seem so basic, so important, that it is more than artificial to argue that states are legally bound to comply

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58. *Id.*, at 67–68.

59. Charlesworth & Chinkin, *supra* note 56, at 35–36.

60. *Id.*, at 50, citing M. Radin, *The Pragmatist and the Feminist*, 63 Southern Californian Law Review 1699, at 1718–1719 (1990).

61. Koskenniemi, *supra* note 7, at 497: His approach "positively *excludes imperialism and totalitarianism*. Beyond that, however, it makes no pretention to offer principles of the good life which would be valid in a global way." (Emphasis in the original.)

with them simply because there exists an agreement between them to that effect, rather than because, in the words of the International Court of Justice (ICJ), non-compliance would ‘shock [ ] the conscience of mankind’ and be contrary to ‘elementary considerations of humanity.’<sup>62</sup>

In this perspective, it is more difficult to show the bindingness of international law than to arrive at its most basic conclusions. Thus, the international legal enterprise is rendered futile, and international law proves incapable of generating outcomes beyond the expression of banalities. If, however, the neutrality and objectivity of the ‘old’ law is rejected, there seems to be no possibility of bridging the gap between different subjectivisms. If, for instance, the feminist claim of the need for a ‘lived knowing’<sup>63</sup> is correct, according to which one can only understand one’s own personal experiences, how can one find language and rules engaging men (or states) from different backgrounds, experience, and value-systems who are incapable of sharing the ‘lived knowing’ of feminists? Thus, it does not come as a surprise that some Third World feminists criticize Western feminists for their disregard of their culture.<sup>64</sup> “Lived knowing” is necessarily subjective, and different situations of women will produce different and even incompatible “lived knowings.” Charlesworth and Chinkin recognize as much when they reply to the relativist challenge:

If all cultures are seen as special, resting on values that cannot be investigated in a general way, it is difficult to make any assessment from an international perspective of the significance of particular concepts and practices for women.<sup>65</sup>

This is also valid for any other radical subjectivism: Without any claim to inter-subjective and general principles or rules, every subjective evaluation can be countered with the opposite subjective statement.

The legitimate and authoritative decision-making was a virtue that a classic understanding of law claimed for itself. If it cannot be preserved, what sense does it make to insist on – or debate – the legality *vel non* of this or that violation of human rights, this or that instance of the use of force or the commission of this or that war crime? And how can the activist convince the powerful to implement a law that the activist herself does not recognize for herself?

Any lawyer knows the activist tension between substantive commitment

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62. M. Koskenniemi, *The Pull of the Mainstream*, 88 Michigan Law Review 1946–1947 (1990) (footnotes omitted). See also *id.*, at 1952. The citations are from Reservations to the Convention on the Preservation and Punishment of the Crime of Genocide, 1951 ICJ Rep. 23; Corfu Channel, 1949 ICJ Rep. 22. Similarly the German sociologist N. Luhmann, *Das Recht der Gesellschaft* 577 (paperback ed., 1995).

63. C.A. MacKinnon, *Toward a Feminist Theory of the State* 98 (1989).

64. See, e.g., C.I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 Harv. Int’l L. J. 381, at 392–393 (2000).

65. Charlesworth & Chinkin, *supra* note 56, at 224–225.

and legal constraints. In the advocacy mode, we all try to put this or that substantive aim into legal language. But even advocacy only succeeds when it is able to convince others – judges, decision-makers, and the public – of the legal quality of its arguments. Almost every conceivable substantive end will have some legal arguments in its favour – still, some arguments are more convincing than others, and to achieve the purpose of changing the behaviour of others, advocates better speak their language to convince them.<sup>66</sup> For the activists, these constraints leave the choice either to accept the legal framework, or to reject, along with the legal framework, the chance to convince.

Of course, for the activist, the choice of these modes will be rather tactical than strategic. It will depend on the audience and the situation. Before legal and law-making fora, she will argue that law does – or should – meet her concerns. But this does not necessarily force her to renounce the criticism of the legal system as a whole.<sup>67</sup> As Charlesworth and Chinkin put it in the concluding sentences of their feminist international law manual:

[I]nternational law has both regulative and symbolic functions. We should use its regulative aspects where we can to respond to particular harms done to women, and harness its symbolic force to reshape the way women's lives are understood in an international context, thus altering the boundaries of international law.<sup>68</sup>

However, as much as “[a]uthentic commitment” may be a solution for the regain of the individual lawyer’s identity and responsibility after the loss of faith in law,<sup>69</sup> it would not fulfil the promise of law to society and the expectation of society towards the role of the lawyer. Of course, these are also abstractions. It was the very concept of law as a system of rules and principles that the traditional authoritative processes of rule-making conformed to a mode of law-making which was acceptable to the members of the community. The purpose of the law was to give the lawyer a more or less objective system of reference for finding the will of society, and not only her own. Without a law at her disposal, the lawyer becomes a political arbiter without any further legitimacy than her own individual preferences.

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66. See A. D’Amato, *Book Review* (R. Cook (Ed.), *Human rights of Women: National and International Perspectives* (1994)), 89 AJIL 840, at 843 (1995): “As a matter of strategy, a legal scholar interested in women’s rights [...] can better reach out to the unconverted by using their language than by trying to change it.”

67. For a critique of this tactical use of law see D’Amato, *id.*

68. Charlesworth & Chinkin, *supra* note 56, at 337.

69. See Koskenniemi, *supra* note 7, at 488. Cf. Korhonen’s critique of this ethical, noble choice, which hardly conceals its tragedy: Korhonen, *supra* note 33, at 21.

## 2.5. Democratic experimentalism

If it is true that international law is either meaningless to or supportive of power, a tool for the fooling of others into obedience, a gradual, tactical critique will not suffice. If the oppressive character is in the very structure of law, this structure must be transformed in a radical way. The task of critical lawyers would consist in designing a radical transformation of international law to make it the weapon of the oppressed instead of that of the oppressor. There has been considerable effort in the reconstruction of law into a tool for the reconceptualization of society. Thus, Roberto Unger pleads for a “democratic experimentalism” in which legal analysis would thrive in the form of “institutional imagination.”<sup>70</sup> He advocates “the legal imagination and construction of alternative pluralisms: the exploration, programmatic argument or an experimental reform, of one or another sequence of institutional change.”<sup>71</sup> He offers this possibility as an alternative to traditional legal theory which “has a hard time reconciling itself to the idea that democratic politics might be the primary, rather than a subsidiary or ultimate, source of law.”<sup>72</sup> Accordingly, Unger aims at a “practice of legal analysis as institutional imagination,” consisting of *mapping*, that is “the attempt to describe in detail the legally defined institutional microstructure of society in relation to its legally articulated ideals,” and *criticism*. The task conferred on the latter is “to explore the interplay between the detailed institutional arrangements of society as represented in law, and the professed ideals or programs these arrangements frustrate and make real.”<sup>73</sup>

A reconceptualized international law would design future institutional models instead of using past criteria for the evaluation of the present. Lawyers would not any more defer to other authorities to justify their enterprise but would creatively reinvent society and strive so as to find the means to change it accordingly. Accordingly, Unger designs three alternative futures of a free society: extended social democracy, radical polityarchy, and mobilizational democracy.<sup>74</sup>

But, as with the World Order Model Project designed by the left wing of the New Haven Approach,<sup>75</sup> this method has the inherent danger of creating unrealistic utopias which are considered not liberating but rather threatening by the great majority of society. As witnessed after the end of the Cold War, many people seem to have no great stomach for political experiments but are rather longing for security and peace to pursue their

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70. See, e.g., R.M. Unger, *What Should Legal Analysis Become?*, at 23, 129 *et seq.* (1996).

71. *Id.*, at 29.

72. *Id.*, at 77.

73. *Id.*, at 130.

74. *Id.*, at 135 *et seq.*

75. See, e.g., R. Falk, *On Humane Governance: Toward a New Global Politics* (1995); R. Falk, *A Study of Future Worlds* (1975), *but see also* R. Falk, *Casting the Spell: The New Haven School of International Law*, 104 *Yale Law Journal* 1991, at 2003 (1995).

individual fortune – the same values which liberal law claims for itself. “Democratic Experimentalism” carries the danger of social experiments on real human beings without regard to their rights to renounce experiments with themselves. Thus, if legal analysis were to follow Unger’s suggestion to “elect the citizenry as its primary and ultimate interlocutor [and to] imagine its work to be that of informing the conversation in a democracy about its present and alternative futures,”<sup>76</sup> this may well turn out to destroy the project before it has begun.

Indeed, Unger rejects the use of his model for adjudication in words which may also damage his further project if intended as a legal, not a political enterprise:

The ideal of popular self-government usually finds its best judicial defense in the modesty of the standard practice [of adjudication, AP] [...]. The shamefaced Bonapartism of legal elites, claiming to defend the people from their own ignorance, anger, and selfishness, does not have an encouraging record. [...] Moreover, to use any particular case to push history forward may often violate the ideal of human concern as well as the ideal of popular self-government by subordinating the problems of the litigants to the ambitions of a black-robed providence.<sup>77</sup>

Thus, democratic experimentalism needs to strive for the very democratic assent which requires legal procedures in order to produce legitimate outcomes. Of course, in a law such as international law, having not accepted “the ideal of popular self-government” dominant in “Western” societies in its entirety, the possibilities of legal imagination are even more restrained.

But the politicization of international law need not only answer the question of its democratic (or otherwise) legitimacy. By eschewing questions of legitimacy and legality, it falls into the trap of elitism protecting itself from the concerns of those it is intended to serve.

## 2.6. A return to positivism?

At the other extreme, in recent “postmodernist” writing there is an amazing tendency to squash the criticism of the past and to return to strict positivism resisting the perceived (neo-)liberal embrace of globalization and the so-called ‘end of history.’<sup>78</sup> The postmodern preference for the individual, the relative and the subjective, results in an embrace of old-fashioned positivism as the only means against the advance of neoliberalism. Postmodern resistance discovers positivism’s insistence on the value of sovereign equality, on the need to assure the consent of the marginal, and its preference for the public over the private. Positivism’s perceived conservatism and apologism converts from a vice into a virtue. The reliance

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76. Unger, *supra* note 70, at 130.

77. *Id.*, at 117.

78. *See supra* note 9.

on fixed rules with determinate meanings mutates into a heroic resistance to the political and economic power-holders of our time.

Unveiling political Realism's origin in the reliance of the infamous 'crown jurist of the Third Reich,' Carl Schmitt, on the alleged authority of ruthless and lawless dictatorship, Martti Koskenniemi gives a fresh look to the logic of positivism:

Whatever one thinks of lawyers, or of a culture within which the question of 'validity' is a matter of professional concern and not of formalistic fiction, doing away with it has definite social consequences. [...] The deformalization of law into a political or moral instrumentality by the use of general, evaluative clauses [...] transforms it into a means for that power that occupies or has control over the executive. [...] And inasmuch *that* concept [of validity, AP] gets thrown away, nothing is left of law but a servile instrument for power [...].<sup>79</sup>

For a lawyer who has himself co-authored a piece dealing with the lasting relevance of positivism,<sup>80</sup> this is indeed quite convincing. However, did not the project of postmodern theory begin with the demonstration that international law lacks determinacy and rather resulted in a self-deception than in 'objective' law? Koskenniemi seems to admit the tactical quality of this move arguing that "[i]t is time to switch from the critique of formalism to a critique of post-formalism and to show (once again, with our formalist grandfathers) how deformalized law equals a system of bureaucratic rule that we have little reason to seek to make universal."<sup>81</sup>

In *From Apology to Utopia*, the seminal "critical" text on international legal argument, Koskenniemi had denied the possibility of a strict adherence to positive rules:

There is, then, no 'objective' meaning to the linguistic expressions of rules. [...] [C]onventional theories have regarded this as a marginal problem, existing in law's penumbral areas. The analysis here suggests, however, that it affects every disagreement within international law, from the definition of *that* expression to the finding of the sense of contested rules. Far from being marginal, it is the very core of law – the generator of there being a possibility to disagree.<sup>82</sup>

The uneasy combination of normativity and concreteness "provides an argumentative structure which is capable of providing a valid criticism of each substantive position but which itself cannot justify any."<sup>83</sup>

This seems to imply that a positivist, purely interpretative approach to

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79. M. Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, in M. Byers (Ed.), *The Role of Law in International Politics* 17, at 32–33 (2000) (emphasis in original). See also M. Koskenniemi, *Repetition as Reform: Georges Abi-Saab Cours Général de droit international public*, 9 EJIL 405, at 411 (1998); *id.*, *supra* note 46, at 494 *et seq.*

80. See Simma & Paulus, *supra* note 12.

81. Koskenniemi, *Repetition as Reform*, *supra* note 79, at 411.

82. Koskenniemi, *supra* note 7, at 475 (emphasis in original).

83. M. Koskenniemi, *The Politics of International Law*, 1 EJIL 4, at 8–9 (1990).

international law is doomed to failure. That is probably why Koskenniemi emphasized early on the necessity of referring to politics and morality for the justification of any legal interpretation: “[I]t is neither useful nor ultimately possible to work with international law in abstraction from descriptive theories about the character of social life among States and normative views about the principles of justice which should govern international conduct.” And further: “[W]ithout a better grasp of social theory and political principles lawyers will continue to be trapped in the prison-house of irrelevance.”<sup>84</sup>

As a result, the Rule of Law depends on contested political principles and cannot fulfil the promise to establish a ‘neutral,’ ‘objective’ arena for the ‘apolitical’ or ‘technical’ solution of political problems between actors coming from different and even opposite value systems.<sup>85</sup> “[W]hether we think of law as a set of rules or some constellation of behaviour we seem unable to grasp it through a specifically legal method which would not involve a discussion of about [*sic*] contested ideas about the political good.”<sup>86</sup> If we are faithful to the propositions of critical theory, a way back into the age of state consent, sovereignty, and strict positivism seems not to be open to us.

### 3. TOWARDS A REINTERPRETATION OF POSITIVE INTERNATIONAL LAW

We have come, as it seems, full circle. Legal postmodernism had begun by a critique of a positivist and objectivist understanding of international law, only to embrace it by the end as the only means against neoliberal politics. Of course, this brief presentation only refers to a limited number of authors and issues and is far from grasping the wealth of their analysis. Nevertheless, the lack of a new convincing alternative to international law as we know it, on the one hand, and the apparent untenability of traditional doctrine, on the other, provokes the question: what next?

The introduction claimed that, notwithstanding recent developments both in the outside world and in international legal theory, international law may be a positive force in a world grappling with terrorism, religious intolerance, social injustice, numerous violations of human rights and humanitarian law, poverty, AIDS and other incurable diseases. Is the post-modern critique of any help here?

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84. Koskenniemi, *supra* note 7, at XIII, XV.

85. Koskenniemi, *supra* note 83, at 7.

86. Koskenniemi, *supra* note 7, at 477.

### 3.1. The impact of the postmodern critique

There are several possibilities to entertain a critique, or rather meta-critique, of the postmodern enterprise – on the lines taken here or for other reasons. But, of course, there is more to it. Against the poverty of classical positivism, postmodernism has designed a more coloured and diverse picture of international law. It has not only pointed out the *lacunae* and inconsistencies of international law rendering futile any claim to indisputable results of legal analysis. It has also drawn attention to the inherent biases of a law developed by European colonial powers, a law that begins with presuppositions which might not fit to other regions and cultures in the world, especially regarding the requirements for legal subjectivity, *e.g.*, territorially defined statehood.<sup>87</sup> And the primacy of inter-state applicability of classical international law is endangered by the decline of the state, especially regarding economic policy, and new threats from non-state actors, especially terrorism and global crime.

But, as we have also seen, the further the critique ventured into reconstruction, it proved incapable of preserving – or establishing – a distinct space for legal analysis, either diverting into politics and subjectivity or returning into a disillusioned, ultimately despairing positivism. Thus, the critique must face its consequences. Taken to its radical end, the deconstruction of international law as a distinct discipline leads to politics without legal bounds, a society subjected to the unfettered, unabashed, unashamed exercise of power. The lack of public control – even worse, the widespread lack of a public that could exercise control – of the forces of globalization demonstrates the inherent dangers of this deconstruction.<sup>88</sup> In the same vein, despair would render impossible both the adaptation of established law towards changed circumstances and the introduction of legal limits against new, especially economic actors, let alone the control of the use of force by states and non-state entities.

### 3.2. Underlying assumptions of international law and their critique

This may require both a return to the foundations of law and their adaptation to a changing international environment. The following are some provisional reflections on this question – tentative, undeveloped, incomplete. The main argument is that, for all its shortcomings, the establishment of an international, if not global, law may be one of our best hopes

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87. See, *e.g.*, Okafor, *supra* note 48.

88. Cf. Kratochwil, *supra* note 3.

for preventing that the “new medievalism”<sup>89</sup> will turn into a medieval apocalypse with modern means – that is, a fight of different authorities, and, even worse, a “clash of civilizations” with incompatible religions and belief systems that are unable to entertain a dialogue or to find common solutions for cross-civilizational problems. Coupled with the means of modern technology, this would be a recipe for disaster – of which the attacks against New York and Washington with their devastating consequences would be a rather modest precursor.

What were, then, the underlying conceptions of international law? For a classic, mainly state-positivist account, sovereigns would agree to limits of their freedom, would even become members of a world-wide legal community<sup>90</sup> to be able to exercise their freedom in peace from each other and for dealing with common problems. There are several presuppositions that view needs to make:

- (1) States are the main relevant global actors, which may legitimately make the rules for all;
- (2) States are free to consent to new rules and principles but these rules are binding on them, as does custom accompanied by a conviction of its legal force;
- (3) States’ interest in the existence of a global rule-system as a whole is greater than that in the realization of immediate interests which would violate the rules of the system;
- (4) Rules and principles of an abstract and general character provide a useful guideline for concrete political action;
- (5) A consistent interpretation and application of those rules and principles is feasible so that every sovereign state is subject to the same rules it freely consented to;
- (6) Third parties of a political (UN) and of a legal character (ICJ, etc.) are capable of “applying” those rules and principles to the outside world and can thereby contribute to the solution of concrete problems;
- (7) The rules and principles valid between existing states are also fair enough for new states, because their problems are basically identical so that the balance of interests would be the same for them as for their brethren.

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89. The first one to use that term was, as far as I can see, H. Bull, *The Anarchical Society: A Study of Order in World Politics* 254–255 (1977), but rather as an alternative future than as a description of the present. For more recent treatments see J. Friedrichs, *The Meaning of New Medievalism*, 7 *European Journal of International Relations* 475 (2001); A. Linklater, *The Transformation of Political Community* 193–198 (1998); A. Minc, *Le Nouveau Moyen Age* (1993); A.G. McGrew, *A Global Society?*, in S. Hall, D. Held & A. McGrew (Eds.), *Modernity and Its Futures* 96 (1992). Cf. already W. Friedmann, *The Changing Structure of International Law* 88, 119 (1964), rejecting the analogy.

90. Cf. T. Franck, *The Power of Legitimacy Among Nations* 39 (1990). Franck’s is of course a much more sophisticated approach than the paraphrase used here.

Again, this list is not exhaustive. However, it is apparent that postmodern international law has attacked several of those propositions. For many new approaches writers, those seven points may roughly be critiqued in the following way:

- (1) States are mere abstractions, not like real people in domestic law, new actors are emerging, and the very concept of a state does not fit to a lot of situations of the Third, but even the First World (*see, e.g.,* minority problems);
- (2) The bindingness of rules and principles agreed upon is non-consensual and therefore incompatible with (absolute) sovereignty;
- (3) States will rather try to bend the rules, preferring the realization of their immediate interests and hoping that they can change or interpret international law in a way that does not constrain them, all this being even more so in case of powerful states, especially nuclear powers;
- (4) Abstract and general rules and principles cannot capture the diversity of social and human life;
- (5) Interpretation is always contested or contestable in those cases which are most important (use of force) or most difficult to decide (hard cases);
- (6) Even if there was a third party as neutral or disinterested as possible, it could not apply the abstract principles to the concrete world because there are always conflicting interpretations that depend on incompatible political and social presuppositions and the subjective views of the interpreter; and
- (7) Not only did the allegedly neutral rules and principles of international law rely on constructs which did not fit to the situation in the Third World, they were also substantively tilted towards the rich industrial (ex-)colonisers and towards men.

No doubt, those and other criticisms presented earlier are – if only to a certain extent – valid, especially since international law has become applicable universally, to different religions, cultures, civilizations. Nevertheless, one may ask, are they really so difficult to accept? Let us regard some examples: the non-consensual character of the bindingness of promises amounts to little more than a recognition of a basic community expectation which is a precondition for human relations. And even if interpretation can never be fully determinate, the very possibility of dialogue between members of different tribes, countries, religions, cultures shows that the range of interpretations in concrete situations are not infinite – there is not only grey, but also black and white.<sup>91</sup> And although international law was tailored to the needs of the European colonial powers and may often bolster powerful states, these very features render it a useful

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91. *Cf.* Weiler & Paulus, *supra* note 12, at 554.

tool for Third World countries to claim equal respect for their sovereignty.<sup>92</sup> In addition, powerful states need not legal protection as much as the poor who have not the means to defend their interests by coercion of others by economic or military means.

Concerning the first proposition, namely that a change in the political structure of international society requires a change of the foundations of the law, this may well be the case. But is the emergence of new powerful actors a reason to abandon legal constraints on existing powers? Or is it not an argument for applying these very underlying principles also to new actors, that is, holding them accountable at least to those standards, principles, and rules they have accepted themselves voluntarily or which they have relied on implicitly by acting on them (custom)? Going back to the World Trade Center attacks with civilian aircraft by terrorists: If self-defence was considered a “natural” or “inherent” right against an armed attack from a state, is it not plausible to allow self-defence also against attacks from terrorists which are comparable in scope and impact? And is it not as plausible to require the observance of the very same limits to those acts of self-defence as in the case of an inter-state attack? Of course, this leaves a lot of issues undecided and subject to debate. But this demonstrates that even in cases where the changing nature of international society renders old concepts questionable, they are still able to both circumscribe and limit international action – and that is what law, especially international law, was about in the first place.

This also means that there are limits to a value-free approach. Even a ‘minimum program’ of international law, the recognition of the traditional sources of custom, treaties, and general principles of law (ICJ Statute, Article 38), requires the recognition that a state member of the international community is bound by either formal expressions of consent – treaties – or by standard behaviour if generally regarded as law – custom, and that those acts must be interpreted according to principles generally recognized in legal orders – “general principles of law.” And an emerging consensus on certain substantive norms such as human rights, humanitarian norms even in times of war, self-determination, and the prohibitions on the use of force and terrorism, to name only a few, limits the range of permissible behaviour.<sup>93</sup> Thus, contemporary international law cannot

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92. See Roth, *supra* note 49 and accompanying text.

93. For accounts of these values see T. Franck, *Fairness in International Law and Institutions* (1995); L. Henkin, *International Law: Politics and Values* 100 *et seq.* (1995); Paulus, *supra* note 12, at 250 *et seq.*; B. Simma, *From Bilateralism to Community Interest in International Law*, 250(VI) RdC 217, at 235 *et seq.* (1994). For scholarship regarding different value systems and human rights, see, e.g., A.A. An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 *Harvard Human Rights Journal* 13 (1990); Y. Ghai, *Human Rights and Governance: The Asia Debate*, 15 *Australian Yearbook of International Law* 1 (1994); O. Yasuaki, *Towards an Intercivilizational Approach to Human Rights*, 7 *Asian Yearbook of International Law* 21 (1998). Cf. also the “elementary considerations of humanity” counted among the principles of international law by the International Court of Justice, *supra* note 62.

claim any more to be value-free, even if the precise meaning and consequences of those values have to be determined in each and every single case and might not be found at all in hard cases. Of course, this does not mean that anything close to a universally recognized set of ethics exist. It is one of the advantages of law that it does not strive to reach full 'deep' agreements on underlying cultural, religious, or ideological factors, but that it is content with a 'political' consensus, that is, a 'second-best' (or rather 'least-worst') consensus on some minimum procedural and substantive rules which allow for the emergence of minimum order. This is probably best captured by John Rawls's notion of the "overlapping consensus" that does not strive for ultimate reasons and complete solutions but allows the peaceful ordering of society.<sup>94</sup>

Still, we might wish to go beyond that minimum – to strive for more social justice, sustainable development, gender equality, protection of minorities, and so forth. Many critiques are thus directed not against international law as such, but against the substantive insufficiency of the consensus. This is the case, for instance, in some of the critiques of the public/private-distinctions. Fair enough. But if we do not want to impose these values on others, we will have to find their agreement, and this requires translation of those critiques into positive law or practice. Others are critical of the imperfect implementation of international legal norms and the bias towards the powerful. But this is a call for the equal implementation of the law, not against law as such. The law is often a compromise between power and protection of the weak. But the more the strong has agreed to limits of its power, the more the weak can invoke the law. Thus, more international law is likely to benefit the weaker states as much or more than the powerful.

Therefore, even if the foundational assumptions of international law are debatable, especially in the margins or in extreme cases, they are everything but heroic in the normal course of events. Thus, they may indeed contribute to find some minimum rules of behaviour which may enable a globalized world of different actors to find minimum rules for decision-making applicable across cultures, religions, and genders.

#### **4. CONCLUSION: POSTMODERNISM OF THE FUTURE OF INTERNATIONAL LAW**

Nevertheless, the postmodern insistence on the lack of neutrality and objectivity of international legal rules and principles and their dependence on

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94. J. Rawls, *Political Liberalism* 133 (1996). For attempts of transferral to international and human rights law, see A.A. An-Na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, in R.J. Cook (Ed.), *Human Rights of Women: National and International Perspectives* 167, at 173 (1994); Franck, *supra* note 93, at 14; Paulus, *supra* note 12, at 157–159, 250 *et seq.*

underlying rationales of power, gender, race, history, culture, identity, sharpens our minds to the diversity international law needs to respond to. The embrace of diversity need not end in dissolution of international law, but may enrich its contribution to international society. Minimum rules are not the end of inter-cultural debate but its beginning. In the end, subjectivism and objectivism have both a legitimate part in legal thinking. As Outi Korhonen has observed:

Subjectivism would have it that [...] interpretations are always relative. Objectivism maintains that outside standards enable [legal practitioners and scholars] to find incontestable interpretations. Both views are inconclusive. [...] In order not to let the indeterminate and determinate influences confuse his thinking, the international law practitioner should become conscious of them. They constitute both the potentialities and the limitations of his situation.<sup>95</sup>

International law, as any system based on the belief in the rule of law, has a close relationship to the liberal project. To quote once more Martti Koskenniemi, “if one tries to engage in the sort of debate about international legality which international lawyers undertake, then one is bound to accept an international legal liberalism. Self-determination, independence, consent and, most notably, the idea of the Rule of Law, are all liberal themes.”<sup>96</sup> Indeed, one can understand the postmodern project not as anti- but, in Roberto Unger’s terms, a super-liberalism, as the radicalization of the liberal enterprise of questioning the conventional wisdom, of permanently unveiling the myths of human thinking:

It pushes the liberal premises about state and society, about freedom from dependence and governance of social relations by the will, to the point at which they merge into a large ambition: the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and put other rules and other constructs in their place.<sup>97</sup>

The point is, however, not to be ashamed of those underlying choices but to make them in the open, to open them up for critique and rebuttal. In the words of John Tasioulas, “by making explicit, and reflectively articulating, the genuine reasons on which decisions are based [...] self-consciously value-based adjudication can enhance, rather than corrode, the

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95. Korhonen, *supra* note 33, at 4–5. Cf. also Roberto Unger’s criticism of indeterminacy: “The thesis of radical indeterminacy turns out to be in large part a metaphor for something else: a planned campaign of social and cultural criticism. The trouble is that it does nothing to equip us for this campaign or to illuminate its aims. It is a dead-end. It tempts the radical indeterminist into an intellectual desert, and abandons him there alone, disoriented, disarmed, and, at last, corrupted – by powerlessness.” Unger, *supra* note 70, at 121.

96. Koskenniemi, *supra* note 7, at XVI–XVII.

97. R.M. Unger, *The Critical Legal Studies Movement* 41 (1986).

realization of the rule of law.”<sup>98</sup> If the lawyer stops to pretend that the outcome of her analysis is the result of a purely objective analysis, if she admits and demonstrates the element of (conscious) choice and individual commitment, the legal enterprise wins much credibility and loses little of its normativity, understood not as a simple conformity of life to general rules but as the quest for public accountability of the exercise of all sorts of power over human beings.

Reality of human society is too rich and concrete to be captured by rules and principles of a general nature. But this is nothing new, and certainly not specific to law. In the words of the philosopher Charles Taylor, “uncertainty is an uneradicable part of our epistemological predicament.”<sup>99</sup> The ‘hermeneutical circle’ cannot be broken.<sup>100</sup> However, the lack of complete certainty does not amount to complete uncertainty. The “either – or” dichotomy may be inherent to the legal enterprise, claiming that this or that behaviour is either legal or illegal, but it is unsuited for the extra-legal argument about the (non)sense of international law. Koskeniemi seems to acknowledge as much when he argues that

the lawyers’ expectations of certainty should be downgraded and that they – as well and [*sic*] States and statesmen – must take seriously the moral-political choices they are faced with even when arguing ‘within the law’ and accept the consequence that in some relevant [*sic*] the choices are theirs and that they therefore should be responsible for them.<sup>101</sup>

What follows is a plea for the broadening of legal discourse “by extending the range of permissible argumentative styles.”<sup>102</sup>

Nevertheless, legal answers are supposed to refer to standards, rules, and principles established by some kind of generally recognized formal procedure. If lawyers did not use those standards, that would result in arbitrariness and, ultimately, in the solipsism of the lawyer incapable of providing reasons acceptable to others, especially those holding positions of power. To quote an observer from political science, norms do not determine outcomes but provide, in Friedrich Kratochwil’s terms, “reasons for action,” and exclude idiosyncratic political choices exercising thereby ‘some form of governance.’<sup>103</sup> But that leaves a lot of space to the imagination and creativity of the individual lawyer how to best apply these standards, rules, and principles to the diversity and richness of life. In legal analysis self-conscious of its limits, those individual value judgments are

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98. J. Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 *Oxford Journal of Legal Studies* 85, at 104–405 (1996), referring to K. Llewellyn, *The Common Law Tradition* 35–45 (1960).

99. Ch. Taylor, *Philosophy and the Human Sciences*, 2 *Philosophical Papers* 18, 21, 52–57 (1985); see also Koskeniemi, *supra* note 7, at 478.

100. See H.-G. Gadamer, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik*, 6th ed., 270 *et seq.*, 296 *et seq.* (1990).

101. Koskeniemi, *supra* note 7, at 479.

102. *Id.*, at 485.

103. F. Kratochwil, *How Do Norms Matter?*, in Byers, *supra* note 79, 35–68, at 53.

not exercised in the closet but in the open. That includes an effort to break out of the traditional bounds of international law to the public sphere towards an inclusion of private actors such as non-governmental organizations, and towards accepting and even embracing cultural diversity.<sup>104</sup>

The application of legal rules and principles to the reality of human society is not an exercise in legal mathematics, and there is – as even sometimes in mathematics – more than one single right answer – or all too often, there may be none at all. Still, the legal hope to control the exercise of power by some minimum rules of behaviour in accordance with norms generated and recognized by the community is as necessary as ever. Legal analysis cannot simply be substituted by the lawyer's individual value judgment. It may be the task of a rejuvenated jurisprudence to seek to clarify where the – relative – constraint of norms ends and where the subjective response of the lawyer to the situation at hand begins. To open up 'legal science' for debate and contestation, without neglect to the constraints of the rules and principles agreed to by international society, may be the challenge of this method. Thus, a certain "middle-of-the-road"-approach steering a course between normativity and contextuality seems unavoidable, even at the price of indeterminacy.<sup>105</sup> In their permanent search for the space between consent and justice, sovereignty and community, apology and utopia, international lawyers should both use the potentiality and accept the limits of their task. Only then they may become able to fulfil their share of responsibility in building a way for what we have got used to call, maybe prematurely, an international community.<sup>106</sup>

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104. Cf. Kennedy, *supra* note 8, at 131 and 133:

[W]e need an international [*sic*] which is open to a politics of identity, to struggles over affiliation and a shifting embrace of the conflicting and intersecting patterns of identity asserting themselves in the newly opened international regime. [...] Perhaps we will develop an internationalism based on a global politics of identity, a shifting sand of cultural claims and contestations among constructed and overlapping identities about the distribution of resources and the conditions of social life.

105. Cf. R. Falk, *The Interplay of Westphalia and Charter Conceptions of the International Legal Order*, in R. Falk & C.E. Black (Eds.), *The Future of the International Legal Order*, Vol. 1, 32, at 34–35 (1969): "We seek here an intermediate position [between legalism and realism], one that maintains the distinctiveness of legal order while managing to be responsive to the extralegal setting of politics, history, and morality"; Simma & Paulus, *supra* note 12, at 307–308; Paulus, *supra* note 12, at 215. *But see* Koskeniemi, *supra* note 83, at 12, arguing against such eclecticism:

There is no space between the four positions, rule approach, policy approach, scepticism and idealism. Middle-of-the-road doctrines may seem credible only insofar as their arguments, doctrines or norms are not contested. But as soon as disagreement emerges, such doctrines, too, must defend their positions either by showing their autonomous binding force, or by demonstrating their close relationship with what states actually do. At this point, they become vulnerable to the charge of being either utopian or apologist. The result is a curiously incoherent doctrinal structure in which each position is *ad hoc* and therefore survives only.

106. On the term 'international community' in international law cf. Simma, *supra* note 93, at 243–248; Paulus, *supra* note 12, with ample references; C. Tomuschat, *Obligations Arising for States without or against Their Will*, 241(IV) RdC 195, at 216 *et seq.* (1993).