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A VIEW OF DELFT: SOME THOUGHTS ABOUT THINKING ABOUT INTERNATIONAL LAW

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Legal theory is always more or less closely connected with philosophical thinking, political conditions, and ideological currents. As these factors were vastly different in England, Germany and France during the nineteenth century, so legal theory took different directions in these three countries.

Karl Olivecrona, *Law as Fact*
(1971), p 27

[T]heories of law . . . are one of the principal causes of low morale among students of international law.

Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations* (1995), p 22

SUMMARY

International law does not exist in an intellectual vacuum. Our understanding of the nature of international law—of what it is and what it can and should do—is ultimately dependent on theoretical assumptions and presuppositions. These can be latent and unexamined, in which case they are likely to foster only an acritical complacency. As all law has a political dimension, because law attempts to provide authoritative models of how people should behave, it is not surprising that theoretical models of international law encode specific views of the world and of relations between States. These assumptions and presuppositions influence the analysis of substantive issues, thus active engagement with theory is a matter which should neither be ignored nor be simply left behind in the academy.

Thinking can be dangerous, much more dangerous than the pseudo-danger envisaged in Professor Brownlie's fatuous assertion that 'there is no doubt room for a whole treatise on the harm caused to the business of legal investigation by theory' (Brownlie, 1983, p 627).¹ Examples of the dangers of thinking are not hard to find. For example, during the Cold War,

¹ For Brownlie's antipathy to theory, see further Brownlie, 1981, pp 5–8, and Brownlie, 1995, pp 22ff.

there was a tendency for some Eastern European analytical legal theorists to focus on logic and formal modes of reasoning (see, eg Wróblewski, 1974). One supposes that at least partly the decision to do so was rooted in prudence because evaluative substantive or policy analysis could be personally, professionally, and politically dangerous.

Brownlie's assertion simply begs the question. How can one know what there is 'legal' to investigate unless one subscribes to some abstract conception of law? That is a matter for legal theory. It need not provide a watertight definition of what law is and what it is about, but it should at least give basic criteria which enable the identification of what counts as 'legal investigation' in the first place. Further, a disavowal of theory can also denote an unthinking and essentially conservative commitment to a hidden or latent theory that rests content with the status quo and seeks neither to question nor justify either the substance or practice of international law (Warbrick, 1991, pp 69–70).² This disinterest simply amounts to a complacent refusal to think about what one is doing, and constitutes an intellectual self-censorship which suppresses analysis and critical evaluation.

If being 'dangerous' takes things too far, thinking should at least be a 'challenge'. How do we know that our beliefs have value unless we examine them and, in particular, their underlying assumptions? These assumptions, these preconceptions, often colour our understanding of the content of international law. As Professor Koskenniemi has observed, a characteristic of contemporary international legal practice is specialization, where discrete sets of substantive issues are packaged into categories such as trade law or environmental law or human rights law and so on. These specializations 'cater for special audiences with special interests and special ethos'. Each contains structural biases in the form of dominant expectations about the values, actors and solutions appropriate to that specialization, which thus affect practical outcomes. The actors in these different fields conceptualize issues in ways which pull upon these preconceptions to reach solutions which are thought suitable for the specialization (Koskenniemi, 2009a and 2009b: see also Beckett, 2009, and Scobbie, 2009). For example, in discussing the relationship between the law of armed conflict and human rights, Professor Garraway underlines the importance of the analyst's own perspective and presuppositions:

For human rights lawyers, human rights principles are those that provide the greatest protection to all by introducing a high threshold for any use of force and even if that threshold is crossed, a graduated use of force thereafter. On the other hand, international humanitarian lawyers see this as idealistic and impracticable. As they see it, it would become almost impossible to conduct hostilities legally to which many human rights lawyers would reply that that would be no bad thing! The difficulty is that such an attitude will not abolish armed conflict. (Garraway, 2010, p 509)

Similarly, Professor Kretzmer points out that the doctrine of proportionality employed by the law of armed conflict differs from that employed by human rights law. Proportionality in the law of armed conflict concerns collateral damage, and thus permits civilian death and injury, an advance calculation which is an anathema to human rights law. He observes that Additional Protocol II, which regulates non-international armed conflict, makes no reference to proportionality, but that the International Committee of the Red Cross' customary international law study claims it is a principle which applies in this type of conflict (see Henckaerts and Doswald-Beck 2005, Vol I, pp 46–50). Kretzmer comments that this appears to assume that in an internal armed conflict proportionality protects potential victims, but its introduction

² See also Warbrick, 2000, p 621 *passim*, but especially at pp 633–6; and Lasswell and McDougal, 1943, p 207. This was their first co-authored work, and is reprinted as an appendix in Lasswell and McDougal, 1992, vol II at p 1265.

could instead weaken the protection they might otherwise enjoy under a human rights regime because the armed conflict test of proportionality entrenches as a legitimate expectation that civilians may be killed and injured (see Kretzmer, 2009, pp 17–22).

These examples underline a point made, amongst others, by Professors Allott and Koskeniemi, that as lawyers we must be conscious of what we are doing and why we are doing it and, above all, take responsibility for our arguments. We therefore owe it to ourselves to examine the assumptions and biases we bring with us to our work. As Gertrude Stein cautions, 'If you do write as you have heard it said then you have to change it' (Stein, 1936 (1998a), p 411). Don't worry about Gertrude: she will pop up again later. She often does.

I. THE PROLOGUE—THE VIEW FROM DELPHI

Probably the most widely-known fact about the ancient Greek philosopher Socrates, one of the founders of Western philosophy, is the manner of his death. He was condemned to commit suicide, by drinking hemlock, after being tried in Athens for impiety and corrupting youth. In the *Apology*, Plato's account of Socrates' own defence speech at his trial, Socrates recounts that one of his friends had once asked the oracle at Delphi if there was anyone wiser than Socrates, and the priestess replied that no-one was (see Plato, 1969, p 49). This was perhaps not the best way for the accused in a capital trial, essentially accused of thought crimes, to ingratiate himself with his jury. Nor, given the nature of the charges against him, was his assertion that he could not abandon philosophy as:

to let no day pass without discussing goodness and all the other subjects about which you hear me talking and examining both myself and others is really the very best thing a man can do, and that life without this sort of examination is not worth living. (Plato, 1969, pp 71–2)

Socrates was as rashly audacious when, having been found guilty, the prosecutor proposed that he be sentenced to death. Socrates suggested an alternative 'penalty'. Because he had shunned material gain in order to devote himself to persuading Athenians to think of their moral well-being, he thought that Athens should not punish but rather reward him by paying for his upkeep (see Plato, 1969, pp 69–70). Perhaps, given the political context of his trial, he knew he was as good as dead (see, eg Hughes, 2010, pp 318–25; Waterfield, 2009, pp 173–90).

Pre-Socratic texts are few and fragmentary (see, eg Gagarin and Woodruff, 1995, and Waterfield, 2000) and no writings by Socrates survive, if indeed there ever were any in the first place. All we know or think we know about what Socrates thought and argued comes from secondary sources, from philosophers such as Plato and Xenophon, and from satirists like Aristophanes. As a result, some contemporary Socratic experts, such as Vlastos, argue that it is unclear what precise ideas should be ascribed to him (Vlastos, 1994).

In *Phaedrus*, Plato places in Socrates' mouth a discussion of the desirability of writing (see Plato, 2002, 264a–b). He tells the fable of the Egyptian god Theuth who invented writing, and showed it to his fellow-god Thamus who asked him to explain what benefits it would bring. Theuth replied that it would increase the intelligence of Egyptians and improve their memories. Thamus dismissed this justification, arguing that Theuth was committed to writing because he had invented it, and that this commitment had blinded him to its true effect. It would shrivel people's memories. Their trust in the written word would make them remember things 'by relying on marks made by others' rather than

on their own mental resources. Writing would simply be a mechanism for jogging the memory, and thus only furnish the appearance of, but not real, intelligence:

Because your students will be widely read, though without any contact with a teacher, they will seem to be men of wide knowledge, when they will usually be ignorant. And this spurious appearance of intelligence will make them difficult company. (Page number to add)

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Thus Socrates argued that anyone who thinks he can help a branch of knowledge to survive by reducing it to writing, or thinks 'that writing will give him something clear and reliable', is wrong:

there's something odd about writing... which makes it exactly like painting. The offspring of painting stand there as if alive, but if you ask them a question they maintain an aloof silence. It's the same with written words: you might think they were speaking as if they had some intelligence, but if you want an explanation of any of the things they're saying and ask them about it, they just go on and on for ever giving the same single piece of information. (page number to add)

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There is an apparent paradox in criticizing the utility of written argument in the course of a written argument (see Waterfield's introduction to Plato, 2002, at pp xxxvii–xlii), but key to Socratic philosophical method is the technique known as *elenchus*, which is a search for truth using dialectic argument. Roughly this is a form of cross-examination where Socrates' interlocutor makes a claim which Socrates thinks is false and aims to disprove. To do so, Socrates secures agreement to an additional proposition or propositions which he then uses as the basis for further argument which aims at reaching a conclusion which his interlocutor will agree refutes or is incompatible with his initial claim. Accordingly, the optimum method of searching for the truth is by discussion in which claims and counter-claims may be tested and challenged. As Waterfield notes (Plato, 2002, p xxxix), Plato might have thought that the discursive nature of his dialogues should engage the reader in the conversation, which in any case was more concerned with provoking questions than providing answers.

The provocative nature of Socratic method is underlined in the *Apology*. Anytus, one of the prosecutors, had argued that Socrates must be condemned to death because, if not, Athenian youths 'would all immediately become utterly demoralised by putting the teaching of Socrates into practice' (Plato, 1969, p 61). The youths would be demoralized because the aim of Socrates' technique of *elenchus* was to leave his interlocutor in a state of *aporia*, an intellectual impasse which demonstrated to the interlocutor that he could not be sure that he really knew anything about the topic under discussion. To counter Anytus's censure, Socrates employed, again somewhat immodestly, what is sometimes known as the 'gadfly analogy':

[If] you put me to death, you will harm yourselves more than me... If you put me to death, you will not easily find anyone to take my place... God has specially appointed me to this city, as though it were a large thoroughbred horse which because of its great size is inclined to be lazy and needs the stimulation of some stinging fly. It seems to me that God has attached me to this city to perform the office of such a fly; and all day long I never cease to settle here, there, and everywhere, rousing, persuading, reproving every one of you. You will not easily find another like me, gentlemen, and if you take my advice you will spare my life. (Plato, 1969, pp 62–3)

The gentlemen comprising the Athenian jury did not agree, and sentenced Socrates to death for impiety and corruption of youth.

This latter charge did not concern sexual impropriety. At that time, among some Athenians, sexual relations between adolescents and older men were socially acceptable. The idea was that the older man would act as a mentor to the younger, take him under his wing to show him how to be a proper Athenian citizen, and perhaps also take him to bed—although these relationships were not widespread but restricted essentially to the upper classes (see, eg Waterfield, 2009, pp 55–7). Some Victorian philosophers tried to cover this up. For example, in his introduction to *Phaedras*, which considers amongst other things the nature of love, Jowett counsels:

In this, as in his other discussions about love, what Plato says of the loves of men must be transferred to the loves of women before we can attach any serious meaning to his words. Had he lived in our times he would have made the transposition himself. But seeing in his own age the impossibility of woman being the intellectual helpmate or friend of man . . . seeing that, even as to personal beauty, her place was taken by young mankind instead of womankind, he tries to work out the problem of love without regard to the distinctions of nature (Plato, 1892, p 406).

The charge levied against Socrates that he had corrupted youth concerned, in particular, a young man named Alcibiades. In *Protagoras*, Plato has an unknown friend of Socrates exclaim:

Hello, Socrates; what have you been doing? No need to ask; you've been chasing around after that handsome young fellow Alcibiades. Certainly when I saw him just recently he struck me as still a fine-looking man, but a man all the same, Socrates (just between ourselves), with his beard already coming. (Plato, 1996, p 3)

It was apparently an intimate relationship and, according to Plato's *Symposium*, they did sleep together. Alcibiades knew, or hoped he knew, what to expect, but these expectations were dashed. Plato has Alcibiades complain that when he and Socrates went to bed 'for all the naughtiness that we'd got up to, I might as well have been sleeping with my father or an elder brother' (Plato, 1994, p 66). Nothing physical took place. Alcibiades' hopes for sexual love were in vain.

This friendship was, nonetheless, one of the reasons why Socrates was sentenced to death as Alcibiades held less than democratic political ideas in the relentlessly democratic Athens of the fifth century BCE. Rather than be a true mentor and teach Alcibiades how to be a proper Athenian citizen, committed to its rather muscular and aggressive form of democracy, Socrates was thought to have corrupted him by encouraging him to challenge the established order and to favour oligarchy. This was the antithesis of Athenian democracy, and was associated with Athens' political rival, Sparta. Socrates, in one way or another, had corrupted young Athenian men because he encouraged them to question the ways and ideals of their fathers (see, eg Waterfield, 2009, especially Ch 11, and Hughes, 2010).

In this light, Professor Brownlie appears to be a modern Anytus who fears that law students and lawyers might be demoralized by being encouraged to think about the nature of law, and to think for themselves. Perhaps we should reformulate his criticism of legal theory to affirm that there is room for a whole treatise on the harm caused to the business of philosophical investigation by political repression. There are times when thinking, and encouraging thinking, can be dangerous, and which sometimes can be fatal. A more recent example than Socrates is that of Evgeny Pashukanis (1891–1937), the Soviet author of *The General Theory of Law and Marxism* (1924). He was denounced

as an ‘enemy of the people’ and as a ‘Trotskyist saboteur’ in 1937 and executed without trial. Pashukanis’ view that the State would gradually wither away under communism was incompatible with Stalin’s claim that socialism had by then been achieved in the Soviet Union (see, eg Bowring, 2008, 146–58, and Head, 2004). Quite simply, the political context may be toxic to a robust and independent evaluation of law’s nature, proper aims, and substantive content.

II. LAW, POLITICS, AND INSTRUMENTALISM

It is beyond doubt that the content and conceptions of law, whether international or domestic, bear some relationship to the wider contemporary socio-political context. All law has a political dimension as it aims to provide authoritative models of how those subject to it should behave. Often an issue emerges that is perceived to require regulation, and the contours of its legal analysis are determined by recourse to broadly political values. An early example in international law is Francisco de Vitoria’s (c.1483–1546) *De Indis (On the American Indians)* (1537) which applied scholastic natural law reasoning to undermine the legitimacy of Spanish claims to sovereignty over its American possessions:

Vitoria’s writings on power and the rights of conquest effectively set the agenda for most subsequent discussions on those subjects in Catholic Europe until the late seventeenth century... [A]lthough it is clearly false to speak of Vitoria as the father of anything so generalized and modern as ‘International Law’, it is the case that his writings became an integral part of later attempts to introduce some regulative principle into international relations. (Vitoria, 1991, p xxviii; *De Indis* is at p 231; see also Brett, 2012, and Tuck, 1999, pp 72–5)

Law and legal theory do not exist in a value-free vacuum but are inevitably concerned with political concerns and conditions,³ and law inevitably favours some values and interests while ignoring or prejudicing others. In the case of international law, the privileged entities are principally States. Since at least the time of the Peace of Westphalia,⁴ global organization been characterized by the primacy of States as the principal actors on its political stage, making international law in pursuit of their own interests and policies. As Professor Craven has noted:

notions of State and sovereignty [are] the key architectural features of international relations, whose existence from the Peace of Westphalia onwards is taken to be both ‘given’ and historically ‘constant’. (Craven, 2012, p 864)

Although, in recent years, international legal theory has started to examine the implications of globalization, global governance, and the constitutionalization of the international legal order (see, for instance, works as diverse as Allott, 2002, Berman, 2005, Dunhoff and Trachtman, 2009, Klabbers, Peters and Ulfstein, 2009, and Slaughter, 2004), the focus of

³ For instance, for an overview of the political context of the development of jurisprudential ideas, see Olivecrona, 1971, Ch 1; and also Tuck, 1999.

⁴ This was constituted by the Peace of Münster (Treaty of Peace between Spain and the Netherlands, signed 30 January 1648: (1648) 1 CTS 1), the Treaty of Münster (Treaty of Peace between the Holy Roman Empire and France, signed 24 October 1648: (1648) 1 CTS 271), and the Treaty of Osnabrück (Treaty of Peace between the Holy Roman Empire and Sweden, signed 24 October 1648: (1648) 1 CTS 198). For an assessment of the influence of the Peace of Westphalia see, eg Gross, 1948, and Duchhardt, 2012, pp 629–34.

international law remains on the State. The substantive structure and content of international law is asymmetric: it privileges States' interests above all others, relegating those of non-State entities to, at best, a secondary consideration. This asymmetry of the international legal system is reflected in theoretical discussions of international law. While it should not be surprising that a great deal of international legal theory has been instrumental, aimed at elucidating and explaining the role and conduct of States in the international sphere, another tendency has been more idealistic and is critical of the international system we have.

On the one hand, international legal theory has frequently been employed to provide instrumental methodologies which aim at embedding States' political programmes into the substance of international law—'Legal doctrines dissolve far too easily into thin disguises for assertions of national interests' (Kennedy, 1985, p 371). Clear examples of an instrumental approach to international law are two schools of thought that are principally associated with the antagonistic world views of the USA and the Soviet Union as they each vied for supremacy and power during the Cold War—the New Haven School and Marxist-Leninist theory. Although Soviet theory changed radically after perestroika (see, eg McWhinney, 1990, and Vereshchetin and Mullerson, 1990, and Tunkin, 2003), instrumentalist approaches did not die with the Cold War, but remain alive and well in contemporary legal theory. Not only has there been a resurgence in interest in the New Haven School (see, eg Borgen, 2007, Dickinson, 2007, Hathaway, 2007, Koh, 2007, Levit, 2007, Osofsky, 2007, and Reisman, Wiessner and Willard 2007), but instrumentalism is also located in arguments that international law should, for instance, be liberal (see, eg Kennedy, 2003, and Slaughter, 1995; compare Alvarez, 2001), be hegemonic (eg Bolton, 2000, Goldsmith and Posner, 2005, and Rabkin, 2005; compare Carty, 2004, and Vagts, 2001) or be Marxist in one way or another (eg Chimni, 2004, Marks, 2008, and Miéville, 2004).

On the other hand, an instrumentalist concentration on the concerns of States has stimulated a counter-reaction which argues, in effect, that international law is something far too important to be left to States. Indeed for some theorists, particularly those associated with the New Stream or New Approaches to International Law group, this appears to amount to a manifesto: 'students of international law should reformulate their sense of cause and effect in international affairs: rejecting reliance upon visions both of State interests that we too often take to propel doctrine and of the law that we take to restrain statesmen' (Kennedy, 1985, p 381).⁵

Perhaps the most radical and extensive contemporary assault on the unchecked focus on the State in the formulation of international law and doctrine is Professor Allott's theory of Social Idealism.⁶ For Allott, what matters is humanity rather than a collection of States, the pursuit of whose interests he thinks has all too often harmed people. The primacy of State concerns in the international arena has given rise to the perception that domestic and international affairs are 'intrinsically and radically separate' (Allott 2001, p 244, para 13.105(6)): morality is discontinuous between the domestic and international spheres. Citizens can only participate in international affairs through the mediation of

⁵ See also Kennedy, 1999 and 2000. Good overviews of New Stream, or New Approaches to International Law, work are Cass, 1996, Paulus, 2001, Purvis, 1991, Rasulov, 2012, and Tushnet, 2005.

⁶ For what might be his manifesto, see Allott, 1998, although the Preface to Allott, 2001 might provide an easier understanding of his enterprise; see also Scobbie, 2011, but compare Prager, 1998. The Eminent Scholars archive on the website of the Squire Law Library contains a video of Allott's 2013 lecture 'The True Nature of International Law', and also audio files and transcripts of conversations with him: the portal to this archive is at http://www.squire.law.cam.ac.uk/eminent_scholars/.

their governments. The State-centric nature of international unsociety (to use Allott's term) and its influence on the conduct of international relations greatly attenuates, if not eliminates, individual moral responsibility for the content and operation of international law. This allows State concerns to trump a demotic humanitarian impulse, as 'governments, and the human beings who compose them, are able to will and act internationally in ways that they would be morally restrained from willing and acting internally, murdering human beings by the million in wars, tolerating oppression and starvation and disease and poverty, human cruelty and suffering, human misery and human indignity' (p 248, para 13.105(16)). What we are left with is 'a world fit for governments' (p 249, para 13.109) in which 'international law is left speaking to governments the words that governments want to hear' (p 296, para 16.1).

Some contemporary theorists, however, deny the very existence of a discipline that we can identify as 'international law', as something distinct from other disciplines, particularly politics:

Our inherited ideal of a World Order based on the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, for reasons internal to the ideal itself, rely on essentially contested—political—principles to justify outcomes to international disputes. (Koskenniemi, 1990, p 7)⁷

This effacement of international law as an entity distinct from politics is, of course, a critique of other theories which see international law as something separate, something distinctly 'legal': it has been challenged (see, eg Beckett, 2005 and, more generally, MacCormick, 1990). To understand the critique, we must first understand the orthodoxy which engendered it, as social institutions, such as law, often develop dialectically, where a new approach or doctrine emerges as reaction to, or against, the established order. For instance, in the nineteenth century, impressionism originated as a rejection of the historical tradition in French painting (see King, 2006). Théophile Gautier, a prominent and influential nineteenth century French art critic, was in despair, as he could not understand this new style—'One examines oneself with a sort of horror... to discover whether one has become obese or bald, incapable of understanding the audacities of youth' (King, 2006, p 231). This reaction mirrors that of the legal philosopher HLA Hart, who in a 1944 letter to Isaiah Berlin ruminated:

I have pictures of myself as a stale mumbler of the inherited doctrine, not knowing the language used by my contemporaries (much younger) and unable to learn it... (quoted in Lacey, 2004, p 115)

Perhaps an appropriate place to start in considering orthodoxy in theories of international law is with Grotius, often celebrated as the father of international law, as his *De Iure Belli ac Pacis* (*On the Law of War and Peace*) (1625) 'played a decisive part in the emergence of international law as a separate legal discipline' (Haggenmacher, 2012, p 1098). It has been claimed that Grotius' ideas served as a theoretical blueprint for the Westphalian order of international organization, although he died a few years before its creation. Haggenmacher argues that this is only a 'piously nurtured foundational myth... [which] is not borne out by the text of Grotius' masterpiece' (ibid, p 1099). But if this is what he was not, what was he?

⁷ See also, for instance, Kratochwil, 1989; and Koskenniemi, 1989: for a commentary on both, see Scobbie, 1990.

III. THE VIEW FROM DELFT

Hugo Grotius was born on 15 April 1583 in Delft towards the start of the Eighty Years' War, the war of Dutch independence from Spain, which lasted from 1568–1648, and which was terminated by the Peace of Westphalia. Johannes Vermeer was born towards the end of the war, being baptized in Delft on 31 October 1632. We have no record of his birth date. These two top and tail the rest of this chapter, although our geography and time frame is cast wider than that of the Eighty Years' War.

Like Socrates, Grotius was a dangerous thinker, while Vermeer was socially marginalized as a convert to Catholicism in a predominantly Protestant community. As well as being a lawyer, Grotius was a theologian, and imprisoned for life in 1619 at least partly for his views on the proper relationship between the civil authorities and the church. He escaped from prison in 1621 hidden in a book chest. (Let's try doing that using a Kindle.) Grotius was also a poet, and perhaps one of his more singular poems was 'a *Proof of True Religion* (*Bewys van den Waren Godtsdienst*), designed particularly for the use of seafaring folk, to relieve the tedium of long voyages, and to furnish them with controversial armour to repel the assaults of heathen, Jews, and Mohammedans' (Lee, 1930, pp 35–6).

Hugo Grotius did not invent international law: as Professor Bederman has demonstrated, international law existed in antiquity (Bederman, 2001), but along with writers such as Vitoria and Alberico Gentili (1552–1608: see Scattola, 2012), Grotius is generally seen as one of its founding figures in the modern period. He was not insulated from the politics of his time and place, which were dominated by the protracted revolt of the Dutch United Provinces against their monarch (the king of Spain). A paramount Dutch concern in the early seventeenth century was trade with the East Indies. Grotius was commissioned to defend the military and commercial activity of the Dutch United East India Company in the Far East, including its resort to war as a non-State actor, which led him to write *De Iure Praedae* (*On the Law of Prize*), although this was first published in its entirety only in 1864. One chapter was published in 1609, entitled *Mare Liberum* (*The Free Sea*), at the request of the East Indies Company, in which some of Grotius' relations were directors, with the hope of influencing peace negotiations which were then underway. Subsequently, after his escape from prison, Grotius revised and expanded the theoretical part of *De Iure Praedae* which became *De Iure Belli ac Pacis*. Surviving working papers show that he wanted to contrast his ideas with those of Vitoria (see Haggemacher, 1990, pp 142–5, and Tuck, 1999, pp 78–83).

Grotius' theory of law marked a break from the scholasticism of Francisco Suárez (1548–1617: see Brett, 2012) and Vitoria. Suarez had rejected the idea that there could be obligation without God, but scholastic natural law embodied an idea of God and the relationship between God and man which could only be considered 'natural' if it were persuasive outside Christian Europe, for instance in the new colonies in America (see Haakonssen, 1996, pp 21–4):

One of the main points of modern scepticism was that this was not the case. Religious and moral notions were so relative to time and place that no theoretically coherent account could be given of them. Not least, such notions were relative to each person's interest or individual utility. (pp21–4)

This scepticism was noted by Grotius in the *Prolegomena* to *De Iure Belli Ac Pacis*. He attempted to formulate a theory of natural law which would be impervious to this scepticism, but in doing so he laid the foundations for a secular natural law, arguing that

principles of natural law are binding ‘though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of Human Affairs’ (*Prolegomena*, para XI, Grotius, 2005, p 38: see also Olivecrona, 1971, pp 13–14). He also rejected the notion that natural law could be identified with either the Old or New Testaments (*Prolegomena*, paras XLIX and LI, Grotius, 2005, pp 47–8). One of Grotius’ central concerns was to prove that ‘a legal, including an international, order was possible independently of religion’ (Haakonssen, 1996, p 30).

Thus it may be argued that Grotius laid the foundations for the secularization of natural law (see Haakonssen, 1985, pp 247–53), although he was not himself irreligious or secular (see, eg Haggemacher, 2012, p 1099). Further, he attempted to create an understanding of international law which was not dependent on the doctrine of a single Christian denomination for its validity:

Grotius had to write outside a single denomination because he sought to fashion a law of nations that could appeal to and bind Catholics, various Protestants and even non-Christians alike. His theory of a law of nations based on the consent of sovereigns was meant to be more or less religiously neutral. (Janis, 1991, p 63, see pp 61–6 generally)

Grotius’ conception of the law of nations contained two principal strands. It comprised the *ius gentium*, the law applied by many or all States concerning matters which had an international aspect, and which was rooted in nature and discovered by human reason or which had been disclosed by divine revelation, and the *ius inter gentes* which arose from States’ express or tacit consent (see Bull, Kingsbury and Roberts, 1990, pp 28–32, and Olivecrona, 1971, pp 23–4). As Grotius stated:

when many Men of different Times and Places unanimously affirm the same Thing for Truth, this ought to be ascribed to a general Cause; which . . . can be no other than either a just Inference drawn from the Principles of Nature, or an universal Consent. The former shews the Law of Nature, the other the Law of Nations . . . For that which cannot be deduced from certain Principles by just Consequences, and yet appears to be every where observed, must owe its rise to a free and arbitrary Will. (*Prolegomena*, para XLI, Grotius, 2005, p 45)

Accordingly, Grotius opened the avenue for consent-based accounts of law between nations which came to dominate subsequent accounts of the nature of international law as he argued:

But as the Laws of each State respect the Benefit of that State; so amongst all or most States there might be, and in Fact there are, some Laws agreed on by common Consent, which respect the Advantage not of one Body in particular, but of all in general. And this is what is called the Law of Nations, when used in Distinction to the Law of Nature (*Prolegomena*, para XVIII, Grotius, 2005, p 39)

Thus a consequence of Grotius’ hypothetical rejection of the theological foundations of natural law was that the consent of States became accepted as the basis of the rules of international law. Grotius paved the way for a consensual and secular concept of international law. A theologically based explanation of international law, regardless of the dominant denomination or religion involved, would be radically different in form and content to the existing system. Could it, for example, contain room for human rights in matters such as gender equality, sexual orientation, and freedom of and from religion, and should we expect to find in it elaborate rules on when resort to war could be justified on religious grounds?

IV. BUT WHAT IS A THEORY?

Kant provides a useful notion of a theory for our purposes. He defined a theory as:

A collection of rules, even of practical rules, is termed a theory if the rules concerned are envisaged as principles of a fairly general nature, and if they are abstracted from numerous conditions which, nonetheless, necessarily influence their practical application. Conversely, not all activities are called practice, but only those realizations of a particular purpose which are considered to comply with certain generally conceived principles of procedure... [N]o-one can pretend to be practically versed in a branch of knowledge and yet treat theory with scorn, without exposing the fact that he is an ignoramus in his subject. He no doubt imagines that he can get further than he could through theory if he gropes around in experiments and experiences, without collecting certain principles (which in fact amount to what we term theory) and without relating his activities to an integral whole (which, if treated methodically, is what we call a system). (Kant, 1793 (1970), pp 61–2)

But what does this mean?

It means that the function of a theory is to formulate or guide practice; to provide a relatively abstract framework for the understanding and determination of action. A theory is necessary because it provides us with the intellectual blueprint which enables us to understand the world, or some specific aspect of human affairs. Kant's notion of a system, which comprises an integrated body of knowledge rather than simply a collection of essentially unrelated general rules, underlines the constitutive function of theory. Theory makes data comprehensible by providing a structure for the organization of a given discipline or body of knowledge.

Different types of legal theory have different aims and concerns. For example, analytical theory tends to deal with questions such as the structure of legal systems, its components (such as the nature of rights and duties), legal epistemology (what is legal knowledge?), and legal ontology (does, and how does, law exist?—see, for instance, Arend, 1999, Ch 1, especially at pp 28ff; and Franck, 1990, Ch 2). Traditionally the ontological argument has dogged international law because of the influence of Austinian imperative theory. Despite, in some quarters (eg Bolton, 2000, pp 2, 4–5, and 48), a lingering attachment to the classical Austinian positivist claim that, because there is no determinate sovereign superior to States capable of promulgating and enforcing its commands, international law is not law but merely amounts to positive morality (see Austin, 1832 (1995), Lecture V, pp 123–5), this view is no longer generally accepted. It seems somewhat bizarre to rely on a discredited nineteenth century legal philosophy which speaks of the 'sovereign' and is essentially pre-democratic (at least in terms of universal suffrage) as the foundation for a contemporary understanding of law, or for the expression of a hostility to—or even a fear of—the very notion of international law. With the posthumous publication of the works of Jeremy Bentham, it is clear that Austin owed much to Bentham's more sophisticated analysis of law. Further, '[a]lthough there is no question that Bentham had doubts about the law-like character of international law, he was by no means the skeptic that Austin was' (Janis, 2004, p 16, see pp 16–18 generally).

These doubts are now a thing of the past, although some vestiges of the ontological debate **remains** in theoretical investigations of the sources of international law—the identification of what counts, or should count, as international law, which is, for instance, exemplified in Professor d'Aspremont's examination of formalism and sources (d'Aspremont, 2011) and the debate about relative normativity (see, eg Beckett, 2001, Roberts, 2001, Tasioulas,

1996, and Weil, 1983). Nevertheless, as Professor Franck (1995, p 6) affirms: ‘international law has entered its post-ontological era. Its lawyers need no longer defend the very existence of international law. Thus emancipated from the constraints of defensive ontology, international lawyers are now free to undertake a critical assessment of its content’.

The conceptual exegesis of distinct substantive themes or fields finds expression in works such as Franck’s account of the emergence of individualism as a core concept in international law (Franck, 1999); in the numerous applications of New Haven analysis to such diverse topics as the law of the sea, (McDougal and Burke, 1962) human rights (McDougal, Lasswell, and Chen, 1969 and 1980), and armed conflict (McDougal and Feliciano, 1994); and in Ragazzi’s exegesis of obligations *erga omnes* as rooted ultimately in natural law (Ragazzi, 1997, pp 183–5). Another important strand of contemporary international legal theory is critical theory, that is the ideological critique of the structure and content of international law, often from a position of identity politics such as gender (eg Charlesworth and Chinkin, 2000), race, or Third World Approaches to International Law (eg Anghie, 2005). This can overlap with more normative theory which questions what is international law for and what it should do.

In this chapter, I do not propose to offer anything like a comprehensive account of the diverse theories of international law, or to offer some ‘master’ theory which trumps all others. We must bear in mind Koskenniemi’s cautionary observation about personal predispositions and biases. This propounds that all theoretical positions are, to some degree, subjective. The aim here is much more modest: to offer an outline of some theoretical points and perspectives which should provide a basis for thinking about the nature and function(s) of international law. But we should be clear on one thing: because writers start from different, and often inarticulate, premises about the nature and function of international law, it is not surprising that adherence to different theoretical presuppositions results in different conclusions about what counts as international law in the first place (Lauterpacht, 1933, p 57).

V. PROVENANCE AND MEANING

Identifying authorial predispositions is crucial to evaluating the weight to be given to an argument. Indeed, identifying the very author of a text can be decisive in law, in a way alien to other disciplines. For instance, in literature, Foucault argues in favour of the death of the author—the idea that the identity and personality of the author of a work of fiction is irrelevant to the authority and interpretation of the text. He acknowledges:

I seem to call for a form of culture in which fiction would not be limited by the figure of the author... All discourses, whatever their status, form, value, and whatever the treatment to which they will be subjected, would then develop in the anonymity of a murmur. We would no longer hear the questions that have been rehashed for so long: Who really spoke? Is it really he and not someone else? With what authenticity or originality? And what part of his deepest self did he express in his discourse... [W]e would hear hardly anything but the stirring of an indifference: What difference does it make who is speaking? (Foucault, 1998, p 222)

Foucault claims that the ascription of an author to a text entails that it ‘is not ordinary everyday speech that merely comes and goes... On the contrary, it is a speech that must be received in a certain mode and that, in a given culture, must receive a certain status’ (p 211). Yet the identity of the person or body promulgating some types of legal texts has

precisely this function. The significance of the identity of the actor in law is akin to that of provenance in the art market. Provenance is the chain of proof that demonstrates that an artefact is not a forgery but may be safely attributed to a given artist. Provenance is crucial to valuation: a painting that cannot be shown to have been painted by, say, Manet, does not have the same value as a ‘real’ attested Manet. (Indeed, Gertrude Stein was displeased when, at the height of the cubist period, her friends Pablo Picasso and Georges Braque signed the other’s name to their paintings, as she thought artists should bear responsibility for their own work—see Wagner-Martin, 1995, p 148.)

The value, or significance, of an ostensibly legal document or statement invariably depends on its author; because its author is a judge; because its author is a legislature; because its author is a foreign ministry; and so on. Legal documents and statements are not simply strings of words: rather, they are speech acts—words which are intended to have a practical impact. They are words which are meant to do things and not remain mere utterances. Like making a promise, they constitute an action (an illocutionary act) which does not describe but which is meant to change social reality (see Austin, 1996). When the Athenian jury sentenced Socrates to death, as it was legally empowered to do, its words were meant to have an effect in the real world, particularly for Socrates.

Legal texts, and their authors, only make sense within the context of the system that gives them authority and meaning. Literary, artistic, even philosophical texts, on the other hand, are a great deal more autonomous. At the extreme, as in the case of the fictitious Australian poet Ern Malley whose works were fabricated to satirize modernist poetry, but which now form part of the Australian literary canon, the ‘author’ need not even exist (see Heyward, 1993). Or reconsider Socrates: he left no writings, but would it matter if ‘Socrates’, like ‘Ern Malley’, never existed? Would it matter if he were only a literary device invented by Plato and Xenophon as a vehicle to present their thoughts?

In some circumstances, therefore, to gain a full understanding of a text, it must be located within a framework where it may be properly understood. Some, however, argue that all readings of a text are partial, and that a search for authorial intent, even in law, cannot generate a ‘correct’ interpretation (eg Balkin, 1986, p 772). There is a degree of truth in this, but it is equally true that legal texts, unlike literary texts, form part of an interlocking system of meaning and are not free radicals that bear the meaning anyone chooses to put upon them. There is a difference between a legal text such as Article 51 of the UN Charter, whose interpretation may be contested in regard to some matters, such as when it would allow a kinetic response (bullets, bombs, and things that go bang) as self-defence in response to a non-kinetic attack (cyber warfare) (see Tallinn Manual, 2013, Ch II, and Schmitt, 2012, pp 18–25), and a literary text which can bear any meaning one chooses, such as these lines from Gertrude Stein’s poem ‘Lifting belly’:

I say lifting belly and then I say lifting belly and Caesars. I say lifting belly gently and Caesars gently. I say lifting belly again and Caesars again. I say lifting belly and I say Caesars and I say lifting belly Caesars and cow come out. I say lifting belly and Caesars and cow come out. (Stein, 1998b, p 410 at 435)

While most literary critics interpret passages such as this as lesbian eroticism written by Stein for her lover Alice B. Toklas, with the ‘cow’ being an orgasm for Alice (but see Turner 1999, pp 24–31), reading early Stein, such as *Lifting belly*, generally involves a fruitless search for meaning, because it is an attempt to unlock the sense which she took pains consciously to erase (see Dydo, 2003):

Stein’s true radical legacy lay in her insistence on showing how words and their meanings could be undone; she took it as her right that she had the freedom to use words

exactly as she pleased, and in doing so she undermined the relation between words and the world. . . Janet Flanner remembered: ‘A publisher once said to her, “We want the comprehensible thing, the thing the public can understand”. She said to him: “My work would have been no use to anyone if the public had understood me early and first”’. (Daniel, 2009, p 190)

Indeed, one contemporary commentator thought that Stein had ‘outdistanced any of the Symbolists in using words for pure purposes of suggestion—she has gone so far that she no longer even suggests’ (Wilson, 1996, p 276, first published 1931). Does this matter? Stein’s purpose in writing was to make manifest her ‘genius’: her work did, and does, not need to ‘mean’ anything. It exists in, and for, itself—as well as for the Greater Glory of Gertrude.

Legal texts, on the other hand, do need to have an identifiable meaning, or range of acceptable meanings, because the practice of law is an instrumental activity aimed at practical outcomes in the ‘real’ world. The Socratic (or at least Platonic) idea that the written word is like a painted image as it can only signify one thing entails that words are univocal, and bear one meaning and one meaning alone. This idea that written words ‘just go on and on for ever giving the same single piece of information’ is simply too reductive. Legal systems are expressed in natural language which cannot fulfil the requirement of univocity because natural language is inherently ambiguous (see, eg Perelman and Olbrechts-Tyteca, 1969, pp 13–14, para 1, pp 120ff, para 30, and pp 130ff, para 33, and Perelman 1976, pp 34–6, para 24 and pp 114–55, para 56bis). Perelman repeatedly illustrates the non-univocity of natural language using the apparent tautologies ‘boys will be boys’ or ‘business is business’. To give these phrases meaning, different interpretations must be given to the repeated terms whereas in formal logical or mathematical systems such propositions would be meaningless because of the systemic requirement of the principle of identity, which necessitates that terms, or words, are univocal and unambiguous (see, eg Perelman and Olbrechts-Tyteca, 1969, pp 21ff, para 51, and pp 442–3, para 94, and Perelman, 1976, pp 115–16, para 56bis).

Perelman’s theory of rhetoric aims at examining how arguments may persuade and thus assumes that legal arguments can communicate meaning. Drawing on the work of linguistic theorists such as Ferdinand de Saussure (1857–1913), particularly his *Course in General Linguistics* (*Cours de Linguistique Générale*, published posthumously in 1916), some legal theorists argue that all texts are inevitably and radically indeterminate and have no settled meaning (for an account and critique, see Solum, 1987). This has long been a tenet of US legal philosophy. One of the principal strands of American Legal Realism, rule scepticism, argued that this uncertainty lay in the very formulation of rules, and thus judicial decisions could not lay claim to being simply the inexorable application of the law to the issue in question (see Frank, 1949). This is reflected in McDougal and Lasswell’s admonition that:

From any relatively specific statements of social goal (necessarily described in a statement of low-level abstraction) can be elaborated an infinite series of normative propositions of ever increasing generality; conversely, normative statements of high-level abstraction can be manipulated to support any specific social goal. (Lasswell and McDougal, 1943, p 213)

It must be conceded that there cannot be hyper-reality in legal discourse because of the ambiguity of language, but that language must be able to communicate effectively. If law were radically indeterminate then no contract, statute, or treaty could have any determinable meaning, and every criminal conviction is unsafe because of the principle of

legality—if all law is indeterminate, then how do we know if/when someone commits a criminal offence? How can there be an effective speech act, if the meaning of that speech cannot be discerned?

While extra-legal factors are undoubtedly taken into account in interpreting an ambiguous text, and in international law the influence of politics in this is well-nigh inescapable, to argue that this means that law inevitably collapses into politics might be to mistake the process for the outcome. Professor Raz draws a distinction between the deliberative and executive stages of legal reasoning. In the former, factors are evaluated to decide what the law should be, and then at the executive stage this solution is incorporated into the law (Raz, 1980, pp 213–14). The drafting of a treaty manifestly falls within the deliberative stage, as does a court's consideration of the proper interpretation of an instrument, but at the executive stage, once the treaty text is finalized, or once the judgment is issued, once the operative speech act takes place, then the political considerations in issue become subsumed within the law.

VI. LIBERAL DEMOCRACY V MARXISM-LENINISM—POLES APART?

It should be clear that the more overtly a writer uncovers his or her theoretical assumptions, the more honest is the writing, because his or her model of international law is exposed on the page for all to see.

To illustrate the formative power of theory, it is convenient to contrast two very different accounts of international law, namely the New Haven School which was elaborated principally by Myres McDougal and Harold Lasswell in Yale Law School, and the pre-perestroika Soviet theory of international law propounded by GI Tunkin. As products of the Cold War, these are primarily of historical interest, but they were distinctive theories of international law which clearly set out to bolster and justify the external projection of the political values of the USA and Soviet Union. Although they thus shared a similar purpose, they embodied profoundly different political aims and objectives: this is abundantly clear in their approach to sources and methodology.

It could be argued that the chasm between the two theories runs deeper, that there is an architectonic difference between the two, as the New Haven School sees law as facilitative whereas Soviet theory amounts to a constitutive theory. Posner explains the facilitative approach as claiming that law provides, 'a service to lay communities in the achievement of those communities' self-chosen ends rather than as a norm imposed on those communities in the service of a higher end' (Posner, 1990, p 94). The latter is, of course, the constitutive approach.

McDougal and Lasswell (1981, p 24) defined 'human dignity' as 'a social process in which values are widely and not narrowly shared, and in which private choice, rather than coercion, is emphasized as the predominant modality of power'. Accordingly, the New Haven goal of clarifying and implementing a world order of human dignity could be seen as falling squarely within Posner's notion of a facilitative theory. This is not the case. The *raison d'être* of the New Haven School was the pursuit of an imposed 'higher end', namely, the defence and maintenance of (American) liberal democracy as a bulwark against the spread of communism. This is manifestly a constitutive theory. It is ideological, the attempted globalization of the claim that the USA is morally exceptional and 'endowed by its creator with a special mission, a **manifest destiny**, to **overspread** the North American continent and perhaps the world, so as to evangelize it with the twin gospels of American

democracy and American capitalism' (Hodgson 2005, p 20). As Falk observes, New Haven analysis is constructed around an:

ideological bipolarity of a world order that pits totalitarian versus free societies as the essential struggle of our time, a view that anchors the McDougal and Lasswell jurisprudence in the history of the Cold War era. (Falk, 1995, p 2004)

For McDougal and Lasswell the choice was one between nuclear annihilation and the global promotion of US democratic values (Falk, 1995, p 2002; Duxbury, 1995, pp 195–8). They, in an act of 'ideological partisanship' (Falk, 1995, p 2003), chose the latter.

A. THE NEW HAVEN SCHOOL

The genesis of New Haven lay in the Second World War and the emergence of communism as an international political force. McDougal and Lasswell argued that, when US law schools reopened after the war, they should be 'a place where people who have risked their lives can wisely risk their minds' (Lasswell and McDougal, 1943, p 292). The aim of legal education was to provide systematic training for policy-makers attuned to 'the needs of a free and productive commonwealth':

The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity. (Lasswell and McDougal, 1943, p 206; see also Falk, 1995, p 1993)

These values should be reinforced so that the student applies them automatically to 'every conceivable practical and theoretical situation' (Lasswell and McDougal, 1943, p 244). As lawyers influence or create policy when indicating whether a proposed course of action is or is not lawful (p 209), the law school curriculum should aim towards the implementation of 'clearly defined democratic values in all the areas of social life where lawyers have or can assert responsibility' (p 207). Policy and value permeate law; there are no autonomous or neutral theories of law which can ignore the policy consequences of rules (McDougal and Reisman, 1983, p 122). Therefore:

In a democratic society it should not, of course, be an aim of legal education to impose a single standard of morals upon every student. But a legitimate aim of education is to seek to promote the major values of a democratic society and to reduce the number of moral mavericks who do not share democratic preferences. The student may be allowed to reject the morals of democracy and embrace those of despotism; but his education should be such that, if he does so, he does it by deliberate choice, with awareness of the consequences for himself and others, and not by sluggish self-deception. (Lasswell and McDougal, 1943, p 212)

Although Lasswell and McDougal initially (1943, *passim*) envisioned the comprehensive application of their theory to reform the entire law school curriculum, it rapidly focused specifically on international law (Duxbury, 1995, p 191). The practical aim of the New Haven School is to advance 'a universal world order of human dignity' which secures the widespread enjoyment of values by individuals. A value is simply 'a preferred event' or, in other words, whatever an individual or decision-maker desires. A full enumeration of values is impossible—'if we were to begin to list all the specific items of food and drink, of dress, of housing, and of other enjoyments, we should quickly recognize the unwieldiness of the task'. McDougal and Lasswell claim that any given value will fall within one or more of the categories that they identify as enlightenment, respect, power, well-being, wealth,

skill, affection, and rectitude (McDougal and Lasswell, 1981, p 20: see also Lasswell and McDougal, 1943, pp 217–32; McDougal and Reisman, 1983, p 118; Arend, 1999, p 72; and Duxbury, 1995, p 178). Human dignity, however, is not foundational, ‘We postulate this goal, deliberately leaving everyone free to justify it in terms of his preferred theological or philosophical tradition’ (McDougal and Lasswell, 1981, p 24: see also Lasswell and McDougal, 1943, p 213).

This goal reflects the New Haven School’s basis in, and intended refinement of, the American Legal Realist school of jurisprudence and its intertwining of law and the social sciences, especially economics.⁸ Realism rejected formalist accounts of law that claimed to be value-neutral and relied on the logical exegesis of legal principle to explain the operation of the courts and legal system.

Realism, contrary to formalism, laid stress on the social consequences of the law which should be taken into account in judicial decisions, and thus emphasized empiricism. This aimed at determining the real factors involved in judgments beyond the formal appeal to rules, and also at demonstrating the social impact that alternative judicial choices might have. Law was seen as a form of social engineering that could be used as a tool to attain desired societal goals. The New Haven School built on this tradition in American jurisprudence by rejecting the notion that law is merely a system of rules, by trying to achieve a more empirical account of the operation of law in society, and by postulating the instrumental aim of achieving human dignity (see Morison, 1982, pp 178–88).

The New Haven School displaces the conception of law as a system of rules in favour of one where law is a normative social system which revolves around trends of authoritative decisions taken by authorized decision-makers including, but not restricted to, judges. There is, after all, more to law than what happens in court rooms— ‘If a legal system works well, then disputes are in large part avoided’ (Higgins, 1994, p 1, emphasis in original). International lawyers, giving legal advice that moulds policy and action, are more likely to be in foreign ministries than appearing before the International Court of Justice. Contemporary New Haven doctrine is more radical in its intentions. It claims that its methodology ‘can be especially empowering for individuals not associated with the state, a class that classical international law all but disenfranchised’. Applying its techniques, either alone or as part of an interest group, individuals can be involved in influencing the decisions that affect their lives (see Reisman, Wiessner and Willard 2007, pp 576–578). Law is a continuing process of decisions involving choices aimed at realizing the common value of human dignity:

the major systems of public order are in many fundamental respects rhetorically unified. All systems proclaim the dignity of the human individual and the ideal of a worldwide public order in which this ideal is authoritatively pursued and effectively approximated. (McDougal and Lasswell 1981, p 19)

The New Haven process of decisions has been likened to Heraclitus’ aphorism that one never steps into the same river twice, because the river moves on. For New Haven adherents, because the social context of decisions change, and because the trends and implications of past decisions can be unclear, the quest for human dignity necessitates the

⁸ On American Legal Realism, see Duxbury, 1995, Chs 1 and 2; and Feldman, 2000, pp 105–15. More elementary accounts of this school may be found in standard textbooks on jurisprudence, such as Freeman, 2001, Ch 9.

rejection of a model of law that comprises simply the neutral or impartial application of rules. Rules are:

inconsistent, ambiguous, and full of omissions. It was Mr. Justice Cardozo who aptly remarked that legal principles have, unfortunately, the habit of travelling in pairs of opposites. A judge who must choose between such principles can only offer as justification for his choice a proliferation of other such principles in infinite regress or else arbitrarily take a stand and state his preference; and what he prefers or what he regards as 'authoritative' is likely to be a product of his whole biography. (Lasswell and McDougal, 1943, p 236)

This, in itself, appears to be a New Haven refinement of the realist notion of the intuitive nature of judicial decision-making. Hutcheson had argued that, in hard cases, the judge does not decide by an abstract application of the relevant rules, but decides intuitively which way the decision should go before searching for a legal category into which the decision will fit—'No reasoning applied to practical matters is ever really effective unless motivated by some impulse' (Hutcheson, 1928–9, p 285). The New Haven School conceded that the application of its method could not overcome discretion or bias on the part of the decision-maker. As a bulwark against this, and thus the tendency to intuitive reductionism advanced by Hutcheson, it counselled that decision-makers should be as self-conscious as possible about their predispositions, and undertake a systematic and comprehensive assessment of policy choices relevant to their decisions as the state of available knowledge allowed (Falk, 1995, p 1999).

Rules are only 'shorthand expressions of community expectations' and thus, like any shorthand, are inadequate as a method of communication (Duxbury, 1995, p 194). Rules simply cannot be applied automatically to reach a decision because that decision involves a policy choice:

Reference to 'the correct legal view' or 'rules' can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law. (Higgins, 1994, p 5)

Higgins continues that the New Haven School's articulation of relevant policy factors, and their systematic assessment in decision-making, precludes the decision-maker unconsciously giving preference to a desired policy objective under the guise of it being 'the correct legal rule'.

The realization of preferred values is not, however, the sole factor in decision-making: law does constrain. Recourse must be made to trends of past decisions; and how these relate to the goals the decision-maker wishes to achieve; and how these decisions may be deployed to realize these goals—'the task is to think creatively about how to alter, deter, or accelerate probable trends in order to shape the future closer to his desire' (Lasswell and McDougal, 1943, p 214). Further, these goals can only be achieved if the decision taken is both authoritative and controlling:

Authority is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures. By control we refer to an effective voice in decision, whether authorized or not. The conjunction of common expectations concerning authority with a high degree of corroboration in actual operation is what we understand by law. (McDougal and Lasswell, 1981, p 22)

More succinctly, Higgins describes law as ‘the interlocking of authority with power’ (Higgins, 1994, p 5: see also Arend, 1999, pp 77–9).

Thus the New Haven School aims at providing a framework of values and matrix of effective and authoritative decision-making in pursuit of the democratic ideal it favours. In this matrix, the actual and desired distribution of values affects every authoritative decision. In turn, the future distribution of values which stems from these decisions aims to mould and secure community public order to maximize the realization of human dignity (McDougal and Reisman, 1983, p 118).

B. SOVIET THEORY

The other principal Cold War doctrine—the theory of international law sponsored by the Soviet Union, rooted in Marxism-Leninism, and reaching its apogee in the pre-perestroika works of Tunkin (but see Bowring 2008 for a more nuanced account of Soviet legal theory)—was a diametrical opposite to the New Haven School, both in its professed structure and envisaged political outcome. This orthodoxy, enforced by the Soviet bloc, relied not on the values encompassed in human dignity to explain international law, but on the ‘objective’ rules of societal development and the historical inevitability of socialism:

The foreign policy and diplomacy of socialist States is armed with the theory of Marxism-Leninism and a knowledge of the laws of societal development. Proceeding on the basis of a new and higher social system replacing capitalism, they adduce and defend progressive international legal principles which correspond to the laws of societal development and which are aimed at ensuring peace and friendly cooperation between states and the free development of peoples (Tunkin, 1974, p 277).⁹

Under Soviet theory, international law was ‘under the decisive influence of the socialist States, the developing countries, and the other forces of peace and socialism’, and was aimed at ‘ensuring peace and peaceful co-existence, at the freedom and independence of peoples, against colonialism in all of its manifestations, and at the development of peaceful international cooperation in the interests of all peoples’ (Tunkin, 1974, p 251). The role of international law was to promote human progress, which necessarily led to socialism. Indeed, Soviet writers argued that socialism was the inevitable outcome of social processes and, with its triumph, the State and law (including international law) would be eradicated as these are the products of class division, although there would still be rules of conduct (eg Tunkin, 1974, pp 42, 238: see pp 232ff generally). Until then, international law was ‘immortalize[d]... as an instrument of struggle between States belonging to opposed social systems’ (Damrosch and Müllerson, 1995, p 4) in which the most that could be achieved was peaceful co-existence between capitalist and socialist States.

Soviet theory is squarely based in Marxist-Leninist theory to the extent that, at times, it seems simply to amount to taking the dogma for a walk. Perhaps paradoxically, Soviet theory is much more traditional, more conservative, than the New Haven School, placing its emphasis on rules and State consent to rules, rather than the New Haven realization of values by authorized decision-makers:

both the Soviet government and Soviet doctrine consistently treated the existing corpus of international law as a system of sufficiently determinate principles and norms which all

⁹ For an overview of Marxist theory of law, see Freeman, 2001, Ch 12: a clear, succinct, and critical introduction is Collins, 1984. For an account of the early formation of Soviet concepts of international law, see Macdonald, 1998.

States are obliged to observe in their mutual relations, in contrast to some Western scholars who find international law to be more or less adaptable and argue that law should fit behaviour rather than the other way around. The Soviet preference for a relatively rigid rule-bound approach was not merely an outgrowth of traditional jurisprudential conventions, but also served political and polemical functions. (Damrosch and Müllerson, 1995, p 9, footnotes omitted)

Soviet theory was rooted in the class struggle, and the Marxist-Leninist tenet that the mode of production within a society (the economic base) is the principal influence on the will of the ruling class, and thus on the social institutions (the superstructure) of that society. Only with the emergence of private property and social classes does the State emerge ‘as an organ of the economically dominant class’, along with law which constitutes the will of this ruling class in defence of its interests (Kartashkin, 1983, p 81).¹⁰

Capitalist and socialist States have different interests, and thus wills, given the difference in their socio-economic organization—‘the influence of the economic structure of society and its societal laws affects the process of creating norms of international law through the will of a state, since the content of this will basically is determined by the economic conditions of the existence of the ruling class in a given state’ (Tunkin, 1974, p 237). While the dominant economic class determines the will of a capitalist State, in a socialist State, this comprises ‘the will of the entire Soviet people led by the working class’ (p 249 and, eg p 36). One clear consequence of this divergence in interest is Soviet theory’s rejection of ‘general principles of law recognized by civilised nations’ (Article 38(1)(c) of the Statute of the International Court of Justice) as an independent source of international law. Because of the opposed nature of their socio-economic systems, Tunkin denied the possibility that there could exist normative principles common to socialist and bourgeois legal systems. Even if principles superficially appeared to be common to the two types of system, they were ‘fundamentally distinct by virtue of their class nature, role in society, and purposes’ (p 199).

A common ideology, however, is unnecessary for the development of international law, but the existence of two opposed social systems places limits on the content of the norms of international law. Because these must be agreed by States on the basis of equality—‘only those international legal norms which embrace the agreement of all states are norms of contemporary general international law’—they can be neither socialist nor capitalist (pp 250–51; see also 1974, Ch 2, *passim*, and Kartashkin, 1983, pp 96ff).

Consent between States, albeit reflecting the interests of their ruling classes, to specific rules is the keystone of Soviet theory which, furthermore, recognizes only treaties and custom as sources of international law (Tunkin, 1974, pp 36, 291). There is no room for some authoritative decision-maker to determine or influence the content of international law—for instance, ‘The [International] Court does not create international law; it applies it’ (p 191). Norm creation necessarily requires State consent, whether express or tacit (p 124 and Ch 4, *passim*):

the majority of states in international relations cannot create norms binding upon other states and do not have the right to attempt to impose given norms on other states. This

¹⁰ See also pp 79–83 generally; and Tunkin, 1974, pp 27, 36, 232ff. Kartashkin (1983, p 81) notes that according to Marxist-Leninist theory, there are five socio-economic formations of society—primitive communal, slave, feudal, capitalist, and communist. Compare Smith’s notion of the four stages of society found, for instance, in Smith (1978, pp 14–16): ‘in these several ages of society, the laws and regulations with regard to property must be very different’ (p 16).

proposition is especially important for contemporary international law, which regulates relations of states belonging to different and even opposed social systems. (p 128)

In its emphasis on consent which allows international law to bridge between different social systems, Soviet theory is redolent of Grotius' attempt to provide common rules for different 'denominations', although it is stripped of any thought of natural law. Tunkin argues that because natural law theorists of international law undermine its consensual basis, this creates a climate which increases the 'possibilities for an international legal justification of the imperialist policy of *diktat, coercion, and military adventurism*' (p 210).

Tunkin stresses that international law, as it exists between socialist and capitalist States, rests on consensual principles of peaceful co-existence which include the principles of the sovereign equality of States and non-interference in their domestic affairs (pp 29 and 251). The application and implications of these principles differ, however, in the international relations between States from opposed socio-economic systems and in the relations between socialist States *inter se*. Relations between socialist States are not predicated on the notion of peaceful co-existence but on the principle of socialist or proletarian internationalism (p 47: this doctrine is expounded at length at pp 427ff). Thus Kartashkin maintains that:

principles of general international law, when applied in relations among socialist countries, expand their shape and acquire new socialist content. They go beyond general principles of international law. For example, the general principle of international law—the equality of states—acquires a new content when applied in relations among socialist states. Parallel to the respect for legal equality, its implementation presupposes the achievement of factual equality of all socialist states and the equalization of their economic level. The principles of socialist internationalism are used by socialist states to strengthen their relations, to protect them from anti-socialist forces, and to ensure the construction of socialism. Thus, in relations among socialist states two types of norms function—the socialist and general principles and the norms of international law. (Kartashkin, 1983, pp 82–3)

The principle of proletarian internationalism is that of 'fraternal friendship, close cooperation, and mutual assistance of the working class of various countries in the struggle for their liberation' (Tunkin, 1974, p 4: see also Butler, 1971, pp 796–7, but compare Hazard, 1971). This manifests itself in principles of socialist legality which, in the relations between socialist States, are *lex specialis* to the norms of general international law (Tunkin, 1974, pp 445–56: see also Osakwe, 1972, p 597). These principles are, 'first and foremost', those of 'fraternal friendship, close cooperation, and comradely mutual assistance' (Tunkin, 1974, pp 434–5: see also Butler, 1971, p 797, and Osakwe, 1972, p 598). Their implementation requires close cooperation between Socialist States in foreign and defence policy to secure 'the gains of socialism from possible feeble imperialist swoops' (Tunkin, 1974, p 430).

At its most stark, this aim was expressed in the Brezhnev doctrine, the claim that socialist States could, if necessary, use force to ensure that another socialist State did not divert from socialism and revert to capitalism. This doctrine asserted that a threat to socialism in one State was 'a threat to the security of the socialist community as a whole'¹¹ and thus a common problem. It therefore constituted 'the joint defense of the socialist system from

¹¹ Brezhnev doctrine as quoted in Schwebel, 1972, pp 816–17; see also Franck, 1970, pp 832–3. Franck argues that the USA foreshadowed the Brezhnev doctrine in its policy towards the Americas—see *ibid*, pp 833–5, and pp 822–35 generally.

any attempts of forces of the old world to destroy or subvert any socialist state of this system' (Tunkin, 1974, p 434). Although the Brezhnev doctrine was promulgated following the forcible suppression of moves towards democratization in Czechoslovakia in 1968 (see, eg Butler, 1971, p 797; Franck, 1970, p 833; and Schwebel, 1972, p 816), this principle of socialist internationalism was employed to justify the Soviet intervention in Hungary in 1956 (Tunkin, 1974, pp 435–6) and its 1980 invasion of Afghanistan (see Brezhnev, 1980, pp 6–9).

C. NEW HAVEN AND SOVIET APPROACHES COMPARED

Accordingly, just as New Haven has the teleological aim of achieving human dignity, and thus the external projection of democratic liberal values, so Soviet theory has the aim of realizing proletarian internationalism, and thus the global triumph of socialism. While New Haven rejects any foundational basis for human dignity, in that it is indifferent to the philosophical positions which individuals may use to justify human dignity, Soviet theory is foundational because it maintains that, by way of objective rules of societal development, the goal of proletarian internationalism is historically inevitable. In the meantime, according to Tunkin (1974, p 48) common ground must be sought in which competing social systems may peacefully co-exist. Despite opposed theories regarding the nature and function of international law, agreement on specific international legal norms was not impossible. For instance, the international regulation of human rights occurred despite the absence of a common ideology:

Marxist-Leninist theory proceeds from the premise that human rights and freedoms are not inherent in the nature of man and do not constitute some sort of natural attributes. Rights and freedoms of individuals in any state are materially stipulated and depend on socio-economic, political and other conditions of the development of society, its achievements and progress. Their fundamental source is the material conditions of society's life. (Kartashkin, 1983, p 95)

McDougal and Lasswell would undoubtedly see this as an example where 'allegedly universal doctrines' such as sovereignty, domestic jurisdiction, and non-intervention are used 'to resist the institutional reconstructions which are indispensable to security'. In this case, the Soviet claim was that the content of internationally agreed human rights fell within the domestic jurisdiction of the implementing State (Tunkin, 1974, pp 82–3). McDougal and Lasswell (1981, p 18) resisted such 'false conceptions of the universality of international law', and argued that the discrediting of such false claims was necessary in order to clarify 'the common goals, interpretations, and procedures essential to achieving an effective international order'.

On the other hand, the policy science approach of New Haven was an anathema to Soviet thinking:

Even though states may use international law as a support for foreign policy, this does not mean that international law is merged with policy. Mixing international law with policy inevitably leads to a denial of the normative character of international law, that is to say, to a denial of international law, which becomes buried in policy and vanishes as law.

Professor McDougal's concept of the policy approach to international law is an example of this kind of mixing or blending of foreign policy and international law.

... McDougal, while not denying the importance of international law in so many words and sometimes also stressing it, in fact drowns international law in policy. In consequence

Author query: Is this sentence set correctly, or should it be part of the extract?

thereof, international law in McDougal's concept is devoid of independent significance as a means of regulating international relations; it disappears into policy and, moreover, is transformed into a means of justifying policies which violate international law. (Tunkin, 1974, p 297)

This criticism that New Haven analysis results in the eradication of international law is commonplace (see, eg Arend, 1996, p 290; Bull, 2002, pp 153–4; and Kratochwil, 1989, pp 193–200). Falk notes that, although not inevitable, the outcome of the application of New Haven analysis to a given issue 'had an uncomfortable tendency to coincide with the outlook of the US government and to seem more polemically driven than scientifically demonstrated' (Falk, 1995, p 2001, see also p 1997, and Koh 2007, p 563). It cannot be doubted that the same was true of Soviet international law, despite its reliance on 'norms'. As Damrosch and Müllerson (1995, pp 8–9) comment:

The political climate of the Cold War undoubtedly contributed to the sense that the international legal order was far from approaching an optimal or perhaps even minimal level of determinacy. Especially in highly politicized areas such as the use of force or intervention, as well as in many aspects of human rights law, the content and clarity of principles and norms suffered from the fact that states proceeded from opposed interests; while they wanted to delineate parameters for the behaviour of the other side, they were wary of tying their own hands. The positions of the two sides were not only different but often irreconcilable; yet those positions were sometimes dictated more by ideological considerations than by real national interests.

The New Haven tendency to make law malleable in its pursuit of human dignity, McDougal and Lasswell's 'penchant for applying their theory in justification of US foreign policy' (Falk, 1995, p 1997), undoubtedly gives an impression of normative indeterminacy. Could it be argued, however, that this mistakes the anomaly for the paradigm? One of the criticisms of formalism made by realist scholars was that it focused on the judgments of appellate courts which concentrate on contestable points of law (Duxbury, 1995, pp 57, 135–7). Is this not also true of the common impression gained of the New Haven School (and equally of Soviet theory for that matter)? As Higgins (1994, pp 6–7) notes, New Haven does not require:

one to find every means possible if the end is desirable. Trends of past decisions still have an important role to play in the choices to be made, notwithstanding the importance of both context and desired outcome. Where there is ambiguity or uncertainty, the policy-directed choice can properly be made.

Koskenniemi has observed that when he worked for the Finnish foreign ministry, politicians seeking international legal advice saw every situation as 'new, exceptional, [a] crisis'. The legal adviser's function was to link this back to precedents, to 'tell it as part of a history', and thus to present it as meshed in 'narratives in which it received a generalizable meaning' in order that the politician 'could see what to do with it' (Koskenniemi, 2005, p 120; compare Charlesworth, 2002b).

The application of most international law is not problematic: standardized rules are applied to standardized situations otherwise, as Franck (1990, p 20) points out, 'for example, no mail would go from one state to another, no currency or commercial transactions could take place... [V]iolence, fortunately, is a one-in-a-million deviance from the pacific norm'. Higgins' point appears to be that if ambiguity exists, then the decision-maker can make a choice which implements or is justified by existing legal material. Choice is

inevitable in legal decision-making because rules are not fully determined. In these circumstances, Higgins (1994, p 5) thinks it:

desirable that the policy factors are dealt with systematically and openly. Dealing with them systematically means that all factors are properly considered and weighed, instead of the decision-maker unconsciously narrowing or selecting what he will take into account in order to reach a decision that he has instinctively predetermined is desirable. Dealing with policy factors openly means that the decision-maker himself is subjected to the discipline of facing them squarely.

While one can disagree with the policy factors Higgins thinks relevant, at least this approach has the virtue of making these factors candid. Analysis and evaluation are easier because one knows the factors in play.

VII. BEYOND THE STATE, ITS INTERESTS, AND INSTRUMENTALISM

Despite their differences, the New Haven and Soviet schools share a common approach: both are instrumental theories of law, aimed at guiding and informing practice while implementing a political programme. Not all legal philosophy has this focus, despite the fact that this might cause disappointment:

Lawyers and law teachers... think (rightly) that legal practice is a practical business, and they expect the philosophy of law to be the backroom activity of telling front-line practitioners how to do it well, with their heads held high. When a philosopher of law asserts a proposition that neither endorses nor criticizes what they do, lawyers and law teachers are often frustrated... They cannot accept that legal philosophy is not wholly (or even mainly) the backroom activity of identifying what is good or bad about legal practice, and hence of laying on practical proposals for its improvement (or failing that, abandonment). (Gardner, 2001, p 204)

Much contemporary theory is non-instrumental, and thus detached from the practice of international law. This tendency towards detachment, a perceived disinclination to making clear commitments to anything but being 'critical', has caused adverse comment. For instance, Higgins (1994, p 9) argues that this approach 'leads to the pessimistic conclusion that what international law can do is to point out the problems but not assist in the achievement of goals'. This is precisely the criticism made of Kennedy by Charlesworth (Charlesworth, 2002a). Others have taken a more extreme view, denouncing critical scholars as engendering legal nihilism (eg Carrington, 1984).

Although these criticisms of the critics contain a degree of truth, they fail to give due weight to the idea that reason and knowledge are contextually embedded, that different discourses have different aims and functions. Consider Balkin's epistemologist who engages in a discussion with her colleagues in the philosophy department about the reliability of our knowledge of the passage of time. When, as a result of this discussion, she gets home later than she should and is upbraided by her husband because they are late for a dinner engagement, Balkin observes that it would be beside the point for her to respond using her philosophical arguments to question his knowledge of the passage of time—'in the context of dinner engagements, these speculations are irrelevant and philosophical scepticism is quite out of bounds' (Balkin, 1992, p 752).

Non-instrumental theories of international law are more akin to epistemological arguments regarding the passage of time than the more prosaic knowledge necessary to be prompt for dinner dates. Kennedy, for instance, is much more concerned with the critique of the practice and consequences of the practice of international law than in guiding that practice. As such, he could be seen as falling into an American intellectual tradition:

Artists and writers began to conceive of themselves as refugees from the American mainstream, the specially endowed inhabitants of a transcendental region sealed off from the hurly-burly of the marketplace, the banality of popular opinion, and the grime of industrialized society. Alienation became the customary and most comfortable posture for American intellectuals; criticism rather than celebration of the dominant American institutions and attitudes became the accepted norm . . . [T]he voluntary withdrawal of American artists and intellectuals into a separate sphere was not peculiar; it was merely part of a major fragmentation that occurred as American society modernized. (Ellis, 1979, p 221)

Nevertheless, an important theme in Kennedy's work (eg 2004) is that individuals should shoulder responsibility for their actions in the international arena, eg in human rights activism. Unfortunately, he also seems to indicate that we can never know the full consequences of our action, which would suggest that we cannot even 'point out the problems'. This could lead to paralysis; a reluctance or refusal to act because we cannot assess the effects of any planned intervention (compare Finnis, 1980, pp 000-00). From Higgins' perspective as a New Haven lawyer, this is indeed a fatal flaw: decisions must be made on the basis of available knowledge with a view to action.

In contrast, Philip Allott, whose work is avowedly iconoclastic (for a range of views, see Allott et al, 2005, and Scobbie, 2011), is essentially a non-instrumentalist critical theorist who demands action. Unlike some tendencies within the New Stream, Allott is imbued with a regenerative idealism, and places his faith in the power of the human mind to reform the future by imagining what that future should be, and then use reason to implement this idea. Human consciousness thus provides the template for human action and human reality, 'We make the human world, including human institutions, through the power of the human mind. What we have made by thinking we can make new by new thinking' (Allott, 2001, p xxvii). Thus at the heart of Allott's project lies an elemental conviction in the power of ideas, of human consciousness, both to structure and to change—to restructure—the world. Allott seeks a 'revolution, not in the streets but in the mind' (p 257, para 14.9) in order to achieve 'a social international society [where] the ideal of all ideals is eunomia, the good order of a self-ordering society' (p 404, para 18.77).

Allott argues for the rejection of the State as the primary unit of authority, and thus for the reconstruction of world affairs. The emphasis in international relations on the centrality of the State is at least a mistake, if not a tragedy, because it encapsulates a fundamental misconception about what matters: it authorizes the pursuit of specifically State interests to the detriment of those of humanity. This structure of international relations, derived from Vattel:

is not merely a tradition of international law. It implies a pure theory of the whole nature of international society and hence of the whole nature of the human social condition; and it generates practical theories which rule the lives of all societies, of the whole human race. It is nothing but mere words, mere ideas, mere theory, mere values—and yet war and peace, human happiness and human misery, human wealth and human want, human lives and human life have depended on them for two centuries and more. (p 243, para 13.105)

Just as the State is not co-extensive with society, international unsociety, where States dominate, is markedly less representative of humanity.

This was the inevitable outcome of the reception of Vattelian thought in international affairs, which played into the hands of ruling élites (pp 248–9, para 13.106). The conduct of international affairs through the conduit of the State made sovereignty, which projects ‘an authority-based view of society’, the structural premise of international affairs. This:

tend[s] to make all society seem to be essentially a system of authority, and . . . to make societies incorporating systems of authority seem to be the most significant forms of society, at the expense of all other forms of society, including non-patriarchal families, at one extreme, and international society, at the other. (p 199, para 12.53)

Thus the notion of the State, organized as sovereign authority over specified territory, trumps membership of other possible societies which are not as exclusive, and whose consciousness and ideals may differ from those of the State (see also Franck, 1999). Moreover, the consciousness of the State is impoverished, concentrating on State rather than human interests. At least in some States, however, the notion of sovereignty has been surpassed by that of democracy which relocates power in society rather than in the simple fiat of authority. This introduces a profound shift in social consciousness as democracy ‘seeks to make the individual society-member seek well-being in seeking the well-being of society. Democracy seeks to make society seek well-being in seeking the well-being of each individual society-member’ (Allott, 2001, p 217, para 13.31).

International unsociety, on the other hand, has chosen ‘to regard itself as the state externalized, undemocratized, and unsocialized’ (p 240, para 13.98). The purposes pursued in the world of States are those of States: ‘purposes related to the survival and prospering of each of those state-societies rather than the survival and prospering of an international society of the whole human race’ (p 247, para 13.105(13)). Morality thus becomes discontinuous between the domestic and international spheres (p 244, para 13.105(6)), and governments are able to act internationally free from the moral restraints that constraint them in domestic affairs, ‘murdering human beings by the million in wars, tolerating oppression and starvation and disease and poverty, human cruelty and suffering, human misery and human indignity’ (p 248, para 13.105(16)). ‘This cannot be how the world was meant to be’ (Allott, 2005). Allott’s fundamental belief is that international society has the capacity to enable all societies to promote the ever-increasing well-being of themselves and their members:

It is in international society that humanity’s capacity to harm itself can achieve its most spectacular effects. And it is in international society that the ever-increasing well-being of the whole human race can, must, and will be promoted. (p 180, para 12.5)

The State system, and consequent discontinuity between international and domestic affairs, alienates people from international law which ‘seems to be the business of a foreign realm, another world, in which they play no personal part’ (pp 298–9, para 16.8). It is something, at best, imposed upon them and not something in which they participate, nor forge through the force of their consciousness. International law has not been integrated into the social process of humanity and is ‘doomed to be what it has been—marginal, residual, and intermittent’ (p 304, para 16.17). As things stand, international law cannot play its proper part in the realization of eunomia—‘the good order of a self-ordering society’.

When *Eunomia* was first published, Allott’s vision was criticized as utopian. It assumes that a fully socialized international society will be benevolent and eschew conflict, as

conflict arises from the competing interests of States. Allott (p xxxii) denies that the criticism of utopianism has any force:

In response to this criticism, it is surely only necessary to say that our experience of the revolutionary transformation of national societies has been that the past conditions the future but that it does not finally and inescapably determine it. We have shown that we can think ourselves out of the social jungle.

It is equally true that we can think ourselves into that jungle: the betrayal of the idealism of the 1917 Russian revolution by subsequent reigns of terror sometimes aimed, although often not, at the realization of socialism is only one case in point. Allott's presupposition that humanity would develop a more just, loving, and peaceful consciousness—and choose to implement this in its social reality were it allowed to do so—is difficult to accept without hesitation. His argument is predicated on the belief that bad or wicked choices have been made which have caused human misery. It might be that Allott does not believe in the possibility of 'pure' evil, of wicked acts done in and for themselves. For Allott, human evil might simply be a contingent possibility, the product of a perverted consciousness arising, for instance, from the asocial conduct of international affairs. Accordingly, for Allott, evil might not be a necessary part of the human condition and may be banished through the transformation of human consciousness in the strive for eunomia. This belief, nevertheless, appears to be more an act of faith than a demonstrable proposition (see Scobbie, 2011, pp 000-000).

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On the other hand, one consequence of Allott's vision must surely be that of taking responsibility for international society and thus for international law. If Allott's inclusive international society were to be realized, international law would become a matter directly within individual consciousness. Accordingly, individuals (ultimately) rather than the State would determine and thus be responsible for the substantive content of international law. With that responsibility, Allott's hope is that morality would no longer be discontinuous between domestic and international society.

VIII. A VIEW OF DELFT

The only landscape that we know Johannes Vermeer painted, *A View of Delft* (c 1660–61), lives in the Hague along with all those international courts and organizations. It hangs in the modest Dutch Classicist setting of the Mauritshuis, the Royal Cabinet of Paintings, and not, for instance, in the more exuberant neo-renaissance exterior, art nouveau interior, of the Peace Palace which houses the International Court of Justice, Permanent Court of Arbitration, and the Hague Academy of International Law. *A View of Delft* is perhaps not as well known as Vermeer's *Girl with a Pearl Earring* (c 1665), which is also in the Mauritshuis, but I think it is the better, and more interesting, painting. It is luminous, with the upper two-thirds of the canvas taken up with a darkening sky.

Art historians have pinpointed that Vermeer painted *A View of Delft* from the upper storey of a building on the Schieweg (Bailey, 2001, p 108). It is also thought that he probably made use of *camera obscura* as an aid in setting out the basic topography of the scene, but the final composition is not a 'photographic' representation of the view from the window on the Schieweg. He reorganized reality, changed perspective, and tonal contrast 'to reinforce the strong friezelike character of the city profile' (Wheelock and Broos, 1995, p 133, see also pp 120–24, Bailey, 2001, pp 109–11, and Westermann, 1996, pp 82–3). The conscious manipulation of elements of composition and perspective was not uncommon with Dutch artists in the eighteenth century (see, eg Westermann, 1996, pp 75–7). The aim

was to highlight and emphasize some aspects at the expense of others in order to produce a more pleasing or dramatic image.

Legal theories are like this: their authors decide the aspects of law they want to discuss and in highlighting some, they downplay or ignore others. In rhetorical theory, this is known as ‘presence’:

choice is...a dominant factor in scientific debates: choice of the facts deemed relevant, choice of hypotheses, choice of the theories that should be confronted with the facts, choice of the actual elements that constitute facts. The method of each science implies such a choice, which is relatively stable in the natural sciences, but is much more variable in the social sciences.

By the very fact of selecting certain elements and presenting them to the audience, their importance and pertinency to the discussion are implied. Indeed, such a choice endows those elements with a presence, which is an essential factor in argumentation. (Perelman and Olbrechts-Tyteca 1969, p 116; see pp 115–120.)

All theoretical discussions of international law are incomplete in one way or another because different theorists emphasize—give presence to—different aspects of the discipline. They have different concerns, different aims, and different presuppositions—in short, different perspectives—in their thinking about international law.

At the start of this chapter, I identified Socrates as ‘one of the founders of Western philosophy’, and this discussion has remained within that tradition. While *Third World Approaches to International Law (TWAAIL)*, to take one example, has been mentioned, it has not been discussed. That silence should be deafening. All theories distort reality through selection and simplification. Some contemporary—and not so contemporary— theorists argue that these differences are inevitable, because one’s whole personality is inextricably involved in one’s approach to and understanding of (international) law (see, eg Kennedy, 2004, and Koskenniemi, 1999; compare Frank, 1949, pp 146–56, and Lasswell and McDougal, 1943, p 236; see also Duxbury, 1995, pp 125–35). Accordingly, there can be no objectivity, no intellectual space beyond the individual analyst—‘there is no there there’ (Stein, 1938, p 251).

In one of his last books, published posthumously, Professor Judt adverted to the methodological solipsism of identity politics—‘Why should everything be about “me”?’—and continued:

If everything is ‘political,’ then nothing is. I am reminded of Gertrude Stein’s Oxford lecture on contemporary literature. ‘What about the woman question?’ someone asked. Stein’s reply should be emblazoned on every college notice board from Boston to Berkeley: ‘Not everything can be about everything.’ (Judt, 2010, pp 189–90)

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FURTHER READING

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- BESSON S, and TASIOLAS, J (eds) (2010), *The Philosophy of International Law*

(Oxford: Oxford University Press) contains an excellent set of essays which are firmly rooted in philosophical concerns.

- BYERS, M (ed) (2000), *The Role of International Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press) is a collection of essays by distinguished authors which examines the interface between international law and politics. This is for a more advanced audience than Beck although it remains fairly accessible.
- KOSKENNIEMI, M (2001), *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University

Press) is an extensive scholarly analysis of the intellectual history of modern international law.

ORAKHELASHVILI, A (ed) (2011), *Research Handbook on the Theory and History of International Law* (Cheltenham: Edward Elgar) is a useful collection of essays.

RUBIN, AP (1997), *Ethics and Authority in International Law* (Cambridge: Cambridge University Press) is a readable and slightly idiosyncratic account of the influence of the naturalist and positivist schools of legal theory on our understanding of international law.