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# THE MODERN LAW REVIEW

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## ‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law

*Martti Koskenniemi\**

*Most international lawyers approved of the 1999 bombing of Serbia by the members of the North Atlantic alliance. But most of them also felt that it was not compatible with a strict reading of the UN Charter. The article describes the argumentative techniques through which international lawyers tried to accommodate their moral intuitions with their professional competence. The urge to achieve this, the article argues, arose from a general turn to ethics in the profession that has been evident since the end of the Cold War. This has often involved a shallow and dangerous moralisation which, if generalised, transforms international law into an uncritical instrument for the foreign policy choices of those whom power and privilege has put into decision-making positions.*

In a famous talk nearly forty years ago Professor Martin Wight of the London School of Economics posed the question about why there was no international theory. One of the reasons he found is the fact that it would have to be expressed in the languages of political theory and law. But these were languages that had been developed in the thinking about the state and about the control of social life in normal conditions:

Political theory and law are maps of experience or systems of action within the realm of normal relationships and calculable results. They are the theory of the good life. International theory is the theory of survival. What for political theory is the extreme case (as revolution or civil war) is for international theory the regular case.<sup>1</sup>

The distinction between the normal and the exceptional came to be part of the Realist explanation for why international law was such a weak structure. In the domestic context, situations are routine. Political normality by far outweighs the incidence of the exception – that is, ultimately revolution. By contrast, the international context was idiosyncratic, and involved ‘the ultimate experience of life and death, national existence and national extinction’. It was not the realm of the regularised search for happiness or avoidance of displeasure: it was struggle for survival. Political theories would not apply and legal rules would not work because the need for survival far outweighed the need for compliance.

Lawyers are not, of course, insensitive to the distinction between the normal and the exceptional. ‘Hard cases make bad law’ we say. Few would fail to distinguish

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1 M. Wight, ‘Why is There is no International Theory?’ in H. Butterfield and M. Wight (eds), *Diplomatic Investigations. Essays in the Theory of International Politics* (London: George Allen and Unwin, 1966) 33.

between the law regulating the provision of parking tickets to diplomats and the law concerning the use of force. In the recent *Nuclear Weapons* case (1996) the International Court of Justice came very close to admitting that no law could govern the case of self-defence when the very existence of the State was at stake.<sup>2</sup> During the Cold War, international lawyers largely gave up any attempt to conceive of the balance of power in terms of legal rules or principles. The dark passion of Great Power politics overwhelmed law's rational calculations. Thus many have understood the post-1989 transformation as a move from an *exceptional* situation to a *normality* where the rules of civilised behaviour would come to govern international life. The limitation of the scope of law during the Cold War had been an anomaly; now it was possible to restart the project of organising the administration of the international society by the Rule of Law in the image of the liberal West. Collective enforcement under the UN Charter 'would function in a regular and non-selective manner each time that circumstances required it, thus providing an institutional guarantee to the broad core of constitutional principles'.<sup>3</sup> Sovereignty would lose its exceptional force as a barrier against the enforcement of human rights, democracy or the requirements of the global market. The indictment of Pinochet and Milosevic would imply a rejection of the 'culture of impunity' that seemed such a violation of normal legal accountability.<sup>4</sup> The creation of the ad hoc war crimes tribunals on the Former Yugoslavia and Rwanda and the establishment of the International Criminal Court in Rome in 1998 would augur a 'new world order based on the rule of international law'<sup>5</sup> and continue the constitutionalisation of the international order, celebrated as a major implication of the new dispute-settlement system under the World Trade Organisation.<sup>6</sup>

The completion of the international legal order by bringing 'exceptional' situations within its compass has taken place through an increasing deformalization, accompanied by a turn to ethics in the profession. To illustrate this, I shall examine the legal argument about the bombing of Serbia by the North Atlantic Treaty Organisation (NATO) in 1999. This enables me to provide a focused genealogy of modern international law as it moves, in a familiar succession of argumentative steps, from formalism to ethics, in order to capture within law a great crisis that under the old, 'realistic' view would have fallen beyond its scope. But it also allows me to argue that the obsession to extend the law to such crises, while understandable in historical perspective, enlists political energies to support causes dictated by the hegemonic powers and is unresponsive to the violence and injustice that sustain the global everyday. The 'turn to ethics' is profoundly conservative in

2 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Reports 1996, paras 90–97 and 105 E (*dispositif*).

3 G. Abi-Saab, 'Whither the International Community' 9 EJIL (1998) 264.

4 Out of the wealth of writings on the matter cf Jill M. Sears, 'Confronting the "Culture of Impunity": Immunity of Heads of State from Nuremberg to *ex parte Pinochet*' 42 GYIL 1999 125–146.

5 A. Cassese, 'On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' 9 EJIL (1998) 8. The establishment of war crimes tribunals as an aspect of liberal legalism's projection of domestic ideals at the international level is usefully discussed in G.J. Bass, *Stay the Hand of Vengeance. The Politics of War Crimes Tribunals* (Princeton NJ: Princeton University Press, 2000) esp 16–36.

6 cf Ernst-Ulrich Petersmann, 'The WTO Constitution and the Millennium Road' in Marco Bronkers and Reinhard Quick (eds), *New Directions in International Economic Law. Essays in Honour of John H. Jackson* (The Hague: Kluwer, 2000) 111–133 and *id.* 'Constitutionalism and International Adjudication: How to Constitutionalize the UN Dispute Settlement System?' 31 NY. Univ J. of Intl L & Pol (1999) 753–790. Astonishingly, many international lawyers continue to interpret the UN Charter as a 'constitution of mankind', eg Bruno Simma and Andreas Paulus, 'The "International Community" Facing the Challenge of Globalization' 9 EJIL (1998) 274.

its implications. Many critics have observed the 'ideological' character of 'Kosovo'.<sup>7</sup> What I wish to do is to generalise from that incident to the state of the discipline as it struggles to find credibility and critical voice in the conditions of increasingly imperial politics.

## I

The bombing of Yugoslavia in the spring of 1999 caused around 500 civilian casualties.<sup>8</sup> From the perspective of the Western Alliance, these deaths were perhaps a tragic but unavoidable collateral damage. For international lawyers, they are an agonising puzzle: humanity's sacrifice for the gift of the Rule of Law or the consummation of a blatant breach of the UN Charter? Part of the agony stems from the difficulty to think that *those* are the only alternatives. In some ways, formal law seems unable to deal with Kosovo. So many prefer to describe it through the discourse of diplomatic or military strategy: you could not negotiate with Milosevic, the only language he understands is force! Others seek to encompass those deaths within the frame of historical causality: it has always been bad down there, it could not be changed overnight – what is important is the creation of the conditions for a more democratic Yugoslavia, and a more humane international order. But most commentators have envisaged Kosovo as a moral or ethical issue, a matter of rights or principles. It is this perspective that tends to separate Kosovo from the old world of the Cold War. While 'then' it was all a calculation of military force and balance of power, 'now' it has become a matter of moral ideals, self-determination, democracy and human rights. When the Secretary-General of the North Atlantic Treaty Organisation announced that the attack on Serbia had commenced, he did this in the following terms:

We must stop the violence and bring an end to the humanitarian catastrophe now taking place in Kosovo. We have a moral duty to do so.<sup>9</sup>

What is the relationship between 'moral duty' and the question about the lawfulness of the killing of the 500? A simple answer would be to relegate the former into a matter of the private conscience, or describe it as part of the foreign policy debate about the pros and cons of Western involvement. But this would be uncomfortably close to Cold War Realism and would counteract the urge to think about the international world, too, in terms of the 'theory of the good life'. Now there have of course been lawyers who have claimed that there is no reason why the law should not be applicable to any international matter, including the high politics of survival. This conclusion has been sometimes received from the nature of law as a complete system.<sup>10</sup> NATO was either entitled to bomb Serbia or it was

7 cf especially Olivier Corten, 'Les ambiguïtés de la référence au droit international comme facteur de légitimation portée et signification d'une déformalisation du discours légaliste' in Olivier Corten and Barbara Delcourt, *Droit, légitimation et politique extérieure: l'Europe et la guerre du Kosovo* (Bruxelles: Bruylant, 2000) 223–259 and Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' 10 EJIL (1999) 679–711.

8 There is no reliable exact number to the civilian deaths of 'Operation Allied Force'. The Human Rights Watch estimates that about 500 civilians were killed in approximately 90 incidents. cf Amnesty International, *NATO/Federal Republic of Yugoslavia. 'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force* (Amnesty International, June 2000) 1 n 2.

9 NATO Press release (1999) 041 (14 March 1999).

10 The completeness of international law was the focus of much of the inter-war reconstructive jurisprudence. For Hans Kelsen, completeness was an outcome of the formal principle of the

not. *Tertium non datur*. Surely it is an essential part of the Rule of Law that society contains no corner of outside-the-law. Surely it would seem strange if the law had nothing to say about the civilian casualties in Serbia. But what does the law say? And with what conviction?

After over two years of debate, the positions are well known. For some, 'Kosovo' was a formal breach of the UN Charter and there is nothing more to say about it. Others read their moral intuitions as part of the law: because the intervention was morally necessary, it was also lawful. But most lawyers – including myself – have taken the ambivalent position that it was both formally illegal and morally necessary.<sup>11</sup> Such schizophrenia tears wide open the fragile fabric of diplomatic consensus and exposes the aporia of a normative structure deferring simultaneously to the impossibility of ethical politics in a divided and agnostic world and the impossibility not to assess political action in the light of some ethical standpoint. The agony of lawyers that parades through conferences and symposia on Kosovo and manifests itself in the odd view that brings law and ethics together by assuming that the Council 'legalised' the NATO action *ex post facto*,<sup>12</sup> suggests that whichever conclusion one holds, it remains a rather secondary rationalisation in view of the speciality of the events.

To think of Kosovo as law is to move it from the realm of the exceptional to that of routine. It becomes a 'case' of a 'doctrine' – the law of humanitarian intervention. To the extent that we then wish to take account of its special aspects, and admit various informal arguments to characterise it, it moves us in the direction of the idiosyncratic, personal – until at the end it becomes the single situation that appeals to us not through the rational rhetoric of the rules but its singular meaning, as it were, through our souls. In this way, I suggest, Kosovo has invited international lawyers to throw away dry professionalism and imagine themselves as moral agents in a *mission civilicatrice*. A particularly shallow and dangerous moralisation that forecloses political energies needed for transformation elsewhere. This is why my title picks up the spontaneous cry – 'the Lady protests too much, methinks' – that Shakespeare put into Queen Gertrude's mouth. The debates reveal that 'Kosovo' is not only about what happened 'out there' – in the play that Hamlet had staged for his mother to watch – but also, and importantly, about what took place 'in here', the audience. Reacting to the play Queen Gertrude was reacting to her own guilt which, of course, was the *real* subject being dealt with. Analogously, Kosovo has come to be a debate about ourselves, about what we hold as normal and what exceptional, and through that fact, about what sort of international law we practice.

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exclusion of the third. More influential has been the theory of material completeness that forms the heart of one of the most important books of 20th century international jurisprudence, Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon, 1933).

11 This argument is expressly made eg in Antonio Cassese, 'Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the International Community?' 10 EJIL 1999 23–30. For nuances, compare Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' 10 EJIL (1999) 1–22. For particularly useful discussions of the international lawyers' reaction, cf Siegfried Schieder, 'Pragmatism as a Path towards a Discursive and Open Theory of International Law' 11 EJIL (2000) 663, 691–8 and Olivier Corten, 'Les ambiguïtés de la référence au droit international comme facteur de légitimation portée et signification d'une déformalisation du discours légaliste' in Corten and Delcourt, n 7 above, 223–259.

12 cf Alain Pellet, 'Brief remarks on the Unilateral Use of Force' 11 EJIL (2000) 389.

## II

Let me now trace the eight steps through which international lawyers are transformed into moralists by the logic of the argument from humanitarian intervention, that also traces modern international law's odyssey for 'policy-relevance'.

*Step 1: (Formal law stricto sensu – law as pure form).* Lawyers who held the bombing illegal base this on the formal breach of Article 2(4) of the UN Charter that was involved. As is well-known, the article admits of only two principal exceptions: authorisation by the Security Council and self-defence under Article 51. Neither was present. *Ergo*, the bombing was illegal. Although there is little doubt of the professional correctness of this conclusion, it still seems arrogantly insensitive to the humanitarian dilemmas involved. It resembles a formalism that would require a head of state to refrain from a pre-emptive strike against a lonely submarine in the North Pole even if that were the only way to save the population of the capital city from a nuclear attack from that ship – simply because no 'armed attack' had yet taken place as required by the language of Article 51. But does the law require the sacrifice of thousands at the altar of the law? Surely the relevant texts should be read so as to produce a 'reasonable' result. If it is the *intention* of the self-defence rule to protect the State, surely it should not applied in a way to bring about the destruction of the State.

How does one know whether self-defence is applicable?

Clearly, this cannot be determined independently of a definition of the relevant 'self'. For the North Atlantic Alliance it may not be implausible to think of European security as a matter for its own security. Or perhaps the relevant 'self' was the Albanian population in Kosovo – in which case the NATO attack might have been lawful assistance for a people struggling for self-determination under the 1975 Friendly Relations Declaration.<sup>13</sup> To what extent might such considerations offset the requirement of prior armed attack? In order to give sense to the normal meaning of the language of the relevant instruments, and solve hierarchical controversies, it is necessary to move to interpretation, that is beyond the pure form of articles 2(4) and 51.

*Step 2: (Formal law lato sensu – law as representative for 'underlying' social, historical, systemic, or other such 'values').* Although it is difficult (though by no means impossible) to sustain humanitarian intervention as a formal custom,<sup>14</sup> many might receive it from the object and purpose of the Charter, supported by a series of General Assembly resolutions plus the residual custom that contains a principle of proportionality and perhaps no longer sustains sovereignty against massive human rights violations. In case of the Charter, recourse to its object and purpose is 'of special significance' due to its constitutional nature and extreme difficulty of

<sup>13</sup> UNGA Res 2625 (XXV).

<sup>14</sup> Unsurprisingly, the customary law argument enjoys wide support among United States lawyers such as Lillich, McDougal or Reisman. The problem with that argument is that it has to be made against the authority of ICJ, *Nicaragua* case, Reports 1986 109. Apart from Kosovo, practice is still scarce of cases in which the acting State itself would have understood (or justified) its action as humanitarian intervention. Cf. Dino Kritsiotis, 'Appraising the Policy Objections to Humanitarian Intervention', 19 Mich J. of Int L (1993) 1010–1013, 1014. For a balanced overview and assessment, cf. Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001) 53–86.

carrying out formal revisions.<sup>15</sup> There is no doubt that the violent oppression of ethnic Albanians in Kosovo by the Milosevic regime was against the Charter. If the Charter prohibits such oppression then surely it must also provide the means whereby it is discontinued. Remember the non-recognition of South Rhodesia by the UN during 1965–1979, the sanctions against South Africa, or the official international community's silence after India's intervention in East Pakistan in 1971. If sovereignty is an expression of communal liberty and self-rule, then surely it cannot be permitted to destroy them.<sup>16</sup> '[A] jurist rooted in the late twentieth century can hardly say that an invasion by outside forces to remove [an usurper of power] and install the elected government is a violation of national sovereignty'.<sup>17</sup>

Notice that the argument in the opposite direction occupies the same terrain. Why would it be necessary to stick closely to the formal prohibition of force and the narrow understanding of the exceptions thereto? Well, surely because of the dangers of abuse and selectivity, the fact that '[m]ilitary enforcement raises the spectre of colonialism and war'.<sup>18</sup> There is no space of 'innocent' literality. If challenged, a restrictive view – even if motivated by bona fides concerns of intellectual rigour – is immediately called upon to produce a substantive defence and will thus reveal its underlying ideology.<sup>19</sup> At that point we have irrevocably left formalism for hermeneutics. Law is now how it is interpreted. As the 'deep-structural' values which the interpretation is expected to reveal do not exist independently of human purposes, we are down the slippery slope of trying to identify those purposes. This might be accomplished in different ways.

*Step 3: (Instrumentalism).* As human activity, international law is not a mechanic transformation of a piece of textual information into action. It is, rather, activity with a point, oriented towards a human purpose. The point of criminal law is to maintain social peace; the point of contract is to exchange goods. Without such point, the law and the contract would seem utterly meaningless or aspects of some strange metaphysics. This is how a Martian might feel trying to interpret what parliaments and businessmen do in abstraction of any point: the raising of the hands, the filing of the ballot, the exchange of pieces of paper – exotic rituals indeed, which we understand as the point-oriented activities of legislation or trade. The same with international law, of course. The point of the UN Charter is to attain peace, human rights, economic welfare. We do not appreciate the Charter because of some mystical quality of its text or the aura of its authors. The Charter is not God. We honour it because we believe it leads us to valuable secular purposes.

This is also how many lawyers understand the sacrifice of the 500 Serbs.<sup>20</sup> The sacrifice is justified by the point of the Charter, to prevent aggression, to bring peace to the Balkans, to protect human rights and self-determination. Or

15 cf Georg Ress, 'The Interpretation of the Charter', in B. Simma (ed), *The Charter of the United Nations. A Commentary* (Oxford: Oxford University Press, 1995) 42, 43.

16 This is the argument in M. Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations* (New York: Basic Books, 2nd ed, 1992), 101–108.

17 M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law', in G. Fox and B. Roth, *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000) 245.

18 T.M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (New York: Oxford University Press, 1999) 272. For the policy objections, cf Kritsiotis, n 14 above, 1020–1034.

19 Pierre-Marie Dupuy, 'L'enfer et la paradigme: libres propos sur les relations du droit international avec la persistance des guerres et l'objectif idéal du maintien de la paix' in *Mélanges offerts à Hubert Thierry* (Paris: Pedone, 1998) 199–200.

20 cf Pierre-Marie Dupuy, 'L'obligation en droit international' 44 *Arch phil droit* (2000) 218.

conversely it was mass murder because the Charter seeks to prevent aggression, protect sovereignty, to channel disputes into UN organs. If human activity is an activity with a point, and the UN is a human activity, then to understand it – and not simply to apply its formal text – we must examine whether the point of the Charter and the point of the sacrifice do or do not coincide. But now a formidable problem emerges.

If law is thoroughly instrumental, we should be able to ascertain what it is an instrument for. But if we *do* know that, we already have access to an objective moral world of what ‘we’ as UN members want (or what is ‘good’) and no longer need (formal) law at all – except as a practical guide on how to get there. But – and here is the difficulty – if law is just a ‘practical guide’ to reach a point, *then we have no need for it if we already know the point*. We have then silently stepped out of the melancholy agnosticism of legal modernity, and entered an earthly paradise in which (1) we can think of ourselves as (again) capable of knowing the good in some inter-individually valid way without the necessary intervention of any authority, or mediator; and (2) the things we know are good are coterminous with each other, there is no conflict between them, and consequently no need for rules on conflict resolution. Morgenthau was wrong: human life is not tragic, utopia is available. Morgenthau was right, it does not include a binding, formal law.<sup>21</sup>

The ‘object and purpose’ test is not just a technique; it is a replacement of the legal form by a claim about substantive morality. It thus involves difficulties of philosophical anthropology and epistemology that bring us to the edge of modernity, and maybe beyond. But it also meets with the practical obstacle that people – and States – still do disagree on what is good, and, by extension, how the Charter should be interpreted. Far from resolving the problem of Kosovo, hermeneutics restates that problem in another vocabulary: the sacrifice was necessary for the same reason that it seemed necessary for Abraham to kill Isaac. Because that is what God said.<sup>22</sup> Verbal uniformity may sometimes reflect or bring about substantive agreement. But often it veils disagreement, and when it does, merely to insist on ‘strict compliance’ with the rule is pointless as the disagreement is about what there is to comply with in the first place.<sup>23</sup>

*Step 4: (Utilitarianism)* Well, you might think, it is true that formal law does not solve the issue, and that God is not available for guidance, but that this is to exaggerate the difficulty. Perhaps, you think, all that is needed is to balance the stakes, to calculate. Is it not the purpose of political action to attain the greatest good of the greatest number? If intervention can save more lives than it might

21 The view that human interests or wants are essentially compatible and that social problems are thus (‘ultimately’) problems of scientific or technical co-ordination lies at the heart of the traditional (liberal) interdependence-based explanations of the possibility of international law. And it is precisely that assumption – the harmony of interests – that was the basis of the ‘Realist’ critique of international law and the tragic view of the human predicament propagated by leading ‘Realists’. cf E.H. Carr, *The Twenty-Years’ Crisis 1919–1939* (London: Macmillan, 2nd ed, 1946) esp 40 *et seq*, 80–88 and Hans Morgenthau, *Scientific Man vs Power Politics* (Chicago: University of Chicago Press, 1946).

22 For this familiar parable in another, but related context, cf Martti Koskenniemi, *Faith, Identity and the Killing of the Innocent*. *International Lawyers and Nuclear Weapons*, 10 *Leiden Journal of International Law* (1997) 137, 158–162.

23 This is what makes the recent obsession about ‘compliance control’ with international agreements so frustrating: in the interesting cases, non-compliance is not a technical or a bad faith problem but a political one: substantive disagreement about what the party accused of non-compliance undertook to comply with. For a more sustained argument on this, cf Martti Koskenniemi, ‘Comment on Compliance with Environmental Treaties’ in Winfried Lang (ed) *Sustainable Development and International Law* (London, Dordrecht, Boston: Nijhoff, 1995) 91–96.

destroy, then it must be carried out. The 500 were sacrificed for the greater good. Many of us often reason this way. Much recent international regulation has refrained from laying down substantive do's and don'ts and instead referred to an *ad hoc* balancing of interests in a contextual, deformed fashion, in order to attain the greatest overall utility.<sup>24</sup> But of course, many of us are aware of the problems, as well, familiar as they have been since John Stuart Mill's adjustment of Benthamite 'pig-philosophy'. Which items are included in the calculation? How are those items weighed against each other? Would massive destruction of nature be part of the package – how might it compare to civilian deaths? What about the formal status of the victims: surely the cost of 10 dead pilots – by flying lower in order to hit only true military targets – might have been a more acceptable offer for the Rule of Law than 500 Serbian civilians. But what is the ratio and which are the relevant values? What about accepting the death of 1000 soldiers in a ground campaign to spare 500 civilians as an offshoot of an air war? But at some point it becomes abominable to count heads in this way. The targeting of old Serbs in order to save young Kosovar Albanians might work as an effective deterrent in which the ratio in terms of saved years of life would clearly be in favour. But it would make banal the value of lives, and inculcate an insensitive and dangerous bureaucratisation that lowers the threshold towards killing if only that might seem rational under some administrative reason. Besides, it presumes full knowledge of the sacrifice that is going to be required and the consequences of alternative scenarios. But we know now that NATO knew precious little of the actual effects of its bombing on the ground – and had still less idea about the political results. As Thomas Nagel has put the point: 'Once the door is opened to calculations of utility and national interest, the usual speculations about the future of freedom, peace, and economic prosperity can be brought to bear to ease the consciences of those responsible for a certain number of charred babies'.<sup>25</sup>

*Step 5: (Rights)* Because of such formidable difficulties, many would say that law or morality are not just about head-counting: surely they are also about justice, in particular about rights. Rights, in this version, act as 'trumps' that prohibit the carrying out of policies that would otherwise seem to provide an aggregate benefit.<sup>26</sup> Indeed, Article 6 of the 1966 UN Covenant on Civil and Political Rights lays down the right to life without provision for exception. Because there is no derogation from right to life, the bombing was illegal. But of course, the right to life is not absolute in this way: the provision prohibits only the 'arbitrary' deprivation of life and what is 'arbitrary' is to be defined *in casu*. Killing in war or in self-defence does not qualify as breach of Article 6.<sup>27</sup> But the point is larger. Rights are always consequential on a prior definition of some benefit as 'right' and on contextual appreciation where rights-language is given a meaning (especially in

24 A good example of this is the 1997 UN *Convention on the Law of the Non-Navigational Uses of International Watercourses*, UN Dec A/RES/51/229 (8 July 1997). The Treaty merely lays down a general standard of 'equitable and reasonable utilization' that reserves the determination of permitted and prohibited uses to an open-ended multi-factor calculation 'taking into account the interests of the watercourse States concerned, consistent with the adequate protection of the watercourse' (Article 5(1) *in fine*).

25 T. Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979) 59. For a good account of the problems of utilitarian arguments about killing in war, cf. Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995) 44–50.

26 The idea of rights as 'political trumps held by individuals' is famously defended in Ronald Dworkin, *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1977).

27 ICJ, *Threat or Use of Nuclear Weapons* (Advisory Opinion) Reports 1996 paras 24–5.

terms of somebody's enforceable duties). Likewise, conflicting rights can only be put to a hierarchy by reference to some policy about the distribution of entitlements under conditions of relative scarcity.<sup>28</sup> In other words, rights depend on their meaning and force on the character of the political community in which they function.<sup>29</sup> This applies also to the right to life. Abortion and euthanasia, for instance, receive normative status only once we know the society that is our reference-point. In the practice of international institutions – that is to say, within the 'thin' culture of public cosmopolitanism – rights turn into effects of utilitarian calculations. Far from 'trumping' policies rights defer to them. To believe otherwise is to accept some policy about rights as binding in an absolute, non-political way – that is to say, to believe it was given to human society instead of created by it, like God's words.<sup>30</sup>

*Step 6: (Legislative discourse)* But if humanitarian intervention involves deference to political principles or balancing calculations, then it threatens to degenerate into a pretence for the use of power by those who have the means. After all, Hitler, too, intervened in the *Sudetenland* to protect the German population. To avoid this, many have suggested the establishment of criteria for such intervention that would check against the possibility of political misuse. If those criteria were clear enough, it would be possible to ascertain objectively – automatically – whether an intervention was justified or not.<sup>31</sup> However, this is to restate the difficulty with rules. However enlightened, peaceful and rational the appliers are, rules cannot be applied in the automatic fashion that their proponents suppose. This is because any rule or criterion will be both over and under-inclusive. It will include some cases that we did not wish to include and it will appear to leave out some cases that we would have wanted to include had we known of them when the criteria were drafted. Say the criterion allows intervention if 500 are killed. From the perspective of a devout Catholic nation, this would allow, perhaps even call for intervention to prevent the thousands of cases of abortion routinely practised in the secular West. Surely that would seem over-inclusive. But it would also leave out the case of where only 400 were killed. But would this not be quite arbitrary? Should there really be no difference between the case where the 400 were military men, killed in combat, or new-born babies, charred to death in their cradles because they belong to an ethnic minority?

A very precise ('automatic') criterion would be undesirable for the reason Julius Stone pointed out in a related context, namely because it would be a 'trap for the innocent and a signpost for the guilty'.<sup>32</sup> It would compel the well-meaning State to watch the atrocity being committed until some in itself arbitrary level has been attained – and allow the dictator to continue until that very point. A criterion is always also a permission. *This is how far I can go!* It is precisely for this reason that the attempts to define 'aggression' have either failed or ended up in parody.

28 M. Koskenniemi, 'The Effect of Rights on Political Culture', in Philip Alston (ed) *EU and Human Rights* (Oxford: Oxford University Press, 1999) 99–116.

29 cf Chris Brown, 'Universal Human Rights: A Critique', in T. Dunne and N.J. Wheeler (eds), *Human Rights and Global Policies* (Cambridge: Cambridge University Press, 1999) 111–114.

30 Which is how they are defended eg in M.J. Perry, *The Idea of Human Rights. Four Inquiries* (Oxford: Oxford University Press, 1998) 11–41. For the classical critique, cf Edmund Burke, *Reflections on the Revolution in France* (1790, Stanford: Stanford University Press, ed by J.C.D. Clark, 2001) 217–221.

31 For a long list of references to academic studies that propose the development of 'criteria', cf Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (Amsterdam: Spinhuis, 1993) 30 and 69 n298. cf also Krtisiotis, n 14 above, 1022–1024.

32 J. Stone, *Conflict through Consensus. UN Approaches to Aggression* (Sydney: Maitland, 1977).

When the General Assembly in 1952 started to look for a definition, its concern was to check political misuse by the Security Council of its broad enforcement powers under Chapter VII. A definition was finally adopted by the Assembly in December 1974.<sup>33</sup> In an operative part that contains eight articles and takes a good two sheets of the space of a regular UN Document the definition lists as ‘aggression’ not only ‘first use of armed force by a State in contravention of the Charter’ but also other kinds of ‘invasion’, ‘bombardment’, ‘blockade’, ‘sending of armed bands’ as well as ‘substantial involvement’ in such actions. After the long – but non-exhaustive – list of examples, the definition then provides that ‘the Security Council may determine that other acts constitute aggression under the provisions of the Charter’. An exercise whose very point was to limit Security Council discretion ended up in defining as aggression whatever the Council chooses to regard as such!

Little is to be expected of legislation. The more precise the proposed criteria, the more automatic their application, the more arbitrary any exclusion or inclusion would appear. And this would be arbitrariness not just in regard to some contested policy but to the humanitarian point of the rule. This is why it would be a mistake to assume that the definition of aggression failed due to the scheming malevolence of diplomats. Everyone participated in the exercise with two legitimate aims: (1) whatever you agree, do not end up curtailing the action of your home State when action is needed to defend its essential interests, and (2) try as best you can to prevent action that might be prejudicial to the interests of your State. Now when *everyone* participated in the debate on such instructions, the result could only be meaningless: language that is both absolutely binding and absolutely open-ended.

An exercise to draft criteria for humanitarian intervention within the UN would end up as the definition of aggression. Because an absolute criterion such as ‘500’ allows the slow torturing to death of 499, flexible terminology is needed. The situation should be such that ‘fundamental human rights are being or are likely to be seriously violated on a large scale and there is an urgent need for intervention’.<sup>34</sup> Like the definition of aggression, this seems both sensible and inconsequential. It is responsive to the humanitarian urge and avoids the danger of absolutism – but only by simultaneously opening the door for military action in dubious cases, and facilitating the tyrant’s hypocrisy. We are back in the original situation. As soon as the rule is no longer automatic, but involves discretion, the possibility of abuse that it was the point of the rule to eradicate reappears.<sup>35</sup> Why?

The proposal to legislate over responses to massive human rights violations brings forth the very problem that Martin Wight pointed out: namely that formal rules work well in a domestic normality where situations are routine and the need to honour the formal validity of the law by far outweighs incidental problems in its application. The benefits of exceptionless compliance offset the losses. Think about the organisation of popular vote. Most societies have an absolute rule about the voting age – often 18. Why do they have such a rule? Because only mature people should be entitled to participate in the direction of political order. But the

<sup>33</sup> UNGA Res 3314 (XXIX) 14 December 1974.

<sup>34</sup> *Humanitarian Intervention*, Report by the Dutch Advisory Council on International Affairs (AIV) and the Advisory Committee on Public International Law (CAVV), No. 13, April 2000 29. For a much more sceptical discussion, cf Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects* (Copenhagen, 1999) 103–111.

<sup>35</sup> cf also Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990) 67–80.

rule is clearly both over and under-inclusive. It lets some people to vote who are immature – your middle-aged alcoholic neighbour who gambled his family's savings. And it excludes others that clearly are mature – your 17-year old daughter who just had a straight A from her social science class. Note again that the problem is not an external distortion: the inclusion and the exclusion appear problematic because they contradict the point of the rule. But we still insist to apply the rule. Why? Because the only alternative would be to condition voting rights directly on the substantive criterion of 'maturity'. But this would allocate the decision on the delimitation of the electorate to those who have been put in the position to assess the 'maturity' of the voters. Now you might think that is all right if it is *you* who sits in the 'maturity board' – but it is more likely to be *your neighbour*.

In domestic normality it is possible to live with automatic rules because the alternative is so much worse. The occasional injustice is not too dramatic and will be dispelled: your neighbour falls in love and sobers up; your daughter votes in the next election. No threat to the legal order emerges. Revolution will not take place. But this is otherwise in a international emergency of some gravity. An injustice caused by the law immediately challenges the validity of a legal system that calls for compliance even against self-interest. The point of the rule (that is, the need to prevent serious and large scale violations of fundamental human rights) is more important than its formal validity. In the domestic situation, the rule is applied perhaps in millions of situations. Automaticity excludes political manipulation and the connected routine brings about an overall result that is more valuable than any (small) injustice that is being caused. In the international situation, on the other hand, and especially if the situation is defined as a 'serious violation of fundamental rights', the need to uphold the formal validity of the law cannot be compared to the weight of the impulse to act now.<sup>36</sup> If the rule does not allow this, so much worse for the rule. Any appeal for passivity in the interests of upholding a general sense of law-obedience will ring hollow, even cynical.

*Step 7: (Law as Procedure):* After all such problems, you might conclude that international law's role lies less in offering substantive rules, whether absolute or flexible, than in providing a decision-process that allows a controlled treatment of the situation. It would channel the problem to institutions and bodies – *regimes*, in a word – in which interested parties could agree on the right interpretation, or the correct course of action, if possible under conditions of transparency and accountability.<sup>37</sup> This would be a democratic way to deal with the problem. But what would be the correct procedure? For some, it was precisely the procedural side-stepping of the Security Council where the illegality of the bombing lay. For others, NATO decision-making offered enough 'collectiveness' to account for lawfulness. Some would retort, of course, that how can a regional body arrogate to itself the power to decide on a matter entrusted by the Charter to a universal one. To those, however, seasoned observers would respond in the way Morgenthau commented on the UN's first efforts to deal with the crises in Greece, Spain,

36 The way in which the legislative choice between (automatic) rules and (evaluative) standards is influenced by the frequency of the conduct being regulated has been much debated in law and economics, including international trade law. The point is that the less frequent the behaviour, the less appropriate are automatic rules for regulating it. Joel Trachtman, 'Trade and ... Problems, Cost-Benefit Analysis and Subsidiarity', 9 EJIL (1998) 37.

37 This move is usefully described in Friedrich Kratochwil, 'How Do Norms Matter?' in M. Byers (ed) *The Role of Law in International Politics. Essays on International Relations and International Law* (Oxford: Oxford University Press, 2000) 37–42.

Indonesia and Iran. They ‘provided opportunities for exercises in parliamentary procedure, but in no occasion has even an attempt been made to facing the political issues of which these situations are surface manifestations’.<sup>38</sup> One need not share Morgenthau’s distaste of liberalism to admit that institutional procedures in the UN and elsewhere often provide more of an excuse for non-action than a reasoned technique for solving acute crises. However much political theorists might seek ‘ideal speech situations’ to account for institutional legitimacy, what is ‘ideal’ will remain open for controversy and empirical evidence of it is largely absent from the international scene. The argument of the Uniting for Peace Resolution in 1950 that justifies overtaking the Security Council if the Council is ‘unable to act’ was then, and remains, a contested redescription of following the Council’s rules of decision-making as a violation of the political *point* of the Charter. This is an incident of the over-exclusiveness of Article 27 (3) of the Charter: it sometimes excludes action in cases where some people think action is needed. There may well be, as intimated in the UN Secretary-General’s General Assembly speech in September 1999, good reason to set aside the correct procedure in order to act.<sup>39</sup> But although to explain this as an implementation of the ‘deep’ logic of the Charter is a part of the diplomatic practice never to say one is actually breaking the law, it still remains the case that a beneficial illegality today makes it easier for my adversary to invoke it tomorrow as precedent for some sombre scheme of his. Hence, of course, the anxiety of Western lawyers about Kosovo.

*Step 8: (The Turn to Ethics)* For such difficulties, many people believe that even as law is not just formal texts and precedents, its informality cannot be reduced to utilitarian calculations, absolute rights or procedural techniques, either. The relevant considerations are situational. One version of such attitude follows Max Weber’s analysis of the failure of legal formality in the conditions of complex modernity, and highlights the way bureaucratisation focuses on the decision-maker’s preferences or alliances. To grasp decision-making in an environment deprived of determining rules, Weber made his famous distinction between an ethics of ultimate ends and an ethics of responsibility. According to him – and to many others – it was the latter that provided the more appropriate framework for decision-makers in a case such as now exemplified by Kosovo.<sup>40</sup> The argument might be – and I have myself sometimes made it in this way – that in the context of 1999, with the experience of passivity in Kigali and in Srebrenica, Western European officials had to take action. If formal law is anyway unclear and cannot be separated from how it is interpreted, then much speaks for the individualisation of Kosovo. A decision has to be made and that decision – as one of Weber’s close readers, Carl Schmitt, the *Kronjurist* of the Third Reich, the theorist of the exception would say – is born out of legal nothingness.<sup>41</sup> What counts are the experience of the decision-maker and his or her sensitivity to the demands of the

38 Morgenthau, n 21 above 119.

39 ‘If ... a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold?’ UN Press release 1999 SG/SM/7136, GA 9596.

40 For the strong recommendation for statesmen to shun from absolute principles and to act on an honest appreciation of the concrete effects of one’s decision, cf Max Weber, ‘Politics as Vocation’, in *From Max Weber: Essays in Sociology* (Translated, edited and with an introduction by H.H. Gerth and C. Wright Mills, London: Routledge, 1967) 77–128. For the application in international relations, cf David Warner, *An Ethic of Responsibility in International Relations* (Boulder CO and London: L. Rienner, 1991).

41 C. Schmitt, *Political Theology* (Cambridge MA: MIT Press, Georg Schwab tr, 1985) 31–32.

situation. The problem is not about criteria or process, but about something that might be called 'wisdom'.<sup>42</sup>

The merit of this flight to decisionism/ethics of responsibility (or love) lies in the way it discounts Kosovo as precedent. Kosovo – the killing of 500 – is so important that it cannot be captured by rules or procedures. But the problem lies in the implied suggestion that the proper realm of the important lies in the personal, subjective, even emotional – and in particular in the conscience of those whom the dictates of power and history have put in decision-making positions. Let me paraphrase Schmitt again. For him, legal normality was dependent on the power of the one who could decide on the exception: legal normality – rules and processes – was only a surface appearance of the concrete order that revealed its character in the dramatic moment when normality was to be defended or set aside. Behind the tranquillity of the *pouvoir constitué* lay the founding violence of the *pouvoir constituant* – a *coup d'état*, a revolution.<sup>43</sup> From this perspective, the bombing of Serbia was the exception that revealed, for a moment, the nature of the international order which lay not in the Charter of the United Nations nor in principles of humanitarianism but in the will and power of a handful of Western civilian and military leaders. The sacrifice of 500 civilians would then appear as a violent reaffirmation of the vitality of a concrete international order created sometime after the second world war and in which what counts as law, or humanitarianism, or morality, is decided with conclusive authority by the sensibilities of the Western Prince.

### III

But to reduce the nature of social order to the mental activities or moral states of Princes – the 'purity of heart' that St. Thomas held an indispensable ingredient of the just war – is to blind oneself to the suffering that is produced by social normality. To credit the decision-makers as having been involved in an emotional process about their moral obligations is to make precisely that mistake of fact (of being in a position of power) for right for which Rousseau once accused Grotius: 'it is possible to imagine a more logical method, but not one more favourable to tyrants'.<sup>44</sup> 'Man was born free and he is everywhere in chains', Rousseau also wrote, bearing in mind the religious binds of an *ancien régime* that were finally loosening in his time. The Enlightenment that we associate with him sought freedom through rational rules and public decision-making processes, and relegated morality into one's conscience. To extrapolate the nature of the international order from the moral dilemmas – however real – of the statesmen involved in great events makes us blind to the political and moral problems of a normality that has lifted those people in decision-making positions in the first place and leaves the rest as passive spectators or sometimes sacrificial victims on the altar of their superior moralities.<sup>45</sup>

42 S.H. Morgenthau, *Politics among Nations* (New York: Knopf, 1948) 444. An excellent analysis of the way Western argument in Kosovo went beyond positivism but fell short of natural law 'theory', is in Corten, n 7 above, 233–259.

43 Schmitt, n 41 above, 5–15.

44 J.-J. Rousseau, *The Social Contract* (Harmondsworth: Penguin, Maurice Cranston tr, 1968) 51.

45 For the ideological nature or standard narratives about humanitarian intervention that 'depend upon the acceptance of gendered and racialized metaphors', cf Orford, n 7 above 701, 689–703.

This leads me to observe an ironic reversal of the relations between the normal and the exception. For the classical realists, the founding violence of law – the violence which could not be encompassed by law because it was its precondition – was an act of physical force, sending in the military to occupy a territory or to overthrow (or uphold) a government, war, aggression, sovereignty: great moments of historical significance. These were the *a priori* on which the law was based and that could not, therefore, be captured within law. How different it all seems today. It is hard to think of a more central concern for the profession than Kosovo, a more normal conference topic or item of polite conversation than war, crisis management and peace enforcement, punishment and sanctions. The wide concept of security promoted by UN officials and European crisis managers has blurred the line between military and civilian matters – thus expanding the jurisdiction of military experts, making talk about forcible intervention a matter of bureaucratic normality. If every concern is a security concern, then there are no limits to the jurisdiction of the security police.<sup>46</sup> Every international lawyer today negotiates genocide and war crimes and learns to speak the language of moral outrage as part of a discipline relearning the crusading spirit, and the civilising mission.

What this new normality has done, like every normality, is to relegate its own founding violence into the shadow. Undoubtedly, a sacrifice of 500 is important. But what about the violence of a global system in which, according to the UNDP report of 2000, more than 30,000 children die every day of malnutrition, and the combined wealth of the 200 richest families in the world was eight times as much as the combined wealth of the 582 million people in all the least developed countries.<sup>47</sup> We deal with military intervention, peace enforcement, or the fight against terrorism in the neutral language of legal rules and humanitarian moralities, and so come to think of it in terms of a policy of a global public realm – forgetting that it is never Algeria that will intervene in France, or Finland in Chechnya. The peace that will be enforced will not be racial harmony in Los Angeles and the terrorism that shall be branded as the enemy of humanity will not be an intellectual property system that allows hundreds of thousands of Africans march into early death by sexually transmitted disease. Our obsessive talk about Kosovo makes invisible the extreme injustice of the system of global distribution of wealth, reducing it to the sphere of the private, the unpolitical, the natural, the historically determined – just like war used to be – a ‘social’, ‘cultural’ or ‘economic’ *condition* of law which therefore cannot be touched by law.<sup>48</sup>

So it is precisely at the moment when we celebrate the capture of the exception of military force into the Rule of Law that all ambition has been renounced to attain a critical grasp of the concrete order of global distribution of power and wealth. It is tempting to think that the very condition that has made it possible to articulate Kosovo in the language of international law has also made it impossible to deal with that other founding violence. If international law is centrally about the informal management of security crises by diplomatic and military experts, then of course it is not about global redistribution: it is about upholding the status quo and about directing moral sensibility and political engagement to waging *that* battle. Kosovo and its civilian deaths spell anxiety, a recognition of the

46 cf Martti Koskenniemi, ‘The Police in the Temple. Order, Justice and the UN: A Dialectical View’, 6 EJIL (1995) 325–348.

47 United Nations Development Programme, *Human Development Report 2000* (Oxford: Oxford University Press, 2000) 73, 82.

48 For this argument in a more general form, cf David Kennedy, ‘Putting the Politics Back in International Politics’ *IX Finnish Yearbook of International Law* (1998) 19–27.

insufficiency of existing rules and principles, a call for moral sensibility. Hunger and poverty do not. The more international lawyers are obsessed by the effectiveness of the law to be applied in 'crises', the less we are aware of the subtle politics whereby some aspects of the world become defined as 'crisis' whereas others do not. Despite the rhetoric of universal international law, and of *ius cogens*, only the tiniest part of the world is encompassed by international law. Even as law now arrogates to itself the right to speak the language of universal humanitarianism, it is spoken only by a handful of experts fascinated about matters military and technological, the targeting of missiles and press conferences with uniformed men who speak clearly. Should *their* moral sensibilities now be the lawyers' greatest concern?

#### IV

What alternatives are there? The eight steps traced above might seem to describe a logic which, after successive failures to attain normative closure, leads into the spontaneous and the private: 'moral duty' compels Kosovo. Such an understanding celebrates the emotional immediacy of the inner life as the sanctuary of the true meaning of dramatic events that cannot be captured within law's technical structures. This would, however, involve an altogether groundless belief in the primacy of the subjective, or the ability of emotion (in contrast to 'reason') to grasp some authentic form of life to be contrasted to the artificial structures of the law. But the conventions of the subject, and the related disciplines of psychology and identity politics are no closer to or distant from 'authentic reality' than the conventions of public life, including formal law, sociology or market. Moreover, as I have argued elsewhere, the very claim that one is arguing from the position of authenticity – for example, a given notion of human right, or self-determination – involves an objectionable attempt to score a political victory outside politics.<sup>49</sup> The subjective and the spontaneous form a symbolic order just like the realm of the objective and rational. Neither occupies an innocent space that would be free from disciplinary conventions and ambitions and at which international lawyers could finally grasp the authentic.

The merit in the 'turn to ethics' lies in the way it focuses on the undetermination of official behaviour by rational standards and criteria and thus, inevitably, brings to the fore the *political* moment in such decisions. It reveals the way such decision-making is an aspect of social antagonism, instead of something neutral or 'rational' in the way liberal internationalism has often assumed. Intervention remains a political act however much it is dressed in the language of moral compulsion or legal technique. On the other hand, however, that cannot be the end of the matter, either, although this is how many critics of liberalism – including Carl Schmitt and Hans Morgenthau – have often suggested. Neither the opposition between the friend and the enemy, nor the lust for power share the character of a final, foundational truth about society or politics. Existentialism, too, is just a symbolic order, a language.

So the turn to ethics, too, is a politics. In the case of international law's obsession about military crises, war and humanitarianism, it is a politics by those who have the means to strengthen control on everyone else. The Kosovo Albanian is worthy of humanitarian support as long as he remains a helpless victim – but turns into a

49 M. Koskenniemi, 'The Wonderful Artificiality of States', *ASIL Proceedings* (1994) 22–28.

danger the moment he seeks to liberate himself.<sup>50</sup> In such a situation, insistence on rules, processes, and the whole culture of formalism now turns into a strategy of resistance, and of democratic hope. Why? Because formalism is precisely about setting limits to the impulses – ‘moral’ or not – of those in decision-making positions in order to fulfil general, instead of particular, interests; because it casts decision-makers as responsible to the political community; and because it recognises the claims made by other members of that community and creates the expectation that they will be taken account of. Of course, the door to a formalism that would determine the substance of political outcomes is no longer open. There is no neutral terrain. But against the particularity of the ethical decision, formalism constitutes a horizon of universality, embedded in a *culture* of restraint, a *commitment* to listening to others’ claims and seeking to take them into account.<sup>51</sup> The reference to ‘moral duty’ in the justification of the bombing of Serbia was objectionable because it signified a retreat from such commitment into the private life of the conscience, casting the Serbs as immoral ‘criminals’ with whom no political community could exist and against whom no measures were excessive.<sup>52</sup> By contrast, a commitment to formalism would construct the West and Serbia as political antagonists in a larger community, whose antagonism can only be set aside by reference what exceeds their particular interests and claims.

In a related context, David Kennedy has characterised analogous arguments in terms of modernity’s ‘eternal return’, the way they reduce professional history into the repetition of familiar moves: from formalism to antiformalism and back, from interpretation to literality and back, from emotion to reason and back, from sociology to psychology and back, from apology to utopia and back – with ‘no exit and existential crisis’.<sup>53</sup> If this were all, then a move to formalism like the move to ethics would indeed only repeat certain modernist tropes that we have seen over the years being performed with some regularity in art, philosophy, politics, as well as in law. But this need not be so. Modernity is unstable, and every move it makes is always already split by reflexivity against itself. Formalism can no longer be blind to its own politics. Having shed the pretensions of objectivity it must enter the political terrain with a programme of openness and inclusiveness, no longer interpreted as effects of neutral reason but of political experience and utopian commitment, as *articulation* of what might be called the ‘sedimented practices constituting the normative framework of a certain society’.<sup>54</sup> To be sure, formalism can no longer believe that it merely translates this framework to particular decisions. This is why it does not suffice only to provide a hearing to the claims of the political other but also to include in political contestation the question about *who* are entitled to make claims and *what kinds* of claims pass the test of validity.

50 As pointed out in Slavoj Žižek, *The Fragile Absolute. Or Why is the Christian Legacy Worth Fighting For?* (London: Verso, 2000) 59–60.

51 The arguments here draw inspiration from recent debates about the possibility of a left universalism that would not only recognise but enhance claims of identity and the reality of politics as (‘agonistic’) struggle. Out of a flourishing recent literature, cf Chantal Mouffe and Ernesto Laclau, *Hegemony and Socialist Strategy* (London: Verso, 1985) and J. Butler, E. Laclau and S. Žižek, *Contingency, Hegemony, Universality. Contemporary Dialogues on the Left* (London: Verso, 2000). I have discussed the culture of formalism at more length in my *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002) 494–509.

52 This ‘Schmittian’ point is made is also made in Žižek, n 50 above, 56–60.

53 cf David Kennedy, ‘The Nuclear Weapons case’ in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999) 468–472.

54 E. Laclau, ‘Identity and Hegemony: the Role of Universality in the Constitution of Political Logics’, in Butler, Laclau and Žižek, n 51 above, 82–83.

Without such self-reflexivity formalism will freeze into the justification of one or another substantive policy – just like democracy may do. Such a formalism lives on a paradox, split against itself inasmuch as it recognises itself as ‘culture’ – an aspect of the human, dependent on psychology and politics, uncertain and partial, yet also seeking to articulate something universal and shared. This ‘split’ holds up its utopian moment, suggesting an exit from the anxiety of the ‘eternal return’ and redeeming cosmopolitanism and emancipation as aspects of a properly political project.

For many years now, international lawyers have been called upon to assume the role of technical policy-advisers, participants in a global culture of effectiveness and control that underwrites the objectives projected onto the unipolar world by those in hegemonic positions. Now their ethical commitment has been directed to military enforcement as part of the gradual naturalisation of an economic system that sustains the hegemon. But the turn to ethics has also revealed a vulnerable spot in the latter. If law is inevitably always also about the subjective and the emotional, about faith and commitment, then nothing prevents re-imagining international law as commitment to resistance and transgression. Having learned its lesson, formalism might then re-enter the world assured that whatever struggles it will have to weigh, the inner anxiety of the Prince is less a problem to resolve than an objective to achieve.