# The Politics of International Law

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## I. The Flight from Politics

It may be a matter of some controversy among historians as to when one should date the beginning of the modern states-system.[1] Less open to debate, however, is that somehow the idea of such a system is historically as well as conceptually linked with that of an international Rule of Law. In a system whose units are assumed to serve no higher purpose than their own interests and which assumes the perfect equality of those interests, the Rule of Law seems indeed the sole thinkable principle of organization – short of the *bellum omnium*. Since the publication of Emmerich de Vattel's *Droit des gens ou principes de la loi naturelle appliquées à la conduite et aux affaires des nations et des souverains* (1758), jurists have written about international matters by assuming that the liberal principles of the Enlightenment and their logical corollary, the Rule of Law, could be extended to apply in the organization of international society just as they had been used in the domestic one.[2]

Notwithstanding the historical difficulty with dates and origins, the connexion between the Rule of law and the principles of the Enlightenment appear evident. Of

* Permanent Mission of Finland to the United Nations.

1 For example, A.F. von der Heydte: *Geburtstunde des souveränen Staates* (1952) suggests the turn of the 14th century, 41-43, while F.H. Hinsley: *Power and the Pursuit of Peace*.(1962), 153, argues that one cannot properly speak of a states-system until the 18th century.

2 The analogy is explicit in J.J. Rousseau: *The Social Contract* (trans. & introd. by Maurice Cranston) (1986) Bk.I Ch. 7 at 63; J. Locke, *Two Treatises on Government* (intr. by W.S. Carpenter) (1984) Second Treatise, sect. 183 at 211. For commentary, see, e.g., P. Vinogradoff, *Historical Types of International Law* (1920), 55-57; E.D. Dickinson, *The Equality of States in International Law* (1920), 29-31, 49-50, 97-98, 111-113. See also M. Walzer, *Just and Unjust Wars* (1980), 58-63; C.L. Beitz, *Political Theory and International Relations* (1979) 74. For useful analysis of the effect of the analogy to the conception of a state's (territorial) rights, see A. Carty, *The Decay of International Law?* (1986) 44-46, 55-56.

the latter, none seems more important than that of the subjectivity of value.[3] Hobbes writes:

> For one calleth wisdom what another calleth fear and one cruelty what another justice; and prodigality what another magnanimity... And therefrom such names can never be ground for any ratiocination.[4]

However much later liberals may have disliked Hobbes' substantive conclusions or his political realism, the one thing which unites them with Hobbes is their criticism of relying upon natural principles to justify political authority. Appealing to principles which would pre-exist man and be discoverable only through faith or *recta ratio* was to appeal to abstract and unverifiable maximums which only camouflaged the subjective preferences of the speaker. It was premised on utopian ideals which were constantly used as apologies for tyranny.

From the simple denial of the existence of principles of natural justice – or at least of our capacity to know them – follow the three liberal principles of social organization: freedom, equality and the Rule of Law. If man is not born to a world of pre-existing norms, then he is born free; if there are no antecedent principles establishing the relative worths of individuals, the individuals must be assumed equal. And finally, freedom and equality are guaranteed only if social constraint is governed by public, verifiable and determining rules: "A free people obey but it does not serve; it has magistrates but not masters; it obeys nothing but the laws, and thanks to the force of laws, it does not obey men."[5]

The fight for an international Rule of Law is a fight against politics, understood as a matter of furthering subjective desires and leading into an international anarchy. Though some measure of politics is inevitable, it should be constrained by non-political rules: "...the health of the political realm is maintained by conscientious objection to the political."[6]

The diplomatic history of the 19th century is a history of such a fight. Since the Vienna Congress of 1814-15 and the defeat of Napoleon, the relations between European powers were no longer built on one power's search for primacy but on a general pursuit of the maintenance of the balance of power, guaranteed by complicated legal procedures and alliances.[7] As contemporaries increasingly saw Europe as a "system" of independent and equal political communities (instead of a *respublica*

3 My discussion of this principle is influenced by R.M. Unger, *Knowledge and Politics* (1975) 76-81, and A. MacIntyre, After Virtue; A Study in Moral Theory (2nd ed.) (1985) 6-35.

4 T. Hobbes, *Leviathan* (ed. & intr. by C.B. Macpherson) (1982) Ch. 4, at 109-110.

5 J.J. Rousseau, *Œuvres complètes*, Pléiade (Vol. III sect. 841-2) quoted by Cranston (Introduction to J.J. Rousseau, *The Social Contract*, *supra* note 2, at 32).

6 Wight, 'Western Values in International Relations', in Butterfield, Wight, *Diplomatic Investigations; Essays in the Theory of International Politics* (1966) 122.

7 See, e.g., F.H. Hinsley, *supra* note 1, at 186-271.

*Christiana*) they began to assume that the governing principles needed to become neutral and objective – that is, legal.

The legal scholarship of the 19th century interpreted and systematized diplomatic practice into legal rules. It assumed that the behavior of European states was determined and explicable by reference to a body of (European) public law. The plausibility of this assumption relied on the procedural character of that law. Containing mainly rules concerning diplomatic and consular contacts, procedures for attaining statehood, territory or neutral status, it did not severely restrict the ends which European sovereigns attempted to pursue. In particular, it renounced theories of the just war: war became now one political procedure among others.[8] Though the professional lawyers of the 19th century did speak about justice in the conduct of the sovereigns' affairs, they no longer thought of justice as material principles. Woolsey put the matter adroitly:

> By justice, however, we intend not justice objective, but as it appears to the party concerned or, at least, as it is claimed to exist. From the independence of nations it results that each has a right to hold and make good its own view of right in its own affairs.[9]

Though 20th-century lawyers have not looked too kindly upon the scholarship of the preceding century, they never rejected the ideal of the Rule of Law. On the contrary, the reconstructive scholarship which emerged first from the catastrophe of the First World War and then in the 1950s and 1960s accused the pre-war doctrines of *not going far enough* to uphold the Rule of Law. Wherever attempts by jurists to construct a solid framework of public law had faltered, it had done so not because of some defect in the liberal assumptions behind this project but because jurists had deviated from them.

The vision of a Rule of Law between states (which re-emerged most recently in United Nations General Assembly Resolution 44/23 [15 November 1989] declaring the period 1990-1999 as the "United Nations Decade of International Law") is yet another reformulation of the liberal impulse to escape politics. So strong is the grip of this vision that the representative of the Soviet Union at the same session of the General Assembly explained that in his view to restructure the basis of international relations there was a need to "arrive at a comprehensive international strategy for establishing the primacy of law in relations between states."[10]

Throughout the present century, reconstructive doctrines have claimed that what merits criticism is the corruption of the Rule of Law either in the narrow chauvin-

8 See, e.g., H. Wheaton, *Elements of International Law* (Text of 1866 with Notes, Carnegie Endowment, Classics of International Law, No. 19) (1936) 313-4.

9 T.D. Woolsey, *Introduction to the Study of International Law; Designed as an Aid in Teaching, and in Historical Studies* (5th ed.) (1879) 183.

10 'Memorandum: On Enhancing the Role of International Law', UN Doc.A/44/585 (2 October 1989).

ism of diplomats or the speculative utopias of an academic elite. If only the Rule of Law can be fortified to exclude these contrasting distortions, then at least the jurist's part in the construction of a just world order has been adequately executed.

In this article, however, I shall extend the criticism of the liberal idea of the *Rechtstaat*, a commonplace in late modern western society,[11] into its international counterpart. I shall attempt to show that 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.[12]

## II. The Content of the Rule of Law: Concreteness and Normativity

Organizing society through legal rules is premised on the assumption that these rules are objective in some sense that political ideas, views, or preferences are not. To show that international law is objective – that is, independent from international politics – the legal mind fights a battle on two fronts. On the one hand, it aims to ensure the *concreteness* of the law by distancing it from theories of natural justice. On the other hand, it aims to guarantee the *normativity* of the law by creating distance between it and actual state behaviour, will, or interest. Law enjoys independence from politics only if both of these conditions are simultaneously present.

The requirement of concreteness results from the liberal principle of the subjectivity of value. To avoid political subjectivism and illegitimate constraint,[13] we must base law on something concrete – on the actual (verifiable) behaviour, will and interest of the members of society-states. The modern view is a *social conception of law*.[14] For it, law is not a natural but an artificial creation, a reflexion of social circumstances.

11 For the ensuing text, particularly relevant are criticisms stressing the *internal* tensions of liberal theory. See generally Unger, *supra* note 3, at 63-103 and, e.g., A. Levine, *Liberal democracy; A Critique of its Theory* (1981) 16-32; Fishkin, 'Liberal Theory and the Problem of Justification', *NOMOS* XXVIII at 207-231.

12 This article is a condensed version of some of the themes in M. Koskenniemi, *From Apology to Utopia; the Structure of International Legal Argument* (1989).

13 For a typical argument stressing the political character of natural law, see, e.g., S. Sur, *L'interprétation en droit international public* (1974) 25-32 or J.H.W. Verzijl, *International Law in Historical Perspective* (Vol. I) (1968) 391-3.

14 'C'est à une conception fonctionnelle de pouvoir, à une conception sociale du droit que s'attache notre enseignement', De Visscher, 'Cours général de principes de droit international public', 86 *RCDI* (1954) 451.

According to the requirement of normativity, law should be applied regardless of the political preferences of legal subjects. In particular, it should be applicable even against a state which opposes its application to itself. As international lawyers have had the occasion to point out, legal rules whose content or application depends on the will of the legal subject for whom they are valid are not proper legal rules at all but apologies for the legal subject's political interest.[15]

Stated in such a fashion, I believe that the requirements of legal objectivity *vis-à-vis* political subjectivity are met. For if the law could be verified or justified only by reference to somebody's views on what the law *should* be like (i.e. theories of justice), it would coincide with their political opinions. Similarly, if we could apply the law against those states which accept it, then it would coincide with those states' political views.

This argumentative structure, however, which forces jurists to prove that their law is valid because concrete and normative in the above sense, both creates and destroys itself. For it is impossible to prove that a rule, principle or doctrine (in short, an argument) is both concrete and normative simultaneously. The two requirements *cancel each other*. An argument about concreteness is an argument about the closeness of a particular rule, principle or doctrine to state practice. But the closer to state practice an argument is, the less normative and the more political it seems. The more it seems just another apology for existing power. An argument about normativity, on the other hand, is an argument which intends to demonstrate the rule's distance from state will and practice. The more normative a rule, the more political it seems because the less it is possible to argue it by reference to social context. It seems utopian and – like theories of natural justice – manipulable at will.

The dynamics of international legal argument are provided by the constant effort of lawyers to show that their law is either concrete or normative and their becoming thus vulnerable to the charge that such law is in fact political because apologist or utopian. Different doctrinal and practical controversies turn on transformations of this dilemma. It lies behind such dichotomies as "positivism"/"naturalism", "consent"/"justice", "autonomy"/"community", "process"/"rule", etc., and explains why these and other oppositions keep recurring and do not seem soluble in a permanent way. They recur because it seems possible to defend one's legal argument only by showing either its closeness to, or its distance from, state practice. They seem insoluble because both argumentative strategies are vulnerable to what appear like valid criticisms, compelled by the system itself.[16]

This provides an argumentative structure which is capable of providing a valid criticism of each substantive position but which itself cannot justify any. The fact

15 See, e.g., H. Lauterpacht, *The Function of Law in the International Community* (1933) 189 and *passim*.

16 For an alternative but similar type of exposition, see D. Kennedy, *International Legal Structure* (1987)

that positions are constantly taken and solutions justified by lawyers, demonstrates that the structure does not possess the kind of distance from politics for which the Rule of Law once seemed necessary. It seems possible to adopt a position only by a political choice: a choice which must ultimately defend itself in terms of a conception of justice.

## III. Doctrinal Structures

Two criticisms are often advanced against international law. One group of critics has accused international law of being too political in the sense of being too dependent on states' political power. Another group has argued that the law is too political because founded on speculative utopias. The standard point about the non-existence of legislative machineries, compulsory adjudication and enforcement procedures captures both criticisms. From one perspective, this criticism highlights the infinite flexibility of international law, its character as a manipulable facade for power politics. From another perspective, the criticism stresses the moralistic character of international law, its distance from the realities of power politics. According to the former criticism, international law is too *apologetic* to be taken seriously in the construction of international order. According to the latter, it is too *utopian* to the identical effect.

International lawyers have had difficulty answering these criticisms. The more reconstructive doctrines have attempted to prove the normativity of the law, its autonomy from politics, the more they have become vulnerable to the charge of utopianism. The more they have insisted on the close connexion between international law and state behaviour, the less normative their doctrines have appeared. Let me outline the four positions which modern international lawyers have taken to prove the relevance of their norms and doctrines. These are mutually exclusive and logically exhaustive positions and account for a full explanation of the possibilities of doctrinal argument.

Many of the doctrines which emerged from the ashes of legal scholarship at the close of the First World War explained the failure of pre-war international doctrines by reference to their apologist character. Particular objects of criticism were "absolutist" doctrines of sovereignty, expressed in particular in the *Selbstverpflichtunglehre*, doctrines stressing the legal significance of the balance of power or delimiting the legal functions to matters which were unrelated to questions of "honour" or "vital interest." Writings by Hersch Lauterpacht, Alfred Verdross and Hans Kelsen among others, created an extremely influential interpretation of the mistakes of pre-war doctrines.[17] By associating the failure of those doctrines with their excessive

17 Lauterpacht, *supra* note 15; A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926); H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920).

closeness to state policy and national interest and by advocating the autonomy of international legal rules, these jurists led the way to the establishment of what could be called a *rule approach* to international law, stressing the law's normativity, its capacity to oppose state policy as the key to its constraining relevance.

This approach insists on an objective, formal test of pedigree (sources) which will tell which standards qualify as legal rules and which do not. If a rule meets this test, then it is binding. Though there is disagreement between rule approach lawyers over what constitutes the proper test, there is no dispute about its importance. The distinctions between hard and soft law, rules and principles, regular norms and *jus cogens*, for instance, are suspect: these only betray political distinctions with which the lawyer should not be too concerned.[18] Two well-known criticisms have been directed against the rule approach. First, it has remained unable to exclude the influence of political considerations from its assumed tests of pedigree. To concede that rules are sometimes hard to find while their content remains, to adopt H.L.A. Hart's expression "relatively indeterminate"[19] is to undermine the autonomy which the rule approach stressed. Second, the very desire for autonomy seems suspect. A pure theory of law, the assumption of a *Völkerrechtsgemeinschaft* or the ideal of the wholeness of law – a central assumption in most rule approach writing[20] – may only betray forms of irrelevant doctrinal utopianism. They achieve logical consistency at the cost of applicability in the real world of state practice.

The second major position in contemporary scholarship uses these criticisms to establish itself. A major continental interpretation of the mistakes of 19th-century lawyers and diplomats explains them as a result of naive utopianism: an unwarranted belief in the viability of the Congress system, with its ideas of legality and collective intervention. It failed because it had not been able to keep up with the politics of emergent nationalism and the increasing pace of social and technological change. Lawyers such as Nicolas Politis or Georges Scelle stressed the need to link international law much more closely to the social – even biological – necessities of international life.[21] Roscoe Pound's programmatic writings laid the basis for the contemporary formulation of this approach by criticizing the attempt to think of inter-

18 This approach is best illustrated in G. Schwarzenberger, *The Inductive Approach to International Law* (1965). Many of its points are forcefully made in Weil, 'Towards Relative Normativity in International Law', 77 *AJIL* (1983) 413-442. For further references on this and the other approaches, see Koskenniemi, *supra* note 12, at 154-186.

19 H.L.A. Hart, *The Concept of Law* (1961) 132.

20 See, e.g., Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of Law', *Symbolae Verzijl* (1958) 196-221 and the "realist" criticism by Stone, 'Non-Liquet and the Function of Law in the International Community', XXV *BYUL* (1959) 124-161.

21 G. Scelle, *Précis de droit des gens. Principes et systématique I-II* (1932, 1936); N. Politis, *Les nouvelles tendances du droit international* (1927).

national law in terms of abstract rules. It was, rather, to be thought of "in terms of social ends."[22]

According to this approach – the *policy approach* – international law can only be relevant if it is firmly based in the social context of international policy. Rules are only trends of past decision which may or may not correspond to social necessities. "Binding force" is a juristic illusion. Standards are, in fact more or less effective and it is their effectiveness – their capacity to further social goals – which is the relevant question, not their formal "validity."[23]

But this approach is just as vulnerable to well-founded criticisms as the rule approach. By emphasizing the law's concreteness, it will ultimately do away with its constraining force altogether. If law is only what is effective, then by definition, it becomes an apology for the interests of the powerful. If, as Myres McDougal does, this consequence is avoided by postulating some "goal values" whose legal importance is independent of considerations of effectiveness, then the (reformed) policy approach becomes vulnerable to criticisms which it originally voiced against the rule approach. In particular, it appears to assume an illegitimate naturalism which – as critics stressing the liberal principle of the subjectivity of value have noted – is in constant danger of becoming just an apology of some states' policies.[24]

The rule and the policy approaches are two contrasting ways of trying to establish the relevance of international law in the face of what appear as well-founded criticisms The former does this by stressing the law's normativity, but fails to be convincing because it lacks concreteness. The latter builds upon the concreteness of international law, but loses the normativity, the binding force of its law. It is hardly surprising, then, that some lawyers have occupied the two remaining positions: they have either assumed that international law can neither be seen as normatively controlling nor widely applied in practice (the sceptical position), or have continued writing as if both the law's binding force as well as its correspondence with developments in international practice were a matter of course (idealist position). The former ends in cynicism, the latter in contradiction.[25]

The late modern mainstream often situates itself between the rule and the policy approaches. In Richard Falk's words, the task of an adequate doctrine is to establish:

22 Pound, 'Philosophical Theory and International Law', I *Bibliotheca Visseiana* (1923) 1-90.

23 The contemporary formulation of this approach is perhaps clearest in McDougal, 'International Law, Power and Policy: A Contemporary Perspective', 82 *RCDI* (1953) 133-259. For useful analysis, see B. Rosenthal, *L'étude de l'œuvre de Myres Smith McDougal en matière du droit international public* (1970).

24 For such criticisms, see, e.g., Allott, 'Language, Method and the Nature of International Law', 45 *BYIL* (1971) 123-125; Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', 26 *Harvard Journal Int'l Law* (1985) 349, and Fitzmaurice, 'vae Victis or Woe to the Negotiators!', 65 *AJIL* (1971) 370-373.

25 For references, see Koskenniemi, *supra* note 12, at 167-170, 178-186.

> [a]n intermediate position, one that maintains the distinctiveness of the legal order while managing to be responsive to the extralegal setting of politics, history and morality.[26]

But such a movement towards pragmatic eclecticism seems self-defeating. There is no space between the four positions, rule approach, policy approach, scepticism and idealism. Middle-of-the-road doctrines may seem credible only insofar as their arguments, doctrines or norms are not contested. But as soon as disagreement emerges, such doctrines, too, must defend their positions either by showing their autonomous binding force, or by demonstrating their close relationship with what states actually do. At this point, they become vulnerable to the charge of being either utopian or apologist.

The result is a curiously incoherent doctrinal structure in which each position is *ad hoc* and therefore survives only. Mainstream doctrine retreats into general statements about the need to "combine" concreteness and normativity, realism and idealism, which bear no consequence to its normative conclusion. It then advances, emphasizing the contextuality of each solution – thus undermining its own emphasis on the general and impartial character of its system.

A doctrine's own contradictions force it into an impoverished and unreflective pragmatism. On the one hand, the "idealist" illusion is preserved that law can and does play a role in the organization of social life among states. On the other, the "realist" criticisms have been accepted and the law is seen as distinctly secondary to power and politics. Modern doctrine, as Philip Allott has shown, uses a mixture of positivistic and naturalistic, consensualistic and non-consensualistic, teleological, practical, political, logical and factual arguments in happy confusion, unaware of its internal contradictions.[27] The style survives because we recognize in it the liberal doctrine within which we have been accustomed to press our political arguments.

A final point is in order. Both of the main positions reviewed, as well as their combinations, remain distinctly modern. Each refuses to develop its concept of law in terms of some material theory of justice. Each assumes that law is an artificial, human creation which comes about through social processes and that an adequate concept of law is one which provides a reliable description of those processes. Moreover, each bases its claim to superiority *vis-à-vis* the other on that very description. The point at which they diverge is their theory on how to interpret those processes, how to understand what goes on in social life in terms of law-creation and law-application.

The difficulty in choosing between a rule and a policy approach is the difficulty of defending the set of criteria which these put forward to disentangle "law" from other aspects of state behaviour. For the rule approach lawyer, the relevant criteria

26 Falk, 'The Interplay of Westphalia and Charter Conceptions of the International Legal Order' in R. Falk, Black (eds.), *The Future of the International Legal Order* (Vol. I) (1969) 34-35.

27 Allott, *supra* note 24, at 100-105, 113.

are provided by his theory of sources. For the policy approach, the corresponding criteria are provided by his theory of "base-values", authority or some constellation of national or global interest and need. Because it is these criteria which claim to provide the correct description of social processes, they cannot be defended without circularity in terms of social processes themselves.[28] To decide on the better approach, one would have to base oneself on some non-descriptive (non-social) theory about significance or about the relative justice of the types of law rendered by the two – or any alternative – matrices.[29] Such a decision would, under the social conception of law and the principle of the subjectivity of value, be one which would seem to have no claim for objective correctness at all. It would be a political decision.

## IV. Substantive Structures

It is possible to depict the tension between the demands for normativity and concreteness in two contrasting methods of explaining the origin of the law's substance. From the perspective of concreteness, this substance comes about as a consequence of the fact of sovereignty of the state. One aspect of sovereignty is the liberty to "legislate" international norms which bind oneself. Wherever particular norms have not been thus established, the metaprinciple of sovereign liberty – the "Lotus principle" – remains valid.

It is equally possible to understand the law as a consequence of the functioning of normative criteria for law-emergence. From the perspective of normativity, there must be assumed criteria – "sources" – which allow us to distinguish between the fact of the existence and behaviour of certain centres of power (states) and the law. In this sense, all international legal substance is dependent on the content of those criteria. These explanations seem radically conflicting and appear to provide exhaustive but incompatible methods for elucidating the origin and character of international law. Indeed, much of the dispute between "idealists" and "realists", or the rule and policy approaches, seems captured in this contrast, reflected also in the organization of the substance of standard textbooks. One style consists of preceding the law's substance with an analysis of the character of statehood and that of the international order – the "political foundations." Another starts out by listing the sources of international law and lets the law's substance follow therefrom.

28 The point about conceptual matrices, scientific theories, "paradigms", interests of knowledge or prejudices, if not strictly determining what we can know of the social world at least significantly influencing our perception, is a common theme in much modern epistemology. See further Koskenniemi, *supra* note 12, at 466-471.

29 On choosing significant features for description, see, e.g., J. Finnis, *Natural Law and Natural Rights* (1980) 3, 9-18. See also MacIntyre, 'The Indispensability of Political Theory', in Miller, Siedentop, *The Nature of Political Theory* (1983) 19-33.

Despite their initially contrasting outlook, both "methods" rely on each other. "Realist" doctrines use criteria to distinguish between law and coercion which fall short of a doctrine of sources only by not bearing that name. "Idealist" programmes look at state practice to defend the relevance of their sources and to verify the content of the law they support.[30] The fact that the available outlooks provide identical substantive systems and both remain vulnerable to well-rehearsed arguments further explains the late modern turn to doctrinal pragmatism.

In the practice of international dispute resolution the lack of a satisfactory explanation for the origin of legal rules has led lawyers to abandon seeking justification for solving interpretative controversies from any of the suggested explanations. Behind ritualistic references to well-known rules and principles of international law (the content of which remains a constant object of dispute), legal practice has increasingly resorted to solving disputes by a contextual criterion – an effort towards an equitable balance. Though this has seemed to work well, the question arises as to whether such practice can be adequately explained in terms of the Rule of Law.

## A. Sovereignty

There is a body of doctrine which addresses itself to the questions: what are the character and normative consequences of statehood? It deals with such themes as the acquisition and loss of statehood, the justification and extent (limits) of territorial sovereignty, the rights of states, the delimitation of competing jurisdictions, etc. The rhetorical importance of this doctrine has varied, but its urgency within the liberal doctrine remains unchallenged. In some ways, sovereignty doctrine plays a role analogous to that played by individual liberty in legitimation discourse. It explains a critical character of legal subjects and sets down basic conditions within which the relations between legal subjects must be organized.

The character and consequences of sovereign statehood might, however, be explained from different perspectives. One explanation holds sovereignty as basic in the sense that it is simply imposed upon the law by the world of facts. Sovereignty and together with it a set of territorial rights and duties are something external to the law, something the law must recognize but which it cannot control. I shall call this the "pure fact view."[31] Another explanation holds sovereignty and everything associated with it as one part of the law's substance, determined and constantly determinable within the legal system, just like any other norms. This might be called the "legal" view.[32]

30 Compare also Kennedy, *supra* note 16.

31 G. Jellinek, *Allgemeine Staatslehre* (3. Aufl.) (1925) 337, 364-367 and, e.g., Korowicz, 'Some Present Problems of Sovereignty', 112 *RCDI* (1961) 102.

32 See, e.g., Verdross, *supra* note 17, at 35 and, e.g., Rousseau, 'Principes de droit international public', 93 *RCDI* (1958) 394.

Normative argument within the different realism of sovereignty doctrine uses the contrast between these explanations to constitute itself. One party argues in terms of pure facts (of effectiveness, for example) while the other makes its point by reference to a criterion external to facts (general recognition, for example). But neither position is sustainable alone. Relying on the pure fact of power is apologist.[33] Relying on a criterion independent of effectiveness is both abstract and question-begging.[34] It is question-begging as it merely raises the further question about whose interpretation of the criterion or its application should be given precedence. A defendable argument seems compelled to make both points: it must assume that sovereign rights are somehow matters of pure fact as well as of some criterion external to those facts themselves.

The development of the positions of Norway and Denmark during the *Eastern Greenland* case (1933) illustrates this. Originally, Norway based its rights to the disputed territory on its effective occupation. Relying on the views of other states would have violated Norway's sovereign equality. Denmark based its own claim on general recognition and challenged Norwegian title on the absence of such recognition. As the title was to be valid *erga omnes*, it could not be dependent on Norway's acts. In their subsequent arguments both states replied assuming their adversary's first position: Norway argued that its occupation was sanctioned by a generally recognized rule which based title on occupation. Denmark aimed to show that Norway in fact could not have occupied the territory because it had already been effectively occupied by Denmark.[35]

Neither claim could be preferred by simply preferring the "pure fact" or the "criterion" of general recognition because both states argued both points. Consequently, the Court affirmed both argumentative tracks. To support its view that Denmark had sovereignty it argued from Danish occupation as well as general recognition and denied both in respect of Norway.[36] To reach this conclusion, the Court had to make interpretations about the facts (effective occupation) as well as the law (the extent of general recognition) which, however, were external to the applicable facts and the law and which were difficult to justify against Norway's conflicting sovereign interpretation of them. The crucial point in the judgement was the Court's discussion of the famous "Ihlen declaration", which allowed the Court to protect Norwegian sovereignty by denying its possession in reference to the construction according to which Norway itself had already "recognized" Danish sovereignty in Eastern Greenland.[37]

33 See, e.g., H. Lauterpacht, *International Law* (Vol. I) (1979) 341-344.

34 See, e.g., *Island of Palmas* case, II *UNRIAA* at 839, 843-846.

35 These points are belaboured at length in the written proceedings. See PCIJ, *Eastern Greenland* case, Ser.C.62 and C.63 and the parties' oral arguments, C.66. For more detailed analysis, see Koskenniemi, *supra* note 12, at 251-253.

36 PCIJ, *Eastern Greenland* case, Ser.A.53 at 45-62

37 *Id.* at 64-74.

The same structure can be detected in all territorial disputes. In each, the "pure fact" and "legal" approaches dissolve into each other in a way which makes it impossible for the court or tribunal to solve the case by merely choosing one over the other. There are two difficulties. First, the need to make both points loses the initial sense of both: the pure fact view was premised on the assumption that the law follows from what facts say. The legal view assumed that the sense of facts was to be determined by rules. In argument, both points claim to defer, or *overrule* each other. To assume that they could be valid (determining) simultaneously makes both meaningless. Second, that the "pure fact" and the "legal" approaches show themselves indeterminate compels the decision-maker to look closer into the relevant "facts" and the relevant "legal" criterion. Decisions turn on contextual interpretations about the facts and the law – interpretations which, by definition, can no longer be justified by reference to those facts or criteria themselves.

Late modern practice of solving sovereignty disputes pays hardly more than lip-service to the traditional bases of territorial entitlement. Deciding such questions is now thought of in terms of trying to establish the most equitable solution.[38] The point is that the various interpretations and pragmatic considerations, as well as the final appreciation of the equity of the proposed solution, cannot be justified by reference to legal rules. On the contrary, recourse to the kind of justice involved in such appreciation can only mean, from the perspective of the Rule of Law, capitulation to arbitrariness or undermining the principle of the subjectivity of value, required in the pursuit of a Rule of Law. Let me take another example. It was often argued that the existence of states is a "matter of fact" and that "recognition" was only "declaratory" and not "constitutive" of statehood. If states were created by an external act of recognition, this would introduce for existing states a political right to decide which entities shall enjoy the status of legal subjects. This conflicts with the principles of self-determination and equality – both following from the rejection of a natural law.[39]

Yet, even such an apparently realistic and democratic view needed to assume the existence of some kind of pre-existing criteria whereby it could be ascertained whether statehood was present in some entity or not. The problem was never really that anyone would have seriously contested that the emergence of states was a factual, sociological process. The problem was – and remains – that people view the normative consequences of social process through different criteria and arrive at irreconcilable conclusions even when using the same criteria.

There is, though, a measure of common agreement on a matter as important as statehood. But it has very little to do with factual power or effectiveness. Rhodesia,

38 See ICJ, *Burkina Faso – Mali Frontier* case, Reports (1986) 567-568 (para. 28) and *infra* note 47.

39 The classic remains Ti-Chiang Chen, *The International Law of Recognition* (1951). See also Kato, 'Recognition in International Law; Some Thoughts on Traditional Theory, Attitudes of and Practice by African States', 10 *IJIL* (1970) 299-323.

Transkei and Taiwan were never regarded as states, whereas Tuvalu and Monaco were. But to explain these "anomalies" – as well as other apparently puzzling cases of statehood – simply by reference to the "constitutive" view is equally unsatisfactory. The original objections against the imperialistic character of this theory remain valid. Lauterpacht's middle-of-the-road position about a *duty* to recognize when the legal criteria have been fulfilled remains question-begging:[40] if a state refuses to recognize an entity because it says that this fulfilled the relevant criteria, there is little point to insist upon the existence of the duty. The matter turns on the interpretation of either the factual circumstances or the content of the relevant norm. The real problem is that it is impossible, within liberal premises, to overrule any participant interpretation in a legitimate fashion. Under those premises norms are "auto-interpretative" and each state must be presumed to have the liberty to interpret the sense of factual events around it.[41]

These anomalies of statehood as well as the resurgence of the time-honoured practice of non-recognition after the *Namibia* Opinion (1971) suggest that the attainment of statehood territorial title – at least if the matter is of some importance – has a relationship to what is decided externally.[42] But they also show that to believe that such decision can be understood as "following a rule" requires either a rule or an imagination so flexible that neither the legal nor the pure fact view can take much credit in trying to establish itself upon it.

If the presence of the quality of sovereignty in some entity is difficult to explain in terms of pure facts or legal rules, it is even more trying to do this in respect of the consequences of sovereignty. That the boundaries of domestic jurisdiction are shifting, and that "sovereignty" has seemed compatible with a state's hermetic isolation as well as extensive integration, indicates that whatever rights or liberties this quality may entail is, as the Permanent Court of International Justice observed, a "relative matter" – dependent on the content of the state's obligations at any given time.[43] In other words nothing determinate follows from sovereignty as a matter of "pure fact" – on the contrary, the content of sovereignty seems determinable only once we know what obligations the state has.

Lawyers adopting the "legal view" sometimes believe that the above conclusion fully vindicates their position. "Sovereignty" is not a matter outside but within the law, a convenient shorthand for the rights, liberties and competences which the law has allocated to the state – and which can be retrieved at any time.[44] To solve a

40 H. Lauterpacht, *Recognition in International Law* (1948).

41 For a useful restatement of this (liberal) point, see Bin Cheng, Custom, 'The Future of General State Practice in a Divided World', in Macdonald, Johnston (eds.) *The Structure and Process of International Law*, at 513, 519-523.

42 ICJ, *Namibia* case, Reports (1971) 51, 54 (paras. 112, 117, 119).

43 PCIJ, *Nationality Decrees* case Ser.B.4. at 24.

44 Schwarzenberger, 'The Forms of Sovereignty', 10 *CLP* (1957) 284; Hart, *supra* note 19, at 218.

sovereignty dispute it suffices only to look at the body of legal rules, and see if the state has the capacity which it claims by a legislative allocation.

The problem with such a conclusion, however, is that on most areas of state conduct no definite legislative act can be found which would establish the state's competence to act in some particular way. Moreover, and here is another paradox, the most important rules of general application seem to be precisely those rules which lay down the right of exclusive jurisdiction, self-determination, non-intervention and – sovereignty. It is not only that if sovereignty were reduced to a non-normative abstraction, then international law would appear as a huge *lacuna*, we would also lack a connected explanation, an interpretative principle to solve differences of opinion about the content or application of the few particular rules which we could then discern.

In most areas of non-treaty-related state conduct, specific obligations are, or can be, plausibly made to seem either ambiguous or lacking. In such case, the state's sovereignty – its initial liberty – will re-emerge as a normative principle in its own right: in the absence of clear prohibitions, the state must be assumed free. This principle – the *Lotus* principle[45] – is not only a convenient rule of thumb. It encapsulates the assumption that the mere fact of statehood has a normative sense (right of self-determination) and that in the absence of unambiguous legislative prohibitions any attempt to overrule the liberty inherent in statehood can only appear as illegitimate constraint.

The difficulty with the *Lotus* principle is twofold. First, all the rules and principles are more or less indeterminate in their content. If the mere fact of the existence of differing interpretations were sufficient to trigger the presumption of liberty, then the binding force of most rules would seem an illusion. The even more important difficulty is useless if the case involves a *conflict* of liberties. But if it is assumed – as is inevitable if the idea of a material natural law is discarded – that the liberties of one state are delimited by those of another, then any dispute about the rights or obligations of two or more states can be conceptualized in terms of a conflict of their liberties and, consequently, would not seem soluble by simply preferring "liberty" – because we would not know which state's liberty to prefer.

At that point, legal practice breaks from the argumentative cycle by recourse to equity – an undifferentiated sense of justice.

Continental shelf disputes are one example. The International Court of Justice (ICJ), as is well-known, started out with the assumption that the entitlement to continental shelf was a matter of giving effect to the coastal state's *ab initio* and *ipso facto* right. It was not a matter of "abstract justice" but of (objective) fact.[46] But this view has proved unhelpful. Which facts are relevant – the decisive problem – is decided by the Court *ad hoc* and it is not inscribed in some transcendental code *ex*

45 PCIJ, *Lotus* case, Ser. A.10 at 30. See further Koskenniemi, *supra* note 12, at 220-223.

46 ICJ, *North Sea Continental Shelf* cases, Reports (1969) 22-23 (paras. 19-20).

*ante*. Later delimitations have even ceased paying lip-service to the *ipso facto/ab initio* theory and seen "arriving at an equitable result" as its prosper task.[47] The history of the argument in continental shelf cases is the history of the Court first noting the lack, or at least the ambiguity of the relevant rule, it then making appeal to a pure fact (*ipso facto*) view; then abandoning that view (because no "fact" can be normative without an anterior criterion) in favour of a legal view (equity *infra legem*[48] as the correct rule) and the whole cycle ending in the content of that rule being dispersed into justice – a justice which can, under the principle of subjective value and the Rule of Law, only be seen as arbitrary.[49]

Transboundary pollution, to take another example, involves the juxtaposition of the freedoms of the source-state and the target-state: on the one hand, there is the former's sovereign right to exploit its natural resources in accordance with its own environmental policies; on the other hand, there is the victim's sole right to decide what acts shall take place in its territories.[50] The former's liberty to pursue economically beneficial uses of its territory is contrasted with the latter's liberty to enjoy a pure environment. The conflict is insoluble by simply preferring "liberty", or some right inscribed in the very notion of sovereignty. Balancing seems inevitable in order to reach a decision.[51]

A similar structure manifests itself everywhere within sovereignty doctrine. While sovereignty immunity is usually stated either in terms of the (pure fact of) sovereignty or a systematic necessity for international communication, legal practice tends to construct the foreign sovereign's exemption from local jurisdiction by balancing the two sovereigns' interests *vis-à-vis* each other.[52] The same seems true in cases dealing with the determination of the allowable reach of a state's extraterritorial jurisdiction.[53] The law on uses of international watercourses[54] and fishery re-

47 ICJ, *Tunisia-Libya Continental Shelf* case, Reports (1982) 59 (para. 70); *Gulf of Maine* case, Reports (1984) 312 (para. 155); *Libya-Malta Continental Shelf* case, Reports (1985) 38-39 (para. 49). See further Koskenniemi, *supra* note 12, at 223-232.

48 ICJ, *North Sea Continental Shelf* cases, Reports (1969) 20-22 (paras. 15-20).

49 For this criticism, see, e.g., Gros, *diss.op.* ICJ, *Tunisia-Libya Continental Shelf* case, Reports (1982) 151-156 and *Gulf of Maine* case, Reports (1984) 378-380.

50 See Principle 21, UN Conference on the Human Environment, Stockholm 5-16 June 1972, UN Doc. A/CONF.48/14.

51 See, e.g., Koskenniemi, 'International Pollution in the System of International Law', 17 *Oikeustiede-Jurisprudentia* (1984) 152-164; Lammers, "Balancing the Equities" International Environmental Law', *RCDI Coll.* (1984) 153-165.

52 Crawford, 'International Law and Foreign Sovereigns, Distinguishing Immune Transactions', 54 *BYIL* (1983) 114-118.

53 Meng, 'Völkerrechtliche Zulässigkeit und Grenzen der wirtschaftsverwaltungsrechtlichen Hoheitsakte mit Auslandswirkung', 44 *ZaOeRV* (1984) 675-783; Lowe, 'The Problem of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution', 34 *ICLQ* (1985) 730.

54 Schwebel, 'Third Report on the Non-Navigational Uses of International Watercourses', *YILC* (1982/II/1) 75-100.

sources,[55] as well as conflicts concerning foreign investment between the home state and the host state,[56] entails the drawing of a boundary between the two sovereigns, a determination of the extent of their sovereign liberty. In the absence of any determinate rules, and being unable to prefer one sovereign over another, legal practice has turned to equity in order to justify the delimitation of the two sovereignties *vis-à-vis* each other.

The substance of the law under sovereignty doctrines has dispersed into a generalized call for equitable solutions or "balancing" whenever conflicts arise. Standard academic justifications of state rights, either as a consequence of the pure fact of statehood or as laid down in legislative enactments, have no application. Nor can they have application because neither "facts" nor "rules" are self-evident in the way Enlightenment lawyers once believed. The facts which are assumed to establish title do not appear "automatically" but are the result of choosing a criterion from which facts may be invested with normative significance.[57] But rules, too, are always subject to interpretation. In order to link itself to something tangible, interpretation should refer back to some kind of facts. To establish the sense of facts, we must take the perspective of a rule; to decide interpretative controversies about the rule, we must – under the social conception – look at facts. Hence the late modern silence about theoretical justifications and the leap to *ad hoc* compromise.

## B. Sources

Despite its original emphasis on actual power, the doctrine of sovereignty seemed unworkable because of the abstract and arbitrary way in which its normative content was determined. It is possible to make a fresh start and imagine that international law might just as well be described not as consequence of statehood but through a set of normative criteria – sources – for law-creation and identification.

Not surprisingly, sources doctrine is riddled with dualisms which express in different ways the conflicting pull of the demands for concreteness and normativity. The very doctrine is often understood from two perspectives: as a description of the social processes whereby states create law (concreteness) and as a methodology for verifying the law's content independently of political opinions (normativity). By integrating both explanations, sources doctrine can maintain its apparent objectivity. On the one hand, something would not be law merely as a result of its content but as a result of a social process. On the other hand, the existence of sources as a con-

55 *Fisheries Jurisdiction* cases, ICJ Reports (1974) 30 (paras. 69-70).

56 *The LIAMCO Award*, 20 ILM (1981) 76-77 (paras. 150-151).

57 "In the realm of law there is no fact in itself, no immediately evident fact; there are only facts ascertained by the competent authorities in a procedure determined by law." H. Kelsen, *Principles of International Law* (ed. & rev. by R.M. Tucker) (1966) 388.

straining methodology creates the needed distance between it and whatever states might will at any one moment.

Though there is no major disagreement among international lawyers about the correct enumeration of sources (treaties, custom, general principles), the rhetorical force of sources ("binding force") is explained from contrasting perspectives. Their importance is sometimes linked with their capacity to reflect state will (consensualism). At other times, such binding force is linked with the relationship of sources arguments with what is "just", "reasonable", "in accordance with good faith", or some other non-consensual metaphor.

Standard disputes about the content or application of international legal norms use the contradiction between consent and justice based explanations. One party argues in terms of consent, the other in terms of what is just (reasonable, etc.). But neither argument is fully justifiable alone. A purely consensual argument cannot ultimately justify the application of a norm against non-consenting states (apologism). An argument relying only on a notion of justice violates the principle of the subjectivity of value (utopianism). Therefore, they must rely on each other. Arguments about consent must explain the relevance and content of consent in terms of what seems just. Arguments about justice must demonstrate their correctness by reference to what states have consented to. Because these movements (consent to justice; justice to consent) make the originally opposing positions look the same, no solution can be made by simply choosing one. A solution now seems possible only by either deciding what is it that states "really" will or what the content of justice "really" is. Neither question, however, is answerable on the premises of the Rule of Law.[58]

For the modern lawyer, it is very difficult to envisage, let alone to justify, a law which would divorce itself from what states think or will to be the law. The apparent necessity of consensualism seems grounded in the very criticism of natural norms as superstition. Yet, the criticisms against full consensualism – its logical circularity, its distance from experience, its inherent apologism – are well-known.[59] Consensualism cannot justify the application of a norm against a state which opposes such application unless it creates distance between the norm and the relevant state's momentary will. It has been explained, for example, that though law emerges from consent, it does not need every state's consent all the time, that a general agreement, a *volonté générale* of a *Vereinbarung* is sufficient to apply the norm.[60]

But these explanations violate the principle of sovereign equality – they fail to explain why a state should be bound by what another state wills. This can, of course, be explained from some concept of social necessity. But in such case we have already moved away from pure consensualism and face the difficulty of explain-

58 See also Kennedy, *supra* note 16, at 11-107.

59 Koskenniemi, *supra* note 12, at 270-273.

60 For the classic, see H. Triepel, *Völkerrecht und Landesrecht* (1899) 27, 51-53.

ing the legal status of the assumed necessity and why it should support one norm instead of another.

A more common strategy is to explain that the state has originally consented (by means of recognition, acquiescence, by not protesting or by "tacitly" agreeing) although it now denies it has. Such an argument is extremely important in liberal legitimation discourse. It allows defending social constraint in a consensual fashion while allowing the application of constraint against a state which denies it consent.[61] But even this argument fails to be convincing because it must ultimately explain itself either in a fully consensual or fully non-consensual way and thereby become vulnerable to the objections about apologism or utopianism.

Why should a state be bound by an argument according to which it has consented, albeit "tacitly"? If the reason is stated in terms of respecting its own consent, then we have to explain why we can know better than the state itself what it has consented to. Even consensualists usually concede that such knowledge is not open to external observers. But even if it were possible to "know better", such an argument is not really defensible within the premises of the Rule of Law. It contains the unpleasant implication that we could no longer rely on the expressed will of the legal subject. It would lose the principal justification behind democratic legislation and justify the establishment of a Leviathan – the one who knows best what everyone "really" wills. It is a strategy for introducing authoritarian opinions in democratic disguise.

Tacit consent theorists usually explain that the question is not of "real" but of "presumed" will. But what then allows the application of the presumption against a state denying that it had ever consented to anything like it? At this point the tacit consent lawyer must move from consensualism to non-consensualism. Tacit consent – or the presumption of consent – binds because it is "just" or in accordance with reasonableness or good faith, or it protects legitimate expectations or the like.[62] Now the difficulty lies in defending the assumed non-consensual position. But under the principle of subjective value, "justice" cannot be discussed in a non-arbitrary way.[63] Were this otherwise, the Rule of Law would be pointless if not harmful. One might, of course, say that a notion of reasonableness is justified because the state in question has itself accepted it. But this defence will re-emerge the problem of how it is possible to oppose a consensual justification against a state denying its validity. And so on, *ad infinitum*.

61 See, e.g., the argument in A. Bleckmann, *Grundprobleme und Methoden des Völkerrechts* (1982) 81, 184-189. On the tacit consent construction generally, see Koskenniemi, *supra* note 12, at 284-291.

62 See, e.g., J.P. Müller, *Vertrauenschutz im Völkerrecht* (1970); A. Martin, *L'estoppel en droit international public* (1979).

63 "[l]e principe de bonne foi est un principe moral et rien de plus." E. Zoller, *La bonne foi en droit international public* (1977) 345.

In the *Gulf of Maine* case (1984), Canada argued that the United States was bound to a certain line of delimitation as it had not protested against its *de facto* use. Relying on absence of protest reflected, Canada explained, on the one hand, U.S. consent to be bound and, on the other hand, gave expression to good faith and equity. It argued in terms of consent as well as justice. The Chamber of the Court accepted both explanations. It started out with the latter, non-consensual one. What is common to acquiescence and estoppel is that: "... both follow from the fundamental principle of good faith and equity."[64]

Had it followed this understanding, it should, because not *all* silence creates norms, have had to enter a discussion of whether or not the conditions of good faith or equity were present to bind the United States now. But there was no such discussion. This is understandable, as arguing from non-consensual justice seems so subjective. Instead, it moved to a consensual understanding of relying on absence of protest and went on to discuss whether the "Hoffmann letter" was evidence of United States acceptance of the Canadian equidistance. It was not: "... facts invoked by Canada do not warrant the conclusion that the U.S. Government thereby recognized the median line..."[65]

In other words, the United States was not bound because there was no subjective intent to be (regardless of considerations of good faith or equity). How did the Court arrive at this conclusion? This would have been apologist and a violation of Canadian sovereignty. The Chamber's conclusion did not concerns lack of "real" intent but rather of "constructive" U.S. intent. On what principles was that construction based? Mainly on inconsistency in the facts and on the low governmental status of the authorities involved.[66] But what justified this choice of relevant facts and their ensuing interpretation? What made the Court's construction better than the Canadian one? The argument stops here. The principles of construction were left undiscussed.

In theory, the Chamber could have used two principles of construction: 1) a construction is justified if it corresponds to intent; 2) a construction is justified if it reflects non-consensual justice. These are exclusive justifications. But neither was open to the Chamber. The former was excluded by the previous argument which ruled out the possibility of knowing real U.S. intent and using it against Canada. The latter was excluded because it would have involved arguing in a fully non-consensual way against Canadian non-consensual justifications. This would have assumed the correctness of an objective justice and would have conflicted with the Chamber's previous refusal to think of acquiescence-estoppel in a fully non-consensual way. The Chamber simply took another interpretation of U.S. conduct than Canada. Why it was better was not discussed as it could not have been discussed. The decision was, on its own premises, undetermined by legal argument.

64 *Gulf of Maine* case, ICJ Reports (1984) 305 (para. 130).
65 *Id.* at 307 (para. 138).
66 *Id.*

An identical argumentative structure is present in treaty interpretation. Particular interpretations are traced back either to party will or to some idea of good faith, reasonableness, etc.[67] Because "real" party will cannot be identified and justifiably opposed to a party denying such intent, and because the content of what is a "just" interpretation cannot be determined in a legal way, late modern doctrines usually concede the aesthetic, impressionistic character of the interpretative process.[68] Controversial points about party will clash against equally controversial points about the justice of particular interpretations.

In the *case Concerning the Interpretation of the Algerian Declarations of 19 January 1981*, the Iran-United States Claims Tribunal was to decide whether Article II of the Claims Settlement Declaration included a right for Iran to press claims against United States' nationals. The majority held that it could not be so interpreted. A "clear formulation" of that Article excluded Iranian claims from the Tribunal's jurisdiction. This clear formulation had authority because it was clearest evidence of Party consent.[69] The minority argued that a literal construction failed to give effect to the settlement's reciprocal character. According to the minority, reciprocity had been the very basis on which Iran had entered the agreement. By excluding reciprocity, the majority had violated Iranian consent and unjustifiably preferred the justice of literality to the justice of reciprocity.[70] Both sides invoke consent and justice but are unable to address each others' views directly. Neither side argues on the basis of "real consent." But while the majority sees consent manifested in the text, the minority sees consent in reciprocity. Both sides say their interpretative principle is better as it better reflects consent. But deciding the dispute on these arguments would require a means of knowing consent independently of its manifestations – a possibility excluded as reference was made to manifestations because of the assumption that real consent could not be known. Moreover, neither can the two sides argue that their justice – the justice of literality or the justice of reciprocity – is better without arguing from a theory of justice which seems indefensible under the Rule of Law. Ultimately, both interpretations are unargued. A doctrine which excludes arguments from "knowing better" and natural justice has no means to decide on the superiority of conflicting interpretations.

Attempts to explain why states should be bound by unilateral declarations meet with similar problems. In the first place, as the ICJ observed in the *Nuclear Tests* case (1974) such statements might be held binding "(w)hen it is the intention of the state making the declaration that it should become bound according to its terms."[71] However, their binding force cannot be *fully* consensual because then the state could

67 For this contrast generally, see, e.g., Zoller, *supra* note 63, at 205-244.

68 Sur, *supra* note 13. See also McDougal, *supra* note 23 at 149-157.

69 Iran – United States Claims Tribunal, 'Interpretation of the Algerian Declaration of 19th January 1981'. 62 ILR (1982) 599-600.

70 *Id.* at 603-606.

71 *Nuclear Tests* cases, ICJ Reports (1974) 267 (para. 43).

be freed simply by a further act of will. Therefore, the Court also noted that "(o)ne of the principles governing the creation and performance of legal obligations ... is the principle of good faith... Thus interested states may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."[72] Now the declaring state is bound regardless of its will, by the simple fact of the statement and others' reliance.

The necessity of making both arguments seems evident. The Court's first – consensual – argument justified holding the France bound by its statements. But it was also threatening because it implied that France could modify or terminate this obligation at will. This would violate the wills and sovereignty of the Applicants (Australia and New Zealand ). The second – non-consensual – argument about good faith and legitimate expectations was needed to protect the latter. The decision was consensualist and non-consensualist at the same time. It allowed basing the applicable norm on protecting the sovereignty of each state involved. Simultaneously, it seemed to give effect to what justice seemed to require.

But the decision remains also vulnerable from each perspective. How could the Court base its norm on French consent in face of French denial of such consent? It leaves unexplained how it can protect the Applicants' reliance, as they denied having relied. And it leaves unexplained its theory of justice which says that these statements and actions in these circumstances bind because that is in accordance with good faith.

The structure, importance and weaknesses of tacit consent is nowhere more visible that in the orthodox argument about customary international law.

According to this argument, binding custom exists if there is a material practice of states to that effect and that practice is motivated by the belief that it is obligatory. This "two-element theory" gives expression to the principle of liberal sociology for which the meaning – law or not law – of social action lies neither in its external appearance nor in what someone thinks about but is a combination of the two: an external (material) and an internal (psychological) element.[73] The function of the former element is to ensure that custom can be ascertained without having to rely on states' momentary, political views. The point of the latter is to distinguish custom from coercion.

The problem with the two-element theory is that neither element can be identified independently of the other. Hence, they cannot be used to prevent the appearance of Mr. Hyde in each other.

Modern lawyers have rejected fully materialistic explanations of custom as apologist, incapable of distinguishing between factual constraint and law. If the possibil-

72 *Id.* at 268 (para. 46).

73 See Hart, *supra* note 19, at 91. For discussion, see Koskenniemi, 'The Normative Force of Habit; International Custom and Social Theory', 1 *Finnish Yearbook of International Law* (forthcoming).

ity is excluded that this distinction can be made by the justice of the relevant behaviour, then it can only be made by reference to the psychological element, the *opinio juris*. But, as many students of the ICJ jurisprudence have shown, there are no independently applicable criteria for ascertaining the presence of the *opinio juris*. The ICJ has simply inferred its presence or absence from the extent and intensity of the material practice it has studied.[74] Moreover, it does not even seem possible to assume the existence of such criteria and that the *opinio* thus received could be opposed to a non-consenting state. That would be an argument about knowing better. In other words, though it seems possible to distinguish "custom" from what is actually effective only by recourse to what states believe, such beliefs do not seem capable of identification regardless of what is actually effective.

One might try to avoid the above circularity by assuming that some types of behaviour are by their character – "intrinsically" – such as to generate (or not to generate) normative custom. But attempts to single out lists of such types have been unsuccessful. A "flexible" concept of material practice has emerged: any act or statement may count as custom-generating practice if only the states wish so.[75] (Indeed, any other conclusion would manifest an illegitimate naturalism and violate the principles of liberal sociology: it would fail to have regard to the "internal aspect"). Using this criterion (what it is that states wish), however, would assume that we can know the *opinio* independently of the act in which it is expressed. But this possibility was already excluded by our previous argument about the need to look at material practice in the first place. Indeed, were it so that we could know state intentions regardless of what states do, the whole two-element theory would become unnecessary: we could simply apply those intentions. Custom would coalesce with (informal) agreement. (In which case, of course, we would face the difficulty of having to interpret the content embedded in any such agreement by further reference to the parties' "real" wills or to some notion of justice, as explained above).

Customary law doctrine remains indeterminate because it is circular. It assumes behaviour to be evidence of states' intentions (*opinio juris*) and the latter to be evidence of what behaviour is relevant as custom. To avoid apologism (relying on the state's present will), it looks at the psychological element from the perspective of the material; to avoid utopianism (making the distinction between binding and non-binding usages by reference to what is just), it looks at the material element from the perspective of the psychological. It can occupy neither position in a permanent way without becoming vulnerable to criticism compelled by the other. The very as-

74 See, e.g., M. Sørensen, *Les sources du droit international* (1946) 108-111; Virally, 'The Sources of International Law', in Sørensen (ed.), *Manual of Public International Law* (1968) 134-135; H. Günther, *Zur Entstehung von Völkergewohnheitsrecht* (1970) 70. See further, Koskenniemi, *supra* note 12, at 380-381.

75 See, e.g., Ferrari-Bravo, 'La coutume internationale dans la pratique des Etats', 192 *RCDI* (1985) 243, 261 and Koskenniemi, *supra* note 12, at 383-384.

sumptions behind customary international law provide the mechanism for its self-destruction.

For late modern international practice the standard theory is increasingly a camouflage for what is really an attempt to understand custom in terms of a bilateralized equity. The ICJ, for instance, has always been somewhat ambiguous as to the character of the rules of non-written law which it has discerned. The Court's argument about the relevant custom in the *Anglo-Norwegian Fisheries* (1951) as well as *Fisheries Jurisdiction* (1974) cases already looked upon the matter more in terms of the relevant interest at stake than trying to find some general rule to "apply."[76] The several maritime boundary cases further extended this move. The judgement in the *U.S. Military and Paramilitary Activities* case (1986) did not even seriously attempt to justify its four customary rules – non-use of force, non-intervention, respect for sovereignty and especially the relevant humanitarian rules – in terms of material practice and the *opinio juris*.[77]

Many have been dissatisfied with the modern strategy of arguing every imaginable non-written standard as "custom." Sir Robert Jennings, among others, has noted that what we tend to call custom: "is not only not customary law: it does not even faintly resemble a customary law."[78] But if a non-written standard is not arguable in terms of material practices or beliefs relating to such practices then it can only exist as natural law – being defensible only by reference to the political importance of its content. In fact, much ICJ practice in the relevant respect remains *ex cathedra*: the Court has "instituted a system of decision-making in which the conclusion reached is determined by the application of rules largely treated as self-evident."[79] To be sure, often there is *consensus* on such rules, for instance, on the "elementary considerations of humanity" invoked by the Court in the *Corfu Channel* case (1949). But the problem is clearly less to explain why people who agree are bound than why also those should be who do not and how one should argue if interpretative controversies arise.

## V. The Politics of International Law

The idea of an international Rule of Law has been a credible one because to strive for it implies no commitment regarding the content of the norms thereby established or the character of the society advanced. It was possible for 19th-century European

76 *Anglo-Norwegian* case, ICJ Reports (1951) 133; *Fisheries Jurisdiction* cases, Reports (1974) 30-33 (paras. 69-79).

77 *US Military and Paramilitary Activities* case, ICJ Reports (1986) 97-115 (paras. 183-220).

78 Jennings, 'The Identification of International Law', in Cheng (ed.), *International Law, Teaching and Practice* (1982) 5.

79 Kearney, 'Sources of Law and the International Court of Justice', in Gross (ed.), *The Future of the International Court of Justice* (Vol. I) (1976) 653.

powers to start thinking of their relationships in terms of legal rules because they formalized inter-sovereign relationships and no sovereign needed to feel that his substantive policies were excluded by them it. It was possible for the UN General Assembly to accept by consensus the Declaration on the "Decade for International Law" for precisely those same reasons. This is strikingly highlighted by the fact that the Decade contained no substantive programme. The declaration merely calls for the promotion of respect for the principles of international law and the peaceful settlement of disputes and for the encouragement of the development and dissemination of international law. For what purpose the law was to be put or what kinds of rules it should promote is not addressed by it.

Modern international law is an elaborate framework for deferring substantive resolution elsewhere: into further procedure, interpretation, equity, context, and so on. The 1982 Law of the Sea Convention is the typical example: in place of a list of do's and dont's it establishes a framework for delimiting sovereign powers and allocating jurisdictions – assuming that the substantive problems of the uses of the sea can be best dealt with through allocating decision-power elsewhere, into context and usually by reference to "equitable principles."[80] The success of international law depends on this formality; this refusal to set down determining rules or ready-made resolutions to future conflict. Though there is a distinctly legal "process" – and in this sense a relatively autonomous and coherent system which can be abstracted in academic treatises – there are no determining legal standards. Let me explain this somewhat schematically.

The Rule of Law constitutes an attempt to provide communal life without giving up individual autonomy. Communal life is, of course, needed to check individualism from leading either into anarchy or tyranny. Individualism is needed because otherwise it would remain objectionable for those who feel that the kind of community provided by it does not meet their political criteria. From their perspective, the law's communitarian pretensions would turn out as totalitarian apologies.[81]

The law aims to fulfil its double task by becoming formal: by endorsing neither particular communitarian ideals nor particular sovereign policies. Or, conversely, an acceptable legal rule, argument or doctrine is one which can explain itself both from the perspective of enhancing community (because it would otherwise seem apologist) as well as safeguarding sovereignty (because its implications would otherwise remain totalitarian). The problem is that as soon as any of these justifications are advanced to support *some particular kind of communal existence or some determined limit for sovereign autonomy*, they are vulnerable from an opposing substantive perspective. So, while an advocate justifies his preferred substantive outcome by its capacity to support community, it becomes simultaneously possible for his coun-

80 See generally, Allott, 'Power Sharing in the Law of the Sea', 77 *AJIL* (1983) 1-30; Kennedy, *supra* note 16, at 201-245.

81 See further the seminal article by Kennedy, 'The Structure of Blackstone's Commentaries', 18 *Buffalo L.R.* (1979) 205.

terpart – not sharing the same communal ideal – to challenge the very justification as totalitarian. Correspondingly, a rule, principle or solution justified by resource to the way it protects sovereignty may – for someone drawing the limits of "sovereignty" differently – be objected as furthering egoism and anarchy.

Take the case of transfrontier pollution. Noxious fumes flow from state A into the territory of state B. State A refers to its "sovereign right to use its natural resources in accordance with its national policies." State B argues that A has to put a stop to the pollution. It interprets A's position to be an egoistic one while it makes its own argument seem communitarian. It might refer to a norm of "non-harmful use of territory", for example, and justify this by reference to analogies from rule concerning international rivers and natural resources as well as precedents and General Assembly resolutions.[82]

State A can now retort by saying that norms cannot be opposed to it in such a totalitarian fashion. A is bound only by norms which it has accepted. It has never accepted the analogies drawn by B. This would force B either to argue that its preferred norm binds irrespective of acceptance – in which case it stands to lose as its argument would seem utopian – or to change ground so as to make its position seem protective of sovereignty as well. State B might now argue that the pollution violates its own freedom and constitutes an interference in its internal affairs as Australia did in the *Nuclear Tests* case.[83] B's position would now seem both communitarian (in respect to A) and individualistic (in respect to B itself).

To counter this last argument by B, A needs to make a communitarian point. It may argue that there is a norm about friendly neighbourliness, for example such as that observed in the *Lake Lanoux* case (1957), which requires that states tolerate minor inconveniences which result from legitimate uses of neighbouring states' territories.[84] B cannot demand complete territorial integrity. A's position is now both individualistic (in respect of A itself) and communitarian (in respect of B).

The argument could be continued. Both parties could support the communitarian strand in their positions by referring to equity, general principles and the like, to deny the autonomy (egoism) of the other. And they could support the sovereignty-based arguments by further emphasis on their independence, consent, territorial integrity, self-determination, etc. to counter their adversary's communitarian (totalitarian) arguments. As a result, the case cannot be decided by simply preferring autonomy to community or vice-versa. Both arguments support both positions. The case cannot be solved by reference to any of the available concepts (sovereignty, non-harmful use of territory, territorial integrity, independence, good neighbourliness, equity, etc.) as each of the concepts may be so construed as to support either

82 For both arguments, see Principle 21 of the Stockholm Declaration, *supra* note 50 and further Koskenniemi, *supra* note 51, at 100-103.

83 *Nuclear Tests* cases, ICJ Pleadings I at 14.

84 *Lake Lanoux* case, XII UNRIAA at 316.

one of the claims. And the constructions have no *legally* determined preference. A court could say that one of the positions is better as a matter of equity, for example. Or it might attempt to "balance" the claims. But in justifying its conception of what is equitable, the court will have to assume a theory of justice – a theory, however, which it cannot justify by further reference to the legal concepts themselves.

Another example concerns the relations between a foreign investor and the host state. The view which emphasizes individualism, separation and consent may be put forward to support the host state's sovereignty – its right to nationalize the corporation without "full, prompt and adequate" compensation. But the same position can equally well be derived from communitarian points about justice, equality or solidarity or the binding character of the new international economic order, for example.[85] The home state's case may be argued in a similar way, by laying emphasis on that state's freedom, individuality and consent – as expressed in the acquired rights doctrine – or the non-consensually binding character of the *pacta sunt servanda* norm, good faith or other convenient conceptions of justice. To make a choice, the problem-solver should simply have to prefer one of the sovereignties – in which case sovereign equality is overruled – or it should use another theory of justice (or equity) which it cannot, however, justify by reference to the Rule of Law.[86]

The relationship between the principles of self-determination and territorial integrity, both having been enshrined in countless UN General Assembly Resolutions has remained a puzzle.[87] The problem, as we now can understand it, is that neither of the conflicting principles can be preferred because they are ultimately the same. When a people call for territorial integrity, they call for respect for their identity as a self-determining entity and vice-versa. In order to solve the conflict, one should need an external principle about which types of human association entail this respect and which do not. And this seems to involve arguing on the basis of contested, political views about the type of organization the law should materially aim at.

The formality of international law makes it possible for each state to read its substantive conception of world society as well as its view of the extent of sovereign freedom into legal concepts and categories. This is no externally introduced distortion in the law. It is a necessary consequence of a view which holds that there is no naturally existing "good life", no limit to sovereign freedom which would exist by force of some historical necessity. If this kind of naturalism is rejected – and since the Enlightenment, everybody has had good reason to reject it –

85 Both justifications for this right may be read, for example, from the Charter of Economic Rights and Duties of States, UNGA Res. 3281 (XXIX) (12 December 1974).

86 "A solution therefore should recognize the home state's and the host state's sovereign right to the investment concerned and should endeavour to find an equitable balance between them," Seidl-Hohenveldern, 'International Economic Law. General Course on Public International Law', 198 *RCDI* (1986) 54.

87 See UNGA Res. 1514 (XV) 14 December 1960; 2625 (XXV) 24 October 1970 and comments, e.g., in M. Pomerance, *Self-Determination in Law and Practice; the New Doctrine in the United Nations*, 43-47 and *passim*.

then to impose any substantive conception of communal life or limits of sovereignty can appear only as illegitimate constraint – preferring one state's politics to those of another.

It is impossible to make substantive decisions within the law which would imply no political choice. The late modern turn to equity in the different realms of international law is, in this sense, a healthy admission of something that is anyway there: in the end, legitimizing or criticizing state behaviour is not a matter of applying formally neutral rules but depends on what one regards as politically right, or just.

## Conclusion

Theorists of the present often explain our post-modern condition as a result of a tragedy of losses. For international lawyers, the Enlightenment signified loss of faith in a natural order among peoples, nations and sovereigns. To contain political subjectivism, 19th and 20th-century jurists put their faith variably on logic and texts, history and power to find a secure, objective foothold. Each attempt led to disappointment. One's use of logic depended on what political axioms were inserted as the premises. Texts, facts and history were capable of being interpreted in the most varied ways. In making his interpretations the jurist was always forced to rely on conceptual matrices which could no longer be defended by the texts, facts or histories to which they provided meaning. They were – and are – arenas of political struggle.

But the way back to Victoria's or Suarez' unquestioning faith is not open to us. We cannot simply start assuming that politics – justice and equity – could be discussed so that in the end everyone should agree. This teaches us a lesson. Because the world – including lawyers views about it – is conflictual, any grand design for a "world order" will always remain suspect. Any legal rule, principle or world order project will only seem acceptable when stated in an abstract and formal fashion. When it is applied, it will have overruled some interpretation, some collective experience and appear apologist.

Social theorists have documented a recent modern turn in national societies away from the *Rechtstaat* into a society in which social conflict is increasingly met with flexible, contextually determined standards and compromises.[88] The turn away from general principles and formal rules into contextually determined equity may reflect a similar turn in the development of international legal thought and practice. There is every reason to take this turn seriously – though this may mean that lawyers have to re-think their professional self-image. For issues of contextual justice cannot be

88 See, e.g., R.M. Unger, *Law in Modern Society. Toward a Criticism of Social Theory* (1976); T. O'Hagan, *The End of Law?* (1984).

solved by the application of ready-made rules or principles. Their solution requires venturing into fields such as politics, social and economic casuistry which were formally delimited beyond the point at which legal argument was supposed to stop in order to remain "legal." To be sure, we shall remain uncertain. Resolutions based on political acceptability cannot be made with the kind of certainty post-Enlightenment lawyers once hoped to attain. And yet, it is only by their remaining so which will prevent their use as apologies for tyranny.